10

Regional Arrangements

Part C on international institutions and processes concludes with a look at the world's major regional human rights systems. After an introductory section comparing advantages and disadvantages of a regional rather than universal system—in fact, in the case of human rights, of a regional system together with a universal system, rather than *only* a universal system—this chapter turns to the regional arrangements in Europe, the Americas and Africa.

The materials describe the institutional structure and international processes of the regional systems, and invite comparisons among them as well as with the UN system. The European and Inter-American systems have distinctive institutions and processes; the African system has distinctive norms. Thus the regional arrangements add in important ways to knowledge derived from the UN and from UN-related treaties like the ICCPR about possible avenues toward control of human rights abuses.

Rather than attempt comprehensive analyses of the three regions, Chapter 10 concentrates on one important aspect of each. The remarkable feature of the European system is its productive and effective Court; the materials illustrate the work of the Court through several revealing decisions. In the Inter-American system, the Commission has been a very significant organ. We examine it at work in one field of increasing importance for Latin America and for global human rights, institutionalizing the practices of democratic government. The African system is the least developed institutionally; the materials concentrate on a distinctive aspect of its norms, a stress on duties as well as rights.

A. COMPARISON OF UNIVERSAL AND REGIONAL SYSTEMS

The relationship between 'universal' (meaning, in this context, United Nations-sponsored) and regional human rights arrangements is a complex one. In addition to the three major systems, there is a largely dormant Arab system and a proposal for the creation of an Asian regional system. Although Chapter VIII of the United Nations Charter makes provision for regional

arrangements in relation to peace and security, it is silent as to human rights cooperation at that level. Nevertheless, the Council of Europe moved as early as 1950 to adopt the European Convention on Human Rights. It was not until 1969 that the analogous American Convention was adopted. In the meantime, at least until the mid-1960s, the UN remained at best ambivalent about such developments. Vasak has noted some of the reasons for its hesitation:

> For a long time, regionalism in the matter of human rights was not popular at the United Nations: there was often a tendency to regard it as the expression of a breakaway movement, calling the universality of human rights into question. However, the continual postponements of work on the International Human Rights Covenants led the UN to rehabilitate, and to be less suspicious (less jealous, some would say) towards, regionalism in human rights, especially after the adoption of the Covenants in 1966.[1]

It was not coincidental then that the UN General Assembly began to contemplate the active encouragement of regional mechanisms only in 1966, when the two basic Covenants were finally adopted by the General Assembly. In 1977, it formally endorsed a new approach by appealing 'to States in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights' (GA res. 32/127 (1977)). Four years later, the African Charter on Human and Peoples' Rights was adopted. Throughout this period the Communist states of Eastern Europe were strongly opposed to regional arrangements, and the Asian and Pacific countries generally argued that their region was much too heterogeneous to permit the creation of a regional mechanism.

Although there have been no significant new regional or sub-regional systems created since 1981 (despite the General Assembly's annual adoption of a resolution calling upon the relevant regions to act), the current climate is somewhat more hospitable than was previously the case. The desire of Eastern and Central European governments to become full partners in a united Europe, and even to join the European Union, has prompted many of them to join the European human rights system. Moreover, the transformation of the Organisation on Security and Co-operation in Europe (OSCE) from an East–West debating forum (or shouting match) into a complex set of arrangements designed to promote respect for a broadly defined range of human rights, has added another important dimension to regional human rights cooperation.

The successful example of the OSCE in promoting political cooperation, combined with the dramatically increased importance of the role of regional

[1] In Karel Vasak and P. Alston (eds.), The International Dimensions of Human Rights 451 (Vol. 2, 1982).

trading blocs—exemplified by the Single European Act and the Maastricht Treaty in Europe, and the North American Free Trade Agreement among the U.S., Canada and Mexico—and efforts to develop the Asian–Pacific Economic Cooperation (APEC) initiative, have given renewed impetus to regional co-operation arrangements. It is to be expected that this will, over time, have potentially important consequences in relation to human rights.

* * * * *

The following readings develop some comparisons between universal and regional systems, both in general and with respect to human rights. Several themes suggested by these materials recur throughout the chapter: what are the relations between these systems—for example, are there hierarchical 'controls' between them; in what ways is it preferable from the perspective of observance of human rights to have a regional system complement a universal one; how do we explain the different institutional structures and differences in norms among these system; what can we learn from these differences about effective architecture for intergovernmental human rights organizations?

INIS CLAUDE, SWORDS INTO PLOWSHARES

(4th ed., 1984), at 102.

Regionalism is sometimes put forward as an alternative to globalism, a superior substitute for the principle of universality. Emphasis is placed upon the bigness and heterogeneity of the wide world, and the conclusion is drawn that only within limited segments of the globe can we find the cultural foundations of common loyalties, the objective similarity of national problems, and the potential awareness of common interests which are necessary for the effective functioning of multilateral institutions. The world is too diverse and unwieldy; the distances—physical, economic, cultural, administrative, and psychological—between peoples at opposite ends of the earth are too formidable to permit development of a working sense of common involvement and joint responsibility. Within a region, on the other hand, adaptation of international solutions to real problems can be intelligently carried out, and commitments by states to each other can be confined to manageable proportions and sanctioned by clearly evident bonds of mutuality.

. . .

The advocacy of regionalism can be, and often is, as doctrinaire and as heedless of concrete realities as the passion for all-encompassing organization. It should be stressed that the suitability of regionalism depends in the first place upon the nature of the problem to be dealt with. Some problems of the modern world are international in the largest sense, and can be effectively treated only by global agencies. Others are characteristically regional, and lend

themselves to solution by correspondingly delimited bodies. Still others are regional in nature, but require for their solution the mobilization of extra-regional resources.

. . .

The nature of a problem is significant not only for the determination of the most appropriate means of solution, but also for the measurement of the range of its impact. A problem may be regional in location, and susceptible of regional management, and yet have such important implications for the whole world that it becomes a fit subject for the concern of a general organization. The world-at-large cannot be disinterested in such 'regional' matters as the demographic problem in Asia or racialism in Southern Africa. Thus, the question of the ramifications of a problem as well as that of its intrinsic quality affects the choice between regional and universal approaches.

. . .

However, . . . [t]he world does not in fact break easily along neatly perforated lines. Rational regional divisions are difficult to establish, boundaries determined for one purpose are not necessarily appropriate for other purposes, and the most carefully chosen dividing lines have a perverse way of changing or coming to require change, and of overlapping. It is true that brave universalist experiments tend to give way to sober regionalist afterthoughts, but it is equally true that carefully cut regional patterns tend to lose their shape through persistent stretching in the direction of universalism. In a sense, the adoption of the universal approach is the line of least resistance, since it obviates the difficulties of defining regions and keeping them defined.

. . . Intraregional affinities may be offset by historically rooted intraregional animosities, and geographical proximity may pose dangers which states wish to diminish by escaping into universalism, rather than collaborative possibilities which they wish to exploit in regional privacy. While global organization may be too large, in that it may ask states to be concerned with matters beyond the limited horizons of their interests, regional organization may be too small, in that it may represent a dangerous form of confinement for local rivalries. Global stretching, in short, may be no worse than regional cramping.

. . .

In a very general sense, it may be contended that regional organizations are particularly suitable for the cultivation of intensive cooperation among states, while global organizations have special advantages for dealing with conflict among states. If the goal is the development of linkages that bind states together in increasingly intimate collaboration and perhaps culminate in their integration, it would appear to be essential to restrict the enterprise to a few carefully selected states.

. . . On the other hand, the capacity of an organization to promote the con-

trol and resolution of conflicts may be enhanced by its inclusiveness. A global agency is inherently better equipped than a regional one to provide the mediatorial services of governments and individuals whose disinterested attitude toward any given pair of disputants is likely to be regarded as credible, and its potency as a mobilizer of pressure upon states engaged in conflict is a function of the broad scope of its membership and jurisdiction. The European Community may be treated as the model for international organization as a workshop for collaboration, and the United Nations as the model for international organization as an arena for conflict.

REGIONALISM AND THE UNITED NATIONS

The atmosphere [during the 1945 Conference that drafted the UN Charter in] San Francisco was affected by the necessity of making the bow to regionalism which was demanded by those states that had already made heavy political investments in such arrangements as the Inter-American system, the Commonwealth, and the Arab League. . . .

. . .

The interaction between theoretical preference for universalism and political pressures for regionalism at San Francisco produced an ambiguous compromise. The finished Charter conferred general approval upon existing and anticipated regional organizations, but contained provisions indicating the purpose of making them serve as adjuncts to the United Nations and subjecting them in considerable measure to the direction and control of the central organization. The Charter reflected the premise that the United Nations should be supreme. . . .

. . .

REGIONAL PROMOTION AND PROTECTION OF HUMAN RIGHTS

Twenty-Eighth Report of the Commission to Study the Organization of Peace (1969), at 15.

. . . [In response to a 1968 UN study, the] Inter-American Commission on Human Rights supported those members of the Ad Hoc Study Group who favored regional human rights commissions, noting four grounds: (1) the existence of geographic, historical, and cultural bonds among States of a particular region; (2) the fact that recommendations of a regional organization may meet with less resistence than those of a global body; (3) the likelihood that publicity about human rights will be wider and more effective; and (4) the fact that there is less possibility of 'general, compromise formulae,' which in global bodies are more likely to be based on 'considerations of a political nature.'

. . .

Opposition to the establishment of regional human rights commissions has been expressed on numerous occasions by the Eastern European States and other Members of the United Nations, on several grounds. First, they argue that human rights, being global in nature and belonging to everyone, should be defined in global instruments and implemented by global bodies. 'The African and the Asian should have the same human rights as the European or the American.' Second, regional bodies in the human rights field would, at best, duplicate the work of United Nations bodies and, at worst, develop contradictory policies and procedures. . . . Third, the Eastern European States in particular object that any cooperation between regional commissions and the United Nations would add to the financial burdens of the latter. Fourth, several Western European States contend that preoccupation with regional arrangements might deflect official and public attention from the two International Covenants and delay their ratification.

It may be argued that the global approach and the regional approach to promotion and protection of human rights are not necessarily incompatible; on the contrary, they are both useful and complementary. The two approaches can be reconciled on a functional basis: the normative content of all international instruments, both global and regional, should be similar in principle, reflecting the Universal Declaration of Human Rights, which was proclaimed 'as a common standard of achievement for all peoples and all nations.' The global instrument would contain the minimum normative standard, whereas the regional instrument might go further, add further rights, refine some rights, and take into account special differences within the region and between one region and another.

Thus what at first glance might seem to be a serious dichotomy—the global approach and the regional approach to human rights—has been resolved satisfactorily on a functional basis. . . .

Implementation procedures may well vary even more from region to region, as the Governments therein desire. Indeed, they may vary within a region.

. . .

It may also be argued that the regional approach involves certain possible risks. First, a regional or sub-regional commission might serve to insulate the area from outside influences and encourage it to ignore the global standards and institutions of the United Nations system. Second, institutions of one region or sub-region might become involved in competition or conflict with those of another area. Given a modicum of good will and statesmanship on the part of any newly-established regional institutions, however, these risks should be minimal.

The further question arises whether if human rights commissions were established in certain regions, they might interpret international standards too narrowly and thus adversely affect the work of global bodies in this field. It might be necessary in such a case to establish the right of global institutions to consider a particular matter *de novo*.

Another difficulty might arise with respect to cases involving a 'consistent pattern of gross and reliably attested violations,' which are subject to special procedures established by Resolution 1503 (XLVIII) of the Economic and Social Council (27 May 1970). It would delay the consideration of such questions if prior exhaustion of available regional remedies were required.

NOTE

Consider the following cautions of Vasak about conditions for the success of a regional human rights organization:[2]

> The experience of the European Convention of Human Rights . . . tends to show that the regional protection of human rights can achieve full success only if it constitutes an element in a policy of integration on the part of the States of a given region. Only at this price is it possible to permit the blow struck by regionalism in the matter of human rights against that necessary universalism which springs from the intrinsically identical nature of all human beings. The recent entry into force of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which should be preserved as a legal expression of the universal character of the human being, should even lead us to be more exacting in the future in respect of regionalism than we were in the past when no universal system for the effective protection of human rights seemed feasible. In the last analysis, regional protection must come within the framework of regional organization in accordance with the Charter of the United Nations and become one aspect of the policy of integration. If, however, regional protection were but a *form of intergovernmental co-operation*, the parochial and perhaps even selfish attitudes of which it would also be the expression, would by no means justify the danger of such a serious blow to universalism.

Note the flexibility of conceptions of what a 'region' constitutes. For a range of purposes, such as caucuses among state representatives in the UN Commission on Human Rights, the UN divides the world into five geo-political regions: Asia, Africa, Eastern Europe, Latin America, and Western Europe and Others (including the United States). That classification need bear no relation whatsoever to appropriate definition of regions for purposes of a human rights regime. For example, the Pacific region (with or excluding Australia and New Zealand), South Asia, West Asia, Southeast Asia and possibly other groupings of states might all be considered appropriate units for the creation of a given type of joint human rights mechanism.

[2] In Karel Vasak and P. Alston (eds.), The International Dimensions of Human Rights 455 (Vol. 2, 1982).

QUESTIONS

1. Consider the observation that '[r]egional and sub-regional blocs and groupings, whatever their purpose, are by their very nature inward-looking and designed to serve specific ends. Like the states of which they are composed, these blocs and groupings are more concerned with the exploitation of immediate advantages than with long-range world plans . . . '?[3] Is this view as appropriate for a human rights regime as for, say, a regional trading bloc?

2. To date, there have been no major conflicts (as opposed to minor differences) in interpretation, or between formal decisions of the existing regional bodies and their UN counterparts, although the texts of the different regional treaties suggest on their face that serious conflicts with UN-related treaties could arise. In theory, such conflicts are to be avoided through the application of some basic guidelines or rules. How do you assess the following guidelines, and what alternatives might you propose to them:

a. The standards in the Universal Declaration and in any other UN-related treaties accepted by the state or states concerned must be respected.

b. Human rights standards forming part of general principles of international law must also be respected.

c. Where standards conflict, the one most favorable to the individual concerned should prevail.

3. Consider how you might handle some further complications of having numbers of states subject to regional and universal human rights regimes. Suppose that an individual alleging injury through violation of both regional and universal human rights instruments can under the terms of each treaty (say, the European Convention and the ICCPR) bring a communication or complaint before a committee or court. Should choice be open? Could both paths be entered simultaneously? If the individual either loses or wins in one or the other forum, is she then free to follow the other route?[4]

4. Should regional organizations provide an opening for cultural relativism (see Chapter 4)—that is, for regionally specific norms that should be respected rather than superseded by the universal systems? How do the guidelines in Question (2) above bear on that possibility?

[3] M. Moscowitz, The Politics and Dynamics of Human Rights 48 (1968).

[4] Treaty provisions handle some of these issues. See, for example, Article 4(2) (a) of the First Optional Protocol to the ICCPR, providing that the ICCPR Committee shall not consider a communication from an individual if the same matter is 'being examined under another procedure of international investigation . . . '

ADDITIONAL READING

John Burton, *Regionalism, Functionalism and the United Nations*, 15 Australian Outlook 73 (1961); Bruce Russett, *International Regions and the International System: A Study in Political Ecology* (1967); R. Taylor, *International Organization in the Modern World: The Regional and the Global Process* (1993); Burns Weston, Lukes and Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 Vanderbilt J. Transnat'l L. 585 (1987); Chapter VIII: Regional Arrangements, in Bruno Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, 679 (1994).

B. THE EUROPEAN CONVENTION SYSTEM: THE PARAMOUNT ROLE OF THE COURT

1. INTRODUCTION

The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950 and entered into force in 1953. It is of particular importance within the context of international human rights for several reasons: it was the first comprehensive treaty in the world in this field; it established the first international complaints procedure and the first ernational court for the determination of human rights matters; it remains most developed of the three regional systems; and it has generated a more nsive jurisprudence than any other part of the international system. Our ncipal concern in this selective examination of the European Convention is h the evolving institutional architecture, particularly with the European urt of Human Rights as the dominant institution and with the manner in hich it has performed the judicial function. Before turning to the Court, nowever, this section locates the Convention within a broader European ramework of post-war initiatives and institutions.

COMMENT ON BACKGROUND TO THE CONVENTION

The impetus for the adoption of a European Convention came from three factors. In the first place, it was a regional response to the atrocities committed in Europe during the Second World War and an affirmation of the belief that governments respecting human rights are less likely to wage war on their neighbors. Secondly, both the Council of Europe, which was set up in 1949 (and under whose auspices the Convention was adopted) and the European Union (previously the European Community or Communities, the first of

which was established in 1952) were partly based on the assumption that the best way to ensure that Germany would be a force for peace, in partnership with France, the United Kingdom and other Western European states, was through regional integration and the institutionalizion of common values. This strategy contrasted strongly with the punitive, reparations-based, approach embodied in the 1919 Treaty of Versailles after the First World War.

Thus, the Preamble to the European Convention refers (perhaps somewhat optimistically at the time) to the 'European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law . . . '. But this statement also points to the third major impetus towards a Convention—the desire to bring the non-Communist countries of Europe together within a common ideological framework and to consolidate their unity in the face of the Communist threat. 'Genuine democracy' (to which the Statute of the Council of Europe commits its members) or the 'effective political democracy' to which the Preamble of the Convention refers, had to be clearly distinguished from the 'people's democracy' which was practiced and promoted by the Soviet Union and its allies.

The European Convention's transformation of abstract human rights ideals into a concrete legal framework followed a path which has characterized virtually all subsequent attempts. The initial enthusiasm was soon tempered by concerns over 'sovereignty' and a reluctance to take the concept of a state's accountability too far. Thus a call by the Congress of Europe in 1948 for the adoption of a Charter of Human Rights to be enforced by a Court of Justice 'with adequate sanctions for the implementation of this Charter,' an approach which, to a large extent, was reflected in the first draft of the Convention in July 1949, went further than Western European Governments were prepared to go. Instead, the final version of the Convention acknowledges in the Preamble that it constitutes only 'the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.'

In recent years, major reforms (noted below) of some institutional provisions of the Convention have helped to move the system closer to that envisaged by the maximalists of the early 1950s. As with most systems for the protection of human rights, progress has required the gradual growth of popular expectations and an accumulation of experience in the functioning of the procedures that has served to assuage the worst fears of governments.

COMMENT ON RIGHTS RECOGNIZED BY THE CONVENTION

Although the initial moves to create a European Convention pre-dated the UN's adoption of the Universal Declaration, the text of the latter was available to those responsible for the final drafting of the Convention. After rejection of an early proposal to do no more than list the same rights in the Convention, the drafters defined rights in terms similar to the early version of

the draft Covenant on Civil and Political Rights. Since there were numerous changes in the latter before it was eventually adopted by the General Assembly in 1966, the formulations used in the two treaties sometimes differ significantly. Several weighty provisions appear in only one or the other. For example, the European Convention contains no provision relating to self-determination or to the rights of members of minority groups (Articles 1 and 27 of the ICCPR). Each treaty limits freedoms of expression, association and religion in similar ways (criteria of public safety or national security, for example), but the European Convention consistently requires that a limitation be 'necessary in a democratic society' (Articles 8–11). The derogation clauses for periods of war or public emergency threatening the life of the nation (Article 4 of the ICCPR, Article 15 of the Convention) differ with respect to the list of non-derogable provisions.

The rights recognized in Articles 2–12 of the European Convention include the right to life; freedom from torture and inhuman or degrading treatment; freedom from slavery, servitude or forced labor; liberty and security of person, and detention only in accordance with procedures prescribed by law; the right to a fair and public hearing in determining civil rights and obligations or criminal charges; respect for privacy and family life; freedom of thought, conscience and religion; freedom of expression, peaceful assembly and association; and the right to marry and found a family. Article 14 guarantees freedom from discrimination in relation to enjoyment of the recognized rights.

Article 1 requires the Parties to 'secure [these rights] to everyone within their jurisdiction', while Article 13 requires the state to provide 'an effective remedy before a national authority' for everyone whose rights are violated. Compare the more demanding Article 2 of the ICCPR, which specifically refers to states' duty to adopt legislative and other measures to give effect to the recognized rights and to 'develop the possibilities of judicial remedy.'

When the Convention was adopted in 1950, there were several outstanding proposals on which final agreement could not be reached. It was therefore agreed to adopt Protocols containing additional provisions. Since 1952 eleven protocols have been adopted. While the majority are devoted to procedural matters, others have recognised the following additional rights: the right to property ('the peaceful enjoyment of [one's] possessions'), the right to education, and the obligation to hold free elections (Protocol 1 of 1952); freedom from imprisonment for civil debts, freedom of movement and residence, freedom to leave any country, freedom from exile, the right to enter the country of which one is a national, and no collective expulsion of aliens (Protocol 4 of 1963); abolition of the death penalty (Protocol 6 of 1983); the right of an alien not to be expelled without due process, the right to appeal in criminal cases, the right to compensation for a miscarriage of justice, immunity from double prosecution for the same offence, and equality of rights and responsibility of spouses (Protocol 7 of 1984). Acceptance of each of the Protocols is, however, optional.

By March 1995 thirty States were parties to the European Convention.[5] Twenty-eight States had ratified Protocol No. 1, 22 had ratified Protocol No. 4, 23 had ratified Protocol No. 6 and 17 had ratified Protocol No. 7.

At this point students should familiarize themselves with the provisions of the European Convention that are reproduced in the Document Annex, *infra*.

2. THE BROAD EUROPEAN INSTITUTIONAL CONTEXT

Before examining the procedures and institutions through which the European system protects rights, it is necessary to consider the broader European institutional context within which the Convention is situated. The Convention is the creation of the Council of Europe, which is only one of three major regional mechanisms dealing with human rights within Europe. The other two are the European Union and the Organization (formerly termed Conference) for Security and Co-operation in Europe. None of the three is concerned exclusively with human rights. The Council of Europe has the longest and most significant track record in this field.

COMMENT ON THREE EUROPEAN ORGANIZATIONS

The Council of Europe

The Council was established in 1949 by a group of ten states, primarily to promote democracy, the rule of law, and greater unity among the nations of Western Europe. It represented both a principled commitment of its members to these values and an ideological stance against Communism. Over the years its activities have included the promotion of cooperation in relation to social, cultural, sporting and a range of other matters. Until 1990, the Council's membership was essentially confined to Western European countries. Since then, post-Cold War developments have made a major impact upon the Council. Finland, whose neutrality had previously been seen to be not readily compatible with membership, joined. It was followed in rapid succession over the next three years by (in chronological order): Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, the Czech Republic, Slovakia, Romania and

[5] Four members of the Council of Europe, listed in note 6, *infra*—Andorra, Estonia, Latvia and Lithuania—had signed the Convention but not yet ratified.

Latvia. By March 1995 the Council of Europe had 34 Member States, an increase of 50 per cent in only seven years.[6]

The conditions for the admission of a state to the Council of Europe are laid down in Article 3 of its Statute. The state must be a genuine democracy that respects the rule of law and human rights and must 'collaborate sincerely and effectively' with the Council in these domains. In practice, such collaboration involves becoming a party to the European Convention on Human Rights. An applicant state must satisfy the Council's Committee of Ministers that its legal order conforms with the requirements of Article 3. The opinion of the Parliamentary Assembly is sought and the Assembly in turn will appoint an expert group to advise it.

The opinion of the experts is based upon an on-site visit. For example, a 1994 expert report on the situation in Russia concluded that the requirements were not met. The report noted 'important shortcomings with regard to the rights to liberty and security of person and to fair trial' as well as the absence of the rule of law in view of the fact that the 'activities of public authorities are mainly decided upon according to general policy choices, personal allegiance and the effective power structure'.[7]

The importance attached by the states of Central and Eastern Europe to membership of the Council reflects not only a commitment to human rights but a determination to gain 'respectability' within Europe and, perhaps most importantly, to qualify for certain membership 'benefits' as well as for possible admission to the European Union. Although the process of becoming a party to the Convention is not required to be completed prior to obtaining membership in the Council, it is generally assumed that the domestic legislative and other measures required to enable the state to ratify or accede will be completed within a period of two years.[8]

The European Union

The origins of the European Union lie in the Treaty of Paris of 1952 establishing the European Coal and Steel Community (ECSC) and subsequently in the two Treaties of Rome of 1957 creating the European Economic Community (EEC) and the European Atomic Energy Community. The entry into force on November 1, 1993 of the Treaty on Economic Union converted these communities into the European Union. Since January 1, 1995, the Union has consisted of fifteen members: France, Germany, Italy, Belgium, the

[6] As of March 1995 the Members were: Andorra, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom.

[7] Rudolf Bernhardt et al, Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards, reprinted in 15 Hum. Rts. L.J. 249, 287, (1994).

[8] This explains why, in March 1995 for example, there were 34 members of the Council of Europe but only 30 parties to the Convention.

Netherlands, Luxembourg (original EEC members in 1957), United Kingdom, Ireland, Denmark (since 1973), Greece (since 1981), Spain, Portugal (since 1986), Sweden, Finland and Austria (since 1995).

The impetus for the first step of creating the ECSC came essentially from a desire to ensure that the heavy industries of the Ruhr, which had underpinned Germany's military might in two World Wars, would be 'contained' within an intergovernmental structure bringing together West Germany and its former antagonists. The expansion into an EEC in 1957 was an attempt to promote closer economic integration within Europe for both federalist and economic reasons. While the adoption of a bill of rights had been proposed in the early 1950s, none of the subsequent treaties contained such a bill or a list of enumerated rights. The 1957 treaties were more concerned with protecting states' rights from Community encroachments than with the rights of individuals. The latter were seen to be appropriately protected at the national level.

Despite the absence of a bill of rights, the European Court of Justice (the judicial organ of the European Union) began in 1969 to evolve a specific doctrine of human rights, the original motivation for which probably owed more to a desire to protect the competences of the Community than to any concern to provide extended protection to individuals. Over the years during which the human rights doctrine has evolved, the Court has identified several different normative underpinnings for it. They include certain provisions of the Treaty of Rome, the constitutional traditions of the member states, and international treaties accepted by member states. For the most part the European Court of Justice has applied this concept of human rights to the actions of the Community itself, but not to actions of the member states.[9]

The European Convention on Human Rights (of the Council of Europe) has been accorded a priveliged position within the Community legal order, but on a *de facto* rather than a formal basis. In 1977 the European Parliament, the Council and the Commission issued a Joint Declaration emphasizing the importance they attached to fundamental rights, as derived in particular from the constitutions of the member states and the European Convention, and pledged to respect them in the exercise of their powers. In 1979 the Commission proposed that the Community should formally adhere to the European Convention. This suggestion, which has been revived in the 1990s, drew both technical and political objections (primarily from member states such as the United Kingdom, Ireland and Denmark which had not incorpo-

[9] It now appears to be generally accepted by commentators, however, that member states are required to respect the Community concept of human rights in certain circumstances: (1) whenever that concept is used to interpret provisions in the Treaties or Community legislation; (2) where a provision of Community law grants rights which are subject to derogation, in which case the latter must be consistent with the concept; and (3) when member states implement Community rules, in which context they are bound to respect that concept. See Trevor Hartley, The Foundations of European Community Law, 148 (3rd. ed., 1994); Joseph Weiler, Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities, 61 Wash. L. Rev. 1103 (1986).

rated the European Convention into their domestic law).[10] To date, no action has been taken to achieve this objective, nor to adopt a Community bill of rights *per se*.[11]

Note that the institutional arrangements relating to the European Convention are quite separate from those of the Union despite the use of similar appellations. The following table illustrates only a part of the immense potential for confusion in discussions about European institutions:

Council of Europe	*European Union*
Parliamentary Assembly	European Parliament
Committee of Ministers	Council of the European Union European Council Ministerial Councils
European Commission of Human Rights	Commission of the European Union
European Court of Human Rights	European Court of Justice
Committee of Independent Experts on the European Social Charter	Economic and Social Committee

Although arrangements exist to facilitate consultation and coordination between the two sets of institutions, they remain separate entities operating in very different settings despite the fact that the activities of each organization are very relevant to those of the other.

The Organization for Security and Co-operation in Europe (OSCE)

The Conference on Security and Co-operation in Europe (CSCE) opened in 1973 and concluded in August 1975 with the signing of the Final Act of Helsinki (known as the Helsinki Accord) by the 35 participating states (including all European states except Albania, plus Canada and the United States). The Soviet Union was motivated mainly by a desire to obtain formal recognition of its European frontiers, while the West took advantage of a period of East–West *détente* to obtain concessions primarily in relation to security matters. Human rights were of only secondary concern.

The CSCE process continued in the form of long-running diplomatic conferences throughout the late 1970s and 1980s designed to follow up and elaborate on the obligations contained in the Helsinki Accord. These subsequent agreements were reflected in the 'Concluding Documents' of various

[10] See J. McBride and Brown, The United Kingdom, the European Community and the European Convention on Human Rights 1 Yearbook of European Law 167 (1981).

[11] See Jean Paul Jacqué, The Convention and the European Communities, in R. St J Macdonald et al (eds.), The European System for the Protection of Human Rights 889 (1993).

follow-up meetings. In the human rights context the most important were those held in relation to what came to be known as 'the human dimension of the CSCE.' They include meetings which concluded in Vienna and Paris in 1989, Copenhagen in 1990, Moscow in 1991 and Geneva in 1992.

Several characteristics distinguish the work of the CSCE from that of other entities in the human rights field. Its standards are all formally non-binding (in the sense that they are solemn undertakings, but are not in treaty form and thus not ratified or acceded to by states). Secondly, its membership is far broader than that of the European Union or even the Council of Europe and by 1995 had grown to 53 states. Thirdly, until 1991 it had no more than a token institutional structure designed only to arrange its periodic meetings. It performed no operational tasks.

The non-binding diplomatic nature of the Helsinki Process led many observers to question its utility. Whatever contribution the process ultimately made to the demise of Communism, it clearly played an important role, especially in the second half of the 1980s and early 1990s, in legitimating human rights discourse within Eastern Europe, providing a focus for non-governmental activities at both the domestic and international levels, and developing standards in relation to democracy, the rule of law, 'human contacts,' national minorities and freedom of expression which went beyond those already in existence in other contexts such as the Council of Europe and the UN. To a large extent, it was its formally non-binding nature that enabled the CSCE standard-setting process to yield more detailed and innovative standards than those adopted by its counterparts.

Since 1991 the CSCE's institutional dimension has been developed through the establishment of a general secretariat in Prague, an Office for Democratic Institutions and Human Rights and an Office for Free Elections, both based in Warsaw, a Conflict Prevention Centre, based in Vienna, and a High Commissioner on National Minorities, based in the Hague. The work of the last of these is in some ways illustrative of the CSCE's overall approach. The position was created in July 1992 and a former Dutch Foreign Minister, Mr Max van der Stoel, took office in January 1993. He is assisted by only a couple of staff members. On occasion CSCE organs or the country concerned have requested him to undertake a mission, but the decision to do so is his own. His on-site visits are to the country itself as well as to other relevant countries, such as neighboring states in which members of the minority group in question also reside. Statements to the press are very limited and the High Commissioner reports confidentially to the CSCE Chairman-in-Office (see *infra*) and to the Foreign Minister of the country concerned. His recommendations address both short-term policy towards minorities and longer-term measures to encourage a continuing dialogue between the government and minority members. The relevant correspondence is eventually released by mutual consent.

In 1995 the CSCE was officially transformed into the Organisation for Security and Co-operation in Europe (OSCE). Its official organs include the

Parliamentary Assembly of the OSCE, the Council of Ministers for Foreign Affairs, the Committee of Senior Officials (CSO) which meets regularly, the 'Chairman-in-Office' which is a rotating post held by each Member State Foreign Minister in turn, and the biennial summit or Review Conference. This move to institutionalize the OSCE has been welcomed by most observers, although the level of bureaucratic and infrastructural support remains low and the institutions are physically scattered throughout Europe. One long-time observer has suggested that the institutionalization process will have certain negative consequences including a greater detachment of OSCE activities from the NGO community which was instrumental in many of the early successes of the process.[12]

One issue which the OCSE's evolution has made more pressing is its relationship with the Council of Europe's human rights activities. Until recently, it was sufficient to contrast the Council's traditional focus on protecting the rights of individuals through judicial and quasi-judicial mechanisms with the OSCE's concern with inter- and intra-state conflict and with the larger issues concerning democracy and the rule of law. In that respect the division of labour seemed reasonably clear. Nevertheless, as the Council of Europe has sought to adapt to the radical changes within Europe it has begun to develop a much greater focus on broader rule of law issues, has established a European Commission for Democracy through Law, based in Venice, and has adopted a Framework Convention for the Protection of National Minorities (see *infra*). In addition, the European Convention has always provided for an inter-state procedure and for the possibility of on-site fact-finding.[13]

An assessment by the Council of its relationship with the CSCE states that the two 'have reached a normal working relationship characterised by accepting and acknowledging each other's character, working methods, expertise and strong points',[14] but this belies an inevitable and continuing tension as the two entities seek to develop their respective comparative advantages. This process is certain on occasion to involve unwelcome incursions into the domain of the other and the question remains as to whether such competition will be beneficial or destructive. In the meantime, the proliferation of institutions, mechanisms and normative statements is unavoidably confusing for even the most seasoned observers.[15]

[12] William Korey, The Promises We Keep: Human Rights, The Helsinki Process and American Foreign Policy 429–38 (1993).

[13] See Jochen Frowein, Fact-Finding by the European Commission of Human Rights, in R. Lillich (ed.), Fact-Finding Before International Tribunals, 237 (1992).

[14] Council of Europe, Information Sheet No. 34, 134 (1995).

[15] The Dutch Advisory Committee on Human Rights and Foreign Policy concluded in a September 1994 Advisory Letter on CSCE Mechanisms that there is 'overwhelming evidence' that coordination between the CSCE on the one hand and the Council of Europe, the European Union and the UN on the other 'is still extremely deficient. The relationship between the CSCE and the Council of Europe continues to pose particular problems.' See Philip Alston, The Emerging European-Wide Human Rights Regime: Too Much of a Good Thing?, in V. Bornschier and P. Lengyel (eds.), Waves, Formations and Values in the World System, 237 (1992).

ADDITIONAL READING

European Union: J. Weiler and N. Lockhart, *'Taking Rights Seriously': The European Court and Its Fundamental Rights Jurisprudence*, 32 Common Market L. Rev. 51 (1995); Andrew Clapham, *Human Rights and the European Community: A Critical Overview* (1991); A. Cassese, A. Clapham and J. Weiler (eds.), *Human Rights and the European Community: Methods of Protection* (1991); *idem. Human Rights and the European Community: The Substantive Law* (1991).

The OSCE: Arie Bloed (ed.), *The Conference on Security and Cooperation in Europe: Analysis and Basic Documents 1972–1993* (1993); William Korey, *The Promises We Keep: Human Rights, The Helsinki Process, and American Foreign Policy* (1993); Thomas Buergenthal, *The CSCE Rights System*, 25 Geo. Wash. J. Int'l L. & Econ. 333 (1991); E. B. Schlager, *The Procedural Framework of the CSCE: From the Helsinki Consultation to the Paris Charter, 1972–1990*, 12 Hum. Rts. L. J. 22 (1991); A. Rosas and J. Helgesen (eds.), *Human Rights in a Changing East/West Perspective* (1990); S. Terstal *et al*, *The Functioning of the CSCE High Commissioner on National Minorities*, 20 New Community 502 (1994); Arie Bloed, *Monitoring the CSCE Human Dimension: In Search of its Effectiveness*, in A. Bloed *et al* (eds.), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms 45 (1993)*.

3. OTHER HUMAN RIGHTS CONVENTIONS ADOPTED BY THE COUNCIL OF EUROPE

COMMENT ON THREE CONVENTIONS

The European Social Charter

Although economic and social rights were reflected in the post-World War II constitutions of France, Germany and Italy, they were not included in the European Convention. One of the key drafters, Pierre-Henri Teitgen, explained this decision in 1949 on the grounds that it was first necessary 'to guarantee political democracy in the European Union and then to co-ordinate our economies, before undertaking the generalisation of social democracy.' These rights were subsequently recognized in the European Social Charter of 1961.

The Charter consists of four parts. The first lists nineteen social 'rights and principles' which the contracting parties accept as the aim of their policy. They include the rights to: 'just conditions of work,' 'fair remuneration sufficient for a decent standard of living,' freedom of association, special protection for children and young persons, 'benefit from all measures enabling [enjoyment of] the highest possible standard of health attainable.' social security and social

welfare services. These rights are not legally binding *per se*. The legal obligations designed to ensure the effective exercise of those rights are contained in Part II, which expands upon the specific measures to be taken in relation to each of the rights. Part III reflects the principle of progressive implementation tailored to suit the circumstances of individual states. Each contracting party must agree to be bound by at least five of seven rights which are considered to be of central importance. It must also accept at least five of the other rights as listed in Part II.

Part IV provides for a monitoring system based on the submission of regular reports by contracting parties. The reports are examined by the Council of Europe's Committee of Independent Experts (CIE) whose assessments of compliance and non-compliance are then reviewed by the Parliamentary Assembly and a Governmental Committee (also established under Council auspices). Finally, on the basis of all these views, the Committee of Ministers may, by a two-thirds majority vote, make specific recommendations to the state concerned. In addition to being cumbersome and time-consuming, this system vests excessive power in the hands of the representatives of governments who have shown an unsurprising reluctance to take forceful action even when both the CIE and the Assembly consider it to be warranted.

A member of the CIE commented in 1992 that '[a]lthough having a potentially valuable role, the Charter has been until now one of the less prominent of human rights treaties. The Conclusions, or Annual Report, of the [CIE] might almost be classified in the rare books category.'[16] A 1991 Amending Protocol will introduce major reforms when it enters into force by giving the CIE exclusive competence to interpret and apply the Charter, significantly downgrading the role of the Governmental Committee, enabling the CIE to engage in an oral dialogue with governments, and enhancing the role of NGOs.

The Charter entered into force in 1965.[17] In 1987 an Additional Protocol was adopted that extends the protection of certain rights, particularly in relation to equal employment opportunity. It entered into force for the relevant states in September 1992.[18]

[16] D. J. Harris, Introductory Note, 31 Int. Leg. Mat. 155, 156 (1992).

[17] As of March 1995, twenty States were parties. Member States of the Council of Europe that have signed but not ratified are: the Czech Republic, Hungary, Liechtenstein, Poland, Romania, Slovakia and Switzerland. Non-signatories are: Andorra, Bulgaria, Estonia, Latvia, Lithuania, San Marino and Slovenia.

[18] The European Social Charter should be distinguished from the European Community's Charter of Fundamental Social Rights of Workers. The latter is neither a treaty nor an instrument of Community law, and applies only to 'workers' rather than to all members of society. The emphasis is upon implementation at the national rather than regional level. The 1991 (Maastricht) Treaty on European Union includes a 'Social Policy' Protocol to which eleven of the then twelve member states committed themselves (with the United Kingdom objecting). See Erik Lundberg, The Protection of Social Rights in the European Community, in K. Drzewicki, Krause and Rosas (eds.), Social Rights as Human Rights: A European Challenge 169 (1994).

The European Convention for the Prevention of Torture

In 1987 the Council of Europe adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This step was taken after the adoption of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984, but the European Convention is concerned especially with prevention and is far more innovative and intrusive in its approach to supervision. As of March 1995 the European Convention had been ratified by 29 states.

The Convention establishes a Committee for the Prevention of Torture (CPT) which is composed of independent experts. Its function is 'to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons' from torture, inhuman or degrading treatment (Art. 1). The Convention is not concerned solely with prisoners but with any 'persons deprived of their liberty by a public authority.' Each state party is required to permit the Committee to visit any such place within the state's jurisdiction (Art.2), unless there are exceptional circumstances (which will rarely be the case). Most visits are routine and scheduled well in advance but there is also provision for *ad hoc* visits with little advance notice (Art. 7).

The Committee meets *in camera* and its visits and discussions are confidential as, in principle, are its reports. The latter, however, may be released, either at the request of the state concerned or if a state refuses to cooperate and the Committee decides by a two-thirds majority to make a public statement. This occurred in December 1992 when the Committee concluded after three visits to Turkey that the Government had failed to respond to its recommendations to strengthen legal safeguards against police torture, specifically in relation to the activities of certain police 'Anti-Terror Departments'.[19] Virtually all other states visited have voluntarily agreed to the release of the Committee's report, together with the government response thereto.

Framework Convention for the Protection of National Minorities

Despite the importance of national minorities within Europe and discussions about appropriate measures since 1949, the issue had proven too controversial and complex for the Council of Europe to adopt specific standards until November 1994, when the Framework Convention was adopted. In part, the impetus was the adoption of the 1992 UN Declaration on Rights of Members of Minorities, p. 1001, *infra*, and the development of non-binding standards and promotional activities in this field by the CSCE. The Council sought to avoid longstanding controversies by, among other things, confining the Convention to programmatic obligations that are not directly applicable and

[19] Public Statement on Turkey, Doc. CPT/Inf (93)1 (15 Dec. 1992).

that leave considerable discretion about implementation to the state concerned. International supervision is to be undertaken by the Committee of Ministers of the Council based upon periodic reports to be submitted by states parties.

* * * * *

Note that even within one region, deep differences appear in the institutional structures of conventions adopted by the same body, as one compares these three conventions among themselves and with the European Convention on Human Rights to which the materials now turn.

QUESTIONS

1. Compare the powers and functions of the Committee for the Prevention of Torture with those of treaty organs under the UN-related conventions described in Chapter 9, particularly with the Committee formed under the Convention against Torture(CAT), p. 560, *supra*. In what respects is the European Committee for the Prevention of Torture 'innovative,' as the text above states? Are its innovative characteristics likely to be easier to include in a treaty relating to a regional rather than universal arrangement?

2. Even based on the brief descriptions in the preceding Comment, can you draw on prior materials to suggest some relationships between the different institutional structures of the three conventions and their different subject matters?

4. THE EUROPEAN CONVENTION'S IMPLEMENTATION MACHINERY: ARTICLE 25 INDIVIDUAL PETITIONS

The European Convention on Human Rights provides for two procedures by which member states (referred to in the Convention as the High Contracting Parties) may be held accountable by the Convention organs for violations of the recognized rights: the individual petition procedure pursuant to Article 25, and the inter-state procedure under Article 24.

Various provisions of the Convention make clear that the primary responsibility for implementation rests with the member states themselves at the national level. The implementation machinery provided for in the Convention comes into play only when domestic remedies are considered to have been exhausted. Indeed the great majority of cases received by the Commission are

deemed inadmissible, frequently on the grounds that domestic law provides an effective remedy for any violation that may have taken place. Recall the obligations of member states under Articles 1 and 13 of the Convention to 'secure to everyone' the Convention's rights and to provide 'an effective remedy before a national authority' for violations of those rights.

That remedy given by, say, a domestic court may be pursuant to provisions of domestic law that stand relatively independently of the Convention although are perhaps influenced by it—a code of criminal procedure or a constitutional provision on free speech that are consistent with the Convention, for example. Or a remedy may be given pursuant to the substantive provisions of the Convention itself after the Convention has been incorporated into domestic law automatically or by special legislation. The second possibility is considered with respect to application of the Convention by the judiciary in some European states in Chapter 11 at pp. 725–38, *infra*.

This preference for domestic resolution is also reinforced by the requirement to seek a friendly settlement wherever possible and by the procedures for full government consultation in the examination of complaints. The confidentiality of the Commission's own proceedings, the role accorded to the Committee of Ministers, and the provision for there to be a judge and Commission member from every state party again underscore the state-centred nature of many of the Convention's procedures.

COMMENT ON THE COMMISSION AND COURT

The procedures prescribed by the Convention are relatively complex. For reasons noted below, a far-reaching set of institutional and procedural reforms was adopted by the member states in Protocol No. 11, which is unlikely to enter into force before 1998. The Convention as amended by Protocol No. 11 is hereinafter referred to as the Revised Convention. In the following readings the complexities of the existing arrangements are not dealt with in detail, partly because of the pending changes pursuant to Protocol No. 11, and partly because our primary concern is with the functioning of the European Court, rather than the Commission or Committee of Ministers. Protocol No. 11 provides for the establishment of one institution, a full-time Court, to replace the present related functions of the Commission and Court and the present role of the Committee of Ministers.

As now constituted, the Commission consists of a number of members equal to that of the states parties ('High Contracting Parties') to the Convention. The Court, on the other hand, consists of one judge for every member state of the Council of Europe. In March 1995, there were 30 members of the Commission and 34 judges. The individuals are usually judges, university professors, or practising lawyers. Some have previously been senior government officials. Few women have been elected, and sitting judges and commissioners tend to be reelected.

Proceedings under the individual petitions procedure of Article 25 (Article 34 of the Revised Convention) begin with a complaint by an individual, group or NGO against a state that has expressly accepted this procedure. By March 1995 some 550 million people in 30 countries were eligible to lodge petitions under this procedure. Under the Revised Convention acceptance of this procedure will be mandatory for all member states.

To be declared admissible a petition must not be anonymous, manifestly ill-founded, or constitute an abuse of the right of petition. Domestic remedies must have been exhausted, it must be presented within six months of the final decision in the domestic forum and it must not concern a matter which is substantially the same as one which has already been examined by the Commission or submitted to another procedure of international investigation or settlement. Once the application is declared admissible (a procedure which often, but not always, involves an oral hearing), the Commission's task is to establish the facts and encourage efforts to reach a friendly settlement. Decisions on admissibility are published.

Where a friendly settlement is reached between the parties, and provided it considers the settlement to be based upon 'respect for human rights as defined in the Convention,' the Commission reports on this to the Committee of Ministers, which consists of the Foreign Ministers or their deputies of the member states of the Council of Europe. It is up to the government concerned to take the measures to which it has agreed. When the Convention was first drawn up most governments considered it imperative that they retain the final say in relation to all cases decided by the Commission. According such a role to a quintessentially political body has been strongly criticized in the following terms by a former Director of Human rights of the Council of Europe.

> [Bodies such as the Committee of Ministers] are composed of State or Government representatives whose task is to defend what are—rightly or wrongly— regarded as 'State interests'. These political bodies are therefore, almost inevitably, a playground or battlefield of the 'raison d'Etat'.
>
> Although nowadays we are increasingly aware of the fact that human rights are not only violated by State power, international systems for the protection of human rights are mainly designed to control the action of States in this field. When political bodies are entrusted with this task, are we not confronted with an inherent contradiction? These bodies and their members whose normal task is to defend State interests are supposed to protect fundamental rights of individuals or groups against State power. Within these bodies, States are at one and the same time judges and parties.[20]

Where no friendly settlement is reached the Commission determines whether there has been a breach of the Convention. Its opinions, which are

[20] Peter Leuprecht, The Protection of Human Rights by Political Bodies: The Example of the Committee of Ministers of the Council of Europe, in Manfred Nowak, Steurer and Tretter (eds.), Progress in the Spirit of Human Rights: Festschrift für Felix Ermacora 95, 96 (1988).

usually published, are not *per se* legally binding on the states parties. Within three months of the Commission's report the case can be referred to the Court by either the Commission or by a state concerned, but not (until Protocol No. 9 comes into force) by the complainant. If the case is not referred to the Court, the Committee of Ministers decides whether there has been a violation of the Convention and what measures must be taken by the state concerned.

The Court cannot determine which cases it hears but rather is at the mercy of the Commission or the state concerned. It does not undertake the examination of a case *de novo*. The subject-matter of each case brought before it is, in essence, determined by the Commission's decision on admissibility. In practice, most cases have been referred by the Commission. There are no established criteria to guide the Commission about referral. One observer has identified elements that might be influential in these decisions: where the case raises a point of interpretation that has not previously arisen; where the Commission is divided as to whether there has been a violation; or where a case is perceived to have particularly serious political implications.[21]

Although the Commission is not a party to cases before the Court, one of its members participates in the proceedings to assist the Court. Since 1983, an individual applicant may be represented before the Court by a lawyer but is still not formally a party to the case. Although there is no *amicus curiae* provision, the President of the Court may authorize interested parties to submit comments on specific issues and various NGOs have been invited to do so.

The functioning of the Court is explored in Section 8 below in relation to specific cases.

5. RESPONSES OF STATES TO FINDINGS OF VIOLATIONS

ANDREW DRZEMCZEWSKI AND MEYER-LADEWIG, PRINCIPAL CHARACTERISTICS OF THE NEW ECHR CONTROL MECHANISM, AS ESTABLISHED BY PROTOCOL NO.11

15 Hum. Rts. L. J. 81 (1994), at 82.

. . .

The Convention's achievements have been quite staggering, the case-law of the European Commission and Court of Human Rights exerting an ever deeper

[21] J. G. Merrills, The Development of International Law by the European Court of Human Rights 4 (2nd. ed., 1993).

influence on the laws and social realities of the State Parties. A few examples may be mentioned.

In Austria, where the Convention has the rank of constitutional law, the Code of Criminal Procedures has had to be modified as a result of case-law in Strasbourg; so too the system of legal aid fees for lawyers. In Belgium, amendments have been made to the Penal Code, its vagrancy legislation and its Civil Code to ensure equal rights to legitimate and illegitimate children. In Germany modifications that bring legislation better into line with the Convention's provisions have also been made, e.g. the Code of Criminal Procedure concerning pre-trial detention was amended. Various measures have been taken to expedite criminal and civil proceedings, and transsexuals have been given legal recognition.

In the Netherlands, where most of the Convention's self-executing substantive provisions are endowed with a hierarchically superior status to the Constitution itself, changes have been made in the Military Criminal Code and the law on detention of mental patients. In Ireland, court proceedings have been simplified and civil legal aid and advice schemes set up. Sweden has introduced rules concerning time-limits for expropriation permits and legislation enacted concerning the regulation of building permits. Switzerland has amended its Military Penal Code and completely reviewed its judicial organisation and criminal procedure as applied to the federal army, as well as its Civil Code as regards deprivation of liberty in reformatory centres.

In France, the law relating to the secrecy of telephone communications had to be altered, while in Italy a new Code of Criminal Procedure was enacted to change the law concerning regulation of detention on remand. In the U.K., despite the fact that the Convention has not been incorporated into domestic law (as is also the case in Ireland, and for the time-being in Iceland, Norway and Sweden), its constitutional impact cannot be doubted, with changes in domestic law being made in the areas of freedom of information, privacy, prison rules, mental health legislation and payments of compensation for administrative miscarriages of justice, among others.

But the effects of the Convention are not limited to the follow-up given to judgments of the Court, decisions of the Commission and findings of violation by the Committee of Ministers. The procedure for friendly settlements under the Convention has also produced significant results in this respect. Indeed, over two hundred instances can be cited where settlements have been reached either formally or informally, often with the Commission's or the Court's approval, subsequent to concessionary measures taken by the governments concerned.

More generally, national courts in the States Parties to the Convention increasingly turn to the Strasbourg case-law when deciding on a human rights issue, and apply the standards and principles developed by the Commission and Court. Many instances can also be cited of States modifying legislation and administrative practices prior to their ratification of the Convention.

particularly in the case of those States which have recently joined the Organisation.

CHRISTIAN TOMUSCHAT, QUO VADIS, ARGENTORATUM? THE SUCCESS STORY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS—AND A FEW DARK STAINS

13 Hum. Rts. L. J. 401 (1992).

. . . [Despite the system's successes] symptoms of a deep-seated crisis cannot be overlooked. As any mechanism for the protection of human rights, the Strasbourg system must be measured by the concrete results which it produces in favour of the aggrieved individual. It is not the legal perfection of its normative structure that matters in the last analysis, but its actual impact on the real enjoyment of human rights. In that respect, substantial reasons barring euphoria exist. However numerous and bold the decisions of the Strasbourg bodies may be, it has recently emerged that especially their implementation lacks sufficiently effective safeguards.

[One of Tomuschat's principal concerns is the failure of the Committee of Ministers to discharge its obligations under the Convention effectively, both in relation to inter-state and individual applications. That deficiency will be remedied once Protocol No. 11 enters into force. Another major deficiency relates to enforcement of the judgments of the Court.]

a) Reparation in individual cases

As far as obligations to make specific payments are concerned, in the telephone tapping case of *Kruslin* France took more than one year and four months before it made the required payment to the applicant in respect of costs and expenses . . . and in the *Ezelin* case the period amounted to almost one year . . . . But the unfortunate top position is held by Italy. It appears that the *Colozza* case, in which Italy was ordered to pay to the victim's widow six million Lire by way of just satisfaction, [had still not been wound up seven years later].

. . .

b) General amendment of legislation

The most far-reaching challenge arises for a State when it has to modify its legislation following a judgment of the Court.

. . .

. . . It took Belgium roughly eight years to change its legislation on the status of illegitimate children after the judgment in the *Marckx* case had been

delivered, whereas Ireland responded within one year to the Court's conclusion that certain aspects of the position of illegitimate children amounted to unlawful discrimination. The Federal Republic of Germany needed more than five years to comply with the judgment in the *Öztürk* case, according to which provision of an interpreter free of charge for the accused is mandatory also with regard to regulatory offences (*Ordnungswidrigkeiten*). A strange response was given by the Swiss authorities to the judgment of 18 December 1987 in *F. v. Switzerland*, which held that a prohibition to remarry, as foreseen in Article 150 of the Swiss Code, was contrary to Article 12. Switzerland informed the Committee about its intention to abolish the controversial provision in connection with a general reform of the Swiss law on divorce which would probably enter into force in 1995, i.e. no less than eight years after the pronouncement of the judgment. Lastly, it is worth mentioning the judgment in *Norris v. Ireland* of 26 October 1988 . . . [see p. 618, *infra*. Four years later the legal position had remained unchanged].

. . .

More positive examples are the swift reaction of the Netherlands to the finding in the *Benthem* case that the system of review of administrative decisions was not in keeping with the required safeguards of a judicial procedure, and similarly Sweden introduced mechanisms to ensure judicial review of administrative conduct after it had emerged that the existing machinery was characterized by large gaps. It is also with praiseworthy celerity that France responded to the *Huvig* and *Kruslin* judgments of 24 April 1990 which had passed a verdict of incompatibility with the Convention of the French system for telephone tapping in criminal proceedings. Finally, one of the guiding forces behind the adoption of the new Italian Code of Criminal Procedure, which entered into force on 24 October 1989, may have been the pressures engendered by the numerous applications complaining about excessive length of criminal proceedings. It remains to be seen what actual effects in practice this reform will produce. In this connection, one reads with mixed feelings the information that the Italian Court of Cassation, in an amazing *tour de force*, disposed in 1990 of no less than 44,811 of the appeals pending before it.

QUESTION

On what criteria or standards would you evaluate the effectiveness of the European Convention system? Should we examine the system in its own terms, primarily through judicial decisions and state responses thereto? Or should we compare the functions and powers of the organs in the Convention system with the different institutional structures and powers of other human rights systems, universal or regional, to make a broader judgment? Note the differences from the other systems examined in Chapters 7 and 9.

6. REFORMING THE CONVENTION SYSTEM

Between 1953 and 31 December 1994 the Council of Europe had established 78,583 provisional files (letters received), of which 26,041 were registered as applications. Of those 2,027 had been declared admissible. In 223 of those cases friendly settlements were achieved, 506 were referred to the Court (of which 290 resulted in a finding of violations, 103 in a finding of no violations, 62 are pending and 51 were settled or struck off the list). There were 551 cases that were referred to the Committee of Ministers (of which 121 were considered to involve violations, 64 no violations, 332 pending and 34 settled or leading to other findings).

Partly because of the expansion of the Council of Europe's membership and partly because of the Convention system's perceived effectiveness, it has become overburdened. In recent years the Commission has received between 5,000 and 10,000 complaints (known as 'applications') annually. In the years prior to 1990 the Commission built up a large backlog which began to be reduced only when it was permitted by Protocol No. 8 to meet in Committees of Three and Chambers. In a five month period between August 1994 and January 1995, for example, the Commission, in examining admissibility, dealt with 2,378 applications under Article 25. It declared 396 applications admissible, 947 inadmissible, struck 48 applications off its list of cases pending, and communicated 489 applications to governments.[22] In examining applications which had already been admitted, it referred 36 to the Court, adopted 19 reports based on friendly settlements (Article 29 (2)) and adopted 203 reports on the merits (Article 31).[23] The figures for the preceding six months were similar.

The existing system is unable to deal with the greatly increased number of cases. For example, the number of applications registered by the Commission (i.e. accepted for examination rather than being deemed immediately irrelevant) went from 404 in 1981, to 500 in 1983, 700 in 1986, 2,037 in 1993 and close to 4,000 in 1994. This tenfold increase in less than 15 years has placed severe strains on the entire system. With this increased volume has come growing complexity as the Convention jurisprudence has evolved.

As a result of these combined factors, the procedures have become unacceptably time-consuming. In 1993 it took, on average, five years and eight months for a case to be finally decided (four years and four months before the Commission and one year and three months before the Court). This is especially ironical in view of the Court's case law, which has often found states whose courts take equivalent periods of time to decide a case to be in breach of the right to a hearing 'within a reasonable time' under Article 6. Another

[22] The figures for any given period do not 'add up' since not all petitions are processed in the period in which they are received.

[23] Information taken from European Commission of Human Rights, Information Note, Nos. 121–123.

factor favoring reform is the rapid expansion in the number of states parties to the Convention, with further additions expected in the future.

Protocol No. 11, of May 1994, will enter into force one year after it has been ratified by all of the Convention's High Contracting Parties. At the time of its adoption it was generally predicted that the necessary ratifications would not be achieved before 1997, making 1998 the earliest likely date for the implementation of the Revised Convention. The essential features of the reform are described in the following excerpt.

ANDREW DRZEMCZEWSKI AND MEYER-LADEWIG, PRINCIPAL CHARACTERISTICS OF THE NEW ECHR CONTROL MECHANISM, AS ESTABLISHED BY PROTOCOL NO. 11

15 Hum. Rts. L. J. 81 (1994).

. . .

[The basic features of the reform]

With the signature of Protocol No. 11 by 27 of the 28 States Parties to the European Convention on Human Rights (ECHR) on 11 May 1994, the reform of the ECHR has now taken on a clear structure and has been provided with the necessary political impetus. Since then, Slovenia has already ratified Protocol No. 11, thereby becoming the first State to firmly commit itself in the path of reform.

A permanent European Court of Human Rights will replace the existing Commission and Court as well as the Committee of Ministers, in so far as the last-mentioned functions concerning individual and inter-State complaints are concerned. The competence of the Committee of Ministers will henceforth be limited to the supervision of the execution of the Court's judgments.

The Court will sit permanently, i.e., it will work in a similar way as does the Court of Justice of the European Communities in Luxembourg. The salaries of judges will be paid by the Council of Europe. With the permanent presence of judges in Strasbourg, the way in which the system functions will of necessity change fundamentally. The influence of civil servants in the Secretariat of the Commission and Registry of the Court will diminish. On the other hand, the participation of judges—in particular as rapporteur-judges—will, from the very beginning of the procedure, become more intense. An infrastructure, even more professional than now, together with a specific role provided to legal secretaries, should ensure an improvement in the quality of the Convention's control mechanism.

1. Composition of the Court

The Court will consist of a number of judges equal to that of State Parties to the Convention. It will sit in committees, Chambers and a Grand Chamber.

The judge elected in respect of the State concerned will sit as of right in Chambers and the Grand Chamber when a case concerning that State is examined by the Court. The plenary Court will only deal with organisational matters.

Committees will be composed of three judges. Chambers of seven judges and the Grand Chamber of seventeen judges. Committees are to be set-up by Chambers for fixed periods of time. They will exercise a filter function with respect to applications as does presently the Commission; they will be able to declare individual applications inadmissible. Admissibility criteria are to remain unchanged.

Chambers will also be set-up by the Court for fixed periods of time. Judges will be able to be members of more than one Chamber at the same time. Chambers will be able to determine the admissibility as well as the merits of applications.

The Grand Chamber will have jurisdiction with respect, in effect, to certain matters which the present plenary Court possesses. It will decide—in exceptionally important cases—on individual as well as inter-State applications referred to it. The President of the Court, the Court's Vice-Presidents, the Presidents of the Chambers and the judge elected in respect of the State against which an application has been lodged will be *ex officio* members of the Grand Chamber. The other members will be chosen by the Court. The Grand Chamber could be set-up for a specific case or for a fixed period of time.

2. Outline of the procedure

As under the present system, individual applications will be able to be lodged by any person or a State Party. . . . The application will . . . be examined by a committee of three judges, one of whom would be the judge rapporteur, which will then declare the application admissible or, in the alternative, reject it. The committee will be able, unanimously, to declare an application inadmissible; such a decision would be final. If a judge rapporteur were to consider that the application raises an issue of principle or that the application cannot be declared inadmissible, the application would be transmitted directly to the Chamber. This procedure corresponds closely to the present system. . . .

There will normally be a hearing before a Chamber. The parties will present their observations in writing. The Chamber will be able, at any stage of proceedings, to put itself at the disposal of the parties so as to facilitate a friendly settlement. . . .

. . .

Following the delivery of judgment, the parties to a case will be able to request that it be referred to the Grand Chamber. This procedure will be restricted only to exceptional cases, i.e. when a case raises a serious question concerning the interpretation or application of the Convention or its protocols, or if it raises an issue of general importance. A panel of the Grand Chamber will determine whether the request for a re-hearing can be accepted (Article 43).

A judgment of the Court will become final once the possibility of referral to the Grand Chamber is no longer feasable. Such a judgment will be definitive and, as is the case at present, binding in international law. The Committee of Ministers will maintain its role of supervising the execution of the Court's judgments.

. . .

QUESTIONS

1. Is there an inherent contradiction in a system for protecting human rights that accords a significant role (as on the Committee of Ministers) to governmental representatives? If so, how should we view the role(s) played by such representatives on the UN Commission on Human Rights?

2. How well insulated from such political/governmental pressures will the European system be, once the Protocol No. 11 changes are in place?

3. The Revised Convention continues to provide for the possibility of having a judge from every state party. This is justified on the grounds that it gives the judiciary in each state a sense of confidence in the Court and it assures the Court of expertise in the functioning of every national legal system. Would an international (UN) human rights court therefore need to have a comparable system? If this is considered not to be feasible (e.g. 190 judges), does it cast serious doubt on the viability of any such court? What are the implications for the 18-member ICCPR Human Rights Committee rendering its 'views' under the Optional Protocol, p. 535, *supra*?[24]

4. Protocol No. 11 provides that two members of the first instance Chamber (its President and its member from the state concerned) will sit again in the Grand Chamber if there is an appeal. The Court has held this practice to be an infringement of the right to a fair trial under Article 6 of the Convention when it occurs at the national level. Is there any justification for this apparent double standard?

5. What challenges and risks would you identify for the Court's functioning and jurisprudence after the recent expansion of the Convention system to include

[24] Consider the following provisions in the Statute of the International Court of Justice, the judicial organ of the UN that is briefly described at p. 637, *infra*. Article 3(1) provides that the Court shall consist of fifteen members, 'no two of whom may be nationals of the same state.' Article 9 provides that in electing members, the electors (states) should bear in mind 'that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.' Under Article 31, if in a case before the Court (only states can be parties in cases) the Bench includes a judge of the nationality of one party, the other party may choose a person to sit as judge. If there is no judge of the nationality of either party, each may proceed to choose a judge.

many states from Central and East Europe with very different legal and political backgrounds and comparatively embryonic systems of judicial independence?

6. One of the great strengths of the European system has been its provision of an effective remedy for individual violations. How do you react to the following question of Tomuschat (op. cit., *supra* p. 588, at 406)?

> Can the system of the European Convention . . . operate successfully only under generally favourable conditions, which make violations an exceptional occurrence, an accident-like event which can easily be remedied? Does it need special procedures for looking into 'situations', where any individual case brought to the attention of the monitoring bodies is representative of a general phenomenon with much larger dimensions . . . ?

7. THE INTER-STATE PROCEDURE: ARTICLE 24

Whereas the individual petition procedure is optional, states parties to the Convention are automatically subject under Article 24 of the Convention (Article 33 of the Revised Convention) to a procedure by which one or more states may allege breaches of the Convention by another state party. Unlike the traditional approach to such cases under the international law of state responsibility for injury to aliens, p. 75, *supra*, it is not necessary for an applicant state to allege that the rights of its own nationals have been violated, although this has generally been the case.

As of March 1995 eleven inter-State applications had been lodged.[25] They concern only six different situations and are as follows:

(a) *Greece vs. the United Kingdom* (2 cases, in 1956 and 1957) relating to Cyprus. The case concerned the declaration of a state of exception in Cyprus (then a British colony) and the introduction of emergency measures by the U.K. Government. A political settlement was reached in 1959 before the Committee of Ministers had formulated its views.

(b) *Austria vs. Italy* in 1960 related to the murder trial of six members of the German-speaking minority in the South Tyrol. The Committee of

[25] See generally P. van Dijk and G. J. H. van Hoof, Theory and Practice of the European Convention on Human Rights 33 (2nd ed., 1990).

Ministers informed the parties of the Commission's view that clemency should be shown and sought to achieve a broader resolution of the issues surrounding the case.

(c) *Denmark, the Netherlands, Norway and Sweden vs. Greece* in 1967 and the same group, minus the Netherlands, again in 1970. This case is considered below.

(d) *Ireland vs. the United Kingdom* (2 cases, in 1971 and 1972) relating to a declared state of emergency in Northern Ireland. The three Commission delegates heard 118 witnesses before the Commission concluded that, although measures for detention without trial were 'strictly required by the exigencies of the situation,' certain interrogation techniques used by the British forces did constitute torture and inhuman treatment. The Irish Government referred the case to the Court which found that while the techniques involved 'inhuman and degrading treatment' (and thus violated Art. 3), they did not amount to 'torture'.

(e) *Cyprus vs. Turkey* (3 cases in 1974, 1975 and 1977) after the Turkish intervention by armed forces in Cyprus. The Commission found in response to the last of these complaints that violations, including large-scale evictions, had occurred. The Committee of Ministers requested Turkey to put an end to them, and urged the parties to resume inter-communal talks.

(f) *Denmark, France, the Netherlands, Norway and Sweden vs. Turkey* in 1982, alleging violations, including torture, by the military government. Under the settlement approved by the Commission, the Turkish Government gave a number of vague undertakings such as a commitment to instruct 'the State Supervisory Council . . . to have special regard to the observance by all public authorities' of the Convention's prohibition against torture. In relation to the lifting of the state of emergency the settlement noted that 'special regard is given to the following declaration made by the Prime Minister of Turkey on 4 April 1985 in Washington D.C.: "I hope that we will be able to lift martial law from the remaining provinces within 18 months"'.[26] The settlement was widely criticised on the ground that it was not based on the respect for human rights required by the Convention.

The Commission's response to the applications brought against Greece in 1967 and 1970 has been described as a model 'for demonstrating both the possibilities and the political limitations of the international protection of human rights.'[27] The case also provides an excellent illustration of fact-finding by the

[26] Report of the Commission, 25 Int'l Legal Materials 308 (1986).
[27] Francis Jacobs, The European Convention on Human Rights 27 (1975).

Commission. It should be noted, however, that this 'model' is in no sense representative of the outcome of the other inter-state cases to date.

The background to the case involved the seizure of power by 'the Greek colonels' in a *coup d'état* in 1967. The military government proclaimed a state of emergency and notified various derogations under Article 15 of the Convention. The applications by Denmark, the Netherlands, Norway and Sweden were declared admissible in January 1968. The Commission had to consider whether there was (under the criteria set for states of emergency under Article 15) an 'emergency threatening the life of the nation,' and if so, whether the measures taken by the military government were 'strictly required by the exigencies of the situation.' The prohibition against torture as well as eleven other articles of the Convention were alleged to have been violated. The Commission initiated a fact-finding exercise on the basis of Articles 28 and 31 of the Convention. The story continues in the following reading.

A. H. ROBERTSON AND MERRILLS, HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(3rd ed., 1993), at 278.

[A]fter hearing about thirty witnesses in Strasbourg in November and December 1968, the sub-commission 'fixed 6 February 1969 as the opening date for its investigation in Greece'. In accordance with Article 28 of the Convention the Greek government was consulted about the arrangements, but not about the question whether the investigation should take place. At its request the date for the opening of the investigation was postponed until the beginning of March.

The sub-commission met in Athens on 9 March 1969 and began its investigation the following day. In the main, the Greek government cooperated and facilitated its work and the sub-commission expressed its appreciation of this. Between 10 and 20 March it heard thirty-four witnesses with regard to allegations of torture and twenty witnesses about the existence of a state of emergency. In addition it visited the police stations of the Security Police in Athens and Piraeus and delegated one of its members to visit the Hagia Paraskevi detention camp. When the sub-commission wanted a medical opinion on the condition of witnesses who alleged that they had been tortured, it summoned two forensic experts from the University of Geneva, who were provided with the necessary facilities. On the other hand, the government prevented the sub-commission from hearing thirteen witnesses whom it wished to examine in connection with allegations of torture and also prevented it from inspecting detention camps on the island of Leros and from visiting the Averoff prison in Athens. Since it considered the reasons for these refusals unjustified, the sub-commission terminated its visit and reported the facts to the plenary Commission.

Although some of the facilities it required were refused, the sub-commission succeeded in making a thorough investigation into the allegations of torture and the question of the existence of a state of emergency. This is demonstrated by the fact that, in addition to hearing many witnesses on the torture issue, it visited and photographed the notorious Bouboulinas station of the Security Police in Athens. Furthermore, during the hearings on the largely political question of the existence of a state of emergency, the witnesses included three former Prime Ministers, the Governor of the Bank of Greece, the chief of the armed forces and the Director General of Security at the Ministry of Public Order.

. . . [T]he full Commission, acting on the information obtained by its sub-commission, concluded that there was not a public emergency in Greece at the material time and, as a consequence, the Greek derogations were invalid. It also found that there was a practice of torture and ill-treatment by the Athens Security Police and, furthermore, that there had been violations of eight other articles of the Convention, together with Article 3 of Protocol No. 1. The Commission's conclusions were endorsed by the Committee of Ministers in April 1970 and thereby became decisions of the Committee under Article 32 of the Convention. In the meantime, however, while the Committee had been considering a recommendation from the Consultative Assembly on the situation in Greece, the Greek Minister for Foreign Affairs announced that his government had decided to denounce the Statute and withdraw from the Council of Europe, and also to denounce the European Convention.

NOTE

After the restoration of civilian government, Greece rejoined the Convention regime in 1974. Although the inter-state procedure has been used only in relation to six situations, recall that a comparable procedure involving the Human Rights Committee under Articles 41–43 of the ICCPR has never been invoked.

QUESTIONS

1. Some of the largest European countries, including the United Kingdom, Germany and Spain, have never lodged an inter-state complaint against another European government. Does this mean that this procedure is only likely to be invoked by small countries with limited political clout? If so, would that indicate a fundamental weakness of the procedure?

2. Under what circumstances might the lodging of an inter-state complaint be most productive and when might it be considered counter-productive?

3. Rather than maintaining this rarely used inter-state judicial procedure, would the Council of Europe be better served by a fact-finding system similar to that developed by the UN Commission on Human Rights?

8. THE EUROPEAN COURT IN ACTION: SOME ILLUSTRATIVE CASES

The role of the European Court is of particular importance for several reasons. Consider first the volume of cases. Until the early 1980s the Court dealt with an average of only five to six cases annually. By contrast, between 1989 and 1992 this figure rose to 63 cases. Put another way, the Court heard its first 100 cases between 1959 and 1985, its second hundred between 1985 and 1989. In the space of only six months in 1994, it delivered judgments in 24 cases.

Secondly, many cases that are now brought are more complex and raise more complicated jurisprudential issues than those which tended to come before the Court in its earlier years. Thirdly, because the Court is the longest standing international human rights court (the Inter-American Court, p. 650, *infra*, being the only other international body fulfilling a comparable role), it is inevitably seen as the model against which to measure other regional courts or a possible universal human rights court. Finally, the jurisprudence of the Court (as well as that of the Commission, although to a lesser extent) has been influential in the normative development of other parts of the international human rights system. Thus, the Inter-American Court and the ICCPR Human Rights Committee have frequently referred to judgments of the European Court. Its unacknowledged and perhaps unrecognized influence may have been even greater.

The frequency with which states have been before the Court differs considerably from country to country.[28] Italy holds the record (136 cases as of April 1995 in 82 of which the Court found violations). A large number related, however, to a single issue, delay in bringing prosecutions to trial. The next best customer has been the United Kingdom (73 cases. of which 35 have been held to involve violations), followed by France (29 of 62 cases involving violations), Austria (27 of 55), Sweden (21 of 32) and Belgium (20 of 34). Towards the other end of the scale 11 cases of 28 have involved violations by Germany and only two in six for Denmark and one in three for Norway. To some extent these figures reflect the extent to which adequate domestic remedies are available, which in turn is influenced by whether the Convention has been incorporated in domestic law. See pp. 725–38, *infra*.

[28] For a detailed guide see Donna Gomien, Judgments of the European Court of Human Rights: Reference Charts (Council of Europe. 1995).

Before examining some of the Court's case law consider the following description of its role.

J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS

(2nd ed., 1993), at 9.

. . . Since there is no aspect of national affairs which can be said to be without implications for one or other of the rights protected by the Convention, there is no matter of domestic law and policy which may not eventually reach the European Court.

In terms of the character of the Court's work this has a double significance. In the first place, it means that the Court is required to investigate and pronounce on many issues which have not hitherto been regarded as appropriate subjects for international adjudication, which in turn raises the question of how far the Court is entitled to go in monitoring the laws and practices of the Contracting States. This is essentially a question about the impact of human rights law on national sovereignty and the role of international adjudication in establishing and enforcing uniform standards. The other way in which the nature of the Court's work is significant is that as a tribunal dealing with human rights, the Court is required to decide difficult and important questions concerning the proper relationship between the individual and the State. The issue here is what it means to have a particular right and how the balance is to be struck between such competing interests as, for example, privacy and national security, or prompt trial and the limitation of public expenditure.

. . . As a commentator has said of the Strasbourg [European Convention] institutions, 'Conceived as regional international organs with limited jurisdiction and even more limited powers, they have gradually acquired the status and authority of constitutional tribunals'. As we shall see, this transformation of the Convention and its institutions, which is still in progress, is the key to understanding the wider significance of the Court's decisions.

. . .

Although the Court is careful to avoid trespassing on what it sees as the function of the national authorities, investigating 'the international responsibility of the State' almost always calls for scrutiny of certain aspects of domestic law. Thus another feature of the Court's work is that the very nature of the obligations with which the Court is concerned makes the adequacy of the Contracting States' domestic law a matter for investigation.

. . .

The Court's decisions are binding on the Contracting States, which under Article 53 of the Convention, 'undertake to abide by the decision of the Court

in any case to which they are parties'. When the Court concludes that the Convention has been violated, it is therefore incumbent on the respondent to take whatever steps may be needed to put matters right.

. . .

In each decision the Court is not just spelling out the obligations of the State which happens to be involved in the particular case.

. . . The common law, advancing from precedent to precedent, has a counterpart, then, in the developing law of the European Convention.

Judgments have this wider significance because the Court consistently seeks to justify its decisions in terms which treat its existing case-law as authoritative. In other words, it follows judicial precedent.

. . .

NOTE

The following decisions explore some of the characteristic issues when international tribunals decide human rights issues that may deeply implicate the internal order of states. They involve two fields of work—national security issues and rights of homosexuals—among the vast range of matters that have come before the Court, a range characteristic of national courts such as the Supreme Court of the United States that decide constitutional issues. Indeed, the United States offers a useful comparison: relationships between the European Court and the (judiciaries of the) member states of the European Convention, on the one hand; relationships between the U.S. Supreme Court and the (judiciaries of the) component states of the United States federalism, on the other.

The differences between, say, the work of the UN Commission on Human Rights or even the ICCPR Human Rights Committee and the European Court are striking. Of course moral and political premises inform the work of the Court and sometimes become explicit. But its opinions take the forms of the law—a stress on the text of the Convention, the facts of the dispute, arguments over interpretation of the text, reflection on the institutional role of the Court in relation to national political orders, the ultimate decision applying the Convention in a decision binding the states parties. From this point of view, a study of the European Court's decisions best illustrates the promise of an international (regional) *legal* order governing national human rights issues.

The question inevitably arises of how transferable this experience of the European human rights system may be. You should bear in mind that question—whether, for example, an equally effective judicial system functioning with so high a record of compliance by states would be as likely within a universal human rights regime such as the ICCPR, or in a regional regime like the Americas or Africa.

The decisions below fall into two parts. (1) *Brogan v. United Kingdom* deals with one of the few situations where the European human rights system has been required to deal with serious and ongoing violent conflict. No such violence in Europe has been longer lasting than the conflict in Northern Ireland over whether it remains part of the U.K. *Brogan* is then not typical of the case law of the European Court; its context of terrorism and extended detention resembles the kinds of circumstances brought to the attention of universal human rights organs like the UN Commission on Human Rights, or of the Inter-American Commission and Court on Human Rights. Indeed, the problems in the *Brogan* case can be compared with the situation before the Inter-American Court of Human Rights in the *Velasquez-Rodriguez* decision, p. 650, *infra*.

(2) *Norris v. Ireland*, the second principal decision below of the European Court, is more reminiscent of the kinds of issues apt to be decided by constitutional courts within liberal democracies—and indeed, all member states of the European system have democratically elected governments. The decision deals with the issue of the right to privacy in relation to homosexual relations. For purposes of comparison of the substantive law in the two decisions and of the European system with the United States federalism, the materials include the decision of the U.S. Supreme Court in *Bowers v. Hardwick* on a similar issue of privacy and homosexual relations.

The dominant jurisprudential and political theme in these cases is the doctrine (or theory, or principle) of margin of appreciation, critical to an understanding of the dilemmas before this international court and the ways in which it tries to come to terms with them. After the decisions, there follow excerpts from writings of scholars that probe the ways in which the Court has employed and developed this theme.

BROGAN v. UNITED KINGDOM

European Court of Human Rights, 1988
Ser. A, No. 145-B, 11 EHRR 117.

[In the 1970s and 1980s, terrorism in Northern Ireland caused thousands of deaths and tens of thousands of injuries. Parliamentary legislation in 1974 and 1976, subject to renewal each year, gave to the police special powers of arrest and detention. The 1976 Act was renewed annually until 1984, when it was replaced by the Prevention of Terrorism Act (1984 Act) proscribing both the Provisional Irish Republican Army (IRA) and the Irish National Liberation Army (INLA) as terrorist organizations. Annual reports on the 1984 Act were required to be submitted to Parliament before annual renewal. The authors of these reports had concluded that ongoing terrorism made special powers of arrest and extended detention indispensable.

Section 12 of the 1984 Act authorized a constable's arrest without warrant of a person 'who he has reasonable grounds for suspecting to be' a person involved with 'acts of terrorism' in Northern Ireland. It provided for

detention after arrest for not over 48 hours, except that 'the Secretary of State may, in any particular case, extend the period of 48 hours by a period or periods specified by him' not to exceed five days. Police requests for extended detention were forwarded to the Secretary of State for Northern Ireland. The 1984 Act contained no criteria governing decisions to extend the original period of detention. From 1984–87, about two percent of the police requests were denied by the Secretary of State.

These provisions of the 1984 Act displaced the normal legislative rule that a person arrested without warrant and held for 24 hours must then be brought before a Magistrates Court as soon as practicable, in any event not more than 48 hours after arrest. The principal remedies of detained persons under the 1984 Act were an application for a writ of habeas corpus (not made by any of the four persons involved in this case) and a civil action claiming damages for false imprisonment.

Under ordinary law, police had no power to arrest and detain a person merely to make inquiries, and arrest without warrant required reasonable suspicion that a specific crime had been committed. The 1984 Act differed. No charge had to be preferred during the permitted period of detention under that act. The detention was not necessarily the first step in a criminal proceeding leading to judicial investigation of a charge against the detained person.

Four persons who later initiated proceedings against the U.K. before the European Commission of Human Rights were arrested and detained in 1984 and 1985 under the 1984 Act. Each was told by the police that there were reasonable grounds for suspecting his involvement in terrorism, and was cautioned that he need not say anything. The Secretary of State agreed in each case to a police request for extension of detention. None was brought before a judge or charged after their release, which occurred after periods of detention ranging from 4 days and 6 hours to 6 days and 16 hours.

Two typical cases were as follows: Brogan was questioned after his arrest about his suspected involvement in an attack on a police patrol leading to death and injuries, as well as about his suspected membership in the IRA. He maintained a total silence to his police questioners throughout his detention. Tracey was questioned about an armed robbery and about a conspiracy to murder members of the security forces. He too remained silent. Each was visited during the period of detention by his solicitor.

The four applicants argued before the Commission that the U.K. had violated provisions of Article 5 of the European Convention that are set forth below. In its report in 1987, the Commission concluded by different votes, and in some cases with respect to certain but not all applicants, that two provisions of Article 5, but not other provisions relied on by the applicants, had been violated. It referred the case to the European Court of Human Rights. Excerpts follow from the Court's Judgment and from several concurring and dissenting opinions.]

II. General approach

48. The government has adverted extensively to the existence of particularly difficult circumstances in Northern Ireland, notably the threat posed by organised terrorism.

The Court, having taken notice of the growth of terrorism in modern society, has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights.

The government informed the Secretary General of the Council of Europe on 22 August 1984 that it was withdrawing a notice of derogation under Article 15 which had relied on an emergency situation in Northern Ireland. . . .

Consequently, there is no call in the present proceedings to consider whether any derogation from the United Kingdom's obligations under the Convention might be permissible under Article 15 by reason of a terrorist campaign in Northern Ireland. Examination of the case must proceed on the basis that the Articles of the Convention in respect of which complaints have been made are fully applicable. This does not, however, preclude proper account being taken of the background circumstances of the case. . . .

III. Alleged breach of Article 5(1)

49. The applicants alleged breach of Article 5(1) of the Convention, which, in so far as relevant, provides:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> . . .
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence . . .

. . .

52. Article 5(1)(c) . . . requires that the purpose of the arrest or detention should be to bring the person concerned before the competent legal authority.

. . .

The applicants . . . referred to the fact that they were neither charged nor brought before a court during their detention. No charge had necessarily to follow an arrest under section 12 of the 1984 Act and the requirement under the ordinary law to bring the person before a court had been made inapplicable to detention under this Act. In the applicants' contention, this was therefore a power of administrative detention exercised for the purpose of gathering information, as the use in practice of the special powers corroborated.

53. The court is not required to examine the impugned legislation *in abstracto*, but must confine itself to the circumstances of the case before it.

. . . [S]ub-paragraph (c) of Article 5(1) does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody.

Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. There is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming or dispelling the concrete suspicions which, as the Court has found, grounded their arrest. . . .

Their arrest and detention must therefore be taken to have been effected for the purpose specified in paragraph (1)(c).

54. In conclusion, there has been no violation of Article 5(1).

IV. Alleged breach of Article 5(3)

55. . . . The applicants claimed, as a consequence of their arrest and detention under this legislation, to have been the victims of a violation of Article 5(3) which provides:

> Everyone arrested or detained in accordance with the provisions of paragraph (1)(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

The applicants noted that . . . there was no plausible reason why a seven-day detention period was necessary, marking as it did such a radical departure from ordinary law. . . . Nor was there any justification for not entrusting such decisions to the judiciary of Northern Ireland.

56. The government . . . drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissable and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism. Time was also needed to undertake necessary scientific examinations, to correlate information from other detainees and to liaise with other security forces. The government claimed that the need for a power of extension of the period of detention was borne out by statistics. For instance, in 1987 extensions were granted in Northern Ireland in respect of 365 persons. Some 83 were detained in excess of five days and of this number 39 were charged with serious terrorist offences during the extended period.

As regards the suggestion that extensions of detention beyond the initial 48-hour period should be controlled or even authorised by a judge, the government pointed out the difficulty, in view of the acute sensitivity of some of the information on which the suspicion was based, of producing it in court. Not only would the court have to sit *in camera* but neither the detained person nor

his legal advisers could be present or told any of the details. . . . If entrusted with the power to grant extensions of detention, the judges would be seen to be exercising an executive rather than a judicial function. It would add nothing to the safeguards against abuse which the present arrangements are designed to achieve and could lead to unanswerable criticism of the judiciary. In all the circumstances, the Secretary of State was better placed to take such decisions and to ensure a consistent approach. . . .

. . .

The assessment of 'promptness' has to be made in the light of the object and purpose of Article 5. The Court has regard to the importance of this Article in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, 'one of the fundamental principles of a democratic society . . . , which is expressly referred to in the Preamble to the Convention' and 'from which the whole Convention draws its inspiration'.

59. The obligation expressed in English by the word 'promptly' and in French by the word '*aussitôt*' is clearly distinguishable from the less strict requirement in the second part of paragraph 3 ('reasonable time'/'*délai raisonnable*') and even from that in paragraph 4 of Article 5 ('speedily'/'*à bref délai*'). . . . Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty.

The use in the French text of the word '*aussitôt*', with its constraining connotation of immediacy, confirms that the degree of flexibility attaching to the notion of 'promptness' is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. . . .

. . .

61. The investigation of terrorist offences undoubtedly presents the authorities with special problems, partial reference to which has already been made under Article 5(1). The Court takes full judicial notice of the factors adverted to by the government in this connection. It is also true that in Northern Ireland the referral of police requests for extended detention to the Secretary of State and the individual scrutiny of each police request by a Minister do provide a form of executive control. In addition, the need for the continuation of the special powers has been constantly monitored by Parliament and their operation regularly reviewed by independent personalities. The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during

which the authorities may, without violating Article 5(3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.

. . .

62. As indicated above, the scope for flexibility in interpreting and applying the notion of 'promptness' is very limited. In the Court's view, even the shortest of the four periods of detention namely the four days and six hours spent in police custody by Mr. McFadden, falls outside the strict contraints as to time permitted by the first part of Article 5(3). To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word 'promptly'. An interpretation to this effect would import into Article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought 'promptly' before a judicial authority or released 'promptly' following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5(3).

There has thus been a breach of Article 5(3) in respect of all four applicants.

[The Court considered Article 50 of the Convention stating that in event of a violation, if the internal law of a respondent state 'allows only partial reparation,' the Court's decision shall 'afford just satisfaction to the injured party.' The applicants sought exemplary damages because of the 'conscious and flagrant' character of the breaches of the Convention, suggesting assessment on the basis of £2,000 per hour for each hour of wrongful detention. The Court reserved this matter for later decision, 'taking due account of the possibility of an agreement between the respondent State and the applicants.']

Joint Dissenting Opinion of Judges Thór Vilhjálmssón, Binschedler-Robert, Gölcüklü, Matscher and Valticos

. . .

The background to the instant case is a situation which no one would deny is exceptional. Terrorism in Northern Ireland has assumed alarming proportions and has claimed more than 2,000 victims who have died following actions of this kind. . . .

It is therefore necessary to weigh carefully, on the one hand, the rights of

detainees and, on the other, those of the population as a whole, which is seriously threatened by terrorist activity.

. . .

While considering, therefore, that there was no breach of Article 5(3) in the instant case, we are anxious to stress that this view can be maintained only in so far as such exceptional conditions prevail in the country, and that the authorities should monitor the situation closely in order to return to the practices of ordinary law as soon as more normal conditions are restored, and even that, until then, an effort should be made to reduce as much as possible the length of time for which a person is detained before being brought before a judge.

. . .

Dissenting Opinion of Judges Walsh and Carrillo Salcedo in respect of Article 5(1)(c)

We believe that Article 5 of the European Convention on Human Rights does not afford to the State any margin of appreciation. If the concept of a margin of appreciation were to be read into Article 5, it would change the whole nature of this all-important provision which would then become subject to executive policy.

. . . In our opinion Article 5 does not permit the arrest and detention of persons for interrogation in the hope that something will turn up in the course of the interrogation which would justify the bringing of a charge.

In our view the arrests in the present cases were for the purpose of interrogation at a time when there was no evidential basis for the bringing of any charge against them. No such evidence ever emerged and eventually they had to be released. That the legislation in question is used for such a purpose is amply borne out by the fact that since 1974 15,173 persons have been arrested and detained in the United Kingdom pursuant to the legislation yet less than 25 per cent. of those persons, namely 3,342, have been charged with any criminal offence arising out of the interrogation including offences totally unconnected with the original arrest and detention. Still fewer of them have been convicted of any offence of a terrorist type.

The Convention embodies the presumption of innocence and thus enshrines a most fundamental human right, namely the protection of the individual against arbitrary interference by the State with his right to liberty. The circumstances of the arrest and detention in the present cases were not compatible with this right and accordingly we are of the opinion that Article 5(1) has been violated.

The undoubted fact that the arrest of the applicants was inspired by the legitimate aim of protecting the community as a whole from terrorism is in

our opinion not sufficient to ensure compliance with requirements of Article 5(1)(c). . . .

Partly Dissenting Opinion of Sir Vincent Evans

. . .

The commission for its part has for more than 20 years taken the view that in normal cases a period of up to four days before the detained person is brought before a judge is compatible with the requirement of promptitude and that a somewhat longer period is justifiable in some circumstances. The Court has not hitherto cast doubt on the Commission's view in these respects. If anything, the Court's judgments in the *De Jong, Baljet* and *Van Den Brink* and other cases have tended by implication to confirm it.

Furthermore, the Court has consistently recognised that States must, in assessing the compatibility of their laws and practices with the requirements of the Convention, be permitted a 'margin of appreciation' and that inherent in the whole Convention is the search for a fair balance between the demands of the general interest of the community and the protection of the individual's fundamental rights. . . .

In my opinion the case law thus far developed constitutes a reasonable interpretation of Article 5(3) and in particular of the word 'promptly'.

4. The need to assess the issue of promptness according to the special features of the case and to strike a fair balance between the different rights and interests involved are considerations which are surely relevant in the special circumstances of the situation in Northern Ireland where more than 30,000 persons have been killed, maimed or injured as a direct result of terrorist activity in the last twenty years. . . .

. . . The need for the exceptional powers under section 12 to which such factors give rise is supported by the statistics quoted in . . . paragraph [56] of the judgment—that in 1987, for instance, of some 83 persons detained in excess of five days, 39 were charged with serious terrorist offences during the extended period.

Dissenting Opinion of Judge Martens

. . .

3. As the Court rightly recalls in paragraph 48 of its judgment, terrorism is a feature of modern life, which has attained its present extent and intensity only since the Convention was drafted. Terrorism—and particularly terrorism on the scale obtaining in Northern Ireland—is the very negation of the principles the Convention stands for and should therefore be combatted as vigorously as possible. It seems obvious that to suppress terrorism the exec-

utive needs extraordinary powers, just as it seems obvious that governments should to a large extent be free to choose the ways and means which they think most efficacious for combatting terrorism. Of course, in combatting terrorism the States Parties to the Convention have to respect the rights and freedoms secured therein to everyone. I subscribe to that and I am aware of the danger of measures being taken which, as the Court has put it, may undermine or even destroy democracy on the ground of defending it. But I think that this danger must not be exaggerated—especially with regard to States which have a long and firm tradition of democracy—and should not lead to the wings of national authorities being excessively clipped, for that would unduly benefit those who do not hesitate to trample on the rights and freedoms of others.

4. It goes without saying that a person against whom there is a reasonable suspicion of being involved in acts of terrorism should be free from torture or inhuman or degrading treatment. But it seems to me legitimate to ask whether he may not be detained, before being brought before a judge, for a somewhat longer period than is acceptable under ordinary criminal law. In this connection, I consider that the Court by saying in the second section of paragraph 58 of its judgment, that Article 5 'enshrines a fundamental human right' somewhat overestimates the importance of this provision in the Convention system. Undoubtedly, the right to liberty and security of person is an important right, but it does not belong to that small nucleus of rights from which no derogation is permitted. This means that there is room for weighing the general interest in an effective combatting of terrorism against the individual interests of those who are arrested on a reasonable suspicion of involvement in acts of terrorism. . . .

. . .

Striking a fair balance between the interests of the community that suffers from terrorism and those of the individual is particularly difficult and national authorities, who from long and painful experience have acquired a far better insight into the requirements of effectively combatting terrorism and of protecting their citizens than an international judge can ever hope to acquire from print, are in principle in a better position to do so than that judge!

It is in this context that three factors seem to me to be of importance:

(i) The first factor is the particular extent, vehemence and persistence of the terrorism that has raged since 1969 in Northern Ireland. . . .

(ii) The second factor is that we are undoubtedly dealing with a society which has been a democracy for a long time and as such is fully aware both of the importance of the individual right to liberty and of the inherent dangers of giving too wide a power of detention to the executive.

(iii) The third factor is that the United Kingdom legislature, apparently being aware of those dangers, has each time granted the extraordinary

powers only for a limited period, *i.e.* one year on each occasion, and only after due inquiry into the continued need. . . .

In my opinion, these factors also make it highly desirable for an international judge to adopt an attitude of reserve.

Against this background I think that the Court can find that the United Kingdom, when enacting and maintaining section 12 of the 1984 Act, overstepped the margin of appreciation it is entitled to under Article 5(3) only if it considers that the arguments for maintaining the seven-day period are wholly unconvincing and cannot be reasonably defended. In my opinion that condition has not been satisfied.

. . .

NOTE

Following the *Brogan* decision, rather than revise the Prevention of Terrorism legislation or the practice of non-judicial supervision of extended detention, the U.K. government lodged a derogation under Article 15 of the Convention on grounds of 'public emergency'. Article 5 was again at issue before the European Court in *Brannigan and McBride v. United Kingdom*, Judgment of 26 May 1993, 17 EHRR 539. The Court held by 22 votes to 4 that the derogation by the U.K. was justified under Article 15 and that detention of suspected terrorists in Northern Ireland without judicial control, for 6 days and 14 hours and 4 days and 6 hours respectively, was justified by the public emergency.

In defining its standard of review under Article 15, the Court stated that it fell to each state party, with its responsibility for the life of its nation, to determine when that life was threatened by a public emergency and, if so, what measures were required to overcome the emergency.

> By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.
>
> Nonetheless, Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on whether *inter alia* the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. At the same time, in exercising its supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.

'Making its own assessment' in the light of all material before it about terrorism in Northern Ireland and elsewhere in the U.K., 'the Court considers there can be no doubt that such a public emergency existed at the relevant time.' It referred to the U.K. Government as having direct responsibility 'for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other.' In view of all considerations, 'it cannot be said that the Government have exceeded their margin of appreciation in deciding, in the prevailing circumstances, against judicial control.'

> Having regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, the Court takes the view that the Government have not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.

QUESTIONS

1. 'The U.K. effectively gets to benefit in *Brogan* from a derogation under Article 15 of the Convention even though it had withdrawn its notice of derogation.'

a. Do you agree? If so, in what respects does the Court treat the case as if Article 15 were applicable, and is such treatment justified under the Convention? Is the statement better applied to the dissent of Judge Martens than to the Court's Judgment?

b. How do you distinguish the 'balancing' in several opinions of 'interests' like protection of state institutions and protection of individual rights, from judicial analysis of the case if Article 15 had been applicable? Do they amount to the same thing?

2. The Court's opinion does not mention the margin of appreciation. Three of the other opinions invoke that principle in different ways. What operative force does the principle seem to have? What premises about state sovereignty and the role of the Court seem to underlie its invocation?

3. Does the fact that Britain has long been a democracy with a respected Parliament appear to influence any of the opinions? Does it appear to affect the burden of proof of the complainants? Might opinions have been written differently if, on similar facts, less established democracies like Portugal or Spain were the respondent states?

4. In *Brannigan and McBride v. U.K.*, the Court's opinion gives the margin of appreciation a central position. Why the difference from *Brogan*? Do the

criteria in Article 15 for a justified derogation inevitably draw the Court into discussing matters raised by the margin of appreciation? What are those matters?

5. In 1993 in *W v. Switzerland*, 14 Hum. Rts L. J. 178 (1993), a businessman was held in pre-trial detention for over four years on charges relating to serious and complex corporate fraud. The Government justified the need for detention on the grounds of the danger of W absconding, the risk that he would collude with other defendants, and the need to prevent further offences. The Commission held, by 19 votes to 3, that Article 5(3) had been violated. A Chamber of the Court overturned this finding by 5 votes to 4. The dissenting judges strongly criticized the majority, with Judge Pettiti, in particular, referring to the undermining of the principle that 'liberty is the rule, detention the exception,' suggesting that the presumption of innocence had been abandoned, and criticizing the 'perverse effects' of such lengthy pre-trial detention. At what point in such types of cases should the Court defer to national-level findings as to the need for an exceptional period of detention? Should rejection of the position of the national executive and courts require a showing of bad faith or procedural error?

NOTE

In *Otto-Preminger-Institut v. Austria*,[29] the European Court of Human Rights decided in 1994 by 6 votes to 3 that the seizure and forfeiture of a blasphemous film did not violate the freedom of expression guaranteed by Article 10 of the European Convention. The applicant association had advertised the screening of the film, *Das Liebeskonzil*, based on an 1894 play, which,

> . . . portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the devil with whom he exchanges a deep kiss and calling the devil his friend . . . . Other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother's breasts, which she is shown as permitting.

The film was presented by the association as a 'satirical tragedy.' 'Trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated.'

The Innsbruck Regional Court in Austria ordered seizure and forfeiture of the film under Section 188 of the Austrian Penal Code for the criminal offense

[29] Judgment of 20 September 1994—No. 11/1993/406/485, reprinted in 15 Hum. Rts. L. J. 371 (1994).

of 'disparaging religious precepts.' The criminal proceedings against the association were eventually dropped.

Since there was no dispute that the seizure constituted an interference with the association's freedom of expression, the European Court considered whether the seizure was permissible under the conditions set by Article 10, para. 2, p. 615, *infra*.

The Court concluded that the interference had the 'legitimate aim' of protecting the rights of others to freedom of religion. Interpreting Article 9 of the Convention to include the right to respect for one's religious feelings, the Court found that such considerations outweighed the film's contribution to public debate. The Court reasoned:

> The respect for the religious feelings of believers as guaranteed in Article 9 can legitimately thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society. The Convention is to be read as a whole and therefore the interpretation and application of Article 10 in the present case must be in harmony with the logic of the Convention. (Para. 47). . . . [T]he Court accepts that the impugned measures pursued a legitimate aim under Article 10 para. 2, namely 'the protection of the rights of others.'

The Court stressed that freedom of expression applies not only to ideas that are favorably received, but also to those

> that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'

Nonetheless, people exercising their rights under Article 10 were subject to duties, among which could legitimately be included

> an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of further progress in human affairs.

It determined that the seizure could be considered 'necessary in a democratic society.' There was no 'uniform conception of the significance of religion in society' throughout Europe, 'even within a single country.' A 'certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.' It is 'for the national authorities, who are better placed than the international judge, to assess the need for such a measure in the light of the situation obtaining locally.' Given that the Tyrolean population was 87% Roman Catholic, the Court found that the Austrian authorities had acted within their margin of

appreciation 'to ensure religious peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner.'

Three judges dissented. Given the precautions against offense to viewers taken by the association through a warning announcement, the showing of the film to a paid audience only, and the restriction of viewing to those over 17 years of age, the dissent found the seizure and forfeiture to be disproportionate to the aim pursued, and thus not necessary in a democratic society.

QUESTION

During the colonial period, the British colonial government in India enacted several laws as part of the Indian Penal Code that defined offences including 'defiling a place of worship,' 'acts insulting religion or religious beliefs,' 'disturbing a religious assembly,' 'trespassing on burial grounds,' and 'utterances wounding religious feelings.' Punishments were a maximum of two years imprisonment, a fine, or both.

These laws were amended or supplemented by the Government of Pakistan. Section 295-B of the Pakistan Penal Code, added in 1982, provided:

> Whoever willfully defiles, damages or desecrates a copy of the Holy Quran or an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.

Section 295-C was enacted in 1986. It states:

> Whoever by words, either spoken or written, or by any visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Mohammed (peace be upon him) shall be punished with death, or imprisonment for life and shall also be liable to fine.

Compare these statutes with the Austrian criminal law described in the *Otto-Preminger-Institut* case and with the proceedings in that case. What are the salient differences? How would the Pakistani statutes be judged under the European Convention?

NOTE

The *Handyside* decision formed part of the background of jurisprudence of the European Court when it decided *Norris v. Ireland*, *infra*. There follow excerpts from *Handyside* that pertain only to issues bearing directly on the *Norris* decision.

HANDYSIDE CASE

European Court of Human Rights, 1976
Ser. A, No. 24, 1 EHRR 737.

[Handyside, a U.K. citizen who owned a publishing house, had advertised in 1971 and was en route to publishing 'The Little Red Schoolbook,' an English translation of a Danish book published in a number of continental countries which was meant to serve as a reference work for schoolchildren. It treated education and teaching in general, advancing in many instances unorthodox, counter-cultural perspectives. About ten percent of the book dealt with sexual matters, including 'reference' sections on masturbation, intercourse, contraceptives, homosexuality, pornography and venereal disease. Here too the advice offered was unorthodox: experiment, learn for yourself, don't fear disapproval. The publicity given the book drew adverse reactions from quarters such as schools, churches and parents' groups.

Before publication, government authorities acted under the Obscene Publications Acts of 1959 and 1964, seizing all found copies of the book. Handyside was convicted of a violation of the Acts before a Magistrate's court, which fined him and ordered that all books be destroyed. The appellate court affirmed, concluding that the book, seen as a whole, would tend to corrupt and deprave a significant portion of children who would read it, and that despite its virtues as an educational document, the book could not benefit from a statutory defense to the effect that on balance publication could be justified as being in the public good. A revised edition of the book was published later in 1971 and was not interfered with.

In 1972 Handyside filed an application against the United Kingdom before the European Commission of Human Rights, alleging several violations of the Convention but stressing Article 10. The Commission in effect concluded that there had been no breach of the Convention, and it referred the case to the European Court of Human Rights in 1976. The Court decided that no breach of Article 10 (or any other article) had been established. Article 10 provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

After review of the book and the evidence before the English courts, the Court concluded that the English judges had a basis, in the exercise of the discretion left them by the Convention, for finding that the book would have a pernicious effect on the morals of the likely readers between ages 12 and 18. The excerpts below from the opinion treat matters relevant to a determination whether the U.K. restrictions on publication were 'necessary in a democratic society' within the meaning of Article 10(b).]

48. . . . These observations apply, notably, to Article 10 § 2. In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them. . . . [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context.

Consequently, Article 10 § 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force. . . .

49. Nevertheless, Article 10 § 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'. . . .

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.

From another standpoint, whoever exercises his freedom of expression undertakes 'duties and responsibilities' the scope of which depends on his

situation and the technical means he uses. The Court cannot overlook such a person's 'duties' and 'responsibilities' when it enquires, as in this case, whether 'restrictions' or 'penalties' were conducive to the 'protection of morals' which made them 'necessary' in a 'democratic society'.

50. It follows from this that it is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 the decisions they delivered in the exercise of their power of appreciation.

. . .

NOTE

The judgment below of the European Court of Human Rights in *Norris v. Ireland* refers both to the *Handyside* case, *supra*, and in some detail several times to the *Dudgeon Case*, Ser. A, No. 45, 4 EHRR 149 (1981). In that case, Dudgeon, a homosexual resident of Northern Ireland, brought proceedings against the United Kingdom based on his complaint against laws of Northern Ireland that made certain homosexual acts between consenting adult males criminal offenses. The Court concluded that Dudgeon had suffered an unjustified interference with his right to respect for his private life and accordingly found a breach by the U.K. of Article 8 of the Convention, also at issue in *Norris*.

Consider the following three provisions in human rights instruments bearing on the right to privacy:

Article 8 of the European Convention

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 of the Universal Declaration of Human Rights

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the ICCPR

The ICCPR provision is similar to the Universal Declaration, except that it refers to 'arbitrary *or unlawful* interference' and to '*unlawful* attacks' (emphasis

added). The ICCPR Human Rights Committee has issued a General Comment No. 16, see pp. 524 and 529, *supra*, on Article 17 without mentioning questions of sexuality.

As indicated below in the decision of the United States Supreme Court in *Bowers v. Hardwick*, the U.S. Constitution makes no reference to a right to 'privacy' as such.

We turn to two judicial decisions interpreting and applying the European Convention and the U.S. Constitution.

NORRIS v. IRELAND

European Court of Human Rights, 1989
Ser. A, No. 142, 13 EHRR 186.

[The applicant, an Irish national and member of the Irish Parliament, was a homosexual and chairman of the Irish Gay Rights Movement. In 1977, he instituted proceedings in the High Court of Ireland, seeking a declaration that certain laws prohibiting homosexual relations were invalid under the Irish Constitution. Those laws included (i) Section 62 of the Person Act 1861 to the effect that '[w]hosoever shall attempt to commit the said abominable crime [of buggery], or shall be guilty of any . . . indecent assault upon a male person,' is guilty of a misdemeanor and subject to a prison sentence not exceeding ten years, and (ii) Section 11 of the Criminal Law Amendment Act 1885 to the effect that any 'male person who, in public or in private, commits . . . any act of gross indecency with another male person' is guilty of a misdemeanor and subject to imprisonment not exceeding two years. The term 'gross indecency' was not statutorily defined and was to be given meaning by courts on the particular facts of each case. Later acts gave courts discretion to impose more lenient sentences.

At no time was the applicant charged with any offence in relation to his admitted homosexual activities, although he was continuously at risk of being so prosecuted on the basis of an indictment laid by the Director of Public Prosecutions. The Director made a statement in connection with this litigation to the effect that '[t]he Director has no *stated* prosecution policy on any branch of the criminal law. He has no unstated policy *not* to enforce any offence. Each case is treated on its merits.' Since the Office of the Director was created in 1984, no prosecution had been brought in respect of homosexual activities except where minors were involved or the acts were committed in public or without consent.

Mr. Norris offered evidence of the ways in which this legislation had interfered with his right to respect for his private life, including evidence (i) of deep depression on realizing that 'any overt expression of his sexuality would expose him to criminal prosecution,' and (ii) of fear of prosecution of him or of another man with whom he had a physical relationship.

The judge in the High Court found that '[o]ne of the effects of criminal

sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression . . . .' However, he dismissed the action on legal grounds, and his decision was upheld in 1983 by the Supreme Court of Ireland. That court concluded that the applicant had standing (*locus standi*) to bring an action for a declaration even though he had not been prosecuted, for the threat continued.

The Supreme Court rejected the applicant's argument that the Irish Constitution should be interpreted in the light of the European Convention on Human Rights, for the Convention was 'an international agreement [which] does not and cannot form part of [Ireland's] domestic law, nor affect in any way questions which arise thereunder.' Article 29(6) of the Irish Constitution declared: 'No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas,' and the Oireachtas (legislature) had not taken action to enact the Convention as domestic legislation.

The Supreme Court found the laws complained of to be consistent with the Constitution, since no right of privacy encompassing consensual homosexual activity could be derived from the 'Christian and democratic nature of the Irish State.' It observed (i) that homosexuality 'has always been condemned in Christian teaching as being morally wrong' and has been regarded for centuries 'as an offence against nature and a very serious crime,' (ii) that '[e]xclusive homosexuality, whether the condition be congenital or acquired, can result in great distress and unhappiness for the individual and can lead to depression, despair and suicide,' and (iii) that male homosexual conduct resulted in many states in 'all forms of venereal disease,' which had become a 'significant public health problem' in England.

Mr. Norris started proceedings before the European Commission on Human Rights, claiming that the Irish laws constituted a continuing interference with his right to respect for private life under Article 8 of the European Convention. In 1987, by 6 votes to 5, the Commission expressed its opinion that there had been a violation of Article 8. The case was then referred to the European Court. Excerpts from its Judgment follow:]

30. . . . Article 25 requires that an individual applicant should be able to claim to be actually affected by the measure of which he complains. Article 25 may not be used to fund an action in the nature of an *actio popularis*; nor may it form the basis of a claim made *in abstracto* that a law contravenes the Convention.

. . .

32. In the Court's view, Mr. Norris is in substantially the same position as the applicant in the *Dudgeon* case, which concerned identical legislation then in force in Northern Ireland. As was held in that case, 'either [he] respects the law and refrains from engaging—even in private and with consenting male

partners—in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies', or he commits such acts and thereby becomes liable to criminal prosecution.

. . .

34. On the basis of the foregoing considerations, the Court finds that the applicant can claim to be the victim of a violation of the Convention within the meaning of Article 25 (1) thereof.

. . .

38. The Court agrees with the Commission that, with regard to the interference with an Article 8 right, the present case is indistinguishable from the *Dudgeon* case . . . . [E]nforcement of the legislation is a matter for the Director of Public Prosecutions who may not fetter his discretion with regard to each individual case by making a general statement of his policy in advance. . . .

. . . As was held in that case, 'the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life . . . within the meaning of Article (1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life . . .'

. . .

39. The interference found by the Court does not satisfy the conditions of paragraph (2) of Article 8 unless it is 'in accordance with the law,' has an aim which is legitimate under this paragraph and is 'necessary in a democratic society' for the aforesaid aim.

40. It is common ground that the first two conditions are satisfied. As the Commission pointed out in paragraph 58 of its report, the interference is plainly 'in accordance with the law' since it arises from the very existence of the impugned legislation. Neither was it contested that the interference has a legitimate aim, namely the protection of morals.

41. It remains to be determined whether the maintenance in force of the impugned legislation is 'necessary in a democratic society' for the aforesaid aim. According to the Court's case law, this will not be so unless, *inter alia*, the interference in question answers a pressing social need and in particular is proportionate to the legitimate aim pursued.

. . .

42. . . . It was not contended before the Commission that there is a large body of opinion in Ireland which is hostile or intolerant towards homosexual acts committed in private between consenting adults. Nor was it argued that Irish society had a special need to be protected from such activity. In these circumstances, the Commission concluded that the restriction imposed on the applicant under Irish law, by reason of its breadth and absolute character, is disproportionate to the aims sought to be achieved and therefore is

not necessary for one of the reasons laid down in Article 8(2) of the Convention.

. . .

44. . . . As early as 1976, the Court declared in its *Handyside* judgment of 7 December 1976 that, in investigating whether the protection of morals necessitated the various measures taken, it had to make an 'assessment of the reality of the pressing social need implied by the notion of "necessity" in this context' and stated that 'every "restriction" imposed in this sphere must be proportionate to the legitimate aim pursued.' It confirmed this approach in its *Dudgeon* judgment.

. . . [A]lthough of the three aforementioned judgments two related to Article 10 of the Convention, it sees no cause to apply different criteria in the context of Article 8.

. . .

46. As in the *Dudgeon* case, '. . . not only the nature of the aim of the restriction but also the nature of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of paragraph (2) of Article 8.

Yet the Government has adduced no evidence which would point to the existence of factors justifying the retention of the impugned laws which are additional to or are of greater weight than those present in the aforementioned *Dudgeon* case. At paragraph 60 of its judgment of 22 October 1981 the Court noted that 'As compared with the era when [the] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.' It was clear that 'the authorities [had] refrained in recent years from enforcing the law in respect of private homosexual acts between consenting [adult] males . . . capable of valid consent.' There was no evidence to show that this '[had] been injurious to moral standards in Northern Ireland or that there [had] been any public demand for stricter enforcement of the law.'

Applying the same tests to the present case, the Court considers that, as regards Ireland, it cannot be maintained that there is a 'pressing social need' to make such acts criminal offences. On the specific issue of proportionality, the Court is of the opinion that 'such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life

of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.'

47. The Court therefore finds that the reasons put forward as justifying the interference found are not sufficient to satisfy the requirements of paragraph (2) of Article 8. There is accordingly a breach of that Article.

48. Under Article 50 of the Convention:

> If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the . . . Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

The applicant seeks compensation for injury and reimbursement of legal costs and expenses.

49. The applicant requested the Court to fix such amount by way of damages as would acknowledge the extent to which he has suffered from the maintenance in force of the legislation.

50. . . . [I]t is inevitable that the Court's decision will have effects extending beyond the confines of this particular case, especially since the violation found stems directly from the contested provision and not from individual measures of implementation. It will be for Ireland to take the necessary measures in its domestic legal system to ensure the performance of its obligation under Article 53.

For this reason and notwithstanding the different situation in the present case as compared with the *Dudgeon* case, the Court is of the opinion that its finding of a breach of Article 8 constitutes adequate just satisfaction for the purposes of Article 50 of the Convention and therefore rejects this head of claim.

. . .

NOTE

Consider the following observation of Andrew Clapham in *Human Rights in the Private Sphere* (1993), at 64:

> . . . [T]he courts, even when faced with a popular legitimate law, such as the law of the Isle of Man on birching [a form of whipping or spanking with a birch rod, used under the law referred to for discipline of children],

may prefer to follow the Strasbourg lead. A parallel can be drawn between this case and the situation concerning homosexuality in Northern Ireland, where the Court of Human Rights, faced with another popular law (which prohibited sexual relations between men), found a breach of human rights: *Dudgeon v. United Kingdom*. It is in these types of situation involving unpopular minority interests that human rights theory is really tested. Both laws were relatively popular in the Isle of Man and Northern Ireland respectively and it was the European Court of Human Rights in Strasbourg that held the laws to violate human rights. It may well be that such a court can bring a detachment to bear on domestic laws that national courts may find hard. It is for this reason that even if the United Kingdom were to adopt the European Convention in the form of a Bill of Rights, the right of individual petition to Strasbourg should still be kept open, so that the European Court of Human Rights has the chance to examine cases arising in the United Kingdom context and give authoritative judgments on the scope of the rights guaranteed by the Convention.

BOWERS v. HARDWICK

Supreme Court of the United States, 1986
478 U.S. 186 106 S. Ct. 2841.

[A Georgia statute defined the crime of sodomy as 'any sex act involving the sex organs of one person and the mouth or anus of another.' Hardwick (who was under some surveillance by the police) was arrested in his home bedroom immediately after engaging in oral sex there with a consenting adult male. He was charged with the crime of sodomy and, before being tried, challenged the statute.

The Supreme Court, by a 5–4 vote, held that the statute was constitutional. Five opinions were written, including the opinion for the Court by Justice White, two separate concurrences and two dissents. The excerpts below from several opinions touch on a few of the complex themes relevant to this litigation and are intended to provide comparisons with the opinion of the European Court of Human Rights in *Norris*.]

Opinion of Justice White for the Court:

. . . The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal . . . .

We first register our disagreement with the [opinion of the Court of Appeals below] that the [Supreme] Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy . . . . [The opinion referred to prior decisions involving child rearing and education of children, to procreation and contraception, to marriage, and (*Roe v. Wade*) to abortion. Some of those decisions relied on a right to privacy not explicit in the

Constitution but found to be within the protection provided by constitutional provisions such as the Due Process Clause of the Fourteenth Amendment.]

. . . [W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . .

. . .

. . . Proscriptions against [consensual sodomy] have ancient roots . . . Sodomy was a criminal offense at common law and . . . [i]n 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. . . . Against this background, to claim that a right to engage in such conduct is [quoting from prior decisions in unrelated cases seeking to give content to concepts like due process or basic rights] 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . .

. . .

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. . . .

Chief Justice Burger, concurring:

. . . Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

. . .

Justice Blackmun (joined by Justices Brennan, Marshall and Stevens), dissenting:

This case is [not] about a 'fundamental right to engage in homosexual sodomy,' as the Court purports to declare. . . . Rather, this case is about [quoting here and below from prior decisions of the Court] 'the most comprehensive of rights and the rights most valued by civilized men,' namely, 'the right to be let alone.'

. . . I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.'

. . .

. . . We protect those rights [to family, procreation] not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. . . . We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. . . .

Only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.' The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.

. . .

The assertion [in the State Attorney General's brief] that 'traditional Judeo-Christian values proscribe' the conduct involved cannot provide an adequate justification [for the Georgia statute]. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. Thus, far from buttressing [the Attorney General's] case, invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that [the statute] represents a legitimate use of

secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. . . .

. . . [The State] and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. . . .

. . . This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legal cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

. . .

NOTE

Compare Laurence Tribe. *American Constitutional Law* (2nd ed. 1987), at 1428:

> . . . Therefore, in asking whether an alleged right forms part of a traditional liberty, it is crucial to define the liberty at a high enough level of generality to permit unconventional variants to claim protection along with mainstream versions of protected conduct. The proper question, as the dissent in *Hardwick* recognized, is not whether oral sex as such has long enjoyed a special place in the pantheon of constitutional rights, but whether private, consensual, adult sexual acts partake of traditionally revered liberties of intimate association and individual autonomy.
>
> . . . It should come as no surprise that, in the kind of society contemplated by our Constitution, government must offer greater justification to police the bedroom than it must to police the streets. Therefore, the relevant question is not what Michael Hardwick was doing in the privacy of his own bedroom, but what the State of Georgia was doing there.

* * * * *

The margin of appreciation has figured in a number of the preceding court decisions. One Judge of the European Court has said that this concept lies 'at

the heart of virtually all major cases that come before the Court, whether the judgments refer to it expressly or not.'[30] There follow excerpts from an article by van Dijk and van Hoof on the subject, and a summary of views of some commentators about the meaning and relevance of this concept.

P. VAN DIJK AND G. J. H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(2nd ed. 1990), at 585.

The 'margin of appreciation' doctrine is rooted in national case-law concerning judicial review of governmental action. The same doctrine also makes sense within the framework of the European Convention. There, however, the scope of its applicability should in our view be rather limited. . . . As far as the determination of facts is concerned, application of the 'margin of appreciation' doctrine by the Strasbourg organs would seem to be justified and self-evident. It should be borne in mind that national law and its interpretation are also factual data from the point of view of the Strasbourg organs. For the determination of those facts, i.e. for answering the question of whether and in what way precisely the facts took place and what are the exact contents and meaning of national law, the national authorities are in a better position than international organs. . . .

The situation is in our opinion quite different as far as the determination of questions of law is concerned. For the latter, *viz.* the assessment whether the facts as they have ultimately been established in the Strasbourg proceedings constitute a violation of the Convention, only the Strasbourg organs are competent in the last resort. According to Article 19 of the Convention it is the Court's and the Commission's task 'To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention'. In performing this task they should not refer to the opinion of the national authorities of the State concerned. . . .

. . .

As far as the scope of the margin of appreciation is concerned, a number of different approaches of the doctrine can be discerned in the Strasbourg case-law. . . . For the sake of convenience these may be labeled the narrow approach, the reasonableness test, and the not-unreasonable test.

The demarcation between a full-fledged review and the narrow approach is not always clear. Despite reference to the existence of a 'certain measure of appreciation' on the part of the competent national authorities it is not uncommon for the Commission and the Court to subsequently conduct a

[30] R. Macdonald, The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights, in Essays in Honor of Roberto Ago 187, 208 (Vol. III, 1987).

comprehensive independent inquiry into the question of whether or not the requirement of necessity has been satisfied, without apparently being guided very much by the views of the national authorities.

. . .

The trend of widening the national authorities' discretion is taken to the extreme in cases where the *reasonableness* test is turned into a *not-unreasonable* test. In the latter approach it is required of the national authorities not that the government acted reasonably, but that they did not act unreasonably. This is more than a mere play of words, since the not-unreasonable test would seem to imply a change with respect to the burden of proof. While the reasonableness test requires the government to prove that the national authorities have acted reasonably, the not-unreasonable test seems to burden the applicant (or the Strasbourg organs themselves?) with sustaining that they have not.

. . .

. . . [T]he structure of the Convention provides every reason to elaborate common standards, thereby reducing the area of application of the margin of appreciation doctrine. However, the case-law up to this point shows only a modest use of common or uniform European standards and where such standards are resorted to for deciding cases, they do not seem to rest on very firm ground. One authoritative commentator has observed in this respect with reference to the *Dudgeon* Case and the *Sunday Times* Case:

> Search as one may, through both judgments, there is no reference whatsoever to the relevant legislation of all or even most Contracting States, let alone comparative analysis to establish what degree of unity may or may not have existed.

. . . In the view of the Court [in the *Handyside* Case], there existed no such thing as 'a uniform European conception of morals'. Even assuming that this was a correct conclusion it would still be up to the Court—and the Commission—to develop such a 'European conception', since the term 'morals' is frequently mentioned in the Convention. That this term is interpreted in each individual case by reference to the national conceptions on this point is irreconcilable with a collectively guaranteed set of international norms like the Convention, at least in the long run.

. . . [T]he Strasbourg practice up to now offers the following picture. First, the case-law does not show a determined effort on the part of the Commission and the Court to systematically search for and elaborate such common standards. Secondly, conclusions as to the existence or the lack of common standards do not appear to rest on the firm basis of comparative legal analysis. Thirdly—and maybe consequently—there is not infrequently disagreement as to the existence or lack of common standards. Fourthly, in areas where there

is agreement, conclusions as to the lack or existence of common standards are not always consistently applied. . . .

The preceding discussion of the margin of appreciation doctrine may be summed up as follows. In our view within the framework of the European Convention the margin of appreciation doctrine to some extent is to be compared to a spreading disease. Not only has the scope of its application gradually been broadened to the point where in principle none of the Convention's rights and freedoms is excluded, but also has the illness been intensified in that wider versions of the doctrine have been added. . . .

. . . The Commission and the Court appear to follow in many cases what might be called a *raison d'état* interpretation: when they weigh the full enjoyment of the rights and freedoms on the one hand and the interests advanced by the State for their restriction on the other hand. They appear to be inclined to pay more weight to the latter. In our opinion, however, the 'object and purpose' of the European Convention would seem to dictate a different attitude, which might be referred to as the 'constitutional' attitude. The latter implies that the full enjoyment of the rights and freedoms constitutes the point of departure and that the possibilities to restrict this enjoyment are exceptions which should be interpreted restrictively, while the organ examining the case should review these restrictions in an independent way for their conformity with the conditions laid down by the Convention.

. . . The use of the not-unreasonable test, has not been kept confined to the above-mentioned matters concerning economic policy. It has also been applied to cases concerning secret surveillance measures and has been advocated within the Court even with respect to the requirement of promptness contained in Article 5(3). In the *Brogan* Case the majority of the Court conducted a full-fledged review as to this latter requirement. In his dissenting opinion Judge Martens in fact proposed the use of the not-unreasonable test for answering the question of whether a seven-day period for detaining an accused before bringing him before a judicial authority was compatible with the requirement of promptness:

> the Court can find that the United Kingdom . . . overstepped the margin of appreciation it is entitled to . . . only if it considers that the arguments for maintaining the seven-day period are wholly unconvincing and cannot be reasonably defended.

The issues at stake in the *Brogan* Case he described as 'questions on which reasonable people may hold different views'. According to Judge Martens

> This means that the Court should respect the United Kingdom Government's choice and cannot but hold that they did not overstep their margin of appreciation.

. . .

The emphasis on the striking of a balance between individual and general interests in the above-mentioned cases as well as in many other cases in which the margin of appreciation is involved, derives from the principle listed in the *Silver* Case according to which the phrase 'necessary in a democratic society' means that, to be compatible with the Convention, the interference must, *inter alia*, correspond to a pressing social need and be proportionate to the legitimate aim pursued. This weighing of the various interests involved is indeed characteristic for the very nature of the Convention. . . . However, the question is not so much whether a weighing of interests has to take place, but rather which authority in the final analysis is empowered to do the weighing. It is this latter question which the debate on the margin of appreciation doctrine sharply puts in perspective. Those who argue that the doctrine should not—or only in its narrow version—be applied within the framework of the Convention in fact hold that the Strasbourg organs ultimately are the only competent bodies in this respect. Those, on the other hand, who favour application of the wider versions of the doctrine opt for a primary role of the competent authorities of the contracting States.

The former position is defended here. In our view, the arguments underlying that position were aptly summarized by the Court in the *Norris* Case. . . . Article 19, which reflects the structure of the European Convention, leaves room for no other conclusion than that in the final analysis only the Strasbourg organs are competent to conduct the weighing of interests involved in the Convention. Leaving this task to the national authorities is eventually going to undermine the Convention's entire structure. Granting the extreme latitude inherent in the above-mentioned wide version of the margin of appreciation doctrine—and exemplified by the Irish Government's claim in the *Norris* Case—would reduce the Strasbourg supervisory machinery to a mechanism for rubberstamping almost anything a Government wants.

. . . However, with respect to questions of law, too, it may be necessary to grant the national authorities a certain discretion, if the aspects of expediency, which are usually of a highly factual nature, clearly predominate over the aspects of lawfulness.

The latter occurs, for instance, when the issue is whether the grant of guardianship or the grant of a visiting right to one of the divorced parents is in the interest of the child, a question which may be important for judging whether a violation of the right to family life of Article 8 is to be considered justified on the ground of the second paragraph. More or less the same applies to the question of whether the measures taken are 'strictly required' in the sense of Article 15. Although this is a question of law—have the conditions of Article 15 been complied with?—still questions of expediency play a very important part as well, and the local situation will be conclusive in many cases.

In our view, however, the situation is generally different for the question of whether a restriction imposed on one of the rights and freedoms is 'necessary in a democratic society in the interest of . . . /for the protection of . . . '. It is

true that here too the circumstances of the individual case and the questions of expediency connected therewith play a part, but still the relevant norm, in view of the very reference to 'democratic society', can be objectified and interpreted independently of the actual situation to a much greater extent, so that the review here leaves greater scope for an independent assessment by the examining international organ. . . .

. . .

VIEWS OF COMMENTATORS ON THE MARGIN OF APPRECIATION

Paul Mahoney[31]

Mahoney refers to concerns that the 'doctrine' of the margin of appreciation constitutes an 'abdication by the Court of its duty of adjudication or . . . an improper reading into the text of a pro-government restriction.' He notes fears that the Court has 'emptied many of the strict conditions laid down in the Convention of their strength' in the exercise of 'judicial self-restraint.' Such criticism is, however, 'misconceived' for it fails to recognize the 'distribution of powers' between the Convention and state. The margin of appreciation is indeed 'the natural product of that distribution of powers; it serves to delineate the dividing line.'

Like a national constitution safeguarding basic rights, the Convention 'reflects a desire to disable democratic discretion in certain respects,' but not all state discretion is removed. The Convention system, Mahoney argues, is grounded on the belief

> that political democracy is the best system of government for ensuring respect of . . . human rights. Any theory of interpretation or review by the Court must be compatible with that basic underpinning of political theory. In a pluralistic democratic society there will on many topics covered by the Convention be a spectrum of different but acceptable opinions. The Convention issue for decision before the Court will often be whether the choice of the national authorities remained within the permissible spectrum. To attach a label saying 'margin of appreciation' to that aspect of adjudication is not to add anything to the Convention.

Judicial review protects individuals against the 'excesses of majoritarian rule,' but in political democracies there is a 'deeply held view' that majority decision-making is 'the best guarantee of the survival of society.'

Mahoney grants that the doctrine of margin of appreciation runs risks, given the Court's duty under Article 19 to ensure that the member states

[31] Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin, 11 Hum. Rts. L. J. 57, 80 (1990).

observe their engagements. 'Too liberal an application of the doctrine in favour of the respondent State will in the long run undermine the Court's claim to be the authoritative institution for interpretation and application of the Convention.' The Court would do well to clear up the doctrine, to 'articulate clearer criteria' as to its scope. Such clarification should allay fears bred by the doctrine's current vagueness.

Franz Matscher[32]

Matscher argues that Convention institutions 'are not entitled to dictate uniformity' but 'are obliged to respect, within certain bounds, the cultural and ideological variety, and also the legal variety, which are characteristic of Europe.' He refers to remarks of Hallstein, a former President of the European Community Commission, to the effect that

> what we need is not a streamlined Europe; rather, the preservation of the marvellous richness and inexhaustible variety of our continent must remain a goal as important as integration. It is precisely this insight which forms the ideological background to the theory of the so-called 'margin of appreciation' of discretion, which is also a characteristic of the case-law of the Convention institutions.

Matscher notes that the Convention does not expressly allow member states any discretion in relation to the protected rights but 'merely defines the extent of those rights.' He emphasizes the number of general, undefined terms in the Convention that states must apply—terms like 'family life,' 'protection of morals,' necessary in a democratic society,' and so on. But the Court

> has adopted a more realistic attitude here and de facto has allowed the States a certain discretion in their legislative and executive functions. The Court merely examines whether the States have used the discretion allowed them in a reasonable fashion . . . .

He sums up the 'theory' of margin of appreciation as 'the expression of a realistic "judicial self-restraint."'

R. St. J. Macdonald[33]

Macdonald sees the task of the Court 'to reconcile' the political, economic, social and cultural diversity of the member states with the 'development of an effective and reasonably uniform standard of protection for Convention

[32] Methods of Interpretation of the Convention, in R. St. J. Macdonald, Matscher and Petzold (eds.), The European System for the Protection of Human Rights 63, 75 (1993).

[33] The Margin of Appreciation, in Macdonald, Matscher and Petzold (eds.), The European System for the Protection of Human Rights 83, 122 (1993).

rights.' The margin of appreciation, 'more a principle of justification than interpretation,' helps the Court to show 'the proper degree of respect' for member states' objectives while 'preventing unnecessary restrictions' on the Conventions's rights. It is this 'flexibility' that has enabled the Court 'to avoid any damaging dispute' with states over authority of the Court and Convention on one hand, and the states and their legislatures on the other.

The margin of justification has then a 'pragmatic' justification. Progress toward the goal of a European-wide uniform standard of protection must be gradual.

> [T]he gradual refining of an originally expansive margin of appreciation reflects the increasing legitimacy of the Convention organs in the European legal order. As that legitimacy has increased, an obvious way of reducing the amount of discretion to which national authorities should consider themselves entitled is to hold them to standards which are observed Europe-wide.

This pragmatism is not without its costs, for it 'prevents the emergence of a coherent vision of the Court's function. . . . But perhaps the Convention system is now sufficiently mature to be able to move beyond the margin of appreciation and grapple more openly with the questions of appropriateness which that device obscures.'

J. G. Merrills[34]

Merrills criticizes the views of a commentator on the *Handyside* decision who suggested that it might appropriately be the function of the Court to develop a 'European conception of morals' to displace the variations among the Convention's member states. 'To this the answer is surely no. The Court's function is not to decree uniformity wherever there are national differences, but to ensure that fundamental values are respected.' Where there are 'clear differences of view' among member states, there must be 'room for a significant margin of appreciation.'

> [I]n any democratic society there are situations in which the rights set out in the Convention may be limited. The question which then arises is how and by whom the need for a disputed limitation is to be judged. No one, of course, would wish to argue that the matter should be wholly in the hands of the respondent State. The difficulty, however, is that the limitations are permitted for reasons which on the face of it only the State can properly assess. There is a great deal to be said for the view that 'If it is accepted that the State has a valid interest in the prevention of corruption and in the preservation of the moral ethos of its society, then the State has a right to enact such laws as it may reasonably think necessary to achieve

[34] The Development of International Law by the European Court of Human Rights 146 (1988).

these objects. . . .' The result [of reviewing a number of the Court's judgments] is not so much an inconsistency in the Court's jurisprudence, as a demonstration . . . that decisions about human rights are not a technical exercise in interpreting texts, but judgments about political morality.

VIEWS OF COMMENTATORS ABOUT DYNAMIC INTERPRETATION AND CONSENSUS

The preceding views of commentators about the margin of appreciation also considered the problem of consensus among European states on a question before the Court. In fact, these two issues are complexly intertwined, as the opinions in *Dudgeon* and *Norris* demonstrate. Both refer to the changing laws and morals of European states, and indicate the relevance of those changes for the Court's judgments. Consider two commentators' views.

Laurence Helfer[35]

Helfer asserts that the Commission and Court, far from 'being bound by the intention of the drafters . . . interpret the Convention as a modern document that responds to and progressively incorporates changing European social and legal developments.' When 'rights-enhancing' practices among member states 'achieve a certain measure of uniformity, a "European consensus", so to speak, the Court and Commission raise the standard of rights-protection to which all states must adhere.' In this way, these institutions have extended the Convention's protection to groups not within the drafters' intentions.

Helfer warns that the 'failure to articulate with precision the scope and function of the consensus inquiry poses a potentially grave threat to the tribunals' authority as the arbiters of European human rights.' They must develop 'a more comprehensive and rigorous methodology for applying the European consensus inquiry.' To the present, these institutions have relied on three factors as 'evidence of consensus': legal consensus expressed through statutes or regional agreements; expert consensus; and European public consensus. But the tests lack specificity. Helfer asks, for example, what percentage of member states must alter their laws 'before a right-enhancing norm will achieve consensus status.'

P. Van Dijk[36]

Van Dijk refers to a decision of the Court of Human Rights to the effect that the Convention's right to marry guaranteed by Article 12 refers to 'traditional'

[35] Consensus, Coherence and the European Convention on Human Rights, 26 Cornell Int. L. J. 133, 134 (1993).

[36] The Treatment of Homosexuals under the European Convention on Human Rights, in K. Waaldijk and Clapham (eds.), Homosexuality: A European Community Issue 179, 198 (1993).

heterosexual marriage as the basis of a family. Even conceding that such a link between marriage and procreation was intended by the Convention's drafters, he questions whether Article 12 should have been interpreted decades later to refer to such 'traditional' marriage in view of the dynamic interpretation of 'family.'

Van Dijk discusses a later case involving a transsexual, in which the Court held that developments in the member states did not evidence a departure from the traditional concept of marriage.

> It is submitted that by requiring such evidence of a general abandonment the Court sets a limitation to its powers to adopt a dynamic approach in its case-law . . . . After all, in the *Dudgeon* case and the *Norris* case there was also no general abandonment of the penalisation of homosexual acts between adults. Application of the 'European consensus inquiry' in its extreme would exclude the possibility of finding any national legislation in violation of the ECHR.

Van Dijk refers to a dissenting opinion in that decision, which argued that in cases involving family law and sexuality, the Court adapt its interpretation of the Convention to societal changes (quoting here from the dissenting opinion)

> only if almost all member States have adopted the new ideas. In my opinion this caution is in principle not consistent with the Court's mission to protect the individual against the collectivity and to do so by elaborating common standards. . . . [I]f a collectivity oppresses an individual because it does not want to recognize societal changes, the Court should take care not to yield too readily to arguments based on a country's cultural and historical particularities.

QUESTIONS

1. What are the salient differences between the opinions of the courts in *Norris* and *Bowers*? For example, what significance do the opinions accord to trends in legislation and mores, in one case, in European states and, in the other, in the component states of the United States federalism? Are the trends similar?

2. Do you believe that it was significant for the opinions that the European Convention is explicit about the right to 'respect' for 'private life' and the U.S. Constitution is not? Would, or could, the European Court have ruled the same way if there had been no Article 8 provision on privacy, so that the Court would have to 'discover' or 'infer' a right to privacy from other provisions of the Convention?

3. Given the views of the commentators above about dynamic interpretation and consensus in the context of the European system, what method do you think the Court should explicitly follow in deciding a case like *Norris*, or the birching case from the Isle of Man, or the blasphemy decision in *Otto-Preminger-Institut v. Austria*? Should it survey the legislation and practice thereunder (whether or not to prosecute, nature of punishment, and so on) in all member states? What should it make of the survey? Would all states have equal 'weight' in the decision? What relevance would a 'trend' have—for example, thirty years ago 90% of the states barred the practice at issue, but now only 60% bar it?

4. Given the several opinions and the different views of the commentators, what meaning(s) or methods or premises do you attach to invocation by a judge of the margin of appreciation? Does it appear to have the same meaning in the different decisions, or does that meaning change with context? Consider the following assertions:

a. 'The margin of appreciation is simply a fancy name given to an inevitable concern of an international tribunal. It tells the Court not to overstep its role and to be respectful of the sovereign states that created and submitted to the Court in the first instance. Else the Court and the Convention could get into deep trouble. It is a rule of prudence.'

b. 'The margin of appreciation is another name for cultural relativism. It respects difference, and cautions the Court not to compress the varied European states and cultures into one juridical and moral form.'

c. 'The margin of appreciation is less an application than a perversion of cultural relativism. Europe possesses an important unity vis-à-vis the rest of the world. We are not talking of a universal system embracing the United States and Yemen, Russia and Ecuador. The effect of the principle is to permit ongoing oppression of the culturally deviant within a country, the minorities that characteristically have had to resort to universal human rights norms to challenge their national laws and practice.'

d. 'The margin of appreciation is consistent with the principle of subsidiarity in European Community Law, a principle expressed in the Treaty on European Union whose Preamble declares that decisions will be taken "as closely as possible to the citizen in accordance with the principle of subsidiarity."'

COMMENT ON POWERS AND JURISDICTION OF INTERNATIONAL TRIBUNALS

Consider some comparisons and contrasts between the European Court of Human Rights and other international tribunals.

(1) *International arbitral tribunals.* Recall the discussion of arbitral tribunals on p. 73, *supra*, and the *Chattin* case, p. 75, *supra*, decided by the United

States–Mexican Claims Commission under the 1923 General Claims Convention between the two states. Frequently these tribunals were tripartite, one member appointed by each party to the dispute and the third pursuant to a stated procedure. In most instances, as in *Chattin*, the states themselves were the parties to the arbitration, with the complainant state frequently acting on behalf of (extending diplomatic protection to) an allegedly injured national. In a few instances, the individuals alleging injury by another state could themselves initiate proceedings before the arbitral tribunal. The governing agreement between the states generally required that the individual involved had exhausted the respondent state's local remedies. The tribunal or claims commission could provide whatever relief (generally, not invariably, the award of damages) that the governing instrument (a general arbitration treaty, an *ad hoc* agreement to create the tribunal for a given controversy, and so on) provided. As in the United States–Mexican General Claims Convention, the governing agreement generally spelled out the applicable law, often through terse references to principles of justice or international law.

(2) *International Military Tribunal*, p. 99, *supra*. This Tribunal, whose Charter was annexed to the London Agreement of 1945 among the Allied powers, was created for the trial of the Nazi war criminals at Nuremberg. The Charter spelled out the governing norms. The IMT's four judges were drawn from each of the four major Allied powers. The punishments imposed by the IMT on the individual defendants included the death penalty. (Chapter 15 examines the contemporary International Criminal Tribunal for the Former Yugoslavia, which again exercises a criminal jurisdiction over individual defendants. It was created pursuant to a decision of the UN Security Council.)

(3) *The International Court of Justice*. The opinion in the *Minority Schools in Albania* case of the Permanent Court of International Justice, the predecessor court under the League of Nations, appears at p. 89, *supra*. The contemporary ICJ is provided for in Article 92 of the UN Charter. It has both a contentious and advisory jurisdiction. Under Article 94, each member state of the UN agrees to comply with a decision of the ICJ against it. The Court's jurisdiction depends on states' consent, and under its Statute, only states may be parties before it. The Statute defines the governing law in very general terms (see Article 38 of the Statute, p. 27, *supra*). The Court may order the payment of damages by a respondent state as well as provide other forms of relief.

(4) The *Court of Justice* created under the Treaty Establishing the European Community (Common Market), p. 576, *supra*, is to 'ensure that in the interpretation and application of this Treaty the law is observed.' (Art. 164). Generally that application will in the first instance be by the courts of member states. The Court of Justice exercises different types of jurisdiction—for example, in cases brought against a state by another institution of the European Community (such as the Commission) (Art. 169), or brought by one member state against another (Art. 170). States are 'required to take the necessary measures to comply with the judgment' of the Court (Art. 171). Depending on its precise jurisdictional base, the Court may enter judgment

against a party, annul an administrative act, award money damages, or afford other relief.

Article 177 grants the Court jurisdiction to give 'preliminary rulings' on matters including the Treaty's interpretation, and the validity and interpretation of acts of Community institutions.[37]

> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court of tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Article 177 is not an 'appeals' procedure leading to affirmance, reversal, remand with instructions, and so on. The Court does not 'decide' the case. Rather, the Court must 'interpret' the relevant Treaty provision, not 'apply' it. (In these respects, Article 177 is analogous to a form of proceedings before and jurisdiction of appellate courts in a number of civil law countries.) The state court suspends proceedings and itself (rather than a party to the state court proceeding) certifies questions of interpretation to the Court of Justice, which renders its opinion in the form of an abstract interpretation. The state court then continues the proceedings in light of that opinion. At the start, the primary purpose of Article 177 was to assure a uniform application of Community law by the courts of the member states. Over the decades, most of the Court's major rulings deciding basic principles about the Community grew out of Article 177.

Article 177 involves then mutual cooperation and a shared jurisdiction of both a state and Community court. Predictable problems have arisen with respect to the responsibility of state courts (the conditions under which that responsibility arises) to certify a question to the Court of Justice rather than resolve the question themselves, and with respect to the duty of the state court to decide the case consistently with the interpretation of the Court of Justice. Attitudes of judiciaries in the several member states have varied.

QUESTIONS

1. Compare the situation of international tribunals as described in the preceding Comment with procedures and powers of appellate courts in relation to lower courts in the domestic law of states. In many countries, a typical procedure would

[37] For analyses of the problems that have arisen under Article 177, see P.S.R.F. Mathijsen, A Guide to European Union Law 97–103 (6th ed. 1995); and Josephine Steiner, Textbook on EEC Law 285–305 (3rd ed. 1992).

involve the certification to the appellate court of a record of proceedings in the lower court; a decision by the appellate court to affirm or reverse the lower court, perhaps with a remand ordering the lower court to enter judgment for one or the other party (in which event, the case is terminated if the decision is by the highest appellate court); or a remand by the appellate court to the lower court with instructions to proceed in other stated ways (to hold a new trial, modify an injunction, order release of a prisoner, dismiss or reinstate the case, and so on).

a. Would you view it as desirable to have an international tribunal linked to, say, the highest court in a state judiciary in the same way that an appellate court in a state is linked to a lower court within that state's judicial system?

b. Would you view such an arrangement as politically feasible? In what respects does it go beyond existing arrangements?

2. In the light of the illustrations in the preceding Comment, what changes do you think desirable in the procedures, powers and jurisdiction of the European Court of Human Rights within the European human rights system? If you believe that some changes are desirable, why do you suppose that they are not now part of that system?

ADDITIONAL READING

R. St J. Macdonald, Matscher and Petzold (eds.), *The European System for the Protection of Human Rights* (1993); Franz Matscher and Petzold (eds.), *Protecting Human Rights: The European Dimension* (2nd ed., 1990); J. G. Merrills, *The Development of International Law by the European Court of Human Rights* (2nd ed., 1993); A. H. Robertson and Merrills, *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd ed., 1993); P. Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed., 1990); Andrew Clapham, *Human Rights in the Private Sphere* (1993); Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights* (8 vols., 1975–85); Andrew Drzemczewski, *European Human Rights Convention in Domestic Law* (1983); James Fawcett, *The Application of the European Convention on Human Rights* (2nd ed., 1987); Jochen Frowein, *The European Convention on Human Rights as the Public Order of Europe*, 1/2 *Collected Courses of the Academy of European Law* 267 (1992); David Kinley, *The European Convention on Human Rights: Compliance without Incorporation* (1993); Kees Waaldijk and Clapham (eds.), *Homosexuality: A European Community Issue: Essays on Lesbian and Gay Rights in European Law and Policy* (1993); Rudolf Bernhardt, *Reform of the Control Machinery under the European Convention on Human Rights: Protocol No. 11*, 89 Am. J. Int'l L. 145 (1995).

C. THE INTER-AMERICAN SYSTEM: PROMOTING DEMOCRACY

The aspect of the Inter-American system that Section C selects to illustrate the workings of that system involves building respect for and promoting some basic features of democratic government within the Western Hemisphere. At the same time, although less extensively than with respect to the European human rights system, the materials describe the rights protected by the American Convention on Human Rights and the complex institutional arrangements that result from the parallel existence of organs based on both the Charter of the Organization of American States (OAS) and the Convention. The section includes a leading decision of the Inter-American Court of Human Rights and a prominent report of the Inter-American Commission on Human Rights.

1. BACKGROUND AND PROTECTED RIGHTS

COMMENT ON DEVELOPMENT OF THE INTER-AMERICAN SYSTEM

In May 1948 the ninth Inter-American Conference, held in Bogotá, established the Organization of American States (OAS). Its predecessor organizations date back to the International Union of American Republics of 1890. The 1948 Charter entered into force in December 1951 and has since been amended by the Protocol of Buenos Aires of 1967, the Protocol of Cartagena de Indias of 1985, the Protocol of Washington of 1992, and the Protocol of Managua of 1993. The latter two have not entered into force. The purposes of the OAS are:

> to strengthen the peace and security of the continent; to promote and consolidate representative democracy, with due respect for the principle of nonintervention; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; to provide for common action on the part of those States in the event of aggression; to seek the solution of political, juridical and economic problems that may arise among them; to promote by cooperative action, their economic, social and cultural development, and to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States. (Annual Report of the Inter-American Commission on Human Rights 1994 (1995), at 347.)

Its principal organs are the General Assembly that meets annually and in additional special sessions if required, the Meeting of Consultation of Ministers of Foreign Affairs that considers urgent matters, the Permanent Council and the General Secretariat. The latter two organs are based in Washington D.C.

The Bogotá Conference of 1948 also adopted the American Declaration of the Rights and Duties of Man. The Inter-American system thus had a human rights declaration seven months before the UN had adopted the Universal Declaration and two and a half years before the European Convention was adopted. Nevertheless, the development of a regional treaty monitored by an effective supervisory machinery was to take considerably longer. The Inter-American Commission on Human Rights was created in 1959 and the American Convention on Human Rights was adopted in 1969. It entered into force in 1978.

The gradual evolution of the Inter-American system can only be understood against the background of a complex relationship between Latin America and the United States. The commitment to democracy and respect for human rights given in treaties by the former was both tempered and inspired by a desire to prevent intervention by the latter. A shared dislike of communism complicated matters further, in so far as it encouraged a certain reluctance on the part of the U.S. and others to insist on the restoration of democracy by dictatorships that purported to be resisting communist infiltrators.

For these and other reasons the development of the Inter-American system followed a different path from that of its European counterpart. Although the institutional structure is superficially very similar and the normative provisions are in most respects directly comparable, the conditions under which the two systems developed were radically different. Within the Council of Europe, military and other authoritarian governments have been rare and short-lived, while in Latin America they were close to being the norm until the 1980s.

The major challenges confronting the European system are epitomized by issues such as the length of pre-trial detention and the implications of the right to privacy. Cases involving states of emergency have been relatively few. The European Commission and Court have rarely had to deal with completely unresponsive or even antagonistic governments or national legal systems. By contrast, states of emergency have been common in Latin America, the domestic judiciary has often been extremely weak or corrupt, and large-scale practices involving torture, disappearances and executions have not been uncommon. Many of the governments with which the Inter-American Commission and Court have had to work have been ambivalent towards those institutions at best and outrightly hostile at worst.

In September 1995 there were 35 Member States of the OAS. Twenty-five of them had ratified the American Convention on Human Rights and 16 of

those had recognized the jurisdiction of the Court.[38] Although the United States signed the Convention in 1978, it has yet to ratify. Cuba remains, technically, a member of the OAS, but the Government of Fidel Castro has been excluded from participation in its work since 31 January 1962. This has not prevented the OAS from scrutinizing the human rights record of Cuba.

COMMENT ON RIGHTS RECOGNIZED IN THE AMERICAN DECLARATION AND CONVENTION

You should now become familiar with the American Convention, excerpts from which appear in the Document Annex.

In terms of rights, the American Declaration on the Rights and Duties of Man is similar in content to the Universal Declaration, including the economic and social rights therein. What distinguishes it are ten articles setting out the duties of the citizen: the duty 'so to conduct himself in relation to others that each and every one may fully form and develop his personality;' to 'aid support, educate and protect his minor children,' to 'acquire at least an elementary education,' to vote in popular elections, to 'obey the law and other legitimate commands of the authorities,' to 'render whatever civil and military service his country may require for its defence and preservation,' to cooperate with the state with respect to social security and welfare; to pay taxes; and to work.

The process of drafting an Inter-American treaty began in 1959. The Inter-American Council of Jurists prepared a draft, based largely on the European Convention. This was considered in 1965, along with a draft by Chile, which emphasised democratic rights, and one by Uruguay which stressed economic and social rights. A revised, consolidated draft was then prepared by the Inter-American Commission on Human Rights. The result was the American Convention on Human Rights of 1969 (also known as the Pact of San José, Costa Rica) which contains 26 rights and freedoms, 21 of which are formulated in similar terms to the provisions of the ICCPR. Consider some comparisons:

1. Article 27 of the ICCPR, which recognizes the rights of members of minority groups, has no counterpart in the American Convention.

2. The five provisions which are in that Convention but not in the ICCPR are the right of reply (Art. 14), the right to property (Art. 21), freedom

[38] The States that both ratified the Convention and recognized the Court's jurisdiction were: Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, Uruguay and Venezuela. The following states ratified the Convention: Barbados, Brazil, Dominica, the Dominican Republic, El Salvador, Grenada, Haiti, Jamaica, and Mexico. In addition to the United States, the OAS member states that have not become parties to the Convention are Antigua and Barbuda, The Bahamas, Belize, Canada, Chile, Cuba, Guyana, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines.

from exile (Art. 22(5)), the right to asylum (Art. 22(7)), and prohibition of 'the collective expulsion of aliens' (Art. 21(9)).

3. The American Convention also recognizes several rights not contained in the European Convention, including the right of reply, the rights of the child, the right to a name and nationality and the right to asylum.

4. Some provisions in the American Convention express the same general idea as in other human rights treaties but give it a distinctive specification—for example. Article 4 on the right to life that provides in para. 1 that the right 'shall be protected by law and, in general, from the moment of conception.'

5. Article 23 on participation in government, which figures in the later materials, contains the same rights and requirements as the analogous Article 21 of the UDHR and Article 25 of the ICCPR.

When the Convention was adopted in 1969 it was decided not to have a separate treaty relating to economic, social and cultural rights but rather to include a general provision (Art. 26) in the following terms:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively by legislation or other means, the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The OAS Charter, as amended, sets up an Inter-American Council for Education, Science and Culture, as well as an Economic and Social Council, both of which are supposed to set standards, consider reports made by States, and make recommendations. That machinery has, however, achieved very little indeed in relation to economic, social and cultural rights, although the Inter-American Commission on Human Rights has carried out occasional reviews of States' reports. In 1988 the OAS adopted an Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (known as the Protocol of San Salvador). It has received four ratifications and has not yet entered into force. It obliges parties to adopt measures, 'to the extent allowed by their available resources and taking into account their degree of development,' for the progressive achievement of the rights listed.

The rights recognized in the Protocol are similar to those in the International Covenant on Economic, Social and Cultural Rights, although the formulations differ significantly. The Protocol does not recognize the rights to adequate clothing and housing or to an adequate standard of living (Art. 11 of the ICESCR), but it does include the right to a healthy environment, the

right to special protection in old age, and the rights of persons with disabilities, none of which are explicitly recognized in the ICESCR. Although the system of supervision relies primarily on reporting, the Protocol provides for a right to petition when trade union rights or the right to education 'are violated by action directly attributable to a State Party' (Art. 19(6)).

NOTE

Compare the duties expressed in the American Declaration with the ICCPR, in which duties are only referred to in a preambular paraphrasing of Article 29(1) of the Universal Declaration ('Everyone has duties to the community in which alone the free and full development of his personality is possible'). The conception and nature of the duties expressed in the African Charter on Human and Peoples' Rights, p. 689, *infra*, is radically different.

2. INSTITUTIONAL ARRANGEMENTS

CECILIA MEDINA, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS: REFLECTIONS ON A JOINT VENTURE

12 Hum. Rts. Q. 439 (1990), at 440.

[When the Inter-American Commission was established in 1959, the assumption was that it would confine itself to 'abstract investigations'. When complaints immediately flowed in, the Commission was compelled to respond in some way.]

. . .

A significant part of the Commission's work was addressing the problem of countries with gross, systematic violations of human rights, characterized by an absence or a lack of effective national mechanisms for the protection of human rights and a lack of cooperation on the part of the governments concerned. The main objective of the Commission was not to investigate isolated violations but to document the existence of these gross, systematic violations and to exercise pressure to improve the general condition of human rights in the country concerned. For this purpose, and by means of its regulatory powers, the Commission created a procedure to 'take cognizance' of individual complaints and use them as a source of information about gross, systematic violations of human rights in the territories of the OAS member states.

The Commission's competence to handle individual communications was formalized in 1965, after the OAS reviewed and was satisfied with the Commission's work. The OAS passed Resolution XXII, which allowed the Commission to 'examine' isolated human rights violations, with a particular focus on certain rights. This procedure, however, provided many obstacles for the Commission. Complaints could be handled only if domestic remedies had been exhausted, a requirement that prevented swift reactions to violations. Also, the procedure made the Commission more dependent on the governments for information. This resulted in the governments' either not answering the Commission's requests for information or answering with a blanket denial that did not contribute to a satisfactory solution of the problem.

Furthermore, once the Commission had given its opinion on the case, there was nothing else to be done; the Commission would declare that a government had violated the American Declaration of the Rights and Duties of Man and recommend the government take certain measures, knowing that this was unlikely to resolve the situation. The fact that some of the Commission's opinions could reach the political bodies of the OAS did not solve the problem, because the Commission's opinions on individual cases were never discussed at that level. Consequently, in order not to lose the flexibility it had, the Commission interpreted Resolution XXII as granting the Commission power to 'examine' communications concerning individual violations of certain rights specified in the resolution without diminishing its power to 'take cognizance' of communications concerning the rest of the human rights protected by the American Declaration. The Commission preserved this broader power for the purposes of identifying gross, systematic human rights violations.

The procedure to 'take cognizance' of communications evolved and became the general case procedure and was later used in examining the general human rights situation in a country. This procedure, maturing with the Commission's practice, had several positive characteristics in view of the Commission's purposes. First, it could be started without checking whether the communications met any admissibility requirements or even in the absence of any communication. All that was necessary was for news to reach the Commission that serious violations were taking place in the territory of an OAS member state. Second, the Commission assumed a very active role by requesting and gathering information by telegram and telephone from witnesses, newspapers, and experts, and also requesting consent to visit the country at the Commission's convenience. Third, the Commission could publicize its findings in order to put pressure upon the governments. Finally, the report resulting from the investigation could be sent to the political bodies of the OAS, thereby allowing for a political discussion of the problem which, at least theoretically, could be followed by political measures against the governments involved.

Since financial and human resources were limited, the Commission concentrated all its efforts on the examination of the general situation of human rights in each country. The examination of individual cases clearly took a secondary place. The Commission appeared to process them only because it had

a duty to do so and not because of a conviction that its intervention would be helpful. After all, the special procedure for individual cases did not improve the victims' possibilities for redress, and the Commission could attempt to solve the cases through an examination of the general human rights situation in the country.

In short, the Commission was the sole guarantor of human rights in a continent plagued with gross, systematic violations, and the Commission was part of an international organization for which human rights were definitely not the first priority, and these facts made an imprint on the way the Commission looked upon its task. Apparently, the Commission viewed itself more as an international organ with a highly political task to perform than as a technical body whose main task was to participate in the first phase of a quasi-judicial supervision of the observance of human rights. The Commission's past made it ill-prepared to efficiently utilize the additional powers the Convention subsequently granted it.

A. The System Under the American Convention on Human Rights

The Convention vested the authority to supervise its observance in two organs: the Inter-American Commission, which pre-existed the Convention, and Inter-American Court of Human Rights, which was created by the Convention.

The Inter-American Commission is composed of seven members elected in a nongovernmental capacity by the OAS General Assembly and represents all the OAS member states. The entry into force of the Convention in 1978 invested the Commission with a dual role. It has retained its status as an organ of the OAS, thereby maintaining its powers to promote and protect human rights in the territories of all OAS member states. In addition, it is now an organ of the Convention, and in that capacity it supervises human rights in the territories of the states parties to the Convention.

The Commission's functions include: (1) promoting human rights in all OAS member states; (2) assisting in the drafting of human rights documents; (3) advising member states of the OAS; (4) preparing country reports, which usually include visits to the territories of these states; (5) mediating disputes over serious human rights problems; (6) handling individual complaints and initiating individual cases on its own motion, both with regard to states parties and states not parties to the Convention; and (7) participating in the handling of cases and advisory opinions before the Court.

The Inter-American Court consists of seven judges irrespective of the number of states that have recognized the jurisdiction of the Court. Although the Court is formally an organ of the Convention and not of the OAS, its judges may be nationals of any member state of the OAS whether or not they are parties to the Convention.

The Court has contentious and advisory jurisdiction. In exercising its contentious jurisdiction, the Court settles controversies about the interpretation and application of the provisions of the American Convention through a spe-

cial procedure designed to handle individual or state complaints against states parties to the Convention. Under its advisory jurisdiction, the Court may nterpret not only the Convention but also any other treaty concerning the protection of human rights in the American states. The Court may also give ts opinion regarding the compatibility of the domestic laws of any OAS member state with the requirements of the Convention or any human rights treaties o which the Convention refers. . . . The advisory jurisdiction of the Court nay be set in motion by any OAS member state, whether or not it is a party o the Convention, or by any OAS organ listed in Chapter X of the OAS Charter, which includes the Commission.

The procedure for handling individual or state complaints begins before the Commission. The procedure resembles those set forth in the European Convention and in the Additional Protocol to the International Covenant on Civil and Political Rights. It is a quasi-judicial mechanism which may be started by any person, group of persons, or nongovernmental entity legally recognized in one or more of the OAS member states, regardless of whether he complainant is the victim of a human rights violation. This right of individual petition is a mandatory provision in the Convention, binding on all states parties. Inter-state communications, however, are dependent upon an explicit recognition of the competence of the Commission to receive and examne them. In addition, the Commission may begin processing a case on its own notion.

. . .

The Commission has powers to request information from the government concerned and, with the consent of the government, to investigate the facts in he complaint at the location of the alleged violation. If the government does not cooperate in the proceedings by providing the requested information within the time limit set by the Commission, Article 42 of the Commission's Regulations allows the Commission to presume that the facts in the petition are true, 'as long as other evidence does not lead to a different conclusion.' Following this, the Commission need investigate the case no further.

. . .

The Court may consider a case that is brought either by the Commission or by a state party to the Convention. For the Commission to refer a case to the Court, the case must have been admitted for investigation and the Commission's draft report sent to the state party. In addition, the state must recognize the Court's general contentious jurisdiction or a limited jurisdiction specified by a time period or case. For a state party to be able to place a case before the Court, the only requirement is that both states must have recognized the Court's contentious jurisdiction.

. . .

If a state does not comply with the decision of the Court, the Court may inform and make recommendations to the OAS General Assembly. There is no reference in the Convention to any action that the General Assembly might take; the assembly, being a political body, may take any political action it deems necessary to persuade the state to comply with its international obligations.

As may be apparent, a petition to the Court by the Commission or state party to the Convention is meant to handle isolated violations of human rights committed by a state which otherwise respects the rule of law. This procedure functions efficiently when the states concerned act in goodwill and cooperate with the human rights supervisory organs. In the reality of the inter-American system, unfortunately, goodwill and cooperation on the part of the states are seldom seen. This being the case, the procedure is bound to be inadequate.

In addition to the problems posed by the Commission's status as part of a political organization and by the lack of cooperation among the states, financial limitations are also potentially troublesome. The OAS does not provide the Commission with the necessary means to carry out all its various activities. The Commission usually receives about 500 complaints a year, with each complaint frequently involving more than one victim. At times the number is much higher; in 1980, when members of the Commission visited Argentina, 5,000 complaints were received. Furthermore, in any one year, the Commission carries out two or three observations on location and monitors the general situation of human rights in at least six or seven countries. To perform all these functions the Commission holds, in principle, two ten-day sessions a year. To support these activities the Commission currently has only seven lawyers, including the Executive Secretary, four secretaries and one administrative official, and its budget is less than 2 percent of the OAS budget. Under these circumstances, the Commission inevitably makes a choice as to what it can accomplish and places a priority on tasks it perceives as most likely to increase the general respect for human rights. In this ordering, the handling of individual complaints does not rank very high.

. . .

NOTE

The Commission has been criticized by commentators for its handling of individual petitions. Critics, for example, have argued that the Commission does not follow its own regulations and that its decisions are politicized and sometimes confused. One report on the Commission concluded that all such criticisms were 'aspects of one problem: the Commission does not function well as a neutral; quasi-judicial adjudicative body for individual cases.' The report also said:[39]

[39] Committee on International Human Rights [of the Association of the Bar of the City of New York], The Inter-American Commission on Human Rights: A Promise Unfulfilled, 48 The Record 589, 600 (1993).

> Nevertheless, the inadequacies of the Commission's work on individual complaints cannot be explained fully by the intractability of the cases or the obstruction by governments. Those causes will not explain the Commission's reluctance, still persisting in some instances, to prepare and refer cases to the Court. Because the Commission's charter-based jurisdiction long ante-dated the emergence of the Inter-American court, the Commission became accustomed to resolving its cases without the aid of the Court. After the creation of the Court, the custom continued; the Commission feared, for example, that resort to the Court might prolong the already protracted resolution of complaints. Whatever the reason, it is a habit that never completely changed. This created tension between the Commission and the Court, which appears, according to Court opinions and other cases described below, not entirely to have dissipated.

The effective functioning of human rights machinery is heavily dependent on adequate staffing and financial resources. The Commission has an annual budget (1995 figures) of $1,734,000. Of that about $1,000,000 is spent on salaries and other fixed expenses, leaving only a little over $400,000 to cover meetings of the Commissioners, on-site visits, witness and expert expenses and the preparation of reports. According to one report, many States are 'offended by the attentions of the Commission [and] work to keep it starved for funds . . . .' Medina notes that the Commission usually meets for four weeks a year and has very few staff. Its European counterpart meets for 16 weeks and has a staff of over 40 lawyers.

Much of the Commission's work has been devoted to on-site country visits. The reports which have resulted from these visits have been widely praised as the best of their kind in terms of fact-finding. The materials in this Chapter 10 do not, however, explore this aspect of the Commission's work because of the attention given in Chapter 7 to issues raised by fact-finding in the work of the UN Commission on Human Rights.[40] One observer has suggested that:

> . . . With the return to democracy in many countries in the hemisphere, the time is ideal for participation in restoring and protecting human rights through military and police training programs, educational programs on human rights obligations for public servants and political leaders, and the availability of expert legal consultants on drafting and implementing laws for the protection of human rights.[41]

[40] See generally Cecilia Medina Quiroga, The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System (1988).

[41] Dinah Shelton, Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and the Inter-American Court of Human Rights, 3 Am. U. J. Int. L. & Policy 323, 331 (1988).

3. THE COURT IN ACTION

In her article, *supra*, Medina identifies three stages that have characterized the relationship between the Commission and the Court. From 1979 to 1981, the Commission neither sought an advisory opinion nor submitted any contentious cases to the Court. This was seen by many observers as a regrettable omission, since states (the only other potential source of 'business' for the Court) were reluctant for political reasons to initiate a use of the Court that might become regular. From 1982 to 1985 the Commission requested an advisory opinion from the Court for the first time (although the Court had already delivered one such opinion, in response to a request from Peru).

The second stage also involved the Commission's failure to refer to the Court a decision it reached upholding a Costa Rican law requiring journalists to be licensed. Since the Commission's decision had not been unanimous, and the issue at hand was both controversial and important, the Costa Rican Government agreed to refer the case to the Court. The Court took the opportunity to berate the Commission for not acting on its 'special duty to consider the advisability of coming to the Court.'[42]

In the third stage, from 1986 onwards, a cooperative relationship began to evolve, commencing with the referral by the Commission of three contentious cases to the Court, each involving instances of disappearances in Honduras. The principal case, *Velásquez Rodríguez*, appears below. It was the first contentious case initiated by an individual that involved systemic state violence, and was one of three cases leading to decisions by the Court on the question of disappearances in Honduras. The cases placed in a judicial setting the same issues that occupied the UN Commission on Human Rights and its Working Group on Disappearances, p. 421, *supra*, as well as the Inter-American Commission in its function of investigating and reporting.

The Commission has since generated a small but steady flow of cases for the Court. For example, three cases (from Nicaragua, Venezuela and Argentina) were submitted in the first half of 1994.

VELASQUEZ RODRIGUEZ CASE

Inter-American Court of Human Rights, 1988
Ser. C, No. 4, 9 Hum. Rts L. J. 212 (1988).

[This case arose out of a period of political turbulence, violence and repression in Honduras. It originated in a petition against Honduras received by the Inter-American Commission on Human Rights in 1981. The thrust of the petition was that Angel Manfredo Velásquez Rodríguez (often referred to as

[42] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 19 of the American Convention on Human Rights), Advisory Opinion OC-5/85, Ser. A No. 5, 86, 145 (1985).

Velásquez) was arrested without warrant in 1981 by members of the National Office of Investigations (DNI) and the G-2 of the Armed Forces. The 'arrest' was a seizure by seven armed men dressed in civilian clothes who abducted him in an unlicensed car. The petition referred to eyewitnesses reporting his later detention, 'harsh interrogation and cruel torture.' Police and security forces continued to deny the arrest and detention. Velásquez had disappeared. The petition alleged that through this conduct, Honduras violated several articles of the American Convention on Human Rights.

In 1986, Velásquez was still missing, and the Commission concluded that the Government of Honduras 'had not offered convincing proof that would allow the Commission to determine that the allegations are not true.' Honduras had recognized the contentious jurisdiction of the Inter-American Court of Human Rights, to which the Commission referred the matter. The Court held closed and open hearings, called witnesses and requested the production of evidence and documents. The statement of facts below is taken from the Court's opinion and consists both of its independent findings and its affirmation of some findings of the Commission.

The Commission presented witnesses to testify whether 'between the years 1981 and 1984 (the period in which Manfredo Velásquez disappeared) there were numerous cases of persons who were kidnapped and who then disappeared, these actions being imputable to the Armed Forces of Honduras and enjoying the acquiescence of the Government of Honduras,' and whether in those years there were effective domestic remedies to protect such kidnapped persons. Several witnesses testified that they were kidnapped, imprisoned in clandestine jails and tortured by members of the Armed Forces. Explicit testimony described the severity of the torture—including beatings, electric shocks, hanging, burning, drugs and sexual abuse—to which witnesses had been subjected. Several witnesses indicated how they knew that their captors and torturers were connected with the military. The Court received testimony indicating that 'somewhere between 112 and 130 individuals were disappeared from 1981 to 1984.'

According to testimony, the kidnapping followed a pattern, such as use of automobiles with tinted glass, with false license plates and with disguised kidnappers. A witness who was President of the Committee for the Defense of Human Rights in Honduras testified about the existence of a unit in the Armed Forces that carried out the disappearance, giving details about its organization and commanding personnel. A former member of the Armed Forces testified that he had belonged to the battalion carrying out the kidnapping. He confirmed parts of the testimony of witnesses, claiming that he had been told of the kidnapping and later torture and killing of Velásquez, whose body was dismembered and buried in different places. All such testimony was denied by military officers and the Director of Honduran Intelligence.

The Commission also presented evidence showing that from 1981–1984 domestic judicial remedies in Honduras were inadequate to protect human

rights. Courts were slow and judges were often ignored by police. Authorities denied detentions. Judges charged with executing the writs of habeas corpus were threatened and on several occasions imprisoned. Law professors and lawyers defending political prisoners were pressured not to act; one of the two lawyers to bring a writ of habeas corpus was arrested. In no case was the writ effective in relation to a disappeared person.

In view of threats against witnesses it had called, the Commission asked the Court to take provisional measures contemplated by the Convention. Soon thereafter, the Commission reported the death of a Honduran summoned by the Court to appear as a witness, killed 'on a public thoroughfare [in the capital city] by a group of armed men who . . . fled in a vehicle.' Four days later the Court was informed of two more assassinations, one victim being a man who had testified before the Court as a witness hostile to the Government. After a public hearing, the Court decided on 'additional provisional measures' requiring Honduras to report within two weeks (1) on measures that it adopted to protect persons connected with the case, (2) on its judicial investigations of threats against such persons, and (3) on its investigations of the assassinations.

The excerpts below from the Court's opinion refer to several articles of the American Convention. *Article 4* gives every person 'the right to have his life respected. . . . No one shall be arbitrarily deprived of his life.' *Article 5* provides that no one 'shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.' *Article 7* gives every person 'the right to personal liberty and security,' prohibits 'arbitrary arrest or imprisonment,' and provides for such procedural rights as notification of charges, recourse of the detained person to a competent court, and trial within a reasonable time or release pending trial.]

VII

123. Because the Commission is accusing the Government of the disappearance of Manfredo Velásquez, it, in principle, should bear the burden of proving the facts underlying its petition.

124. The Commission's argument relies upon the proposition that the policy of disappearances, supported or tolerated by the Government, is designed to conceal and destroy evidence of disappearances. When the existence of such a policy or practice has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference. Otherwise, it would be impossible to prove that an individual has been disappeared.

. . .

126. The Court finds no reason to consider the Commission's argument inadmissible. If it can be shown that there was an official practice of disap-

pearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this.

127. The Court must determine what the standards of proof should be in the instant case. Neither the Convention, the Statute of the Court nor its Rules of Procedure speak to this matter. Nevertheless, international jurisprudence has recognized the power of the courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment (Cf. Corfu Channel, Merits, Judgment I. C. J. Reports 1949; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment, I. C. J. Reports 1986, paras. 29–30 and 59–60.)

. . .

129. The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. . . .

130. The practice of international and domestic courts shows that direct evidence, whether testimonial or documentary, is not the only type of evidence that may be legitimately considered in reaching a decision. Circumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts.

131. Circumstantial or presumptive evidence is especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress any information about the kidnapping of the whereabouts and fate of the victim.

. . .

134. The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. 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.

135. In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation.

136. The State controls the means to verify acts occurring within its territory. Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State.

. . .

138. The manner in which the Government conducted its defense would have sufficed to prove many of the Commission's allegations by virtue of the principle that the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law. This result would not hold under criminal law, which does not apply in the instant case. . . .

. . .

IX

147. The Court now turns to the relevant facts that it finds to have been proven. They are as follows:

a. During the period 1981 to 1984, 100 to 150 persons disappeared in the Republic of Honduras, and many were never heard from again. . . .

b. Those disappearances followed a similar pattern. . . .

c. It was public and notorious knowledge in Honduras that the kidnappings were carried out by military personnel, police or persons acting under their orders. . . .

d. The disappearances were carried out in a systematic manner, regarding which the Court considers the following circumstances particularly relevant:

i. The victims were usually persons whom Honduran officials considered dangerous to State security. . . .

[Omitted paragraphs deal with arms used, details of the kidnappings and interrogations, denials by officials of any knowledge about the disappeared person, and the failure of any investigative committees to produce results.]

e. On September 12, 1981, between 4:30 and 5:00 p.m., several heavily armed men in civilian clothes driving a white Ford without license plates kidnapped Manfredo Velásquez from a parking lot in downtown Tegucigalpa. Today, nearly seven years later, he remains disappeared, which creates a reasonable presumption that he is dead. . . .

f. Persons connected with the Armed Forces or under its direction carried out that kidnapping. . . .

g. The kidnapping and disappearance of Manfredo Velásquez falls within the systematic practice of disappearances referred to by the facts deemed proved in paragraphs a–d.

. . .

X

149. Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use, not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon. Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last few years.

150. The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion.

151. The establishment of a Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights by Resolution 20(XXXVI) of February 29, 1980, is a clear demonstration of general censure and repudiation of the practice of disappearances. . . . The reports of the rapporteurs or special envoys of the Commission on Human Rights show concern that the practice of disappearances be stopped, the victims reappear and that those responsible be punished.

152. Within the inter-American system, the General Assembly of the Organization of American States (OAS) and the Commission have repeatedly referred to the practice of disappearances and have urged that disappearances be investigated and that the practice be stopped. . . .

153. International practice and doctrine have often categorized disappearances as a crime against humanity, although there is no treaty in force which is applicable to the States Parties to the Convention and which uses this terminology. . . .

. . .

155. The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention. . . .

156. Moreover, prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention. . . .

157. The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention. . . .

158. The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radi-

cal breach of that treaty in that it implies a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. . . .

. . .

[The part of the Court's opinion examining the obligation of a state not only to respect individual rights (such as by not 'disappearing' the government's opponents), but also to ensure free exercise of rights (such as by protecting those expressing political opinions against violence by private, non-governmental actors), appears at p. 946, *infra*.]

XII

189. Article 63(1) of the Convention provides:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such rights or freedom be remedied and that fair compensation be paid to the injured party.

Clearly, in the instant case the Court cannot order that the victim be guaranteed the enjoyment of the right or liberty violated. The Court, however, can rule that the consequences of the breach of the rights be remedied and rule that just compensation be paid.

190. During this proceeding, the Commission requested the payment of compensation, but did not offer evidence regarding the amount of damages or the manner of payment. Nor did the parties discuss these matters.

191. The Court believes that the parties can agree on the damages. If an agreement cannot be reached, the Court shall award an amount. The case shall, therefore, remain open for that purpose. The Court reserves the right to approve the agreement and, in the event no agreement is reached, to set the amount and order the manner of payment.

[In the concluding paragraphs, the Court unanimously declared that Honduras violated Articles 4, 5 and 7 of the Convention, all three read in conjunction with Article 1(1); and unanimously decided that Honduras was required to pair fair compensation to the victim's next-of-kin.]

NOTE

Note several aspects of this opinion. (1) The petition was brought against Honduras in 1981. The decision of the Court is dated 1988. (2) The Commission is active in the Court proceedings, arguing on behalf of the individual seeking relief. (3) The proceedings include varied participants such as

witnesses and non-governmental organizations. The Court itself acts as a blend of trial and appellate court.

The *Velásquez Rodríguez* decision was followed by two related judgments of the Inter-American Court of Justice that also involved disappearances in Honduras alleged to be the Government's responsibility: the *Godínez* Judgment, (Ser. C) No. 5 (1989), and the *Fairen Garbi and Solis Corrales* Judgment, (Ser. C) No. 6 (1989). The *Godínez* case was substantially similar to *Velásquez Rodríguez* and the Court reached a similar decision. In the *Fairen Garbi* case, the Court concluded that Honduras was not responsible for the disappearances there relevant. As far as was known, neither of the disappeared persons were involved in activities considered dangerous by the government. The Court said that there was insufficient evidence 'to relate the disappearance . . . to the governmental *practice* of disappearances. There is no evidence that Honduran authorities had [the disappeared persons] under surveillance or suspicion of being dangerous persons, nor that [they] were arrested or kidnapped in Honduran territory.'

QUESTIONS

1. Recall that the Court found a failure on the part of Honduras to fulfill its duties assumed under Article 1(1) of the Convention—namely, failure of the state apparatus to act to investigate the disappearance. It found a legal duty of states to use means at its disposal 'to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.' How do you respond to the following comment:[43]

> . . . [In no other international law case known to the author] has the state been ordered to prosecute, and it is unlikely that the states drafting the American Convention intended to cede the requisite sovereignty to allow the Court to order them to initiate a criminal prosecution.
>
> [It] is submitted that . . . currently under international law [the Court] is not competent to order the government of Honduras to initiate an investigation or prosecution. This interpretation also appears to be supported by the Court's general philosophy on the purpose of the international human rights protection system:
>
> > The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. 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.

[43] Christina Cerna, The Inter-American Court of Human Rights, in Mark Janis (ed.), International Courts for the Twenty-First Century 117, 147 (1992).

2. The facts are contested, and the method employed by the Court to resolve them represents an important contribution of this opinion to human rights law. How does the Court 'find' the facts about the disappearance? What kinds of evidence does it find convincing? Does it employ such traditional notions of the law of evidence in systems of national law as burdens of proof (burdens of persuasion) or presumptions? If so, what burdens and presumptions? It may help in answering these questions to consider:

a. What is the relevance to the Court's finding of Honduran responsibility of the Court's use of terms like (the Honduran) 'practice' or 'policy', or the characterization of disappearances as 'systemic'?

b. What is the significance of the Court's observation that the state 'controls the means to verify acts occurring within its territory'? Is the state then under a special obligation to make every effort to come forth with the facts? Is the Court threatening the state with an adverse finding if it fails to make that effort?

3. In relation to the European Convention the argument in favor of having a judge and a commissioner for every state party is twofold: to ensure confidence in the European organs on the part of each state, and to ensure expertise in relation to each state legal system. In relation to the Inter-American system the argument in favour of having only seven judges and commissioners is that their independence is thereby assured. Can these propositions be reconciled? If not, which approach would you opt for and why?

4. DEMOCRATIC GOVERNMENT IN THE INTER-AMERICAN SYSTEM

a. Background in Theory and State Practice

COMMENT ON RELATIONSHIPS BETWEEN THE HUMAN RIGHTS MOVEMENT AND DEMOCRATIC GOVERNMENT

As background for the discussion in Sub-section (b) *infra* of the work of the Inter-American Commission relating to democracy, these materials explore links between the basic human rights instruments and political democracy, as well as recent trends in both norms and state practice that bear on the question of democratic governance as a human right. The exploration is cursory,

barely noting the different theories or ideologies or historical realizations of democracy that inhere in the human rights debates and that underlie arguments based on the human rights instruments. This Comment complements the discussions in the related Comment on the liberal political tradition at p. 187, *supra*, and the Comment on Constitutionalism at p. 710, *infra*.

It is indeed difficult to bypass a discussion of democracy in relation to human rights in the contemporary world. Many will argue that democracy—often an unspecified form or realization thereof that may consist of no more than the essential element of periodic, genuine, contested elections—is now becoming or has indeed become a global norm. Hence, an article in this subsection is entitled an 'emerging right to democratic governance.'[44] The conception of democracy in much of the ongoing debate concentrates on, and sometimes does not go beyond, the fundamental premise of 'rule by the people' (or related expressions of this premise such as popular sovereignty, or government as expressive of the will of the people) through one or another form of representative government that elections are meant to achieve. Needless to say, the degree to which the contemporary observer detects a significant trend toward democratic governance will depend on the conception of democracy that is employed and on the related essential components of democratic governance.

Other observers, at least in the context of universal human rights rather than a regional system like the European, raise questions about the content of this 'emerging right' in terms of ideals and components of democracy other than genuine elections. Contested conceptions today of the nature of democratic government range from (1) the classical liberal democracy of a century ago with limited powers and activity of government and a sharp division between the state and civil society, to (2) the different types of social democracies in which governments assume larger responsibility for social and economic structures and are attentive to forms of inequality of wealth, power and opportunity in a society. They range, to employ another example, from (1) a notion of moderate and sporadic political participation by the citizenry primarily through elections to choose between the options offered, to (2) a notion of ongoing and active citizen participation in governance and in the related institutions of civil society. The debate raises vital issues of the relationship, necessary or contingent, between political democracy and an economic system characterized by private property and a market subject to a varying degree of governmental regulation.

Consider as one illustration the argument of Brad Roth[45] that '[g]reat ideological issues remain to be resolved, even if particular ideological positions

[44] See Franck, p. 672, *infra*. See also Gregory Fox, The Right to Political Participation in International Law, 17 Yale J. Int. L. 539 (1992). For discussion of related themes. see James Crawford, Democracy in International Law (1994). See also Gregory Fox and Georg Nolte, Intolerant Democracies, 36 Harv. Int. L. J. 1 (1995).

[45] Evaluating Democratic Progress: A Normative Theoretical Perspective, 9 Ethics & Int. Affairs 55 (1995).

now belong solely to the past. Democracy still admits of radically contradictory interpretations . . . ' Roth's article distinguishes among three ends

> to which the establishment of competitive electoral mechanisms may to a greater or lesser extent be relevant: (1) the furtherance of broad popular empowerment with respect to the full range of social decisions that condition life in the society ('substantive democracy'); (2) the establishment of a government to which the populace may in some manner be said to have manifested consent ('popular sovereignty'); and (3) the establishment of a broadly recognized basis for, and thereby limitation on, the legitimate exercise of power ('constitutionalism').

Roth examines the relations among these different ends in the older democracies and in the states of the former Communist world and of the developing world to which forms of democratic government have spread since the late 1980s. Within his framework, he criticizes the internal trends in numbers of the 'new' democracies that have moved to plural political parties and periodic election.[46]

Constitutions of a particular character have become characteristic of the new democracies, a character that has been captured in the rubric 'constitutionalism' that distinguishes such instruments from, for example, the constitutions of authoritarian states. Constitutionalism itself then becomes complexly related to conceptions of democracy, a relationship stressed in Section A of Chapter 11, *infra*, that describes the horizontal spread among states of liberal constitutions characteristic of Western democracies since the time of decolonization but particularly over the last decade. Those readings raise questions both of the adaptability of Western-style constitutionalism to regions and cultures of radically different histories and structures, and of the aspects of constitutionalism that might be said to inhere in or be required by democratic government—for example, the separation of powers, particularly the independence of the judiciary; the related notion of the Rule of Law; or the protection against majoritarianism offered by constitutionally entrenched individual rights and by judicial review of legislative as well as executive action.

In broad terms, one can pose two questions—perhaps two sides of the same question—about the relationships between the human rights movement and democratic governance, questions that have become more vital and pertinent since the collapse of the Soviet empire with its radically different ideology and practice of government. (1) Do the fundamental norms of the human rights instruments point toward or indeed require democratic government? Will observance of those norms inevitably lead to such government, or are they consistent with other forms of government-say, a monarchy, or theocracy, or military junta, or ideology requiring one ruling and guiding party? (2) Does

[46] There is a vast and growing literature about the spread of constitutionalism and democracy to the former Communist states and to other states of the developing world. Some are noted in the section in Chapter 11 on constitutionalism. Two recent examples are: Larry Diamond, Promoting Democracy, 87 Foreign Policy 25 (1992); and James Johnson, Does Democracy 'Travel'? Some Thoughts on Democracy and its Cultural Context, 6 Ethics & Int. Affairs 41 (1992).

political democracy require the protection and observance of the fundamental norms of the human rights movement—for example, physical security of citizens, due process, equal protection, freedoms of speech and association? Can democratic government be realized without that full array of norms—say, by a simple emphasis on majority rule—or are democracy and human rights linked in some fundamental way?

Such questions rest on premises that must be clarified before one can attempt answers. Those premises involve both the conception and related definition of democracy and of fundamental human rights norms. To use a graphic example, fundamental human rights norms include the rights recognized in the International Covenant on Economic, Social and Cultural Rights. But much of the discussion about human rights in relation to democracy considers only the fundamental civil and political rights noted in the preceding paragraph.

* * * * *

The two readings in this sub-section develop and clarify some aspects of the preceding discussion. Steiner examines theories of democratic participation that inform or could inform the provisions of the basic human rights documents on political participation and democracy, and underscores the basic choices left open by those provisions. Written four years later, after a period which saw the ongoing collapse of the Soviet Union and a trend from authoritarian government to electoral democracy in a number of developing countries, Franck's article argues on the basis of both human rights texts and state practice for an emerging norm of democratic governance.

HENRY STEINER, POLITICAL PARTICIPATION AS A HUMAN RIGHT

1 Harv. Hum. Rts. Y'bk 77 (1988), at 78.

. . .

The article . . . examines the norms expressing this right [to political participation] that are included in two principal international instruments of universal scope: the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. Those norms grant citizens the right to take part, directly or through representatives, in the conduct of public affairs and government, and to vote at genuine periodic elections based on universal suffrage and the secret ballot. My discussion emphasizes these two different ways in which the international norms express citizens' right to political participation: the relatively vague and abstract right to take part in the conduct of public affairs or government, and the relatively specific

right to vote in elections. It builds upon that distinction to explore different modes of political participation. . . .

. . .

II. The Texts: Their Making and Interpretation

. . .

What emerged from the periods of drafting and debates were norms that expressed an important ideal of political participation. But they gave little indication of the different ways of institutionalizing that ideal. It cannot have been by chance that their language was sufficiently confined—with respect to the 'elections' clause—and sufficiently abstract and porous—with respect to the 'take part' clause—to permit democratic and nondemocratic states to assert that they satisfied the norms' demands. More specific norms would have put at risk the goal of achieving broad support for the human rights instruments as a whole.

A. The Two Basic Provisions

Article 25 of the International Covenant, the principal treaty declaring a right to political participation, states:

> Every citizen shall have the right and the opportunity, without . . . unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. . . .

Alone among the International Covenant's provisions, this article restricts a right to citizens. It distinguishes between direct and representative participation, but validates both. The article does not indicate how citizens are to 'take part in the conduct of public affairs,' other than by identifying periodic and 'genuine' elections as an ingredient of the right to participate.

. . .

The provisions of Article 25 are unusual among human rights norms in that they do more than declare a right. They articulate a political ideal inspiring that right. Though not invoking a particular political tradition such as democracy, Article 25 affirms that the popular vote is meant to guarantee 'the free expression of the will of the electors.'

The Universal Declaration, an inspiration and important model for the

International Covenant and similar in content to it, contains the analogous provision in its Article 21:

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. . . .
>
> (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

This earlier instrument, influenced to a greater degree than the International Covenant by the tradition of liberal democracy, gives more emphasis to the role of the 'will of the people' as the 'basis of the authority of government.' But like the International Covenant, Article 21 neither employs the term 'democracy,' nor makes explicit whether plural political parties and contested elections must be permitted.

The influence of the Universal Declaration on the International Covenant extends to the internal structure of Article 25. It too begins with, and thereby gives an apparent priority and emphasis to, the 'take part' clause, and continues with the 'elections' clause. . . . Generally I shall use the two clauses to refer, respectively, to non-electoral and electoral (voting) participation in political processes.

. . .

Notwithstanding its mixed ancestry and ambiguities, the Covenant gives some internal guidance for an understanding of Article 25. In view of their essential role in most political activities, the expressive rights to free speech, press, assembly and association must in some way inform any theory of participation. Their prominence in the International Covenant reminds us that Article 25 should not be approached as an isolated provision, detached from the larger structure of rights in the Covenant. That larger structure here suggests that the 'take part' and 'elections' clauses assume some degree of public political debate and of citizens' participation in political groups expressing their beliefs or interests.

. . .

III. Treaty Provisions in Relation to Contemporary Debate About Participation in the Liberal Democracies

An attempt to formulate a universal norm about political participation confronts mutually antagonistic theories and practices among the liberal democracies, communist states, military dictatorships and a range of third world governments. Consensus over a norm limited to West European, North

American and Commonwealth democracies should then be easier to achieve. Basic obstacles to agreement about reasonably specific provisions fall away when, for example, none of the proposed signatories is a one-party state or imposes strict censorship.

Even among the democracies, however, a norm about political participation must leave significant matters open. To gain adoption, a regional norm embracing West European and North American countries would have to be understood as consistent with distinct theories of participation informing these countries' political systems. It would have to accommodate important variations in forms of government and in related practices institutionalizing political participation.

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A. Political Participation in the Large: Competing Conceptions

All regimes, including over time the most repressive, permit or encourage or even require some institutionalized modes of political participation. Reasons additional to the need to be informed of popular discontent argue for a government's inviting political participation. The government may thereby enlist popular support and gain international as well as domestic legitimacy. It may reduce the risks accompanying efforts to rule exclusively by force.

In nondemocratic societies, such participation will reach beyond the ruling elite, however defined, to include broader elements of the population. It may stop shy even of controlled elections, and involve no more than informal consultations or legally approved ways to express grievances. It may be relatively self-generated *or* mobilized and manipulated, relatively genuine and effectual *or* ceremonial and insubstantial. Like the forms of popular political participation in all societies, it will represent some combination of institutionalized ideals, practical functions, public ritual, and legitimating myth.

Liberal democracies, then, are not distinctive in institutionalizing modes of political participation, but the modes which they stress are. The traditional negative rights and expressive rights of liberalism protect the environment of political pluralism. Political processes culminating in a popular and contested election are meant to yield a representative legislature, and a chief executive or government elected directly (presidential system) or elected indirectly by such legislature (parliamentary system).

Elections serve a variety of purposes for both the voters and the polity. So do the less common forms of citizens' political activities in liberal societies. No one ideal of political participation succeeds in rationalizing these diverse purposes. Therefore, no single scale can measure political participation comparatively. . . . Scales calibrated to different values would weigh different phenomena, or give varying weights to phenomena like elections. . . .

. . . [I]t is useful to concentrate on the divide between theories in which elections constitute a near-sufficient form of political participation for the great majority of the people, and theories urging more. Within this article's frame-

work, that divide could be expressed in terms of the 'elections' clause and 'take part' clause of the international norms. While recognizing that elections are indispensable, the more demanding theories argue for a continuing rather than episodic experience of participation, for a broad conception of a right to 'take part' in the conduct of public affairs. They involve varied and flexible modes of non-electoral participation that supplement rather than substitute for voting. This dispute about the sufficiency of electoral democracy reflects deeper disagreement over the ends of participation. . . .

Permeating these writings is a distinction between notions of participation as an instrumental and as an inherent good. . . . Like most such contrasts, it wrenches apart elements in the psychology and practice of political participation that may usefully complement each other and comfortably coexist for most citizens. But understanding one or the other as a dominant justification for political participation helps to elucidate some underlying themes.

Emphasis on participation's instrumental character suggests that the function of political participation must be to influence public policy, to gain governmental recognition of individual or group interests. The value of participation lies in its instrumental efficacy. It is a means toward a goal rather than an end in itself. Elections are the paramount means for influencing governmental action. They give the electorate some degree of control over and thereby impose some degree of responsibility on those exercising power. Of all modes of political participation, elections enlist the largest number of citizens, including the largest number of those toward the bottom of the socio-economic ladder.

Other more demanding political activities, engaged in by relatively small percentages of the population, are oriented toward and culminate in elections: active membership in a political party, raising campaign funds, soliciting votes for a candidate. They form part of a complex electoral process which is itself part of the larger political process. Some activities which continue between election campaigns require greater devotion from their participants and longer-run planning—for example, the work of the interest groups which have become endemic to liberal societies. Lobbying and other strategies of those groups supplement the electoral process.

Within this prevalent justification for political participation—influencing public policy and governmental action—citizens' votes play a role as vital as it is confined. Theorists emphasize that, in modern mass society, elections cannot convey with any clarity to elected officials the preferences of citizens which they are meant to take into account. . . . Contested elections mean that the people have a choice, but political elites rather than the people decide what that choice is between.

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Despite the indirect and limited control that it exercises, electoral participation does establish boundaries for governmental action. It rules out policies that meet wide opposition, at least if groups with a political voice are among

that opposition. Elections thereby serve a vital protective function, one also served by courts in societies where judicial review vindicates constitutional norms. By periodically subjecting elected officials to the approval of the electorate, they help to arrest governmental violations of widely valued rights, or to counter threats to the interests of sufficiently important groups among the electorate. . . .

Other theorists, faulting a solely functional approach to political participation, hold that participation constitutes an inherent as well as an instrumental good. They do not claim that influencing governmental policies and checking governmental abuses are mythical or trivial consequences of the vote. Rather, they argue that elections and political activities closely related to the electoral process are indispensable, but themselves insufficient to realize the democratic ideal of the citizenry's continuing involvement in public life. Within the framework of the international norms on participation, these theorists could be said to elaborate the 'take part' clause.

Such theorists criticize exclusively instrumental views of participation because of their tendency to value only liberal premises of individualism, of the hegemony of private rights, and of limited government whose primary function is to honor those rights. A nearly exclusive reliance on elections heightens the sense of powerlessness of the many to act other than passively by reacting to choices formulated by others. Most citizens, at least those who even choose to vote, treat that act as meeting their full responsibility for participating in public affairs. Voting satisfies that responsibility in an undemanding and individualistic way without need for collegial discussion or group action. Reducing the participation of most citizens to the periodic vote denies them the benefits of a continuing experience of involvement in public life, of 'taking part' in the conduct of public affairs.

Recognizing the impossibility of extensive participation in the central government of modern states, theorists of direct or strong or participatory democracy emphasize other contexts. Inevitably they advocate decentralization of authority, and direct attention toward local governments of a size and functions more conducive to continuing and active public involvement. That participation can, and in many states now does, take various forms: citizen representation on governmental boards, public meetings and discussions, formally structured relationships between the managers of public enterprises and their consumers or the general citizenry, more extensive functions of city government responsive to citizens' needs.

In effect, these theorists urge the further development of established trends in the legislation of many liberal democracies increasing citizen participation in local government units, ranging from school or zoning boards and consumer protection agencies to environmental agencies. The character of the participation becomes vital. Active involvement in a neighborhood group addressing local concerns would be favored over a passive dues-paying membership in a political party or interest group.

Such proposals reach beyond the involvement of citizens in local govern-

ment. They urge active participation in the formulation of policies of non-governmental institutions like churches or clubs. That is, they challenge the traditional distinction between public and private in the organization of social life. All institutions which exert significant social influence are in that sense political and public. The conception of political participation therefore expands to embrace activities in a broad range of institutional settings. . . .

Theorists of direct and strong democracy apply these arguments with particular force to greater participation of workers in union government and in decision-making in the workplace. . . .

The purposes of this extensive popular involvement in an enlarged domain of public life are at once greater self-government and self-realization. The two are interrelated. By taking responsibility for public life and committing their personal resources to it, citizens experience differently their relationship to society. Through increased participation in the institutions affecting their lives, they develop a sense of their worth and significance. That is, the benefits of participation are at once material and psychological. More citizens will feel empowered to act rather than only react. This heightened sense of responsibility and competence strengthens an ethic of civic virtue which points toward participation for reasons additional to the advancement of self-interest. The inherent good of political participation stems from this possibility of self-realization through development of the social self as a member of the polity.

B. Electoral Systems: Their Range and Effects

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Elections may offer relatively accessible or relatively closed avenues, real or sham avenues, toward the people's participation in governance. The factors determining which of these avenues is opened by a given country's electoral system largely escape consideration or regulation by the international norms.

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Article 25 of the International Covenant and Article 21 of the Universal Declaration require periodic and genuine elections. . . . [T]he international norms leave to the states decisions which carry important consequences for the quality of participation and the distribution of political power.

Consider the alternative systems for election of a legislature: proportional representation ('PR' system), under which the legislature is divided among parties according to the percentage vote received by each party list in the popular election; and single-member constituencies, in which the winner in an electoral district, the first past the post, takes all ('district' system). A choice between these systems or among their many variations will not be determined by the logic of a broadly shared theory of representation, participation or democracy. No such choice will be detached from practical politics.

In a given context, it will generally be clear which groups will benefit from a proposed change in an electoral system. It is not, for example, surprising that suggestions in the United Kingdom for a form of PR come from the smaller parties that have been underrepresented by the district system. On the

other hand, PR's structural problems, namely the party fragmentation often caused by PR and the related politics of coalition governments that may give disproportionate strength to small parties, have led to proposals in countries like Israel for significant modifications.

Electoral systems, including the nominating or selection processes through which parties' candidates are chosen, thus both reflect and mold political power. Each system will favor some interests at the expense of others by defining the avenues and strategies through which political power must be gained. Electoral participation can then be arranged consistently with human rights norms to yield many different arrangements of power.

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. . . [H]uman rights law offers no guidelines for the selection of an electoral system in a given political and socio-economic context, no theory of broad or fair electoral participation or access which might influence the contextual choice by a state among the many possibilities. By its terms and in view of the debates during its drafting period, the 'elections' clause remains neutral about these choices.

C. Elections as the Paramount Mode of Political Participation in Liberal Democracies

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The question here considered is not then *why* Article 25 of the International Covenant specifies elections, but why it specifies *only* elections and leaves the 'take part' clause suggestive and unelaborated. An answer to that question lies in part in the conceptual structure of the human rights instruments and in ideological premises to liberal society. Those instruments impose on governments, not on individuals or nongovernmental institutions, most of the duties that correspond to the individual rights which they declare. Their requirements address principally state action: respect by government for individuals' integrity, governmental protection of individuals against lawless behavior, provision of fair trials, equal protection in the making and enforcement of law. This observation holds for the right to political participation as well. A government's correlative duty requires it to permit, foster or arrange for such participation.

In liberal democracies, most political participation stems from the initiatives of individuals or of institutions that are not formally part of government. Consider, for example, the International Covenant's declaration of rights to free speech and association, rights related to the electoral process. Under the traditional understandings of liberal democratic theory, the correlative duties of government do not obligate it to create the institutional frameworks for political debate and action, or to assure all groups of equal ability to propagate their views. Rather, those traditional understandings require governments to protect citizens in their political organizations and activities: forming polit-

ical parties, mobilizing interest groups, soliciting campaign funds, petitioning and demonstrating, campaigning for votes, establishing associations to monitor local government, lobbying.

Such governmental duties of tolerance and equal protection for all political activities could be viewed as a minimum, essential elaboration of the 'take part' clause. They respond to the liberal commitment to guarantee citizens their political and legal equality. . . . Choices about types and degrees of participation may depend on citizens' economic resources and social status. But it is not government's responsibility to alleviate that dependence, to open paths to political participation which lack of funds or education or status would otherwise block.

Emphasis upon a right to vote, without elaboration of companion rights to other ways of taking part in public affairs, therefore fits traditional liberal conceptions of public and private spheres of competence. . . . Limiting governmental duty to what only governments can do, the construction of an electoral system, leaves the rest of the participatory framework to private initiative. Although Article 25 imposes no such limitation on governmental action, neither does it impose specific obligations other than the conduct of elections.

These understandings do not, however, constitute the whole of the tradition of liberal democracy. Changing ideologies and practices—those associated with the classical and contemporary theorists of direct, strong and participatory democracy—have blurred older lines between private and public spheres. Many states no longer treat the establishment of electoral machinery and the protection of citizens' political speech and association as the outer boundary of a government's duty to honor citizens' right to participate. Governmental functions in liberal democracies have expanded in ways that heighten popular participation. . . .

[Discussion of regulation of political parties, primaries, campaign funding and access to media; of devolution and consultative arrangements; and of worker representation and related matters is omitted.]

Such developing involvement of government in the institutionalization of political participation within and outside electoral processes stems from a theory which my prior discussion of liberal democracy has characterized as participatory and strong rather than representative and thin. . . . That theory is, however, more complex and contentious than one which aims only at justifying elections. Difficulties lie not only in its formulation but also in assessing compliance with an international norm embodying it. Suppose, for example, that such theory were understood to inform the 'take part' clause of Article 25, and thereby to give coherent direction to its elaboration. Problems would arise in reaching a judgment whether a government had satisfied its duty to enact legislation extending opportunities for citizens—for all citizens, powerful and powerless—to 'take part in the conduct of public affairs.'

As generally understood, the 'elections' clause poses no comparable

difficulty. A government's violation of that clause, like torture or mock trials, is relatively easy to determine. Elections either take place or they don't; they are or are not contested; fact finders can make judgments about the integrity of the casting and counting of ballots; those elected do or do not take and hold office.[47] The expression 'genuine elections' in the human rights instruments is generally understood to cover these formal, even measurable criteria. By meeting those criteria elections are understood to comply with the human rights norms.

One can imagine the use of a more complex criterion than procedural correctness to determine whether an election satisfies Article 25—for example, the criterion whether it constitutes, in the article's language, the 'free expression of the will of the electors.' That phrase, if interpreted to require more than a non-coerced and secret ballot, could make relevant those considerations which a concentration on the formal integrity of an electoral process enables one to ignore: the distribution of political and economic power, its effect on differential access of classes and ethnic groups to the electoral process and political power, the obstacles to greater access, the power of elected officials relative to other centers of power in the society. What escapes analysis in the contemporary understanding of international norms on political participation is the quality and significance of electoral participation itself.

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V. Political Participation as a Programmatic Right

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. . . Do the human rights norms about participation express any ideal common to diverse nations? Are they more than indeterminate prescriptions which, in a fractious world, were fated or even meant to be understood in dramatically different ways? Do they serve any useful purpose?

The answers which I propose turn on the suggestion that the right to political participation be viewed as a programmatic right, one responsive to a shared ideal but to be realized progressively over time in different ways in dif-

[47] Farer, Human Rights and Human Wrongs: Is the Liberal Model Sufficient?, 7 Hum. Rts. Q. 189 (1985). Farer, a former Chairman of the Inter-American Commission on Human Rights, comments on a report of the Commission on Colombia, prepared during his tenure. He criticizes the Commission for not attempting 'to peer behind the form of party competition to determine whether . . . the right to participate in government was inhibited' by such factors as limited access to the media by left-wing parties, and an agreement between leaders of the two major parties 'to keep certain potentially popular programs off the political agenda.' *Id.* at 199.

Farer observes that nothing in the text of the governing convention (the American Convention on Human Rights) 'compels [or] precludes deep analysis of the political process as a condition for assessing compliance with the right to participate.' He points to the deep liberal assumption informing such inquiries of human rights groups 'that in a state where associational rights are reasonably well protected, the right of political participation is realized in all cases where formal political power coincides with electoral achievement. As long as the franchise is not arbitrarily restricted and the ballots are accurately counted, traditional liberal criteria are satisfied.' *Id.*

ferent contexts through invention and planning that will often have a programmatic character. . . .

At first look, political participation falls within the . . . immediately effective category of international human rights. It figures in the International Covenant as a right so fundamental that the realization of many others depends upon it. Nothing in Article 25 or in other text of the Covenant justifies a distinction between the clarity or immediacy of a state's duties under that article and, say, its duty to refrain from torture. Citizens of a party to the Covenant would have a valid claim under international law if their government had seized power and abolished elections.

Nonetheless, I argue that the right to political participation can be better understood as sharing the programmatic character of many economic and social rights. So understood, it nourishes a vital ideal and serves important purposes. I mean, to be sure, a programmatic right of a distinct character from the typical economic rights. Moreover, my characterization applies to the 'take part' clause of the international norms rather than to the 'elections' clause. . . .

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The clearer if still open-textured character of the 'elections' clause, together with the programmatic character of the 'take part' clause, nourish the argument that Article 25 now expresses some 'positive law,' but also contains an aspirational or hortatory element which distinguishes it from most provisions of the International Covenant. The aspirations that it expresses are of course shaped by the different strands of political theory and the different national practices with which the world is familiar. But this rich historical deposit of ideas and practices cannot exhaust the ways of understanding or institutionalizing an ideal of political participation.

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Although the practice of participation may be severely suppressed in a given state, the norm stands as an invitation to the disenfranchised or repressed to draw on the example of other societies where it is better appreciated. Its recognition in national and universal instruments legitimates inquiry and may spur protest. Dormant or imprisoned within a hostile environment—as lay dormant for many decades the ideal of equality expressed in the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution—the norm retains its subversive potential.

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. . . Fresh understandings and different institutionalizations of the right in different cultural and political contexts may reveal what an increasing number of states believe to be a necessary minimum of political participation for all states. That minimum should never require less of a government than

provision for meaningful exercise of choice by citizens in some form of electoral process permitting active debate on a broad if not unlimited range of issues. But it could require much more.

THOMAS FRANCK, THE EMERGING RIGHT TO DEMOCRATIC GOVERNANCE

86 Am. J. Int. L. 46 (1992), at 53.

[Franck refers to two notions: governments derive their just powers from consent of the governed, and the international legitimacy of a state needs to be acknowledged by 'mankind.' These two notions form a 'radical vision' which, he contends, 'is rapidly becoming, in our time, a normative rule of the international system.' We see the 'emergence of a community expectation' that 'those who seek the validation of their empowerment patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that will be increasingly promoted and protected by collective international process.'

This 'democratic entitlement' is gradually being transformed 'from moral prescription to international legal obligation.' In support of this claim, 'data will be marshaled from three related generations of rule making and implementation.']

. . . The oldest and most highly developed is that subset of democratic norms which emerged under the heading of 'self-determination.' The second subset—freedom of expression—developed as part of the exponential growth of human rights since the mid-1950s and focuses on maintaining an open market-place of ideas. The third and newest subset seeks to establish, define and monitor a right to free and open elections.

These three subsets somewhat overlap, both chronologically and normatively. Collectively, they do not necessarily penetrate every nook and cranny of democratic theory. For example, the three subsets do not yet address normatively the thorny issue of the right of a disaffected portion of an independent state to secede; nor, as we shall see, is it conceptually or strategically helpful—at least at this stage of its evolution—to treat the democratic entitlement as inextricably linked to the claim of minorities to secession. Still, these three increasingly normative subsets are large building stones, gradually reinforcing each other and assuming the shape of a coherent normative edifice. . . .

[The author interprets the right to self-determination—as expressed in the UN Charter, several General Assembly resolutions and declarations, and Article 1 of the ICCPR and ICESCR; and as developed by state practice—to refer to the right of citizens of all nations to determine their collective political status through democratic means. 'The right now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state.'

Franck then refers to the right of free political expression, and (his third strand) 'the emerging normative entitlement of a participatory *electoral* process' which, despite its infancy, is 'rapidly evolving toward that determinacy which is essential to being perceived as legitimate.' He draws on Article 21 of the UDHR and Article 25 of the ICCPR, and discusses the evolution in the UN and in regional systems such as the European and the OAS of insistence on a state's duty to promote representative democracy, primarily through elections.

Franck notes that this 'evolution of textual determinacy with respect to the electoral entitlement is a relatively recent development,' and traces the recent trend toward election monitoring by the UN, by regional organizations, by states, and by NGOs. He stresses, however, that problems abound about the degree to which the international community can insist on standards that involve concrete forms of intervention, given the residual force of notions like domestic jurisdiction in Charter Article 2(7).]

. . . To proclaim a general right to free elections is less intrusive than monitoring any particular election in an independent state. Effective monitoring is even more intrusive than the mere observation of balloting. And collective action to compel states to adhere to a standard is the most intrusive of all. Thus, the conflict of principles needs to be recognized, made explicit, and reconciled to the general satisfaction of the large preponderance of states before the democratic entitlement's global legitimacy is demonstrated by real, as opposed to formulaic, coherence. That will require action to meet the practical concerns of states that still regard the nonintervention principle as of overriding importance to their national well-being.

Also unclear is the extent to which the various parts of the democratic entitlement can yet claim the legitimacy that derives from 'treating like cases alike.' Are virtually all states, for example, ready to have their elections monitored by a credible global process? This and other issues need to be examined in detail before the democratic entitlement can be said to have achieved universal coherence.

A bright line links the three components of the democratic entitlement. The rules, and the processes for realizing self-determination, freedom of expression and electoral rights, have much in common and evidently aim at achieving a coherent purpose: creating the opportunity for all persons to assume responsibility for shaping the kind of civil society in which they live and work. There is a large normative canon for promoting that objective: the UN Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and the Convention on the Elimination of All Forms of Discrimination against Women. These universally based rights are supple-

mented by regional instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, the Copenhagen Document and the Paris Charter.

Each of these instruments recognizes related specific entitlements as accruing to individual citizens. These constitute internationally mandated restraints on governments. As we have seen, they embody rights of free and equal participation in governance, a cluster within which electoral rights are a consistent and probably necessary segment. The result is a net of participatory entitlements. The various texts speak of similar goals and deploy, for the most part, a similar range of processes for monitoring compliance, several of which have already become common usage in connection with the democratic entitlement. One can convincingly argue that states which deny their citizens the right to free and open elections are violating a rule that is fast becoming an integral part of the elaborately woven human rights fabric. Thus, the democratic entitlement has acquired a degree of legitimacy by its association with a far broader panoply of laws pertaining to the rights of persons vis-à-vis their governments.

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There are . . . no legal impediments to institutionalizing voluntary international election monitoring as one way to give effect to the emerging right of all peoples to free and open electoral democracy, but this is not to say that states as yet have a *duty* to submit their elections to international validation. . . .

[Franck then relates the democratic entitlement to the central concern of the UN (as evidenced by the reversal of Iraq's attack on Kuwait) in stopping aggression and maintaining peace.]

If that principle indeed stands at the apex of the global normative system, the democratic governance of states must be recognized as a necessary, although certainly not a sufficient, means to that end. Peace is the consequence of many circumstances: economic well-being, security, and the unimpeded movement of persons, ideas and goods. States' nonaggressiveness, however, depends fundamentally on domestic democracy. Although the argument is not entirely conclusive, historians have emphasized that, in the past 150 years, 'no liberal democracies have ever fought against each other.' It has been argued persuasively that 'a democratic society operating under a market economy has a strong predisposition towards peace.' This stands to reason: a society that makes its decisions democratically and openly will be reluctant to engage its members' lives and treasure in causes espoused by leaders deluded by fantasies of grievance or grandeur.

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Thus, it appears with increasing clarity, in normative text and practice, that compliance with the norms prohibiting war making is inextricably linked to observance of human rights and the democratic entitlement. . . . A distinction needs to be noted here. As we have observed, some governments have argued that the international community's jurisdiction to intervene in the domestic affairs of states to secure compliance with the democratic entitlement is (or should be) limited to cases where its violation has given rise to breaches of the peace. Others have disagreed, claiming that the jurisdiction to intervene is also based on broader human rights law, which authorizes various intrusive forms of monitoring and even envisages sanctions against gross violators. One can prefer this latter view, while still agreeing that the democratic entitlement does have a connection to the United Nations' 'peace' role, that the *legitimacy* of any collective international intervention to support a democratic entitlement is augmented by the entitlement's intimate link to peace. The substance of that link, however, is not merely the role of democracy in *making* or *restoring* peace after conflict has arisen but also—indeed preeminently—its role in *maintaining* peace and *preventing* conflict.

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The democratic entitlement's newness and recent rapid evolution make it understandable that important problems remain. We have considered these primarily under the rubric of coherence, indicating that this entitlement is not yet entirely coherent. The key to solving these residual problems is: (1) that the older democracies should be among the first to volunteer to be monitored in the hope that this will lead the way to near-universal voluntary compliance, thus gradually transforming a sovereign option into a customary legal obligation; (2) that a credible international monitoring service should be established with clearly defined parameters and procedures covering all aspects of voting, from the time an election is called until the newly elected take office; (3) that each nation's duty to be monitored should be linked to a commensurate right to nonintervention by states acting unilaterally; and (4) that legitimate governments should be assured of protection from overthrow by totalitarian forces through concerted systemic action after—and *only* after— the community has recognized that such an exigency has arisen. In the longer term, compliance with the democratic entitlement should also be linked to a right of representation in international organs, to international fiscal, trade and development benefits, and to the protection of UN and regional collective security measures.

Both textually and in practice, the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance. The task is to perfect what has been so wondrously begun.

NOTE

Compare with Franck's article the views of Michael Reisman in *Sovereignty and Human Rights in Contemporary International Law*, p. 157, *supra*, about the relationship between (a) traditional notions of state sovereignty and (b) popular sovereignty or consent of the people as a condition to a state's international legitimacy.[48] The discussion of different meanings of self-determination in Chapter 14, develops ideas appearing in both those articles.

b. The Commission, Political Participation and Democracy

Until the late 1980s the Inter-American Commission, like its UN counterparts, had rarely grappled with issues relating directly to the right to political participation. The following statement, taken from the Inter-American Commission's Annual Report for 1971, p. 35, illustrates the pre-occupation at that time with military dictatorships rather than the finer points of democratic theory.

> . . . [W]ith each passing day, more and more people in this part of the world are denied the opportunity to take part in the affairs of the governments of the states in which they live. Terrorism and guerrilla action have led to *de facto* governments in a number of states, where the activities of political parties have been suspended . . . and elections have been postponed. Thus, fundamental human rights can no longer be exercised . . . [T]his Commission considers it to be its duty to point out that . . . cultural development is not furthered by the people's belief that they will be better off by turning away from politics, political parties, politicians, and political institutions and practices. . . .

By the late 1980s, however, the world had changed. Democratic governments had been established or restored in many Latin American countries, while in Europe the Berlin Wall had fallen and communism was in its death throes. These developments created a climate that was more conducive to the elaboration of international legal norms relating to democracy. A group of cases from Mexico on elections provided the Commission with an important opportunity on this issue; the Commission's Final Report on these cases appears below. The 1990–91 Annual Report of the Inter-American Commission that follows examines some premises to democratization. As background for these materials on the Commission, the section begins with a review of references to democracy in the basic Inter-American documents.

[48] These themes are explored in two related discussions: Theme Panel I: Theoretical Perspectives on the Transformation of Sovereignty, in American Society of International Law, Proceedings of the 88th Annual Meeting 1994, 1; and Panel: National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law, American Society of International Law, Proceedings of the 86th Annual Meeting 1992, 249.

COMMENT ON PROVISIONS ON DEMOCRACY IN INTER-AMERICAN DOCUMENTS

This Comment describes provisions that refer to democracy in the OAS Charter, a Protocol thereto, the American Declaration and the American Convention.[49] The Annual Report of the Inter-American Commission, p. 684, *infra*, refers to additional documents.

The Charter is distinctive among comparable instruments in the attention that it gives to democratic theory and practice. Its Preamble declares that 'representative democracy is an indispensable condition for the stability, peace and development of the region.' Article 2(b) states that one of the 'essential purposes' of the OAS is '[t]o promote and consolidate representative democracy. . . .' Article 3(d) affirms the 'principle' that the 'solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.'

A 1992 Protocol of Washington amended the Charter to provide in a new Article 9 that an OAS member 'whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of any organs of the OAS, including the General Assembly and the IACHR.

The 1948 American Declaration of the Rights and Duties of Man, whose normative status was recognized by the OAS in the 1967 Protocol of Buenos Aires, declares in Article 20 that every person has a right to 'participate in the government of his country,' and spells out some requirements of voting and elections. Article 32 converts the right to vote into a 'duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.' Article 28 states: 'The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.'

The American Convention contains strong affirmations of democracy. Its Preamble declares the intention of the states parties 'to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.' Article 23, close in wording to Article 21 of the UDHR and Article 25 of the ICCPR, does not employ the term 'democracy' in its statement of the right to political participation. Citizens enjoy the right under para. 1:

> a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

[49] This Comment draws on a section of a seminar paper at Harvard Law School by A. James Vázquez-Azpiri, The Determinacy of the Democratic Entitlement in the Inter-American System, May 3, 1995.

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters. . . .

This provision is made non-derogable 'in time of war, public danger, or other emergency' by Article 27. Contrast the analogous Article 25 of the ICCPR, which does not figure in the list of non-derogable provisions in that instrument that is set forth in ICCPR Article 4.

Article 29(c) of the Convention, a provision dealing with interpretation of the instrument, provides that no Convention provision shall be interpreted as precluding other rights that are 'derived from representative democracy as a form of government.'

FINAL REPORT ON CASES 9768, 9780 AND 9828 OF MEXICO

Annual Report of the Inter-American Commission on Human Rights 1989–90 (1990), at 98.

[These cases before the Commission involved electoral processes in two Mexican states in 1985–86. The petitioners belonged to the National Action Party (PAN). They claimed that members of the ruling Institutional Revolutionary Party (PRI) committed fraud in the elections, including forgeries of voter rolls, cancellation of polling place, stuffing of ballot boxes, and the use of government-controlled police and the military on election day. As a consequence, petitioners alleged violations of their free exercise of political rights set forth in Article 23 of the American Convention.

The Mexican Government argued on several related grounds that the Commission lacked competence to consider these cases. (1) Under federal and state constitutions in Mexico, rulings of domestic electoral bodies are 'final' or 'irrevocable' and thus cannot be subjected to international review. (2) If electoral processes were subjected to international jurisdiction, 'a State would cease to be sovereign.' (3) An adverse finding by the Commission would infringe upon the political autonomy of the Mexican state and violate the principle of the self-determination of peoples. (4) The American Convention did not limit 'the sovereign powers of the States to elect their political bodies,' and when it ratified the Convention, Mexico did not imagine that an international body could review elections of political bodies.

Excerpts from the Commission's Final Report follow:]

40. It is important to point out that Article 27, paragraph 2, of the American Convention, referring to the suspension of guarantees 'In case of war, public danger or any other emergency that threatens the independence or security of the State party . . . ,' does not authorize the suspension of political rights.

41. Hemispheric legal discourse has insisted, for its part, on the existence of

a direct relationship between the exercise of political rights thus defined and the concept of representative democracy as a form of the organization of the State, which at the same time presupposes the observance of other basic human rights. . . .

. . .

44. In short, the exercise of political rights is an essential element of representative democracy, which also presupposes the observance of other human rights. Furthermore, the protection of those civil and political rights, within the framework of representative democracy, also implies the existence of an institutional control of the acts of the branches of government, as well as the supremacy of the law.

45. Since popular will is the basis for the authority of government, according to the terms of the Universal Declaration, it is consistent with a method for naming public officials through elections. Both the Universal Declaration and the American Declaration, the International Covenant on Civil and Political Rights and the American Convention on Human Rights coincide in that elections must have certain specific characteristics: they must be 'authentic' ('genuine' in the American Declaration), 'periodic', 'universal' and be executed in a manner that preserves the freedom of expression of the will of the voter.

. . .

47. The act of electing representatives must be 'authentic,' in the sense stipulated by the American Convention, implying that there must be some consistency between the will of the voters and the result of the election. In the negative sense, the characteristic implies an absence of coercion which distorts the will of the citizens.

48. The different pronouncements which the Inter-American Commission on Human Rights has made on the subject, and which will be presented below, show that the authenticity of elections covers two different categories of phenomena: on one hand, those referring to the general conditions in which the electoral process is carried out and, on the other hand, phenomena linked to the legal and institutional system that organizes elections and which implements the activities linked to the electoral act, that is, everything related in an immediate and direct way to the casting of the vote.

49. As to the *general conditions* in which the electoral contest takes place. from the concrete situations considered by the Commission we can deduce that they must allow the different political groups to participate in the electoral process under equal conditions, that is, that they all have similar basic conditions for conducting their campaign. . . .

. . .

57. With respect to Chile, in its 1987–1988 Annual Report, the Inter-American Commission noted that the mature and reasoned exercise of the

right to vote during the 1988 plebiscite demanded a series of conditions in effect for a sufficiently long period before the aforementioned electoral act. Those conditions were the lifting of the states of exception, a sufficient number of registered voters, equitable access by the different political positions to communications media and the absence of any form of pressure on voters (page 306).

58. After verifying the existence of the first two conditions, the Commission analyzes the situation of the communications media to point out that:

> The presentation makes it possible to draw the conclusion that access to communications media, during the period covered by the present Annual Report and with reference to the plebiscite's campaign, has been characterized by a disproportionate presence of the government, which has used all the resources at its disposal to promote messages and images that favor its position in the next plebiscite. To that, numerous restrictions, legal and *de facto*, must be added, those affecting independent organs of expression and journalists and political leaders. Also, it must be pointed out that the authorization to broadcast political programs constitutes progress that, nevertheless, does not compensate the unequal access to communications media derived from the aforementioned circumstances (pages 307–308).

. . .

62. Another aspect linked to the authenticity of elections is the *organization of the electoral process* and the actual casting of votes. . . .

63. [In its 1978 report on El Salvador the Commission noted:] There is a generalized skepticism on the part of citizens with regard to the right to vote and participation in government. In particular, opposition political parties go as far as doubting the possibility of having pure and free elections, not only in the light of experiences during recent elections, but also with respect to the structure of the electoral system and the obstacles which parties face to organize in the interior of the country. Because of all this, the Commission is of the opinion that electoral rights are not effective in the present circumstances.

. . .

65. In the Seventh Report on the Situation of Human Rights in Cuba, in 1983, the Commission deems that one of the elements that determines the limited political participation of the population in important matters is the result of electoral mechanisms and control exercised over it by the Government and the Cuban Communist Party. After analyzing the principal characteristics of the Cuban electoral system, it points out as a 'counterproductive' element the preponderance of that political party, whose leaders intervene 'in a decisive manner in the operation of mechanisms to select candidates to occupy free elective offices' (pages 44, 45, and 48).

. . .

72. With respect to the exercise of the right to freedom of expression, the Commission has considered the manner in which the government uses its power both for disseminating messages in its favor as well as restricting the possibility of the opposition to broadcast its message. . . .

73. With respect to the freedom of assembly, the experience of the Commission has led it to examine the restrictions of this right resulting from states of exception or other legal restrictions (police permits, for example) or the use of indirect control such as the obligatory participation of public employees in demonstrations.

74. An element of special importance with respect to the general conditions in which electoral processes are conducted, are the activities of groups informally linked to one of the participating parties—usually the government party—who, through acts of violence, tend to intimidate those who oppose them. . . .

75. As to specific features of the organization of elections, the Commission has referred to the laws that regulate them with the aim of determining whether those laws guarantee both the adequate casting of the vote, as well as their correct tally, underscoring the powers vested in those bodies entrusted with implementing the activities of the electoral process and of monitoring both the implementation as well as the results. The institutional system, therefore, has been thoroughly examined by the Commission.

. . .

77. In this regard, the Commission has examined aspects of practical operations such as electoral rolls and registration requirements; the composition of polling stations; the composition of the electoral tribunal and its powers, and the existence of understandable ballots, devoid of any influence on voters.

. . .

81. The Commission considers that the act of ratifying the American Convention presupposes acceptance of the obligation of not only respecting the observance of rights and freedoms recognized in it, but also guaranteeing their existence and the exercise of all of them. . . . [The Commission then cites with approval passages from the *Velásquez Rodríguez* decision, p. 650, *supra*, expounding states' obligations under Articles 1 and 2 of the Convention to respect and guarantee the recognized rights and, pursuant thereto, 'to organize all the State apparatus and, in general, all the structures through which the exercise of public power is manifested, in such a manner that they are able to legally insure the free and full exercise of human rights.' The Commission applied those statements of the Court in the instant case to Mexico's obligations to guarantee rights under Article 23.]

. . .

84. . . . [When Mexico] contracted the obligations derived from the Convention, it also accepted that the Inter-American Commission exercise the

functions and attributions conferred by the Convention: no reservations or limitations were recorded in the instruments deposited when the Convention was ratified.

. . .

86. [In relation to the Government's characterization of the right to legitimate elections as a 'progressively achievable right'] several observations are in order. First of all, it should be pointed out that in order for this interpretive distinction between individual rights of immediate enforceability (the right to vote and to be elected) and collective rights to be developed progressively (the right to elections with particular characteristics) to have validity in the cases under consideration, it would have been necessary for Mexico, at one time or another, to have advanced this interpretation of the article and to have stated this distinction unequivocally.

87. No reference to such a distinction can be found in [any Mexican Government document]. . . .

88. From the normative point of view, the structure of Article 23.1.b makes reference to certain features that should be present in order for the right to be recognized to be valid in practice. Indeed, any mention of the right to vote and to be elected would be mere rhetoric if unaccompanied by a precisely described set of characteristics that the elections are required to meet. . . .

89. The [Mexican] comments also contain the argument that '. . . the need for the elections to be legitimate imposes upon the State an obligation to act: To progressively develop, in accordance with circumstances and conditions in each country, the guarantee that the voters may freely express their will.' This argument would condition the existence of human rights on 'the circumstances and situation of each country' leaving the whole legal system in a precarious state.

90. With respect to the argument contained in the Mexican Government's comments which holds that any opinion issued by the Commission on an electoral process on the basis of individual complaints constitutes a violation of the principle of nonintervention, it should be stated here once again that the Mexican State, by virtue of having signed and ratified the Convention, has consented to allow certain aspects of its internal jurisdiction to be a subject of judgments on the part of the organs instituted to protect the rights and guarantees recognized by the Convention. If this is true whenever a State signs any international instrument, it is even truer when the instrument is a treaty that recognizes the inalienable rights of man, which, antedate and are paramount over those of the State.

91. Moreover, as stated in Article 18 of the OAS Charter, the principle of nonintervention is a rule of conduct that governs the acts of States or groups of States. . . . The Inter-American Juridical Committee, in its 'Draft Instrument' on cases of violations of the principle of nonintervention (1972), indicated that one of the basic criteria followed preparing it was that 'only States can be subjects of intervention.'

. . .

93. The principle of nonintervention is therefore linked to the right of peoples to self-determination and independence and is described as a principle to be practiced in suitable harmony with human rights and fundamental freedoms. This important interrelation of principles of international law is formalized as a rule of law in Article 16 of the OAS Charter, which reads as follows:

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

94. According to this rule, the right of the State to develop its internal life freely has a counterpart in its obligation to respect the rights of individuals. And in inter-American law these rights are formally recognized in the American Convention on Human Rights. The correct interpretation of the principle of nonintervention is, therefore, one based on protecting the right of States to self-determination provided that right is exercised in a manner consistent with respect for the rights of individuals.

95. The above leads to the conclusion that the Commission, based on its regulatory instruments, is empowered to examine and evaluate the degree to which the internal legislation of the State party guarantees or protects the rights stipulated in the Convention and their adequate exercise and, obviously, among these, political rights. The IACHR is also empowered to verify, with respect to these rights, if the holding of periodic, authentic elections, with universal, equal, and secret suffrage takes place, within the framework of the necessary guarantees so that the results represent the popular will, including the possibility that the voters could, if necessary, effectively appeal against an electoral process that they consider fraudulent, defective, and irregular or that ignores the 'right to access, under general conditions of equality, to the public functions of their country.'

. . .

Issues in this case

99. The three denunciations hold that the elections held were not authentic because they did not adequately represent the popular [will]. As for the specific allegations, the Commission has decided to refrain from making any reference to the *de facto* situations alleged in these cases because the validity of some of the allegations would have to rest on a presence of the Commission during the electoral campaign and at the time of the voting. To this should be added the fact that the Commission did not engage in any exhaustive monitoring of the situation in Mexico, as [it] had done in certain cases in which it had issued judgments on electoral processes and even made inspection visits to some of the countries concerned. Accordingly, it neither accepts nor denies the veracity of the facts as alleged. This precludes the possibility that the Commission

comment on the origin of the mandate of the officials chosen in these elections. At present, this is also the intention of the claimants.

100. In relation with the internal remedies and guarantees in Mexico, the matter to be examined is whether Mexican law offers adequate means or a simple and quick remedy or of 'any other effective remedy before competent judges or independent and impartial courts' that protect those who petition against 'acts that violate their fundamental rights,' as is the case with political rights. The Commission has been able to perceive that no such remedy [exists] in Mexico.

101. In view of the aforementioned . . . the Commission deems it advisable to remind the Government of Mexico of its duty to adopt measures of internal law, in accordance with its constitutional procedures and the provisions of the Convention, whether legislative or of another character, necessary to make effective the rights and liberties which the Convention recognizes.

102. . . . [T]he Commission . . . has been informed that there is underway an active process of reform of the electoral laws. The Commission hopes that these reforms will lead to the adoption of standards that will adequately protect the exercise of political rights and create a rapid and effective process assuring the protection of the same. The Commission places itself at the disposal of the Government of Mexico to cooperate with it . . . [and] requests . . . information relating to the electoral reform process currently underway in accordance with Article 43 of the American Convention on Human Rights.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 1990–91

(1991), at 514.

[This Annual Report of the IACHR included a section examining 'areas in which steps need to be taken' toward full observance of the human rights recognized in the American Declaration and the American Convention. Part III of that section is entitled 'Human Rights, Political Rights and Representative Democracy in the Inter-American System.' Excerpts from Part III follow.]

Human rights, political rights and representative democracy are concepts whose interrelationship has been repeatedly reasserted by the inter-American community. There have been numerous declarations and international commitments made by the American states. The Inter-American Commission on Human Rights believed this was a fitting time to summarize the most important milestones in that regard: . . .

. . .

1. *Representative democracy and human rights in the inter-American system*

Later, the postulate of the relationship between representative democracy and human rights was further refined in the Declaration of Santiago, adopted in 1959 by the Fifth Meeting of Consultation of Ministers of Foreign Affairs [of the OAS]. . . .

1. The principle of the rule of law should be assured by the separation of powers, and by the control of the legality of governmental acts by competent organs of the state.

. . .

4. The governments of the American states should maintain a system of freedom for the individual and of social justice based on respect for fundamental human rights.

. . .

7. Freedom of the press, radio, and television, and, in general, freedom of information and expression, are essential conditions for the existence of a democratic regime.

. . .

For its part, the General Assembly of the Organization has on numerous occasions articulated the relationship between representative democracy and human rights, emphasizing the need for political rights to be exercised so as to elect government authorities. And so, it has recommended ' . . . to the member states that have not yet done so that they reestablish or perfect the democratic system of government. . . .'

. . .

The last of the General Assembly resolutions that should be cited is AG/RES. 890 (XVII-0/87), wherein it decides:

> To reiterate to those governments that have not yet reinstated the representative democratic form of government that it is urgently necessary to implement the pertinent institutional machinery to restore such a system in the shortest possible time, through free and open elections held by secret ballot, since democracy is the best guarantee of the full exercise of human rights and is the firm foundation of the solidarity among the states of the hemisphere.

. . .

The Commission has noted that it is no coincidence that the laws drafted in this hemisphere have emphasized the existence of a direct relationship between the exercise of political rights so defined and the concept of democracy as a form of State organization, which in turn presupposes the observance of other fundamental human rights. . . .

Moreover, the observance of these rights and freedoms calls for a legal and institutional order wherein the law take precedence over the will of the governing and where certain institutions exercise control over others so as to preserve the integrity of the expression of the will of the people—a constitutional state or a state in which the rule of law prevails.

On numerous occasions the Commission has made reference to several aspects associated with the exercise of political rights in a representative democracy and their relationship to the other fundamental rights of the individual. For the sake of brevity, only those texts that best illustrate this point will be cited. And so, the Inter-American Commission has said the following in this regard:

. . .

> The right to political participation leaves room for a wide variety of forms of government; there are many constitutional alternatives as regards the degree of centralization of the powers of the state or the election and attributes of the organs responsible for the exercise of those powers. However, a democratic framework is an essential element for establishment of a political society where human values can be fully realized.
>
> The right to political participation makes possible the right to organize parties and political associations, which through open discussion and ideological struggle, can improve the social level and economic circumstances of the masses and prevent a monopoly on power by any one group or individual. At the same time it can be said that democracy is a unifying link among the nations of this hemisphere. (Annual Report of the IACHR, 1979–80, p. 151).

. . .

> In this context, governments have, in the face of political rights and the right to political participation, the obligation to permit and guarantee: the organization of all political parties and other associations, unless they are constituted to violate human rights; open debate of the principal themes of socio-economic development; the celebration of general and free elections with all the necessary guarantees so that the results represent the popular will.
>
> As demonstrated by historical experience, the denial of political rights or the alteration of the popular will may lead to a situation of violence. (Annual Report of the IACHR, 1980–81, pp. 122–123).
>
> The analysis of the human rights situation in the States to which the Commission has made reference in the foregoing chapter, as well as in others where the human rights situation has been considered by the Commission in recent years, enables the Commission to affirm that only by means of the effective exercise of representative democracy can the observance of human rights be fully guaranteed.
>
> It is not a question merely, of pointing out the organic relation that exists between representative democracy and human rights; which is manifest in the Charter of the OAS and other instruments of the inter-American system. The Commission's factual experience has been that serious human rights violations that have occurred or that are occurring in some countries of the Americas are primarily the result of the lack of political participation on the part of the citizenry, which is denied by the

> authorities in power. The resistence of these authorities as regards taking the action necessary to reestablish representative democracy has increased the tyranny, on the one hand, and led to serious social strife, on the other. The result has been that both the government and the more extreme opposition sectors have shown a preference for the use of violence as the sole means of resolving conflicts in the face of a lack of peaceful and rational options.
>
> This experience confirms, therefore, the authentic social peace and respect for human rights can only be found in a democratic system. It is the only system that allows for the harmonious interaction of different political tendencies and within which, by means of the inter institutional equilibrium it establishes, the necessary controls can be invoked to correct errors or abuses by the authorities. (Annual Report of the IACHR, 1985–1986, p. 191).

Finally, in its 1987 Report on the Situation of Human Rights in Paraguay, after analyzing the most relevant legal texts produced in the hemisphere, the Commission [stated]. . . .

. . .

> Exercise of political rights is, in turn, an essential factor in the democratic system of government, which is also characterized by the presence of an institutional system of checks on the exercise of power, the existence of ample freedom of expression, association and meeting; and acceptance of a pluralism that would prevent the use of political proscription as an instrument of power.
>
> This hemispheric vision of the exercise of political rights within the context of a democratic system of government is completed by the requisite development and promotion of economic, social and cultural rights. Without them, the exercise of political rights is severely limited and the very permanence of the democratic regime is seriously threatened.

In short, for the Inter-American Commission on Human Rights the exercise of political rights is an essential ingredient of a representative democracy and presupposes the observance of other human rights as well; the protection of those civil and political rights in a representative democracy also implies the existence of some institutional control over the actions of the powers of the State; it also presupposes the supremacy of the law. It might be well to determine the scope of the definition of the political rights contained in Article 23 of the American Convention on Human Rights, drawing upon earlier statements made by the Inter-American Commission on Human Rights.

. . .

QUESTIONS

1. In what respects, if any, does the Final Report on the Mexican cases elucidate the requirements of democratic government beyond the specific requirements of elections in Article 23(1)(b)?

2. Are the Commission's reasons for not taking a decision on the facts of the case (para. 99) persuasive? What alternative approaches might have been adopted?

3. Can you identify a coherent conception of sovereignty or domestic jurisdiction that the Commission develops to respond to Mexico's challenges to its competence? What content does the Commission give to the broad principle of non-interference in states' domestic affairs?

4. In the light of these cases, is there any aspect of a state's electoral system with which the Commission should not, from either a legal or policy perspective, concern itself? If so, which aspects, and why?

5. Does the 1990–91 Annual Report present a 'theory' of democracy that requires a state to comply with more requirements than periodic elections? If so, what are the elements of that theory, and are all such elements part of the human rights corpus?

6. Recall the suggestion in Steiner that the right to political participation be viewed in some respects as programmatic, thus subject to progressive realization. Would that suggestion have been appropriate for the Commission to incorporate into its 1990–91 Annual Report as a way of defining states' duties with respect to democratic governance? Would it have been appropriate for the Commission in its Final Report on the Mexican cases to have viewed Mexico as in compliance with the American Convention because it was in the process of gradual realization of the right to political participation? Note the Mexican argument in para. 86 of the Final Report.

ADDITIONAL READING

Cecilia Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System* (1988); Thomas Buergenthal, Norris and Shelton, *Protecting Human Rights in the Americas: Selected Problems* (3rd ed., 1990); Scott Davidson, *The Inter-American Court of Human Rights* (1992); Claudio Grossman, *Proposals to Strengthen the Inter-American System of Protection of Human Rights*, 32 Germ. Y.B. Int'l L. 264 (1990); Dinah Shelton, *Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and the Inter-American Court of Human Rights*, 3 Am. U. J. Int'l L. & Policy 323 (1988); Thomas Buergenthal, *The Inter-American System for the*

Protection of Human Rights, in Theodor Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* 439 (1984); Christina Cerna, *The Structure and Functioning of the Inter-American Court of Human Rights* (1979–1992), 63 Brit. Y.B. Int'l L. 135 (1992); Tom Farer, *The Grand Strategy of the United States in Latin America* (1988); Tom Farer, *Finding the Facts: The Procedures of the Inter-American Commission on Human Rights of the Organization of American States*, in Richard Lillich (ed.), *Fact-Finding Before International Tribunals* 275 (1991); Stephen Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala*, 25 Inter-American Law Rev. 393 (1994); Scott Davidson, *Remedies for Violations of the American Convention on Human Rights*, 44 Int'l & Comp. L. Q. 405 (1995).

D. THE AFRICAN SYSTEM: RIGHTS AND DUTIES

The newest, the least developed or effective, the most distinctive and the most controversial of the regional human rights regimes involves African states. In 1981 the Assembly of Heads of States and Government of the Organization of African Unity adopted the African Charter on Human and Peoples' Rights. It entered into force in 1986. As of January 1995, 49 African states were parties.

We describe the African human rights system and Charter briefly both because it has had less than a decade of experience and because its sole implementing organ, the African Commission on Human and Peoples' Rights, has few powers and has been hesitant in exercising or creatively interpreting and developing them. For these reasons the African system has not yet yielded anywhere near the same amount of information and 'output' of recommendations or decisions—state reports and reactions thereto, communications (complaints) from individuals and state responses thereto, studies of 'situations' or investigations of particular violations—as have the other two regional regimes, let alone the UN system. Thus far, the states parties and the weak, hesitant Commission have taken few forceful or persuasive actions to attempt to curb serious human rights violations.

Section D, like the two previous sections, emphasizes one significant feature of the regional system under examination, within the framework of a general description of the system. In this instance, the feature is the distinctive attention that the African system gives to duties as well as rights. (Recall that the American Declaration on the Rights and Duties of Man, p. 642, *supra*, includes ten articles on individual duties. The American Convention on Human Rights does not give special attention to duties.) This distinctive emphasis is obvious on the face of the African Charter, even before we have seen any elaboration or application of the provisions on duties by the African Commission. Examination of these provisions also serves to develop themes

about rights and their relation to duties that were introduced in Chapter 4's broad discussion of cultural relativism, which indeed included African materials. See pp. 184 and 240, *supra*.

The description and analysis of the African human rights system begin with a brief description of the Organization of African Unity. We continue with the Charter's norms, and conclude with an evaluation of the work of the African Commission. You should now become familiar with the provisions of the Charter set forth in the Documents Annex.

COMMENT ON THE ORGANIZATION OF AFRICAN UNITY

The OAU is the official regional body of all African states. It was inspired by the anti-colonial struggles of the late 1950s, and was primarily dedicated to the eradication of colonialism. The emergent African states created through it a political bloc to facilitate intra-African relations and to forge a regional approach to Africa's relationships with external powers. The OAU's Charter (47 U.N.T.S. 39, reprinted in 2 Int. Leg. Mat. 766) was adopted in 1963 by a conference of Heads of State and Government. Today, virtually all African states are members of the OAU.

Unlike the UN Charter, that of the OAU makes no provision for the enforcement of its principles. It emphasizes cooperation among member states and peaceful settlement of disputes, and includes among its purposes in Article II(1) promotion of the 'unity and solidarity' of African states, as well as defense of 'their sovereignty, their territorial integrity and independence.' This inviolability of territorial borders, expressed through the principle of non-interference in the internal affairs of member states, has been one of the OAU's central creeds.

This creed has contributed to the reluctance of member states to promote human rights aggressively. The most visible failure in this regard has been the reluctance of member states to criticize one another about human rights violations. A prominent case in point was the failure of most African states, the single exception being Tanzania, to denounce the abusive regime of Ugandan dictator Idi Amin.

The single prominent exception with respect to human rights policy has been the adoption by the OAU in 1981 of the African Charter on Human and Peoples' Rights. The formal, legal basis for that act is found in Article II(1)(b) of the OAU Charter, which requires member states to 'coordinate and intensify their collaboration and efforts to achieve a better life for the peoples of Africa,' and Article II(1)(e), which asks member states to 'promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.'

The Comment at p. 699, *infra*, describes some relationships between the African Commission on Human and Peoples' Rights and the OAU. In con-

sidering the significance of those relationships, bear in mind the political character of the OAU as sketched above.

COMMENT ON COMPARISONS BETWEEN THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS AND OTHER HUMAN RIGHTS INSTRUMENTS

Even the Charter's Preamble suggests some of the striking differences from other human rights instruments, universal and regional. The key theme is regional cultural distinctiveness, as in '[t]aking into consideration the virtues of [African states'] historical tradition and the values of African civilization. . . .'

Rights

Consider first Ch. 1 of Part I, dealing with 'human and peoples' rights.'

1. Compare the important opening provisions (Articles 1 and 2) of the Charter on the obligations of states with the analogous provisions in Article 2 of the ICCPR.

2. Several of the rights are expressed in ways that differ in wording from equivalent provisions in other instruments but that lack any distinctive qualification and amount in the large to a similar conception. See, for example, Article 4.

3. Many rights are expressed in significantly different ways from the equivalent provisions in, say, the ICCPR. Compare, for example, Article 7 of the Charter on criminal procedure with Articles 14 and 15 of the ICCPR; and Article 13 of the Charter on political participation with Article 25 of the ICCPR. Note the respects in which Article 25 is more specific.

4. The protection of the property right in Article 14 recalls Article 17 of the UDHR but finds no equivalent in the ICCPR. The European Convention as first drafted included no such provision, but its First Protocol extends protection to the property right.

5. Some provisions state familiar norms, but illustrate them or make them specific in ways that recall Africa's experience with the Western slave trade and with colonization. They bear out the phrase in the Preamble quoted above. See, for example, Articles 5, 19 and 20. Other provisions refer especially to abuses in Africa's own post-colonial history, such as Article 12(5) that recalls Uganda's expulsion of its citizens of Asian descent.

6. A number of provisions draw attention to the attempts of the states to reconcile humane treatment of individuals with their interests in territorial integrity and security. See for example, Article 23(2).

7. Compare the characteristic limitations on rights in the Charter with those in the ICCPR. See, for example, Articles 18(3) and 22(2) of the ICCPR.

Compare, say, Article 6 of the Charter providing the right to liberty 'except for reasons and conditions previously laid down by law,' Article 8 providing that freedom of conscience and religion are 'subject to law and order,' and Article 10 declaring the right to free association 'provided that [the individual] abides by the law.' See also Articles 11 and 12(2).

8. Note that the Charter has no provision for derogation of rights in situations of national emergency, equivalent to Article 4 of the ICCPR.

9.The Charter includes economic–social rights as in Articles 15 and 16, but does not qualify these rights with respect to their progressive realization and resource constraints as does Article 2 of the International Covenant on Economic, Social and Cultural Rights.

10. The Charter includes several collective or peoples' rights, sometimes referred to as 'third-generation' human rights, in provisions like those in Articles 23 and 24 dealing with peoples' rights 'to national and international peace and security' and 'to a generally satisfactory environment favourable to their development.' The Charter's title itself signals this important feature.

Duties

Consider now the distinctive Chapter 2 of Part I, on 'duties.' To be sure, references to 'duties' are not alien to human rights instruments. Note, for example, Article 29 of the UDHR, to the effect that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible.' The preamble to the ICCPR observes that 'the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.' Similarly the preamble to the Charter states that 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.'

Nonetheless, the Charter is the first human rights treaty to include an enumeration of, to give forceful attention to, individuals' duties. In this respect, it goes well beyond the conventional notion that duties are correlative to rights, such as the obvious duties of states that are correlative (corresponding) to individual rights—for example, states' duties not to torture, or to provide a structure for political participation. It goes beyond declaring similar correlative duties of individuals—for example, the duty not to invade another individual's right to personal security. The Charter differs in defining duties that are not simply the 'other side' of individual rights, and that run from individuals to the state as well as to other groups and individuals.

QUESTIONS

Assume in the following questions that the African state involved has ratified the Charter, but (typically) has not incorporated it legislatively into its domestic legal system, so that individuals cannot invoke it in civil or criminal proceedings in domestic courts. The individual referred to in each question has been convicted of a crime under state law, and files a communication (complaint) with the African Commission protesting the conviction. How should the Commission decide the issues identified below?

1. Article 10 declares the individual's right to free association 'provided that he abides by the law.' Suppose that the law provides that associations must be registered to be legal. The government refuses to register companies and other associations committed to advocacy of change in the state's political structure. The state arrests and convicts an individual member of an unregistered company with such a goal. What arguments would you make to assert that the state has committed a violation by refusing to register the company, and by the criminal conviction?

2. Article 6 provides for the right to liberty and personal security. 'No one may be deprived of his freedom except for reasons previously laid down by law.' The law provides that persons suspected of disloyalty to the state may be summarily arrested and detained for six months before being charged with a crime. Your client has been so arrested and detained. You allege that the arrest and detention are illegal under the Charter. The government responds that the reasons for deprivation of freedom were 'previously laid down by law,' and thus there has been no violation. How do you respond?

COMMENT ON DUTIES AND THEIR IMPLICATIONS IN THE AFRICAN CHARTER

Depending on their interpretation and possible application within the African human rights regime, the duties declared in the Charter could constitute part of the deep structure of the society contemplated by that instrument. They could inform basic relationships between the individual on the one hand, and society and state on the other. They could resolve in a particular way the tension between the individual and the collective. They could stand more in contradiction than in harmony with the Charter's preceding elaboration of rights.

Note some of the vital phrases in Articles 27–29. Article 27 refers to duties towards one's 'family and society, the State and other legally recognized communities and the international community.' Rights are to be exercised with 'due regard to the rights of others, collective security, morality and common interest.'

The reach of Article 29 is striking. Note such phrases as the 'harmonious development of the family,' 'cohesion and respect,' 'serve the national community,' 'not to compromise the security of the state,' 'strengthen social and national solidarity,' 'strengthen positive African cultural values in [one's] relations with other members of the society,' and 'contribute to the best of [one's] abilities . . . to the promotion and achievement of African unity.'

This stress on duties recalls the materials in Chapter 4 exploring differences between rights-oriented and duty-oriented visions of social or political life, and related issues of cultural relativism. Our present discussion of the significance of duties in the African Charter involves these same themes. For example, the materials in Chapter 4 at pp. 180–87, *supra*, suggested links between a culture's duty-orientation, and ideals and traditions of community and solidarity. This theme of solidarity appears in the African Charter's discussion of rights. Article 10(2) protects individuals against being compelled 'to join an association,' but '[s]ubject to the obligation of solidarity provided for in Article 29'. Article 25 provides that states must 'promote and ensure through teaching, education and publication' respect for the rights declared and to assure that such rights 'as well as corresponding obligations and duties are understood.'

That is, depending on their interpretation and application, duties and ideals of solidarity may impinge in clear and serious ways on the Charter's definitions of rights themselves. Moreover, the Charter imposes individual duties that run not only to the state but also to different types of groups of communities within (or perhaps transcending) that state.

Consider some of the problems raised by these provisions about individual duties:

1. Sometimes what appear to be conventional terms of reference may bear plural meanings that affect the nature of the duty. For example, what definition applies to the word 'family' in Article 27—the nuclear or extended family? In the African context, one might think of the extended family. Nonetheless, the only specific reference to family relationships in the three articles on duties deals with parents and children (Article 29(1)).

Or how are we to understand 'society' in Article 27—as equivalent specifically to the nation state, or to prevailing social and cultural structures within the state? It is striking that the article does not mention or seem to include ethnic groups, for they are frequently not 'legally' recognized.

2. As in the other two articles on duties, the requirements put on the individual by Article 28 raise the question of whether, and by whom, these duties are to be enforced. Who or what institution is to give meaning and application to them, or provide general guidance for their performance? To the present, the African Commission has taken no steps toward interpretation or general elaboration. The question remains open whether the three articles are to constitute in any sense 'binding' and enforceable obligations.

3. The duties are of such breadth and so ambiguous in their connotations that a regime of serious enforcement without some degree of prior elaboration

is difficult to imagine. Consider, for example, Article 28's provision that non-discrimination is not simply a duty of the state, but individuals also must not discriminate against other individuals. The article does not list any forbidden grounds for discrimination. Nor does it on its face distinguish between discrimination in the so-called private and public spheres—that is, discrimination in personal social relationships, and in employment or housing. Compare the legislation in numerous countries, including federal and state jurisdictions in the United States, that forbids defined non-governmental actors such as employers or lessors to discriminate on stated grounds such as race or religion.

4. Article 29 raises a host of such issues, none more salient than the question whether it imposes on individuals a duty to uphold extant, traditional structures ranging from the family to the government. The critical terms seem to be 'harmonious,' 'cohesion,' 'community,' 'security,' 'social and national solidarity,' 'territorial integrity,' 'positive African cultural values,' 'moral well-being of society,' and last but not least, 'African unity.' How are these injunctions to be reconciled with the rights earlier declared, other than by giving great weight to the limitation clauses such as the phrase in Article 8, 'subject to law and order'?

QUESTIONS

1. Consider the questions that could arise about whether the Charter protects the advocacy of a radical reformer who seeks significant changes in gender relationships or in the nature of the family. How, for example, would one reconcile the provisions of Article 29 with Article 18, to the effect that the state should 'ensure the elimination of every discrimination against women'? How would you argue for the supremacy of Article 18?

2. What effect might Articles 27–29 have on the Charter's provisions for speech and association, the very conditions of effective political participation? How would you relate the limitations clauses in those earlier provisions to these articles on duties? As a member of the African Commission, how would you answer these questions?

3. Recall the provisions on individual duties in ten articles of the American Declaration on the Rights and Duties of Man, p. 642, *supra*. Do you find them fundamentally similar to or different from those in the African Charter? Illustrate.

4. Note that the African Charter lacks a provision similar to Article 5(1) of the ICCPR. Would you advocate amendment of the Charter to include such a provision? If so, what effect do you think it would have in shaping the understanding of the Charter's duties?

5. 'One can parse the African Charter, looking as it were for difficulties and inherent violations of universal human rights norms, looking for ways to criticize the prevalence of duties. One can also view it as an instrument that will be sensibly understood and interpreted, even while it seeks to preserve some small degree of the cultural distinctiveness systematically denied Africa by the West as the West invaded, colonized and manipulated Africa for its strategic values, and now penetrates Africa by trade and by imposing media conditions on national or international aid. The Charter should be seen as an affirmation of a modest degree of cultural relativism or particularism, the very occasion and reason for regional as well as universal human rights systems. That particularity speaks to the African tradition and constitutes a fundamental value in the entire human rights movement, namely the preservation of difference.' Comment.

6. 'Even if the provisions on duties are in some way given application and enforcement by the Commission, or indeed by state courts or governments, I do not see how they derogate seriously from fundamental universal human rights. Could this assertion of cultural relativism justify, for example, torture, or a sham criminal trial, or raw governmental discrimination on religious or ethnic grounds? Clearly not. The challenge to the human rights movement of the Charter's stress on duties is much overstated.' Comment.

7. 'Whatever the African Charter says, African states are subject like all states to the universal human rights system expressed through the UDHR and the two basic Covenants. If there is a conflict, if this regional regime requires or permits state conduct that universal norms prohibit, or prohibits state conduct that universal norms require, those norms must prevail. Else the human rights movement collapses into a hopeless regional anarchy, and we encourage the development of additional regional systems that will simply flout universal imperatives by asserting their own distinctive norms.' Comment.

COMMENTATORS' EVALUATIONS OF THE CHARTER'S DUTIES

Note the following excerpts from writings of four authors about the substantive rights and duties set forth in the Charter.

Wolfgang Benedek, Peoples' Rights and Individuals' Duties as Special Features of the African Charter on Human and Peoples' Rights

in Philip Kunig et al., *Regional Protection of Human Rights by International Law* 59, 63 (1985).

The human rights approach to be found in traditional African societies is characterized by a permanent dialectical relationship between the individual and the group, which fits neither into the individualistic nor the collectivistic concept of human rights. . . . It is inherent in the African community-oriented approach towards human rights as discussed above that rights and duties form a common whole. However, different from the marxist concept of human rights of Eastern-European states this does not mean symmetrical or reciprocal rights and obligations between the individual and the state. . . . [T]here is no doubt that the concept of duties in the African Charter reflects an original approach which tries to accommodate both the values of traditional African societies and the needs of modern African states. . . . [T]here is a danger that states could try to use duties to derogate certain human rights. . . . Misuse of the duty provision is further facilitated by the very general and even vague wording of this chapter. . . . [I]t would be important to clarify and ensure that the rights of the African Charter can't be defeated by the provisions on duties of the Charter. . . . In conclusion, the duties in the African Charter appear to be more of a programmatic character. Some spell out a general philosophy and principles of behavior rather than operational legal concepts.

Richard Gittelman, The Banjul Charter on Human and Peoples' Rights: A Legal Analysis

in Claude Welch and Ronald Meltzer (eds.), *Human Rights and Development in Africa* 152 (1984), at 154.

The African [Charter] reference [to duties] imposes an obligation upon the individual not only toward other individuals but also toward the State of which he is a citizen. The notion of individual responsibility to the community is firmly ingrained in African tradition and is therefore consistent with the historical traditions and values of African civilization upon which the Charter relied. The inclusion of this far-reaching clause [on duties, in the Charter's preamble] has roots, however, in factors other than mere tradition and, to a large extent, explains the various tensions throughout the Charter. The Socialist States such as Mozambique and Ethiopia had a difficult time reconciling traditional human rights conventions with socialist philosophy. The notion of 'individual' in a socialist State differs markedly from the notion in a capitalist State. As a result, to ensure the eventual adoption of the Charter by all States, the drafters in Dakar stated that if the individual is to have rights

'recognized' by the State, he also must have obligations flowing back to the State.

Asmarom Legesse, Human Rights in African Political Culture

in Kenneth Thompson (ed.), *The Moral Imperatives of Human Rights* 123 (1980), at 124.

In the liberal democracies of the Western world the ultimate repository of rights is the human person. The individual is held in a virtually sacralized position. There is a perpetual, and in our view obsessive, concern with the dignity of the individual, his worth, personal autonomy, and property. . . . Nothing is more despicable to the Westerner than societies that force individuals to be lost in the 'faceless crowd.' No aspect of Western civilization makes an African more uncomfortable than the concept of the sacralized individual whose private wars against society are celebrated. If we turn the situation around and view it from an African perspective, the individual who is fighting private wars against his society is no hero. . . . [T]he very idea of advertising cultural values by personifying them in the lives of individuals is a very strange idiom to an African. . . . The heart of African culture is egalitarian and antiheroic in character. . . . Most African cultures, whether they are formally egalitarian or hierarchical, have mechanisms of distributive justice that ensure that individuals do not deviate so far from the norm that they can overwhelm the society. This is the factor that was widespread throughout precolonial Africa and served as the cornerstone of African morality.

Makau wa Mutua, The African Human Rights System in a Comparative Perspective

3 Rev. Afr. Comm'n Hum. & Peo. Rts. 5, 8 (1993).

[T]he Charter incorrectly assumes the existence of permanent and static 'African culture' that it has the task of preserving. It fails to recognize that cultural values are socially and historically constructed. Cultures, and African ones are no exception, express values in the context of continuous and permanent social and political struggles over resources and power relations in a given society. Cultural values are not inanimate artifacts or sacrosanct ideals, frozen in time. . . . The Charter's underlying theme, that of preserving the state and 'traditional' structures through the 'duties' that it imposes, requires, in essence, the domination and subjugation of the individual to the authoritarian state.

COMMENT ON INSTITUTIONAL IMPLEMENTATION: THE AFRICAN COMMISSION

Basic Functions of the Commission

The eleven members of the Commission, elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by parties to the Charter, are to serve (Article 31) 'in their personal capacity.' Article 45 defines the mandate or functions of the Commission to be (1) to 'promote Human and Peoples' Rights,' (2) to 'ensure the protection of human and peoples' rights' under conditions set by the Charter, (3) to 'interpret all the provisions of the Charter' when so requested by states or OAU institutions, and (4) to perform other tasks that may be committed to it by the Assembly. So the three dominant functions appear to be promotion, ensuring protection, and interpretation.

The Commission's task of 'promotion' includes (Article 45) undertaking 'studies and researches on African problems in the field of human and peoples' rights,' as well as organizing seminars and conferences, disseminating information, encouraging 'local institutions concerned with human and peoples' rights,' giving its views or making recommendations to Governments, and formulating principles and rules 'aimed at solving legal problems related to human and peoples' rights . . . upon which African Governments may base their legislation.' Article 46 states tersely that the Commission 'may resort to any appropriate method of investigation.'

Communications and Reports

Communications (complaints) and state reports are the most significant functions or processes involving the Commission that are identified in the Charter. Thus far, the procedures in the Charter involving communications by a state party concerning another state party have not been used.

Individuals and national and international institutions can also send communications to the Commission, as provided in Articles 55–59. These provisions recall, but differ significantly from, the First Optional Protocol of the ICCPR examined at pp. 535–52, *supra*. Note the report of the Commission referred to in Article 58 that indicates one possible consequence of a series of communications revealing 'serious or massive violations.' What follows from such a report is not stated in the Charter, but depends on the Assembly's discretion and inherent powers. All 'measures taken' involving a communication are to remain confidential (Article 59) until the Assembly decides otherwise.

The Charter refers tersely to states' reports. Under Article 62, each 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' under the Charter. Compare the more elaborate provisions in Article 40 of the ICCPR

about the role of the ICCPR Committee in reviewing states' reports under the covenant.

The Commission's Performance of its Functions

Article 45 talks of promotion, protection and interpretation. In general, the 'Charter gives pre-eminence to the promotion of human rights and vests a wide range of responsibility on the Commission. In this regard, it has functions that are not directly vested in the European and American Commission.'[50] Several steps have been taken to implement the task of promotion—for example, resolutions by the Commission to the effect that states should include the teaching of human rights at all levels of the educational curricula, should integrate the Charter's provisions into national laws, and should establish committees on human rights.

Although there is some irony in the observation that the Commission, addressing a continent rife with state-imposed abuses, should have promotion as its primary function, that concentration of energy makes some sense in view of Africa's large uneducated population that is ignorant of its rights or lacks organization and capacity for mobilization to vindicate them. Creating a 'rights awareness' could understandably be considered to be a primary function.

Even with respect to promotion, however, the Commission in its early years has not acted energetically in such a way as to maximize the effect of its activities under the Charter. It has not aggressively promoted rights consciousness and has taken few steps to publicize its work with and develop its relationship with struggling African human rights NGOs. It has, however, organized several seminars jointly with NGOs, over 150 of which have observer status with the Commission. It has not explored, for example, massive violations in certain states by undertaking 'studies and researches on African problems in the field of human and peoples' rights,' or done the maximum to 'disseminate information' about the Charter and any such studies (Article 45).

Moreover, in the long run, promotion alone will not be sufficient. This human rights regime governs states that have committed rampant violations, and that lack experience in—and established and respected institutions for—curbing the abuse of governmental power. Such a regime must depend on the effectiveness of institutional pressures for the protection of individuals, in order to achieve long-run change. The African system—in part though not exclusively through the work of the Commission—must raise the costs to states of violations through one or another of the sanctions with which other human rights regimes are familiar.

The 'protection' now offered by the Commission consists primarily of following the Charter's procedures for communications. Those procedures have

[50] U. O. Umozurike, The African Commission on Human and Peoples' Rights, 1 Rev. Afr. Comm. Hum. & Peo. Rts. 5, 8 (1991).

n used in a very cautious way. For example, the provision of Article 59 out the confidentiality of 'measures taken' involving communications had ng been rigorously followed, to the point of excluding the petitioners, .GOs, and even the state concerned from all proceedings, even though Article 6 appears to give the Commission some flexibility. In the words of Amnesty nternational:

> The Charter does not require that the entire procedure be confidential. Much of the Commission's activities in the consideration of communications under Article 55 could be routinely open to the public: the text of the communications, the replies of the governments, the presentation of evidence in open session and questioning of the parties. In addition, the African Commission could request the Assembly [of the OAU] to permit it to include information about 'measures taken' in its annual report.[51]

As of 1994, the Commission relaxed this notion of confidentiality. An annex to its Seventh Activity Report for the year 1993–94 included some information about communications that had been decided on the merits: the name of the author, the country complained against, the subject of the complaint, and the Commission's decision. The facts, however, are presented only in summary form.[52] In the sixteenth session of the Commission in 1994, procedures for communications were also changed. For example, two petitioners on communications made presentations to the Commission in closed meetings, but were free to divulge or publicize what happened.

> For the first time victims of human rights violations or their representatives came to defend their case before the Commission. Though [these] decisions are not yet made public, there is every indication that the Commission seriously and efficiently studies the cases and that the decisions taken were longer and more profound than ever. This shows a promising development in the jurisprudence of the Commission . . . .[53]

The procedures for periodic reports by states have been to some degree creatively developed by the Commission but remain underutilized. Article 45 does not include among the Commission's functions and powers the examination of such reports. Nonetheless, the Commission sought and received from the OAU the authority to study reports and make pertinent observations. It then adopted guidelines for states' submission of reports. But most reports that have been submitted (a large number of states are long past their deadlines for submission) generally refer tersely to formal laws while ignoring actual practice. They are not serious. State representatives often do not appear

[51] Amnesty International, Statement at the Eighth Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, Oct. 8, 1990, 1–2.

[52] Wolfgang Benedek, Human Rights News: Africa, 12 Neth. Q. Hum. Rts. 469 (1994).

[53] Astrid Danielsen and Gerd Oberleitner, Human Rights News: Africa, 13 Neth. Q. Hum. Rts. 83 (1995).

at the public sessions at which reports are discussed. Some way must be fo to make reporting more probing and to engage high state officials in t process, as well as to give greater publicity to the reports.

Consider the following comments in a description of the fifteenth Session c the Commission in 1994:[54]

> . . . Of the three State reports due to be examined at this session, not a single one could be considered, as no representatives of Benin and Cape Verde attended the session and only an incomplete delegation of Mozambique, not authorized to answer the Commission's questions, was present. . . . The anodyne, almost ritualistic appeal of the Commission [to states to submit their reports on time, or even belatedly] seems unlikely, in the absence of other pressures, to budge recalcitrant states. . . . States should not exercise an implicit veto power by refusing to submit reports or to attend meetings . . . . The Commission has the potential to examine reports, compare them with its own findings and other available information, and draw necessary conclusion even in states' absence—to prevent the reporting system from becoming a high-minded but totally ineffective means of promotion and protection.

QUESTIONS

1. 'Despite the limited powers granted by the Charter to the Commission, the Charter offers enough open-textured provisions for the Commission to proceed inventively through expansive interpretation of its terms. Articles 60 and 61 put this beyond doubt.' Do you agree? For example, what processes for investigations of a state or sanctions for violations that are now characteristic of the UN Commission on Human Rights might be adopted by the African Commission without amendment of the Charter?

2. Suppose that an individual in a state party to the Charter is injured—say, arbitrary arrest and imprisonment without trial pursuant to judgment of a military court, with harsh treatment before release. You are a member of a human rights NGO in that state and must advise the individual of possible processes under the Charter (a) to remedy the violations by providing relief to this individual victim, or (b) to attempt to prevent future similar violations. What is your advice?

3. 'What the African human rights system needs is a court. Then it could achieve the effectiveness of a regional system like the European that has relied so heavily and successfully on judicial review of state action.' Comment.

[54] Gerd Oberleitner and Claude Welch, Jr., Africa: 15th Session African Commission on Human and Peoples' Rights, 12 Neth. Q. Hum. Rts. 333 (1994).

4. How do you assess the African human rights system as a whole? Do you have ideas (realistically, taking account of political constraints) as to how it could be improved, either all at once or through implementing stages?

COMMENTATORS' EVALUATIONS OF THE EARLY YEARS OF THE COMMISSION'S WORK

There follow summaries of comments of several participants as published in: Fund for Peace, Proceedings of the Conference on the African Commission on Human and Peoples' Rights (1991).

Professor U. O. Umozurike, Chairman of the Commission (p. 10):

Responding to the more general reservation raised about the Commission's capacity for effectiveness given all the constraints under which it operates, Prof. Umozurike reminded participants of the timing and political context in which the Charter was drafted. In 1981, Africa . . . was a completely different place. The Charter was drafted so that it would be accepted by African states which means that it is not as strong a document in certain areas as it would be if it were drafted today. The Charter is, however, flexible, and, with the changing political environment, it can be reinterpreted in a more liberal fashion in the future. One vehicle for such liberal reinterpretation exists in the present Charter where the principles guiding its interpretation (article 60) make reference to other instruments of international human rights law . . . and the practices of the United Nations. . . .

Makau wa Mutua (p. 25):

Mr. Mutua . . . started by reporting that the Commission faces a crisis of legitimacy in Africa [stemming] first and foremost from the history of government in Africa. Africans have not seen government as an institution designed to advance their welfare. This was true of the colonial state and, sadly, the independent state as well. . . . Therefore, anything governmental is regarded with suspicion, including a region-wide human rights body created by governments. Mr. Mutua assured participants that he is enormously impressed with the commitment of the Commissioners as individuals, but stressed that the Commission must be seen not as a collection of individuals but as an institution with integrity. The institution suffers from the reputations of its founders—people like Mengistu, Barre, Doe, Mobutu and Moi. . . . Thus, when it comes to public perceptions, the burden of proof is with the

Commission. 'NGOs will only take the Commission seriously because of what it accomplishes—not attending seminars here and there but results!' . . . Human rights abuses in Africa must be denounced by Africans! Speaking out about human rights conditions would increase the Commission's visibility on the continent and bolster its credibility with African NGOs. . . . The Commission should [encourage] more NGOs to obtain observer status and attend its meetings. . . . [S]ome Commissioners are unaware even of human rights groups based in their own countries, let alone across their borders.

Ellen Johnson Sirleaf (p. 27):

Ms. Sirleaf was struck by three things about the Commission: it is generally unknown and invisible; it is regarded with suspicion by those who do know of it; and 'as seen from the eyes of a casual observer,' it is not performing. 'I don't know of any cases that you have resolved related to any of the major human rights problems recently affecting our continent.'

. . . [T]he Commission must disseminate information on its own existence and that of other human rights bodies and instruments. In order to become more effective and more visible, Ms. Sirleaf urged the Commission to identify select cases and 'engineer its involvement'—a theme seconded by numerous participants in later discussions. . . . Ms. Sirleaf urged the Commission to expand its membership to include women and young people. Since these two groups comprise a large percentage of abuse victims, she found their perspective essential to the effective functioning of the Commission. Ms. Sirleaf also repeated the plea to the Commission to familiarize itself with the range of African NGOs . . . . The Commission should contact these and lesser-known organizations and identify with them, thus legitimizing them in the eyes of their own governments.

NOTE

Under Charter Articles 41 and 44, the OAU is to provide staff and services necessary for the effective functioning of the Commission, and to provide for salaries of members within the OAU's regular budget.

In its Sixth Annual Activity Report 1992–1993, the Commission commented on its financial situation (p. 7):

> 20. Since the entry into force of the [Charter, the Commission] has suffered from a chronic lack of staff, resources and services necessary for the effective discharge of its functions. . . .
> 22. The Secretariat has only a skeleton staff and is not endowed with the basic facilities for the execution of certain basic functions such as producing documents on time.

ADDITIONAL READING

In addition to the readings cited in this chapter's text and footnotes, see Astrid Danielsen, *The State Reporting Procedure under the African Charter* (1994); Eileen MacCarthy-Arnolds et al., *Africa, Human Rights, and the Global System* (1994); Olusola Ojo and Amadu Sessay, *The OAU and Human Rights: Prospects for the 1980s and Beyond*, 8 Hum. Rts. Q. 89 (1994); and Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 Va. J. Int. L. 339 (1995).



PART D

STATES AS PROTECTORS AND ENFORCERS OF HUMAN RIGHTS

Part D completes the basic structure of this coursebook. We first examined in Part B the processes for the creation of international human rights norms and the basic categories of civil–political and economic–social rights. Our attention in Part C turned to the relations between norms and institutions, particularly to the significance of international institutions and processes for the development and enforcement of norms.

Those two parts gave primary attention to the international dimensions of the human rights movement. Of course, states—the creators of the norms, the designers and members of the institutions, the participants in the processes, as well as the primary duty-bearers under international human rights law—figured in these earlier materials. They appeared frequently as the violators, the defendants, the entities being monitored, investigated and reported on by intergovernmental and non-governmental organizations.

Part D shifts focus. Here we observe primarily the internal processes of the states themselves, particularly the decisions and acts of governments. Our perspective is that of the state rather than the international community. For the most part, we examine state action—executive, legislative, judicial—looking toward the observance and protection of human rights rather than action violating rights. In short, we here imagine states as the first-line enforcers of the international human rights system that they have created.

Part D has two chapters, both of which involve the interpenetration of national legal–political orders and the international system. Chapter 11 examines ways in which states internally observe and protect human rights. Chapter 12 inquires into the ways in which a state acts internationally as an enforcer of international human rights by applying pressure (shy of military force) against other, violator states in the effort to limit or stop the violations.

In both chapters, as in the entire coursebook, the materials view the state primarily *in its relationships* to the international system. That is, these chapters do not examine states intensively—their politics, economic system, history, culture, ideology—*independently* of that system. They are not studies in national or comparative law. The chapters, atypically, draw their illustrations from only one political community of states: the United States and Europe. They concentrate on the United States so as to permit a more contextual examination of the problems of internalizing international human rights norms and the possibilities of bilateral enforcement of those norms against violator states.