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AN INTRODUCTION TO THE HISTORY OF INTERNATIONAL HUMAN RIGHTS LAW

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Preface: The extensive legal protection for human rights that currently exists in national, regional and international law is the product of millennia of struggle by individuals concerned with human justice and well-being. These visionaries have provided inspiration and guidance, some of them acting out of religious belief and duty, others out of compassion or a sense of responsibility. Perhaps like Edmund Burke they believed that "All that is necessary for the triumph of evil is that good men [and women] do nothing." Or, like Margaret Mead they "d[id] not make the mistake of thinking that concerned people cannot change the world; it is the only thing that ever has."

This short course cannot present a detailed history of all the intellectual, cultural, and legal developments that have evolved and merged into the current international system for the protection of human rights. It does, however, attempt to indicate the principal currents, events and individuals who contributed to the present human rights era.

I. National Cultural, Religious and Legal Antecedents

- a. Religious traditions: "all of the major religions of the world seek in one way or another to speak to the issue of human responsibility to others." (Lauren, p. 5)
 - Hinduism (texts: Vedas, Agamas, Upanishads) address the necessity for moral behavior, the importance of duty (dharma) and good conduct toward others suffering in need. Practice charity and compassion for the hungry, the sick, the homeless, and the unfortunate. All life is sacred, to be loved and respected. "Noninjury (ahimsa) is not causing pain to any living being at any time through the actions of one's mind, speech or body." (Veda)
 - Judaism: sacredness of the individual endowed with worth and equal value. Isaiah 58:6-7: "undo the tongs of the yoke, let the oppressed go free. . . share your bread with the hungry, and bring the homeless poor into your house."
 - Buddhism: Respect for all life and duties of compassion and charity; urged renunciation of differences of caste and rank in favor of universal brotherhood and equality.
 - Confucianism: (texts: Analects, Doctrine of the Mean, and Great Learning) Harmony and cooperation exist when duty and responsibility towards others leads to treating all human beings as having equal work and recognizing that "within the four seas, all men are brothers." The fundamental teaching "Do not impose on others what you yourself do not desire." Analects, XV, 23. "If there be righteousness in the heart, there will be beauty in the character. If there is beauty in the character, there

will be harmony in the home. If there is harmony in the home, there will be order in the nation. If there be order in the nation, there will be peace in the world." Great Learning, cited in Smith, 181.

- Christianity: A message of equality: "there is neither Greek nor Jew, nor slave nor free, nor man nor woman, but we are all one in Christ." Gal. 3:28. Respect for others: "Do unto others as you would have them do unto you."
- Islam: Charity or lifting the burdens of those less fortunate is one of the pillars of belief. The Qur-an speaks to justice, the sanctity of life, freedom, mercy, compassion and respect for all human beings. All races are equal and religious toleration should be guaranteed. The first declaration of religious freedom in the world proclaimed that Jews and Christians shall be protected from all insults and vexations; they shall have an equal rights and shall practice their religion as freely as the Muslims.

Note that these texts generally do not speak of rights, but instead address moral duties and responsibilities towards others. At the same time, the rationales underlying these duties -- equality, human dignity, and the sacredness of life -- provide a foundation for the concept of human rights.

b. Cultural and philosophical roots

- Hsün-tzu, Chinese philosopher @ 400 B.C.: "In order to relieve anxiety and eradicate strife, nothing is as effective as the institution of corporate life based on a clear recognition of individual rights." UNESCO, p. 303
- African traditions: see UNESCO, pp. 43, 189, 269.
- Greek philosophy: developed the idea of natural law including equal respect for all citizens, equality before the law, equality in political power and suffrage, and equality of civil rights.
- Cicero: natural law and universal justice binds all human society together and applies to all without distinction. Each person has unique dignity which imposes on all the responsibility to look after others. This natural law is eternal and unchangeable and valid for all nations and all times.
- John Locke: *Second Treatise of Government* (1690): every individual person in the state of nature possesses certain natural rights prior to the existence of any organized government. People are born in a state of perfect equality and enjoy all rights equally. Societies and governments are formed to preserve these rights, not to surrender them.
- Jean-Jacque Rousseau: Man is born free with intrinsic worth.
- Olympe de Gouge (nom de plume of Marie Gouze): Declaration of the Rights of Woman and Citizen (France 1791): "woman is born free and remains equal to man in her rights". In 1793, de Gouge was beheaded.
- Thomas Paine introduced the expression "human rights" in his best seller *The Rights of Man* (1791). He ascribed inspiration to the religious traditions that all observed the unity of humankind and the equality of all individuals.

- Mary Wollstonecraft (1792) publishes *A Vindication of the Rights of Women*.

c. National laws

- Babylon: Code of Hammurabi (1795-1750 B.C.) The oldest legal code known today was itself based upon earlier texts that are now lost. It represented a codification and development of the customary law of the region. While many aspects of it today are incompatible with human rights (in particular the punishments imposed), other portions established basic human rights principles such as equal protection of the law and remedies for mistreatment of prisoners. In the Preamble Hammurabi expresses the fundamental purposes of government: "to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers, so that the strong should not harm the weak . . . and enlighten the land, to further the well-being of mankind."
- Laws of the Pharaohs: "Make sure that all is done according to the law, that custom is observed and the right of each man respected." Lauren, 10.
- Persia: Charter of Cyrus: liberty and security, freedom of movement and religious belief, the right to property, and some other economic and social rights.
- India: Edicts of Asoka (300 B.C.): Guaranteed freedom of religion and other rights. Other Indian customary law developed humanitarian laws of war, protecting all places of religious worship, civilian houses and property against attack. The wartime principle of discrimination is found in the Law of Manu: no killing is permitted of one who is sleeping; who is without his armour; one who is naked; who is deprived of his weapons; one who is only looking on and not fighting, and one who is engaged in fighting with another person. Prisoners of war, the sick and the wounded were to be well treated. Nirmal, p. 2
- Spain, Kingdom of Leon (1188): Confirmation of the rights of the assembly including the rights of an accused to a trial and the inviolability of life, honor, home and property.
- England: The Magna Carta (1215), Petition of Right (1628) and Habeas Corpus Act (1679): Although imposed by - and largely for - the nobility, the Magna Carta also contained more broadly applicable civil rights and established the rule of law: "no freeman shall be arrested, or detained in prison or deprived of his freehold . . . except by the lawful judgment of his peers or by the law of the land."
- Hungary: The Golden Bull (Aranybulla, 1222): During the reign of King András, the Golden Bull recognized the "Hungarian Nation" and created the framework for an annual meeting of the Diet. The text, considered the first written Hungarian constitution, was issued at the insistence of the nobility to safeguard their rights. The last item of the Golden Bull assures the right of individuals to disobey royal acts not

conforming to the law, in effect creating a constitutional monarchy. Any noble arrested was entitled to a fair trial.

- Virginia: Declaration of Rights (1776): "all men are by nature equally free and independent, and have certain inherent rights."
- United States: Declaration of Independence (1776): "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of those ends, it is the right of the people to alter or to abolish it, and to institute new government."
- France: Declaration of the Rights of Man and Citizen (1789): "All are born and remain free and equal in rights." These rights are "natural and imprescriptible." Political rights include: the right to vote, to participate in politics. Civil rights: the right to equality before the law, the right to be protected against arbitrary arrest or punishment, the right to be presumed innocent until proven guilty, the right to hold personal opinions and religious beliefs, the right of freedom of expression, and the right to possess property.
- United States (1791): Bill of Rights to the U.S. Constitution approved by the States.

Why traditions of tolerance and national laws were insufficient:

For each person favoring human rights throughout the world there were powerful opponents who sought to retain privilege, hierarchy, hereditary rule, property, continuity and caste. Human rights proponents were challenging and in turn challenged by vested interests: Thomas Paine was hung in effigy in English cities; Voltaire's writings were banned. Conservative authors referred to the "monstrous fiction" of human equality. Jeremy Bentham rejected the idea of natural law, calling it "simple nonsense" and labeling human rights "nonsense on stilts." People should know "their proper place."

The notion of divine right of rule continued in many countries. Ruling elites aimed to maintain power and cultural practices subordinating women, children, racial minorities and workers. Slavery was widespread and torture was a prevalent method of investigation and punishment. Executions were held in public places and capital punishment was imposed for a wide variety of offenses. Educational opportunities were limited to the very rich, a few landholders dominated the numerous and landless poor. Some human rights abuses gave problems even to rulers because they led to long and impoverishing wars. In particular, religious persecution, forced conversions, and massacres of religious minorities provoked conflicts throughout the world. After repeated and prolonged wars in Europe, peace treaties began to include the first human rights provisions, guaranteeing freedom of religion.

II. International Law Before the Twentieth Century: Addressing Specific Issues

While the concept of internationally protected human rights in general did not appear until the twentieth century, specific human rights issues emerged and were matters of international concern as early as the seventeenth century.

a. Religious Liberty:

On October 24, 1648, the Articles of the Treaties of Peace signed at Munster and Osnabruck, in Westphalia, ended the Thirty Years War between Protestant and Catholic areas of Europe. While the Treaty of Westphalia is often cited as the beginning of the nation-state system and modern international law, the Treaty is also significant in containing various provisions which today are part of human rights law. First, the treaty declares an amnesty for all offenses committed during the "troubles" (art. II) and provides for restitution of property and ecclesiastical or lay status (art. VI-XXXIV). Second, freedom of contract is indicated by annulling those contracts procured under duress and threats. Freedom of movement, of commerce, and the right to legal protection are included. Most importantly, Article XXVIII provides:

That those of the Confession of Augsburg, and particularly the Inhabitants of Oppenheim, shall be put in possession again of their Churches, and Ecclesiastical Estates, as they were in the Year 1624. as also that all others of the said Confession of Augsburg, who shall demand it, shall have the free Exercise of their Religion, as well in public Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.

The Westphalian Treaty of Osnabruck with Sweden contained a similar provision. Pope Innocent X promptly declared null and void the articles in the treaties of Westphalia relating to religious matters, but the principle of religious liberty was established, as was the link between peace and respect for human rights.

The protection of religious liberty continued to be a matter of concern in Europe through the Congress of Vienna (1814-1815) which acknowledged that religious intolerance could jeopardize international peace and security. Thus, the participating states pledged to maintain religious equality and assure equal protection and favor to every sect. They specifically agreed to effect "an amelioration in the civil state of those who profess the Jewish religion in Germany," paying "particular attention to the measures by which the enjoyment of civil rights shall be secured and guaranteed to them." (Federative Constitution of Germany, annexed to the Congress of Vienna Treaty, 9 June 1815). Similarly, in 1839, the Ottoman Sultan Abdulmejid promulgated the Hatti-i Sherif, a decree that guaranteed legal, social and political rights "to all our subjects, of whatever religion or sect they may be" "they shall enjoy them without exception." (Hatti-i Sherif, 3 Nov. 1839; a second decree, the Islahat Fermani followed in 1856 and similarly guaranteed non-discrimination on the basis of religion, language or race).

b. Abolition of Slavery and the Slave Trade:

Among the first widespread efforts of the nineteenth century to protect humanity against injustice were those aimed at the institution of slavery. Slavery had existed throughout history and across the world, but it changed fundamentally in the sixteenth

century with the trans-Atlantic slave trade from Africa. The numbers alone exceeded any past practice. Moreover, slavery came to focus on Africa and led to the emergence of ideologies of racism, apartheid, and segregation. From the sixteenth to the nineteenth century, the international slave trade flourished and slavery was legally practiced in most countries of the world.

Yet, almost from the beginning a small but vocal minority expressed its determined opposition to slavery. These individuals began to organize the world's first non-governmental organizations devoted to a human rights issue. They published articles and pamphlets, they preached against slavery, and they organized active campaigns of protest. Slaves themselves engaged in uprisings in Saint-Dominique, Haiti and elsewhere. Many of those most outspoken against the abuse were themselves former and reformed slave traders or slave owners. They saw and used the gap between the proclamations of rights, especially in the UK, the US and France, as well as the high ideals of religion and philosophy, and the practice of slavery. They were thus able to draw intellectual and moral strength from the general proclamations of human rights. New economic interests that did not rely on slavery joined the movement.

Throughout the first part of the nineteenth century, public pressure grew. In Britain public agitation forced members of Parliament to confront the issue. As early as 1807, public opinion forced votes in the US Congress and British Parliament to end the participation of both countries in slave trading. The U.S. Act to Prohibit the Importation of Slaves was matched by the British Act for the Abolition of the Slave Trade. Both made it illegal to trade in, purchase, sell, barter, or transport any human cargo for the purpose of slavery.

Neither law could be effective, however, without international measures of enforcement and the agreement of other nations. The focus turned to the Congress of Vienna in 1814-1815, where anti-slavery activists, who viewed the issue as one of fundamental moral and religious obligation, pressed for action. About this time, Thomas Clarkson's highly influential tract *Evidence on the Subject of the Slave Trade*, was translated from English into French, German, Spanish, and Italian. The British delegate at the Congress of Vienna complained about the public pressure being mounted, but its force could not be denied. The Congress of Vienna established a special committee on the international slave trade and finally agreed to sign the Eight Power Declaration which acknowledged that the international slave trade was "repugnant to the principles of humanity and universal morality" and that "the public voice in all civilized countries calls aloud for its prompt suppression." Yet the declaration did not make slave trading a crime, sanction the arrest of slavers or provide machinery for enforcement.

Treaty language soon followed, however. During the Congress itself, a Treaty signed Nov. 20, 1815 between Britain, Russia, Austria, Prussia and France included a pledge to consider measures "for the entire and definitive abolition of a Commerce so odious and so strongly condemned by the laws of religion and nature." The Treaty of Ghent signed by the US and Britain the same year declared that traffic in slaves "irreconcilable with the principles of humanity and justice." Treaty of Peace and Amity, 18 Feb. 1815, 12 T.I.A.S. 47.

Anti-slavery societies continued their pressure, led by Wilberforce in the UK. In addition, the Pope issued instructions to all Catholics to abstain from the slave trade. In 1840, the first World Anti-Slavery Conference was organized. Eventually governments

responded. By 1882, a network of more than fifty bilateral agreements permitted the search of suspected slave ships on the high seas, without regard to flag. Internally, states slowly emancipated their slaves in response to public pressure. Britain did so in 1833, France in 1848, most Latin American countries did so as they became independent (Bolivar was a leading opponent of the slave trade and proclaimed the emancipation of slaves in 1816¹). The issue of slavery became a major motivation for the U.S. War between the States and President Lincoln issued the Emancipation Declaration in 1863. Cuba and Brazil were the last countries in the Western Hemisphere to abolish slavery, in the late 1880s.

By 1890 governments were prepared to take effective international action. They negotiated the 1890 General Act for the Repression of the African Slave Trade, which referred to the "crimes and devastations engendered" by trafficking in humans. The convention required actions be taken to suppress the slave trade at sea and along inland caravan routes, to prosecute and punish slave traders, and to liberate captured slaves.² The agreement thus reflected the principle of shared international responsibility to respond to gross human rights violations and marked the first general agreement on a common standard of behavior for all states. (Further agreements on abolition of slavery and repression of the slave trade were concluded in 1919, 1926, and 1956).

c. The emergence of international humanitarian law:

As early as the fourth century B.C., Chinese military theorist Sun Tzu wrote in *The Art of War* that an obligation exists to care for the wounded and prisoners of war. Yet, for the most part warfare was not governed by any mutually acceptable rules limiting the actions of soldiers. The Industrial Revolution had a military side to it and weaponry began an on-going evolution of increased destructiveness. Armies became more professional and larger, as conscription spread during following the Napoleonic Wars. At the same time, the emergence of the press and increased literacy brought home the horrors and atrocities of conflict. The confluence of all these factors led to growing concern with the conditions of war, the treatment of wounded and sick, and the protection of civilians.

The U.S. Civil War and the Crimean War in Europe brought public attention forcefully to bear on wartime conditions. The U.S. produced the Lieber Code, the first western written regulation of armed conflict. In Europe in 1859, Henry Dunant witnessed the Battle of Solferino, where three hundred thousand troops battled for fifteen hours, leaving thousands of wounded among the dead. Dunant's account of the battle aroused public opinion and others offered to support Dunant in an effort to create an international relief society to care for the wounded as individual human beings without regard to nationality, class, or race. An organizing committee invited governments to

¹ In a message to the Congress of Bolivia May 25, 1826, Bolivar called slavery "the negation of all law" and "a sacrilege." He added: "Examine this crime from every aspect and tell me if there a single Bolivian so depraved as to wish to sanctify by law this shameless violation of human dignity. . . No one can violate the sacred doctrine of equality. . . God has willed freedom to man, who protects it in order to exercise the divine faculty of free will." In the same speech, Bolivar argued for freedom of religion as "the law of conscience" and against the establishment of a state religion. Lecuna & Bierck, *Selected Writings of Bolivar 1810-1830*.

² Ironically and tragically, this humanitarian impulse also served to provide a pretext for colonial occupation throughout Africa.

send representatives to Geneva in order to translate this dream into reality. The Geneva International Conference met in 1863 and attracted 30 delegates from 14 countries, as well as four funding agencies. They left the meeting having created a Geneva-based private international organization, the International Committee of the Red Cross.

Within a year, the ICRC, led by Dunant, organized a second conference of government representatives. They negotiated the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, the first international agreement to protect individuals in times of war. The treaty required all signatories to acknowledge and respect the neutrality or immunity of military hospitals and their staffs, and to protect them from attack. Red Cross societies and volunteers quickly emerged and became visible in every subsequent conflict.

By 1899 the Hague Peace Conference could conclude a broad Convention on the Laws and Customs of War on Land that explicitly spoke of the "rights" of the wounded to receive medical treatment, of prisoners of war to be given food and clothing and protection under the law, of individuals to be considered inviolable when surrendering, and of civilians to be protected from unlimited warfare. In 1907 the Hague Peace Conference extended humanitarian law by concluding new agreements on land and marine warfare. In the agreements the Marten's Clause expressed the consensus of participants that the means and methods of warfare are not unlimited.³

d. Protection of citizens abroad

International travel has always been hazardous. Throughout history, merchants, diplomats and others traveling abroad have been vulnerable to robbery, murder, enslavement, or impressment. Ships at sea were frequently looted by privateers or pirates. The loss of a national was and still is seen as the loss of a valuable asset belonging to the sovereign, whether prince or state. Those who caused harm to foreign nationals diminished the wealth of the sovereign to whom such nationals were deemed to belong. Through protests, reprisals, interventions, and other state practice the rule emerged that a state was responsible for acts committed against foreign nationals within its territory and by its nationals on the high seas. The ruler of the acting party and the state itself were deemed to be collectively responsible for the damage caused to the foreign citizen. The victim's ruler could authorize the victim, his family, or commercial partners to use self-help against the other country and its citizens. These letters of marque and reprisal authorized the capture of vessels or cargoes belonging to the state whose nationals were responsible for the wrong, but over time several procedural pre-requisites were developed. Most importantly, it emerged that those wronged had to first seek to obtain justice from the government of the country in which the damage occurred or whose citizens inflicted the injury. Only after a denial of justice were reprisals authorized.⁴ Secondly, reprisals

³ Convention Respecting the Laws and Customs of War on Land, Habue IV, 18 October 1907; and Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Hague X, 18 October 1907. The Marten's Clause reads: "Until a more complete code of the laws of war has been ieedud, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

⁴ Treaties requiring exhaustion of local remedies can be found as early as the ninth century (e.g. Treaty between Naples and Benevent of 836; Treaty between Lothar I and Venice of 840).

had to be proportional to the wrong done; some countries required strict accounting to the government for the execution of reprisals. By the nineteenth century, reprisals for injuries to aliens were removed from private hands and became the prerogative of the state and by the middle of that century the concept arose of peaceful, third party settlement of disputes by arbitration or claims commission. In presenting such claims, the petitioning state was deemed to be asserting its own right to ensure that its subjects were not mistreated in violation of international law.

In rare instances, a state would claim the right to intervene not only for the protection of its own nationals, but on behalf of oppressed minorities. In 1860, the major European powers authorized France to intervene to protect the Christian population in Lebanon against massacres by the Druses. Russia similarly intervened in Bulgaria in the 1870s. Weaker states rightly objected to the selectivity and self-interest that motivated many so-called humanitarian interventions.

Note: While these specific topics became matters of international concern, the general issue of human rights was still felt to be within the domestic jurisdiction of states. Oppenheim's Treatise on International Law, written at the beginning of the twentieth century, opined that "the so-called rights of man" cannot enjoy any protection under international law because that law is concerned solely with the relations between States and cannot confer rights on individuals. Yet, the very exceptions that had been created demonstrated that there was nothing inherently domestic about matters of human rights. Human rights specifically or generally became subjects of international concern when states agreed to make them so.

III. The Early Twentieth Century:

The turn of the century saw a wave of globalization with technological advances in communications (telephone and telegraph) and transportation (rail networks, steamships) accompanied by increasing mobility of wealth through movements of capital and labor. The world became smaller and international awareness increased. NGOs increased in number and variety. The first intergovernmental organizations were formed, starting with the International Telegraph Union (1865), the International Postal Union (1874) and the International Meteorological Organization (1878). Among the NGOs, the Ligue des Droits de l'Homme, which published its first information in 1901, sought to ensure liberty, justice, equality and fraternity to all humanity. It organized conferences and pressured governments on human rights throughout the world. In Iran and China authors published works promoting the rights of individuals. (See e.g., Talibov-I Tabrizi, Explanations Concerning Freedom, and Kang Youwei, The Book of Great Harmony). The International Office of Public Health, created in 1907 advocated a global right to health.

On the regional level, the effort to create a confederation of Latin American states in 1826 led to a series of regional meetings to discuss mutual defense and other forms of cooperation. Prior to 1880, these meetings or Congresses, were convoked in response to specific problems or needs. They became institutionalized with the holding of the First International American Conference in Washington D.C. in 1889-1890. This Conference created "The International Union of American Republics," later changed to the "Pan

American Union” which met in regular sessions until 1938 and then emerged after World War II as the Organization of American States. The Union took up human rights issues very early;⁵ it adopted a Convention relative to the Rights of Aliens in 1902, supplemented in 1928, conventions on asylum in 1928 and 1933, and a convention on nationality in 1933 (other conventions on the rights of women are mentioned below).

Humanitarian efforts on behalf of persecuted minorities took the form of diplomatic protests, formal complaints and in some cases military action. The actions were often very selective and human rights too frequently were invoked as a pretext for intervention. Nonetheless, shining the spotlight on human rights violations made it more difficult for governments to ignore their own internal problems. Various groups subjected to discrimination and other deprivations of rights pressed for change, from the formation of the National Association for the Advancement of Colored People in the United States, to the public protests of Mohandas Gandhi in South Africa.

World War I and events surrounding it proved the dangers of nationalism and ethnic conflict; many ethnic and religious minorities suffered great loss of life. The carnage led to international efforts to ensure minority rights. The revolutions of the early twentieth century drew the attention of all governments to the dangers of denying economic, social and cultural rights.

a. Economic and Social Rights: capitalism, industrialization and the formation of the ILO

In the nineteenth century serfdom was abolished in many countries, but the emergence and development of the Industrial Revolution led to a rapid expansion in the numbers of exploited workers, including young children, in urban centers, primarily in Europe and North America. The average factory work week in Europe in the mid-nineteenth century was eight-four hours. Poverty, starvation, epidemics, and crime were rampant. The obvious social injustices provoked reform movements within countries and eventually on the international level.

Workers fought to create the first trade unions and to take action against abuses. Socialism and Communism emerged as forces. The Catholic Church took up the issue of social justice, most famously in the 1891 encyclical *Rerum Novarum* of Pope Leo XIII, which focused on "the natural rights of mankind." The encyclical affirms the right of everyone to procure for themselves and their families the basic needs of life. "Human rights must be religiously respected wherever they are found; and it is the duty of the public authority to prevent and punish injury and to protect each one in the possession of his own. Still, when there is question of protecting the rights of individuals, the poor and helpless have a claim to special consideration. The richer population have many ways of protecting themselves."

The dangers of denying a decent living were apparent in the years before and after World War I. Revolution came to Mexico, Russia, and Ireland. Riots and strikes occurred in Germany, Russia, Austria, and Italy. The 1910 Mexican Revolution resulted in the first constitution in the world containing guarantees of economic, social and cultural rights. During the same year, 1917, a Chilean jurist, Alejandro Alvarez drafted

⁵ Note that the 1826 Treaty of Perpetual Union, League and Confederation (Panama), which never entered into force recognized the principle of juridical equality of nationals and foreigners and pledged cooperation in the abolition of the slave trade.

the "International Rights of the Individual" arguing the need for internationally-protected human rights for all. Lenin's Declaration of the Rights of the Peoples of Russia called for abolishing all privileges and disabilities based on nationality or religion.

Even before the revolutions and World War I, governments under pressure to reform realized the necessity of international action in order to avoid distortions in competition coming from low labor standards. Some of them met to form the International Association for the Protection of Labor, with an International Labor Office. In 1906 they concluded two conventions -- one on night work for women and the other prohibiting phosphorus in the manufacture of matches -- for the protection of specific economic and social rights, for the first time obliging governments to respect certain rights of their own citizens. Following the end of the War, pressed by labor unions, governments created a Commission on International Labor Legislation comprised of labor representatives. The Commission produced a draft convention for the establishment of a permanent organization for international labor law, to promote "lasting peace through social justice." The proposal envisaged a membership of states represented by a unique tripartite structure of government, labor, and business.

The Commission also produced a second text, a statement of general principles that declared "labor should not be regarded merely as a commodity or article of commerce," and that human beings are entitled to "a reasonable standard of life." Other principles called for adoption of an eight-hour working day, abolition of child labor, rights of association and equal pay for men and women for equal work.

Many of the general principles were combined with the draft convention to become the Constitution of the International Labor Organization. It was an organization founded on human rights principles and its subsequent work has elaborated on and detailed aspects of economic and social rights. The mandate of the ILO was echoed in the Covenant of the League of Nations in which all members pledged themselves "to secure and maintain fair and humane conditions of labor for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend." They agreed to support enforcement of agreements to combat traffic in women and children, as well as drugs, and to take steps to prevent and control disease.

By 1933 the ILO had adopted forty conventions, covering hours of work, maternity leave, unemployment, conditions of labor at night for women and children, equality of pay, minimum age at sea, forced labor, and freedom of association.

b. The League of Nations Minorities Treaties

President Woodrow Wilson's Fourteen Points promised to support liberty, the right of self-determination, and equality of rights across borders. According to him "self-determination is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril." Negotiations at the Paris Peace Conference proved contentious, but ultimately redrew the borders throughout Europe, ending large multinational empires, but creating a host of new minorities in new states. In order to protect these minorities, a series of Minorities Treaties provided human rights guarantees. Poland, Czechoslovakia, Yugoslavia, Romania, and Greece, as a condition of their creation or expansion, had "to assure full and complete protection of life and liberty" to all of their inhabitants "without distinction of birth, nationality, language, race, or religion." The treaties specified equal protection of the law, equal civil and political

rights, language rights, and the rights of minorities to establish their own schools and cultural institutions. Specific protection was afforded Jewish and Muslim minorities. To reinforce the treaties, each one contained a provision stating that "the stipulations in the foregoing articles, as far as they affect persons belonging to racial, religious, or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations."⁶

As for the Covenant, while there were some references to economic rights, other proposals, such as one recognizing "religious persecution and intolerance as fertile sources of war" and promising that member states "will make no law prohibiting or interfering with the free exercise of religion and that they will in no way discriminate, either in law or in fact, against those who practice any particular creed, religion or belief," failed to be adopted. Most controversial of all at the Paris Peace Conference was the issue of race, because of the millions of people who at that time were subjected to colonial exploitation and victimized by the legacy of slavery. Japan and China, the two Asian countries at the conference, sought to include a reference to racial equality but ran into profound opposition by colonial powers. When a vote was taken and the majority favored including the reference, the chairman suddenly discovered a "rule" requiring unanimity. Despite challenge and protest, the chairman's decision against including the provision remained. Public opinion expressed outrage over the West's hypocrisy and demonstrations broke out throughout the world. The unwillingness of the great powers to accept the same rules for themselves that they were imposing on others did not go unnoticed.

In practice, the League came to use respect for minority rights as a condition of membership. The League also encouraged states to sign bilateral agreements protecting minority rights. The organization further expressed its desire "that the States which are not bound by any legal obligations to the League with respect to Minorities will nevertheless observe in the treatment of their own racial, religious, or linguistic minorities at least as high a standard of justice and toleration as is required by any of the Treaties and by the regular action of the Council." Res. adopted 21 Sept. 1922.

The League moved beyond substantive norms to create supervisory machinery and procedures to monitor compliance with the minority treaty obligations. Petitions could be brought to the League of Nations and some nine hundred were during the time the procedure was operational. If the secretary-general of the League considered a claim meritorious, he could recommend to the Council that it appoint an ad hoc Minorities Committee to investigate the matter and try to reach a mutually acceptable settlement. If this friendly settlement effort failed, the complaint could be sent to the council as a whole or to the Permanent Court of International Justice. It was through this means that the PCIJ received two requests for advisory opinions. The first case, the *Rights of Minorities in Upper Silesia*, concerned the application of racial, linguistic, or religious criteria for admission to school. The court held any such criteria for admission to be unacceptable.⁷ In *Minority Schools in Albania*, a 1935 Advisory Opinion, the court insisted on the necessity of maintaining equality in fact as well as in law in educational institutions. In

⁶ Societe des Nations/League of Nations, Document C.L. 110, 1928.

⁷ PCIJ, Rights of Minorities in Upper Silesia, Judgment No. 12 of 26 April 1928, 15 PCIJ, Ser. A..

this respect, the closing of minority schools was deemed incompatible with equal protection because it would destroy the means of preserving cultural uniqueness.⁸

While the League of Nations' system of minorities protection functioned well for fifteen years, it ultimately failed. Those subject to it objected that they were bound by laws that did not apply to the major powers. Further, the United States refusal to join the League of Nations undermined its effectiveness, as did the requirement of unanimity before the Council could act.

c. Civil and Political Rights for Women: many of the women who became leaders in the struggle for women's rights began as abolitionists in the anti-slavery campaigns of the nineteenth century. They learned effective techniques of organizing and protesting. They also learned the importance of the moral claim of equality. Through their efforts, changes began in national law, with women obtaining the right to vote in Finland and Australia in 1906, Norway in 1913. In China, the revolutionary feminist Qui Jin organized the first women's association in China and advocated equal rights for women. Japanese and Filipina women also associated and published works on women's rights. Similar organizations and efforts appeared in Egypt, Iran, India, Sri Lanka, Indonesia, Vietnam, Turkey and Korea.⁹ They soon moved to cooperate internationally by forming NGOs and international federations of trade unions such as the International Ladies' Garment Workers' Union.

Many of the international efforts to guarantee rights for women took place in the regional meetings of the Pan American Union. A 1933 Convention on the Nationality of Women (1933) was the first to provide binding guarantees. It was followed by the Inter-American Convention on the Granting of Political Rights to Women (1948) and the Inter-American Convention on the Granting of Civil Rights to Women (1948), both preceding UN treaty action by more than 30 years. In addition to the treaties, the Conferences adopted resolutions on the rights of women, the first in 1923. The 1928 Conference recommended states adopt legislation on maternity leave and non-discrimination in employment.

The first half of the twentieth century saw the list of international human rights concerns grow, to encompass economic, social and cultural rights and the rights of minorities. Global and regional institutions not only engaged in standard-setting, they created the first international petition procedures. The transboundary dimensions of economic issues perhaps made it easier for states to accept international regulation of workers' rights. The issue of national minorities was so closely linked to the onset of World War I that the peace-human rights link appeared undeniable.

IV. Generalizing Human Rights in Global and Regional Systems of Protection

In August 1941 the Atlantic Charter proclaimed the Four Freedoms¹⁰ President Roosevelt had enunciated at the beginning of the year (Jan. 6, 1941, Eighth Annual

⁸ PCIJ, *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, PCIJ, Ser. A/B, No. 64.

⁹ See Kumari Jayawardena, *Feminism and Nationalism in the Third World* (London: Zed, 1986).

¹⁰ The Four Freedoms are: Freedom of speech and expression, freedom of religion, freedom from fear, and freedom from want. According to Roosevelt, "the social and economic problems . . . are the root cause of the social revolution which is today a supreme factor in the world."

Message to Congress). The Charter also proclaimed the right of self-determination. These principles were reaffirmed in the Declaration of the 26 United Nations on 1 January 1942. Conferences of the American States became increasingly vocal about human rights prior to and during World War II, expressing their concern through resolutions: 1936: Humanization of War; 1938: Defense of Human Rights and Persecution for Racial or Religious Motives; 1945: International Protection of the Essential Rights of Man.

As is now well-known, the UN Charter contains more than a dozen references to human rights, from the Preamble to the end. The very purposes of the United Nations include cooperation in promoting respect for human rights and fundamental freedoms for all. Many of the provisions were included due to pressure from non-governmental organizations and smaller states, especially those of Latin America. The original Dumbarton Oaks proposals for the United Nations prepared by the great powers contained only one general provision about human rights. Even with the amendments, many governments felt the provisions were too weak and thus it was agreed that an international bill of rights should be concluded as soon as possible after the Charter. In his closing speech to the San Francisco Conference, President Truman referred to the “framing of an international bill of rights” and observance of human rights and fundamental freedoms. He added: “Unless we can attain those objectives for all men and women everywhere – without regard to race, language or religion – we cannot have permanent peace and security.” The first step was to list and define human rights. Even before that, the provisions of the United Nations Charter made clear that henceforth respect for human rights within the member states of the United Nations would be a matter of international concern.

While the United Nations was emerging as a global institution, two regional bodies took up the human rights challenge. Given the widespread movement for human rights, it should not be surprising that regional organizations being created or reformed after the War should have added human rights to their agendas. All of them drew inspiration from the human rights provisions of the United Nations Charter and the Universal Declaration of Human Rights.

Europe had been the theater of the greatest atrocities of the Second World War and felt compelled to press for international human rights guarantees as part of European reconstruction. Faith in western European traditions of democracy, the rule of law and individual rights inspired belief that a regional system could be successful in avoiding future conflict and in stemming post-war revolutionary impulses supported by the Soviet Union.¹¹ The Congress of Europe meeting at the Hague in May 1948 announced its desire for a united Europe with free movement of persons, ideas and goods. It also expressed desire for “a Charter of Human Rights guaranteeing liberty of thought,

¹¹ In the preamble to the European Convention on Human Rights, the contracting parties declared that they were “reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, the principles which form the basis of all genuine democracy.” See J.G. Merrills, *The Council of Europe (I): The European Convention on Human Rights*, in R. HANSKI & MARKKU SUKSI, AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 221 (1997) (“Many statesmen of the immediate post-war epoch had been in resistance movements or in prison during the Second World War and were acutely conscious of the need to prevent any recrudescence of dictatorship in Western Europe.”) Merrill also views the emergence of the East-West conflict as a stimulus to closer ties in Western Europe.

assembly and expression as well as the right to form a political opposition” and “a Court of Justice with adequate sanctions for the implementation of this Charter.”

The Americas had a tradition of regional approaches to international issues, including human rights, growing out of regional solidarity developed during the movements for independence. Pan American Conferences had taken action on several human rights matters well before the creation of the United Nations. This history of concern led the Organization of American States to refer to human rights in its Charter¹² and to adopt the Inter-American Declaration on the Rights and Duties of Man,¹³ mentioned further below.

a. Standard-setting (1948-1969)

The purpose of the United Nations to promote respect for and observance of human rights could only be achieved once agreement was reached on the meaning of the term human rights. From 1948 until the late 1960s the United Nations focused its attention on listing those rights whose protection should be guaranteed by all states under international supervision. Regional organizations similarly drafted agreements listing internationally-guaranteed human rights.

The first general human rights text adopted internationally was the Declaration of the Rights and Duties of Man, adopted by resolution of the Organization of American States in Bogota, at the same meeting that concluded the Charter of the Organization. The Inter-American Declaration preceded by some six months the Universal Declaration of Human Rights, adopted by Resolution 217 (III) of the United Nations General Assembly. The Declaration called itself “a common standard of achievement for all peoples and all nations.” Eleanor Roosevelt said it might well become “the Magna Carta of all mankind.” The Declaration has become this and more, as it today represents an agreed statement of the definition of “human rights” as that term is used in the United Nations Charter. It has been reaffirmed in global and regional treaties and in the United Nations Conferences on Human Rights (Teheran, Vienna). This early agreement on the content of human rights cannot be over-emphasized. The recasting human rights policy as international law made it more difficult for states to ignore human rights claims.

The same resolution that approved the Universal Declaration also mandated work on a binding treaty on human rights. While the initial work of the Commission devoted attention to civil and political rights, the General Assembly in 1950 decided in favor of including economic, social and cultural rights as well. In 1952, based on a proposal of India and Lebanon, supported by Belgium and the US, the General Assembly decided that there should be two separate Covenants with as many similar provisions as possible and that both should include a right of peoples and nations to self-determination.

During the drafting of the Covenants, several ambitious proposals emerged. Australia proposed creating an International Court of Human Rights; Uruguay supported

¹² Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, U.N.T.S. 48. The Charter was amended by the Protocol of Buenos Aires (1967), the Protocol of Caragena de Indias (1985). The Protocol of Washington (1992) and the Protocol of Managua (1993) have been adopted but are not yet in force.

¹³ American Declaration of the Rights and Duties of Man (1948), in OAS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM (hereinafter BASIC DOCUMENTS), OEA/Ser.L/VII.92, doc. 31, rev. 3 (1996) at 17.

appointment of a High Commissioner for Human Rights; the French sought an International Investigation Commission headed by an Attorney General. India wanted all issues of human rights violations to be investigated and remedies enforced by the Security Council. Britain, the US and the Soviet Union were cautious. The Soviet Union, in particular, opposed all enforcement machinery by invoking article 2(7) of the Charter. Despite this opposition, the Commission on Human Rights completed its work on the draft Covenants in 1954 and submitted them to ECOSOC. From there the Covenants went to the Third Committee of the UNGA, where they were debated for more than ten years. It was only in 1966 that the General Assembly voted and approved the Covenants, one year after the adoption of the International Convention for the Elimination of All Forms of Racial Discrimination (in force 1969). Another ten years passed before the Covenants entered into force, with provision for a mandatory periodic reporting system and an optional inter-state complaint process. Individual communications were left to a separate protocol.

As noted, it took nearly two decades to finalize and adopt the two UN Covenants. During the process, it became clear that the compliance mechanisms at the global level would not be strong¹⁴ and any judicial procedures to enforce human rights would have to be on the regional level. As a result, beginning with Europe, regional systems focused on the creation of procedures of redress,¹⁵ establishing control machinery to supervise the implementation and enforcement of the guaranteed rights.

The European system, the first to be fully operational, began with the creation of the Council of Europe by ten Western European states in 1949.¹⁶ It has since expanded to include Central and Eastern European countries, bringing the total membership to 44.¹⁷ Article 3 of the Council's Statute provides that every member state must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. Membership in the Council is *de facto* conditioned upon adherence to the European Convention on Human Rights and its Protocols.¹⁸

¹⁴ The UN legal advisor held in 1949 that the UN could not consider human rights complaints.

¹⁵ "We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition; We desire a Court of Justice with adequate sanctions for the implementation of this Charter." *Message to Europeans*, adopted by the Congress of Europe, 8 - 10 May 1948, quoted in Council of Europe, Report of the Control System of the European Convention on Human Rights 4, (H(92)14)(Dec. 1992). A Resolution adopted by the Congress stated that it "is convinced that in the interest of human values and human liberty, the (proposed) Assembly should make proposals for the establishment of a Court of Justice with adequate sanctions for the implementation of this Charter, and to this end any citizen of the associated countries shall have redress before the Court, at any time and with the least possible delay, of any violation of his rights as formulated in the Charter." *Id.*

¹⁶ The Statute of the Council of Europe was signed in London on 5 May 1949 on behalf of Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. Statute of the Council of Europe, May 5, 1949. ETS No. 1, Gr. Brit. T.S. No. 51 (Cmd. 8969).

¹⁷ Five other states have applied for membership: Armenia (8 March 1996), Azerbaijan (13 July 1996), Belarus (12 March 1993), Bosnia-Herzegovina (10 April 1995) and Georgia (14 July 1996). Russia joined in 1996.

¹⁸ See Committee of Ministers, Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe, adopted on 10 November 1994, *reprinted in* Council of Europe, Information Sheet No. 35 (July-December 1994)(1995), Appendix I, 146. All forty member states have

As the first human rights system, the ECHR began with a short list of civil and political rights, to which additional guarantees have been added over time. In addition, the jurisprudence of the European Court of Human Rights has been relatively conservative compared to that of other systems, reflecting an early concern for maintaining state support in light of the innovations of the European system and the then-optional nature of the court's jurisdiction. The European system was the first to create an international court for the protection of human rights and to create a procedure for individual denunciations of human rights violations.¹⁹ The role of the victim was initially very limited and admissibility requirements were stringent. As the system has matured, however, the institutional structures and normative guarantees have been considerably strengthened. Although most of the changes result from efforts to improve the effectiveness of the system and add to its guarantees, some of the evolution has been responsive to the activities of other regional organizations within and outside Europe. Others have resulted from the impact of expanding membership in the Council of Europe.

The European system is in fact characterized by its evolution through the adoption of treaties and protocols. Through its Parliamentary Assembly, the Council has drafted a series of human rights instruments.²⁰ The most significant texts are the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) and its eleven protocols,²¹ the 1961 European Social Charter (ESC) with its Protocols,²² the European

ratified the Convention, as restructured by Protocol 11 and all but Lithuania have ratified or acceded to the European Torture Convention. Russia was the last state to ratify the European Convention, on May 5, 1998. Lithuania signed the Torture Convention on September 14, 1995, but as of May 5, 1998, had not ratified it.

¹⁹ An earlier, more limited effort was made in 1907 with the creation of the Central American Court of Justice. The court had jurisdiction over cases of "denial of justice" between a government and a national of another state, if the cases were of an international character or concerned alleged violations of a treaty or convention. See M. HUDSON, PERMANENT COURT OF INTERNATIONAL JUSTICE 49 (1943).

²⁰ It is also worth noting that the Assembly adopts recommendations on human rights, some of which are influential in shaping the laws and policies of member states. In some cases the Committee of Ministers requests governments to inform it of measures they have taken to implement specific recommendations.

²¹ Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 5, as completed by Protocol No. 2, ETS No. 44, and amended by Protocol No. 3, ETS No. 45, Protocol No. 5, ETS No. 55, and Protocol No. 8, ETS No. 118. In addition, the following protocols have been adopted:

- Protocol to the Convention, ETS No. 9
- Protocol No. 4, ETS No. 46, Securing Certain Rights and Freedoms
- Protocol No. 6, ETS No. 114, Concerning the Abolition of the Death Penalty
- Protocol No. 7, ETS No. 117
- Protocol No. 9, ETS No. 140
- Protocol No. 10, ETS No. 146
- Protocol No. 11, ETS No. 155, Restructuring the Control Machinery.

²² European Social Charter, ETS No. 35. The Charter entered into force on 26 February 1965 and has 23 Contracting parties as of June 22, 1998. A Protocol to the Charter, adopted in 1988, imposes legal obligations in regard to additional economic and social rights. It entered into force on 4 September 1992. ETS No. 128. It has been ratified by 8 of the 22 states parties to the Social Charter (Denmark, Finland, Greece, Italy, Netherlands, Norway, Slovakia, and Sweden). A 1991 Turin Protocol is not yet in force (ETS 142), as it requires the ratification of all parties to the Charter. A further Protocol, adopted 9 November 1995 (ETS 158) to provide for a system of collective complaints is now in force, having 7 ratifications among the 22 states parties to the Charter. Finally, as of 15 July 1998, only 1 state, Sweden, had accepted the revised Charter (ETS 163).

Convention for the Prevention of Torture and its protocols,²³ the European Charter for Regional or Minority Languages,²⁴ and the 1995 Framework Convention for the Protection of National Minorities.²⁵ Together these form a network of mutually reinforcing human rights protections in Europe.

The Inter-American system as it exists today began with the transformation of the Pan American Union into the Organization of American States (OAS). The OAS Charter proclaims the "fundamental rights of the individual" as one of the Organization's basic principles.²⁶ The 1948 American Declaration on the Rights and Duties of Man gives definition to the Charter's general commitment to human rights.²⁷ Over a decade later, in 1959, the OAS created a seven member Inter-American Commission of Human Rights with a mandate of furthering respect for human rights among member states.²⁸ In 1965, the Commission's competence was expanded to accept communications, request information from governments, and make recommendations to bring about more effective observance of human rights.²⁹ The American Convention on Human Rights, signed in 1969, conferred additional competence on the Commission to oversee compliance with the Convention.³⁰ The Convention, which entered into force in 1978, also created the Inter-American Court of Human Rights. The Court has jurisdiction over contentious

²³ European Convention for the Prevention of Torture, ETS No. 126. Protocol 1 widens the geographical scope of the Convention by enabling states not members of the Council of Europe to acceded to it by invitation. ETS No. 151. Protocol 2 makes technical changes to the arrangements for elections of the members of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment. ETS No. 152. Neither of the two protocols are in force because they must be ratified by all states parties to the Convention. The text of the Protocols is reprinted in 1 INT'L HUM.RTS.REP 339 (1994). See A. Cassese, *A New Approach to Human Rights: the European Convention for the Prevention of Torture*, 83 A.J.I.L. 128 (1989); M. Evans & R. Morgan, *The European Convention for the Prevention of Torture: Operational Practice*, 41 INT'L & COMP.L.Q. 590 (1992).

²⁴ European Charter for Regional or Minority Languages, ETS No. 148, entry into force 1 March 1998. It has seven ratifications, five of them from Western Europe (Finland, Liechtenstein, Netherlands, Norway and Switzerland) and two (Hungary and Croatia) from Central Europe.

²⁵ Framework Convention on the Protection of National Minorities, ETS No. 15, reprinted in 2 INT'L HUM.RTS.REP. 217 (1995), entry into force on 1 February 1998. The Convention has been accepted by just over half of the member states of the Council of Europe, equally between western states and those of Central and Eastern Europe. All of the first four states to ratify have significant minority issues: Spain, Hungary, Romania and Slovakia. One non-member state, Armenia, has also ratified the Convention. The term "framework," widely used in environmental agreements, indicates that the Convention sets forth general principles and objectives but does not specify the details of implementation by states parties. Supervision is by means of periodic state reports, to be reviewed by the Committee of Ministers with the assistance of an expert advisory committee. The Convention requires ratification by twelve members of the Council of Europe. Work is also underway on a protocol to the European Convention on Human Rights which would add some minority protections to the Convention, allowing cases to be brought to the European Court.

²⁶ Art. 3, OAS Charter, *supra* note 10.

²⁷ See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention, 10 Inter-Am.Ct.H.R. (Ser.A)(1989).

²⁸ *Id.* at 7-9. The Statute of the Commission described it as an autonomous entity of the OAS having the function to promote respect for human rights. 1960 Statute, Art. 1. In 1967, the Protocol of Buenos Aires amended the Charter to make the Commission a principal organ of the OAS.

²⁹ *Id.* at 10.

³⁰ American Convention on Human Rights, Nov. 22, 1969 reprinted in 9 I.L.M. 673 [hereinafter American Convention].

cases submitted against states that accept its jurisdiction and the Court may issue advisory opinions.

The Commission's jurisdiction extends to all 35 OAS member states.³¹ The twenty-five states which have ratified the Convention are bound by its provisions, while other member states are held to the standards of the American Declaration. Communications may be filed against any state; the optional clause applies only to inter-state cases. Standing for non-state actors to file communications is broad.³²

The Commission may also prepare country reports and conduct on-site visits to individual countries, examining the human rights situation in the particular country and making recommendations to the government. Country reports have been prepared on the Commission's own initiative and at the request of the country concerned. The Commission may also appoint special rapporteurs to prepare studies on hemisphere-wide problems.

Like the European system, the Inter-American system has expanded its protections over time through the adoption of additional human rights norms. The major instruments are: the Inter-American Convention for the Prevention and Punishment of Torture;³³ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights;³⁴ the Second Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty;³⁵ the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women;³⁶ the Inter-American Convention on Forced Disappearance of Persons;³⁷ and the Declaration of the Rights of Indigenous Peoples.³⁸

b. Development of Compliance Mechanisms (1967-1998)

³¹ Virtually the entire western hemisphere is included: Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.

³² Article 44 of the American Convention states that "[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." The Commission's Regulations provide the same extensive standing for complaints to be filed against OAS member states that are not party to the Convention.

³³ Inter-American Convention to Prevent and Punish Torture, OAS T.S. No. 67, reprinted in BASIC DOCUMENTS at 87, entry into force 28 February 1987.

³⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OAS T.S. No. 69, OAS doc. OEA/Ser.A/42 (SEPF), reprinted in BASIC DOCUMENTS at 69. The Protocol is not in force.

³⁵ Protocol to the American Convention on Human Rights to Abolish the Death Penalty. OAS T.S.No. 73, reprinted in BASIC DOCUMENTS at 83. The Protocol entered into force on August 28, 1991. It has four state parties (Brazil, Panama, Uruguay and Venezuela).

³⁶ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, OAS T.S. --- reprinted in BASIC DOCUMENTS at 109, entry into force 5 March 1995.

³⁷ Inter-American Convention on Forced Disappearance of Persons, OAS T.S. ___ reprinted in BASIC DOCUMENTS at 99, entry into force 28 March 1996.

³⁸ IACHR, Press Communique of 3/97, reprinted in OAS, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1997, OAS doc OEA/Ser.L/V/II.98, Doc.7 rev. (1998) at 1081.

Many people throughout the world viewed the founding of the United Nations as the creation of an institution to redress human rights violations. Thousands of petitions began to flow to the United Nations. The Commission on Human Rights asked the UN legal counsel what to do about the petitions. The legal counsel responded that the Commission had no power to take any action in regard to any complaints concerning human rights. The Commission accepted this opinion, which was approved by the Economic and Social Council in 1947 in Res. 75(V) and reaffirmed in 1959 in Res. 728(F). By the mid-1960s, however, the influx of newly independent states led to a re-examination of the question. In 1966, the General Assembly, in Res. 2144(XXI), invited the Economic and Social Council and the Commission to “give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights wherever they might occur.” The Council responded by adopting ECOSOC Res. 1235, approving the Commission’s decision to give annual public consideration to a new agenda item entitled: “Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories.” In this context, the Council approved the Commission’s intention to make a thorough study of situations which reveal a consistent pattern of gross violations of human rights.

Three years later, the Commission approved another procedure whereby it would examine “communications, together with replies of governments, if any, which appear to reveal a consistent pattern of gross violations of human rights”. In Res. 1503, ECOSOC approved the Commission’s decision. Since that time, the Sub-Commission and Commission of the United Nations have examined communications to find those situations of gross and systematic violations. The United Nations bodies have also developed innovative mechanisms such as thematic rapporteurs and working groups to enhance compliance by states with human rights obligations.

Treaty monitoring bodies also have moved towards more effective compliance mechanisms, with optional protocols either adopted or being negotiated for several major human rights instruments to allow the filing of individual petitions. Other mechanisms involve early warning and on site inspections.

Standard-setting did not cease, of course. UN efforts focused on elaborating on and giving further detail to rights already proclaimed and to further protection for groups historically disfavored. Thus, the UN adopted the Convention against Torture (1984), the Convention on the Rights of the Child (1989) and the Convention on the Elimination of All Forms of Discrimination against Women (1979).

On the regional level, the Inter-American system concluded a Convention on Human Rights (1969) and inaugurated the Inter-American Court of Human Rights once the Convention entered into force in 1978. The functioning European and Inter-American courts are one of the great contributions to human rights by regional systems.

In Africa, the regional promotion and protection of human rights is established by the African Charter on Human and Peoples' Rights (African Charter).³⁹ The Assembly of Heads of State and Government of the Organization of African United adopted the African Charter on 27 June 1981. As of January 1, 1998, the African Charter had been ratified by all 53 OAU member states. The African Charter differs from other regional treaties in its inclusion of "peoples' rights." It also includes economic, social and cultural rights to a greater extent than either the European Convention or the American Convention.

The African Charter establishes an African Commission on Human and Peoples' Rights of eleven independent members elected for a renewable period of six years. The African Charter confers four functions on the Commission: promotion of human and peoples' rights; protection of those rights; interpretation of the Charter; and the performance of other tasks which may be entrusted to it by the Assembly of Heads of State and Government. The Commission may undertake studies, conduct training and teaching, convene conferences, initiate publication programs, disseminate information and collaborate with national and local institutions concerned with human and peoples' rights. Unlike the other systems, the African system envisages not only inter-state and individual communications procedures, but a special procedure for situations of gross and systematic violations. The June 8, 1998 protocol to the African Charter,⁴⁰ which will create a court in the African system, promises to add to the regional protections.

Virtually all the legal instruments creating the various regional systems refer to the Universal Declaration of Human Rights (UDHR) and the Charter of the United Nations, providing a measure of uniformity in the fundamental guarantees and a reinforcement of the universal character of the Declaration.⁴¹ The rights contained in the treaties also reflect the human rights norms set forth in other global human rights declarations and conventions, in particular the United Nations Covenants on Civil and Political Rights (CCPR) and Economic, Social and Cultural Rights (CESCR). In addition, as each successive system has been created it has looked to normative instruments and the jurisprudence of those systems founded earlier.

The European system, "considering the Universal Declaration of Human Rights" provides that the "like-minded" governments of Europe have resolved "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration." The Preamble to the American Convention also cites the UDHR, as well as referring to the OAS Charter, the American Declaration of the Rights and Duties of Man, and other international and regional instruments not referred to by name. The drafting history of the American Convention shows that the states involved utilized the European

³⁹ African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG./67/3/Rev. 5, reprinted in 21 I.L.M. 59 (1982). Entry into force 21 October 1986.

⁴⁰ "African States establish Human Rights Court," AFRONET File, http://www.zamnet.zm/zamnet/afrofile/a_file/i6_pg8.htm

⁴¹ Only the American Declaration of the Rights and Duties of Man does not mention the UDHR, because it was adopted prior to the completion of the UDHR. The American Declaration indicates its origin in the "repeated occasions" that the American States had "recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his personality." (Preamble). It also asserts that "the international protection of the rights of man should be the principal guide of an evolving American law." Id.

Convention, the UDHR and the Covenants in deciding upon the Convention guarantees and institutional structure.

The African Charter mentions the Charter of the United Nations and the Universal Declaration of Human Rights in connection with the pledge made by the African States to promote international cooperation. In the Charter's Preamble, the African States also reaffirm in sweeping fashion "their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other international instruments adopted by the Organization of African Unity, the Movement of Non-Aligned Countries and the United Nations."

Yet, there are clear differences in the regional instruments within the framework of the universal norms. The differences may be less pronounced than appears at first reading, however, because of provisions regarding choice of law and canons of interpretation contained in the regional instruments. The application of these provisions has led to a cross-referencing and mutual influence in jurisprudence that is producing some convergence in fundamental human rights principles.

Individual complaints procedures

One of the greatest contributions of the regional systems is the establishment of complaint mechanisms for judicial or quasi-judicial redress of human rights violations. Europe was the first to create a commission and court that could hear complaints, followed by Americas and now Africa. The Inter-American Commission on Human rights, from its creation in 1960, interpreted its powers broadly to include the ability "to make general recommendations to each individual state as well as to all of them."⁴² This was deemed to include the power to take cognizance of individual petitions and use them to assess the human rights situation in a particular country, based on the normative standards of the American Declaration. The Inter-American system was thus the first to make the complaints procedure mandatory against all member states.

The regional commissions and courts have gradually strengthened their procedures for handling complaints. In the European system, a slow evolution toward individual standing first allowed individuals to appear before the court in the guise of assistants to the Commission. A protocol later permitted them to appear by right. With the entry into force of Protocol 11, complainants will now have sole standing.

The European Social Charter has also been strengthened through amendment and through practice.⁴³ Additional rights have been added by a 1988 Protocol and a second Protocol radically revises the system of supervision. Although the latter Protocol is not yet in force, most of its provisions have been implemented by the supervisory organs.⁴⁴

⁴² Inter-American Commission on Human Rights, First Report 1960, OAS Doc. OEA/Ser.L/V/II.1, Doc. 32 (1961).

⁴³ For a general review of the evolution of the European Social Charter, see David Harris, *The Council of Europe (II): The European Social Charter* in HANSKI & SUKSI at 243.

⁴⁴ Although interim application of treaty commitments is common in the environmental field, it is extremely rare in international human rights law. This may, in fact, be a unique example. Among the changes implemented prior to the entry into force of the Protocol, the Committee of Ministers agreed to expand the Committee of Independent Experts that reviews state reports from seven to nine members. The Amending Protocol also codifies the practice of the CIE in assessing from a legal standpoint the compliance of national law and practice with the obligations imposed on states parties by the Charter. Art.

An even greater change is underway with a 1995 Additional Protocol that provides for collective complaints from trade unions and employers' organizations and from non-governmental organizations.⁴⁵

Within the Inter-American system, the Commission has taken steps taken to improve the processing of cases. It has recently begun to determine admissibility before evaluating the merits of the claim and holds hearings on admissibility or the merits at the request of either party or on the Commission's initiative. The re-structuring of the case system in the Inter-American system has also involved greater use of provisional measures, registration of petitions, creating chambers for hearings, and more on site visits to gather evidence. In addition, the Commission has developed a structured friendly settlement procedure and stronger means to protect confidentiality. In the absence of standing for victims at the Inter-American Court until the reparations phase, the Commission has consistently appointed petitioners or their legal representatives as Commission legal advisors, a practice first developed in the European system. The African system has evolved quickly through the African Commission's interpretation of its powers and revision of its rules of procedure. The African Commission, like the Inter-American Commission, may "give its views or make recommendations to Governments." The African Commission has read this to include the formulation of principles and rules for the resolution of human rights problems in specific states. In 1990, the Commission decided to publish its annual reports. Like the other commissions, the African Commission negotiates friendly settlements.⁴⁶ Unlike the Inter-American and European commission, it is developing its own follow-up actions. In various Nigerian cases, the Commission recommended the release of persons it decided were wrongfully detained and decided "to bring the file to Nigeria for the planned mission in order to verify that ... [the victims] had been released."⁴⁷

In its procedures on communications, the African Commission has benefitted from the experience of the other systems. It follows the usual two-stage process of considering a communication for admissibility and on the merits. It added a three month time limit within which states must reply to requests for information and make observations regarding the admissibility of communications. If the Commission determines a petition is admissible, it again gives the state three months to submit explanations or statements regarding the case. The Commission has adopted and strengthened rules on conflict of interest and agreed on the possibility of requesting provisional measures, in spite of a lack of specific reference to such measures in the

24(2) Amending Protocol. Finally, there has already been implementation of the provisions of the Amending Protocol that provide for meetings between the CIE and representatives of a state party at the request of either. This brings the CIE process of reviewing state reports into conformity with the practice of UN treaty-monitoring bodies such as the Human Rights Committee. One difference, however, is that the CIE reviews of state reports during meetings with state representatives are generally *in camera*. For additional provisional application of the Amending Protocol, see *infra* note 47.

⁴⁵ ETS No. 158. The Protocol requires five ratifications to enter into force.

⁴⁶ Communication 44/90, Peoples' Democratic Organization for Independence and Socialism v. the Gambia, concerned voter registration irregularities. A new government acknowledged the problem and expressed its intent to correct the problem by establishing an independent electoral commission and team of experts to review the electoral law.

⁴⁷ Case 60/91 8th p. 4. Also Case 87/93, The Constitutional Rights Project in re Zamani Lakwot & others) v. Nigeria. At 7-9.

Charter. The African Commission's rule on provisional measures is almost identical to article 63(2) of the American Convention.

In general, all the systems have enhanced their complaints procedures through providing means for greater participation by victims and their representatives. In most cases, these changes have occurred through action by the supervisory bodies rather than through amending the basic texts.

c. From State to Individual Responsibility (1998-present)

As early as 1948, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide. It was the first convention (and remains one of only two) to declare the acts referred to "crimes under international law." The other convention to use such terminology is the Convention against Apartheid. Neither convention establishes an international compliance system, but leaves punishment of offenders to national courts. Nuremburg provided a precedent for international criminal prosecution of the most serious violations of human rights, but it was a precedent not followed until 1993 when the UN Security Council created an ad hoc tribunal for the former Yugoslavia, followed one year later by a similar tribunal to consider genocide in Rwanda. It was in 1998 that the principle of individual responsibility for the most serious violations of human rights and humanitarian law became generalized at the international level, with the adoption of the Rome Statute of the International Criminal Court. Many issues remain open, however, such as the relationship between criminal responsibility and customary immunities for diplomats and heads of state. Also to be developed are issues of corporate responsibility, whether civil or criminal. Remedies, including rehabilitation and compensation for victims, are also on the agenda for the coming years.

V. Normative and Institutional Evolution

Human rights systems have evolved through a complex interplay of environmental pressures, institutional changes, and inter-system contacts. Perhaps most importantly, the dynamic reading given human rights guarantees by the global and regional supervisory organs has prevented a rigid formalism from reducing the relevance of human rights bodies as circumstances change and new problems arise. Judicial power in the regional systems is very significant, created in large part by the character of human rights conventions. They are written in general terms, leaving ample scope for judges and commissioners to apply and creatively interpret their provisions. The European Court of Human Rights has confirmed that "the Convention is a living instrument which ... must be interpreted in the light of the present-day conditions."⁴⁸ The Inter-American Court has similarly emphasized the notion of "evolving American law."⁴⁹

All of the systems have a growing case law detailing the rights and duties enunciated in the basic instruments. The jurisprudence of the regional human rights bodies has thus become a major source of human rights law. In many instances this case

⁴⁸ *Tyler v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) (1978) at 10.

⁴⁹ See Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention, *supra* note 30, at paras. 37-38.

law reflects a convergence of the different substantive protections in favor of broad human rights protections. In other instances, differences in treaty terms or approach have resulted in a rejection of precedent from other systems.⁵⁰ In general, the judges and the commissioners have been willing to substantiate or give greater authority to their interpretations of the rights guaranteed by referencing not only their own prior case law but the decisions of other global and regional bodies.

Some decisions cross-reference specific articles of other instruments. The European Court of Human Rights has utilized article 19(2) of the CCPR to extend the application of article 10 of the European Convention to cover freedom of artistic expression.⁵¹ It has referred to the UN Convention on the Rights of the Child in regard to education⁵² and both the CCPR and American Convention in regard to the right to a name as part of European Convention art. 8.⁵³ Most well known is the *Soering* case, where the Court found implicit in article 3 of the European Convention the obligation of article 3 of the UN Torture convention not to extradite someone who might face torture.⁵⁴

The Inter-American Court frequently uses other international court decisions and international human rights instruments to interpret and apply Inter-American norms. It has referred to the European Convention,⁵⁵ the CCPR and other United Nations treaties,⁵⁶ and decisions of the European Human Rights Commission and the Court.⁵⁷ It has explicitly stated that it will use cases decided by the European Court and the Human Rights Committee when their value is to augment rights protection⁵⁸ and has indicated a

⁵⁰ E.g., the European and Inter-American Courts take very different approaches to their remedial powers based on the different language of their respective treaties. In case law, the Inter-American Court has also rejected the European doctrine of “margin of appreciation.”

⁵¹ Muller et al, 133 Eur.Ct.H.R. (Ser. A)(1988) para. 27.

⁵² Costello-Roberts v. UK., 247C Eur.Ct.H.R. (Ser.A)(1993) para. 27..

⁵³ Burghartz v. Switzerland, 280B Eur.Ct.H.R. (Ser.A)(1994) para. 24.

⁵⁴ *Soering v. UK*, 161 Eur.Ct.H.R. (Ser.A)(1989) para. 88(Referring to the UN Torture

Convention the Court said “The fact that a specialized treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. The Commission has also stated that it finds it useful in interpreting the provisions of the Convention to refer to provisions contained in other international legal instruments for the protection of human rights, especially those which contain broader guarantees. See Case no 210/92, *Gestra v. Italy*, 80A Dec.& Rep. 93 (1995).

⁵⁵ See e.g. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 5 Inter-Am.Ct.H.R.(ser.A)(1985) para. 43-46; and *Enforceability of the Right to Reply or Correction*, 7 Inter-Am.Ct.H.R. (Ser.A)(1986), para. 25.

⁵⁶ *Id*; *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, 4 Inter-Am.Ct.H.R. (1984), paras. 50-51.

⁵⁷ *The Effect of Reservations on the Entry into Force of the American Convention*, 2 Inter-Am.Ct.H.R. (Ser.A)(1983) para. 29; *Proposed Amendments*, supra note 98 para 56; *The Word “Laws” in Article 30 of the American Convention on Human Rights*, 6 Inter-Am.Ct.H.R. (Ser.A)(1986) para 20; *Compulsory Membership*, supra note 97, paras. 43-46, 69; *In the Matter of Viviana Gallardo et al v. Government of Costa Rica*, Decision of Nov. 13, 1981, Inter-Am.Ct.H.R. 12, OEA/Ser.L/V/III.7 doc 13, Ser. A and B. No G/101/81 (1982), paras. 26-27; *Gangaram Panday Case*, 16 Inter-Am.Ct.H.R. (Ser.C)(1994) para. 39; *Caballero Delgado and Santa Case (Preliminary Objections)*, 17 Inter-Am.Ct.H.R. (Ser.C)(1994).

⁵⁸ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 5 Inter-Am.Ct.H.R. (Ser. A)(1985), at para. 52 (“if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail.”

commitment to the non-incorporation of restrictions from other systems.⁵⁹ Inter-American Commission and Court decisions in turn provide extensive jurisprudence on due process, conditions of detention and treatment of detainees, legality of amnesty laws, rape as torture, disappearances, obligations to ensure respect for rights, direct applicability of norms, exhaustion of local remedies, burden and standard of proof, admissibility of evidence, and general doctrine of interpretation of human rights treaties.

The decisions of the African Commission also show the influence of other regional systems. The Commission has adopted several doctrines established in European and Inter-American case law: presumption of the truth of the allegations from the silence of government,⁶⁰ the notion of continuing violations,⁶¹ continuity of obligations in spite of a change of government,⁶² state responsibility for failure to act,⁶³ and the presumption that the state is responsible for custodial injuries.⁶⁴ In regard to admissibility of communications, the African Commission like other regional bodies, has found that some so-called remedies are “not of a nature that requires exhaustion” because they are discretionary and non-judicial.⁶⁵ The African Commission and the Inter-

⁵⁹ Id. At para. 51 (the comparison of the American Convention with the provisions of other international instruments “should never be used to read into the “Convention restrictions that are not grounded in its text.”)

⁶⁰ See e.g. the Commission’s decisions in communications 59/91, 60/91, 87/93, 101/93 and 74/92. “The African Commission... has set out the principle that where allegations of human rights abuse go uncontested by the government concerned, even after repeated notifications, the Commission must decide on the facts provided by the complainant and treat those facts as given. This principle conforms with the practice of other human rights adjudicatory bodies and the Commission’s duty to protect human rights.” Communications Nos. 25/89/47/90, 56/91, 100/93, Free Legal Assistance Group, Lawyers’ Committee for Human Rights, Union Interafricaine des Droits de l’Homme, Les Temoins de Jehovah v. Zaire. Annex VIII, at 7. Article 42 of the Regulations of the Inter-American Commission allow it to presume the facts in the petition are true if the government fails to respond to the complaint.

⁶¹ See e.g. Communication 142/94 Muthuthurin Njoka v. Kenya, at 13. Case 39/90 Annette Pagnouille on behalf of Abdoulaye Mazou v. Cameroun is another continuing violations case. In a communication against Malawi case the Commission held: “[p]rinciples of international law stipulate ... that a new government inherits the previous government’s international obligations, including the responsibility for the previous government’s mismanagement. The change of government in Malawi does not extinguish the present claim before the Commission. Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses.” Comm. 64/92 reprinted in 18 HRLJ 29 (1997).

⁶² Joined cases 83/92, 88/93, 91/93 Jean Yaovi Degli, Union Interafricaine des Droits de l’Homme, Commission Internaitonal de Juristes v. Togo. The Commission sent a delegation to Totl and determined that the acts of the prior regime were being remedied by the present government.

⁶³ In regard to Communication 74/92, *Commission Nationale des Droits de l’homme et des Libertes v. Chad*, the Commission expounded on the state duty specified in Article 1 to give effect to the rights and freedoms guaranteed by the Charter. According to the Commission, “if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.” P. 15. The Commission found that Chad had failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. In language reminiscent of the Velasquez Rodriguez case, the Commission said “Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.” Id.

⁶⁴ In the European system, see *Tomasi v France*, 241 Eur.Ct.H.R. (Ser A)(19) para. 40,41.

⁶⁵ See 60/91 *Constitutional Rights Project v. Nigeria*, Communications Annex, 8th Annual Report of the African Commission on Human Rights, p. 3.

American Court emphasize the need for independence of the judiciary and the guarantees of a fair trial. The African Commission has called attacks on the judiciary “especially invidious, because while it is a violation of human rights in itself, it permits other violations of rights to go unredressed.”⁶⁶

While the mutual influence of the systems is clear, there are regional differences in the nature of cases filed that have limited the relevance of precedents from other systems. In Europe, until recently, virtually all cases raised questions of law on agreed facts. In addition, a large percentage concerned procedural guarantees in civil and criminal proceedings. In contrast, nearly all the Inter-American cases have concerned the factual determination of state responsibility for the death, disappearance, or other mistreatment of individuals. The result has been an Inter-American focus on issues of standard of proof and burden of proof that rarely arise in the European system. For this reason, most of the references to European jurisprudence are found in the Inter-American Court’s advisory opinions on questions of law. The Inter-American Commission has also had to be concerned with the widespread armed conflicts in the region. As a result, it has begun to document human rights violations by non-state actors, making an important contribution to international human rights law.⁶⁷

The matters submitted in Africa thus far involve varied issues including trade union freedoms, arbitrary detention, killings, and the right to health.⁶⁸ While it has adopted established doctrines from the other systems, the African Commission has also used some of the unique provisions of the African Charter to progressively apply its guarantees. The Commission has held, for example, that the absence of a derogation clause in the African Charter means the Charter as a whole remains in force even during periods of armed conflict.⁶⁹

To the extent there is a progressive convergence of human rights norms, it is in large part stimulated by victims and their lawyers. They submit memorials that draw attention to the relevant case law of other systems and help to expand human rights protections by obtaining a progressive ruling in one system, then invoking it in another. This tendency is enhanced by the liberal standing rules of the Inter-American and African. Many complaints are filed by non-governmental organizations familiar with and

⁶⁶ Communication No. 129/94, *Civil Liberties Organization v. Nigeria*, AHG/207(XXXII) Annex VIII, 17 at 19. The Commission deemed the ousting of jurisdiction of courts in Nigeria in this case “an attack of incalculable proportions on Article 7.” *Id.* The Commission refers not only to article 7, but to Article 26 which enshrines the duty of the state to guarantee independence of the judiciary. According to the Commission, Article 26 “clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual’s rights against the abuses of State power.” *Id.* Compare the Inter-American Court’s opinions *Habeas Corpus in Emergency Situations*, 8 Inter-Am.Ct.H.R. (Ser.A) (1987) and *Judicial Guarantees in States of Emergency*, 9 Inter-Am.Ct.H.R. (Ser.A)(1987).

⁶⁷ *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, 14 Inter-Am.Ct.H.R. (Ser.A)(1994).

⁶⁸ See e.g. 64/92 *Krischna Achutan* (on behalf of Aleke Banda), 68/92 *Amnesty International on behalf of Orton and Vera Chirwa*; and 78/92 *Amnesty International on Behalf of Orton and Vera Chirwa v. Malawi*. These were political cases involving opposition political leaders. Commission found violations of the right to life, the right to be free from torture, and the right to liberty in violation of Charter articles 4, 5, 6, and 7.

⁶⁹ See Communication 74/92, *Commission Nationale des Droits de l’homme et des Libertes v. Chad*, AHG/207(XXXII) Annex VIII at 12, 16 (“The African Charter...does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.”)

operating in more than one system. Most of the communications submitted to the African system thus far, for example, have come from groups such as Amnesty International, the International Commission of Jurists, and the Lawyers Committee for Human Rights. In the European system, briefs submitted *amicus curiae* by NGOs similarly draw attention to regional and global norms and jurisprudence. The epistemic community of NGOs has its parallel in the regular meetings of the commissioners and judges of the regional systems. The resulting progressive development of regional human rights law strongly suggests that no human rights lawyer should rely solely on the jurisprudence of a single system in pleading a case.

Normative evolution has been matched by institutional developments. The United Nations now has a High Commissioner for Human Rights, field offices, and widespread use of Special Rapporteurs on thematic and country studies. Regional human rights procedures and institutions have evolved perhaps to an even greater extent. While some changes result from amendments to the basic legal instruments, at least as much change is due to regional bodies developing their own implied powers. A serious commitment to giving effect to regional protections is evident in the evolution of the functions and procedures of regional human rights bodies.

Conclusions: Despite continuing controversy over the aims, normative content, and powers of global and regional institutions, human rights law can be said to have restrained many dictatorial powers and established the criteria for transition to democracy and the rule of law. It also succeeded in challenging many totalitarian and authoritarian governments, although it cannot claim sole credit for democratization over the past two decades. Successes in human rights can be attributed to several linked factors. First, unlike many global issues, human rights is aided by its moral and ethical dimensions and the innate desire of every human being for protection from abuse. The very idea of human rights as a legitimate claim of every individual, founded in theology, morality, and philosophy, is thus a powerful governance tool. Second, civil society has insisted on the right to participate in the development of international human rights law and structures. Nonstate actors, particularly human rights NGOs, have played an essential role at every stage of the human rights movement. NGOs represent actual or potential victims of human rights violations who are concerned with preventing governmental actions that are contrary to human rights guarantees. NGOs are often the first to focus attention on new issues. They may take the lead developing the content of specific human rights and pressing states to make them law; in some instances they bypass the states altogether, writing human rights standards to govern key nonstate actors. They provide legal assistance to victims of human rights violations, gather evidence, and bring cases before international tribunals. Their roles as watchdogs and whistle-blowers are crucial to the effectiveness of human rights guarantees. Any state that is concerned with domestic or international political support cannot afford to ignore broad-based NGOs.

Of course there have been failures to prevent or halt many situations of massive abuses, including genocide. The reasons are many. First, there are legal restraints. Human rights has been hampered by traditional concepts of state sovereignty and domestic jurisdiction, as well as by the consent-based nature of international obligations that prevents enforcement of norms against nonconsenting states. This legal barrier is reinforced by the conflict of interest inherent in a system where those violating human

rights participate in standard setting, compliance monitoring, and enforcement. At an extreme, this leads to challenges to the normative basis of human rights governance from ruling elites who seek to retain power by invoking cultural relativism. They challenge the universality of human rights despite their participation in drafting normative instruments guaranteeing such rights and their subsequent voluntary consent to them through treaty ratification.

Second, and more generally, most states exhibit a reluctance to criticize others for human rights violations, unless there are independent political reasons to do so, such as ideological conflicts or unfriendly relations. In many cases, the reluctance stems from concern about reciprocal complaints -- there being no state free of human rights problems -- but it also derives from the multifaceted nature of international relations. States usually must balance, and often subordinate, consideration of human rights issues to other international concerns, including trade, military and strategic policy, and foreign investment. When human rights does become a cornerstone of bilateral and multilateral relations, particularly on the part of a powerful state or a group of states, it can have a significant positive impact on compliance with human rights norms.

Finally, human rights governance is limited by its own design, which had in mind restraining powerful government agents. It has not succeeded in addressing the massive violations that occur in weak or failed states where anarchy and civil conflict prevail, because violations by nonstate actors that cannot be controlled by a state generally fall outside the scope of most human rights law. Humanitarian law and international criminal standards concerning crimes against humanity and war crimes cover nonstate actors, but these topics are usually, if mistakenly, treated separately from human rights in international law. International human rights institutions and systems are seen to lack the power to step into failed states and have been so far unable to develop new institutions and procedures to prevent or remedy violations in anarchical states or those in which internal armed conflicts are occurring. Even where there are functioning states, deregulation and globalization have created powerful nonstate actors outside the governance structure. The future of human rights will need to address all these issues to maintain the progress achieved over the past centuries.

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