

The Evolving International Human Rights System

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## THE EVOLVING INTERNATIONAL HUMAN RIGHTS SYSTEM

By Thomas Buergenthal\*

Few, if any, branches of international law have undergone such dramatic growth and evolution as international human rights in the one hundred years since the founding of the American Society of International Law. This branch of international law did not really come into its own until after World War II. Before then, what today we would broadly characterize as human rights law consisted of diffuse or unrelated legal principles and institutional arrangements that were in one way or another designed to protect certain categories or groups of human beings. Included in this mix prior to World War I were state responsibility for injuries to aliens, international humanitarian law (as we know it today), the protection of minorities, and humanitarian intervention.

The end of World War I and the establishment of the League of Nations produced the post-war treaties for the protection of minorities, whose application was limited to certain countries. The Covenant of the League of Nations provided for a mandates system, consisting of rudimentary normative and institutional processes for the protection of the indigenous populations of some former colonies. These developments, however, did not result in a comprehensive body of law that could be denominated international human rights law, although a few legal scholars promoted the concept.<sup>1</sup> Some of them even succeeded in having the Institute of International Law (Institut de droit international or Institute) adopt a "Declaration of the International Rights of Man" (Declaration) in 1929.<sup>2</sup> After emphasizing in its preamble that "the juridical conscience of the civilized world demands the recognition for the individual of rights preserved from all infringement on the part of the State," the Declaration asserted that it was the duty of states to recognize for all individuals, "without distinction as to nationality, sex, race, language, or religion," the right to life, liberty, and property; it further declared that states had the duty to recognize to all individuals the free exercise of religion and freedom to use the language of their choice.<sup>3</sup>

That the subject of human rights was still very much in its infancy is apparent from an Editorial Comment by Philip Marshall Brown that appeared in the *American Journal of International Law* in 1930, reporting on the 1929 meeting of the Institute and the adoption of its

\* Of the Board of Editors.

<sup>1</sup> See Philip Marshall Brown, *The Individual and International Law*, 18 AJIL 532 (1924); André N. Mandelstam, *La protection internationale des droits de l'homme*, 38 RECUEIL DES COURS 125 (1931 IV).

<sup>2</sup> The authoritative French text is reproduced in 2 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 298 (1929), and reprinted in part in James Brown Scott, Editorial Comment: *Nationality*, 24 AJIL 556, 560 (1930). An unofficial English translation can be found in George A. Finch, *The International Rights of Man*, 35 AJIL 662, 663-64 (1941) [hereinafter Declaration]. In that Editorial Comment, Finch claims that President Franklin D. Roosevelt's 1941 "Four Freedoms" speech was influenced by the Declaration.

<sup>3</sup> Declaration, *supra* note 2, pmbll., & Arts. I, II.

Declaration.<sup>4</sup> The author noted that the Declaration “aims not merely to assure individuals their *international* rights, but it aims also to impose on all nations a standard of conduct towards all men, *including their own nationals*.”<sup>5</sup> Noting that the Declaration “thus repudiates the classic doctrine that states alone are subjects of international law,” Brown continued: “Such a revolutionary document, while open to criticism in terminology and to the objection that it has no juridical value, cannot fail, however, to exert an influence on the evolution of international law.”<sup>6</sup>

Even as late as 1937, Hersch Lauterpacht, as editor of the fifth edition of Oppenheim’s *International Law*—his first edition of that work—left intact the book’s section entitled “The Law of Nations and the Rights of Man,” which denied that such rights existed, but commented in a footnote as follows:

The principles of [the 1929] Declaration are not expressive of the law and practice of many States; neither is their non-observance treated by other States as a breach of International Law. But it is believed that the development of International Law in accordance with its true function is, in the last resort, bound up with the triumph of the spirit expressed in these principles.<sup>7</sup>

It is therefore not surprising that the subject of human rights received little attention in the *Journal* until the late 1940s. Instead, the topics treated until then included humanitarian intervention, minority rights, mandates, and state responsibility for injuries to aliens. None of these legal doctrines, with the possible exception of humanitarian intervention,<sup>8</sup> protected individual human beings as such. Both the minorities and mandates systems sought to safeguard the rights of persons belonging either to certain minority groups or to indigenous or colonial peoples. The law applicable to state responsibility was intended to protect the rights of foreigners. International human rights law as we know it today, while it embraces all these subjects, seeks to protect individual human beings without regard to their nationality or other status. That is its most distinguishing characteristic and overarching value.

In dealing with the evolution of international human rights law, this essay focuses on the evolution of legal norms and institutional mechanisms for the protection of civil and political rights. Limitations of space did not permit me, except in passing, to deal with comparable norms and institutions applicable to economic, social, and cultural rights, or with so-called peoples’ rights or other emerging substantive and institutional elements of contemporary international human rights law. This essay thus presents only one aspect, or part, of the burgeoning human rights revolution.

## I. EARLY INSTITUTIONAL DEVELOPMENTS

The regional human rights machinery in existence today, as well as the plethora of United Nations human rights bodies, traces its antecedents to League of Nations institutions that dealt

<sup>4</sup> Philip Marshall Brown, *The New York Session of the Institut de Droit International*, 24 AJIL 126, 127 (1930).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 509 n.4 (Hersch Lauterpacht ed., 5th ed. 1937).

<sup>8</sup> Humanitarian intervention was applicable in principle only to those human rights violations that shocked the conscience of mankind, i.e., large-scale violations. See generally Ellery C. Stowell, *Humanitarian Intervention*, 33 AJIL 733 (1939).

with minorities' rights and mandated territories.<sup>9</sup> After World War I, the Allied and Associated Powers concluded a series of treaties with Austria, Bulgaria, Czechoslovakia, Greece, Poland, Romania, Turkey, and Yugoslavia for the protection of the rights of the minorities living in those countries. The League agreed to become the guarantor of the obligations the states parties assumed in these treaties. It performed that function by developing special mechanisms, including so-called Committees of Three that reviewed petitions from minorities charging violations of their rights. Serious legal questions that grew out of these reviews were frequently submitted by the Council of the League to the Permanent Court of International Justice, which produced an extensive jurisprudence on the subject.<sup>10</sup>

The League of Nations mandates system applied only to the former colonies of the states that were defeated in World War I. Under Article 22 of the League's Covenant, these colonies were transformed into mandates to be administered by some of the victorious powers in that war. Article 22 further provided that the mandatory states were to administer the mandated territories in accordance with "the principle that the well-being and development of [indigenous] peoples form a sacred trust of civilisation." These states also assumed the obligation to report annually to the League on the discharge of their responsibilities as mandatories. A Mandates Commission, established by the League, was charged with reviewing these reports. Had the League survived, the commission might have been able to transform itself over time into an effective mechanism capable of ensuring that the mandatory powers complied with their obligations. It might also have been able gradually to strengthen these obligations. Although the dissolution of the League of Nations put an end to the work of the commission,<sup>11</sup> some of its functions devolved on the United Nations Trusteeship Council, which was entrusted with powers to supervise the administration of the remaining mandates and other non-self-governing territories.<sup>12</sup> Once most of these territories acquired their independence, the Trusteeship Council itself was abolished.

## II. THE UNITED NATIONS CHARTER

International human rights law, as we know it today, begins with the Charter of the United Nations. According to its Article 1(3), one of the purposes of the United Nations is the

<sup>9</sup> These institutions were treated extensively in the *Journal*. For example, Quincy Wright published a number of articles on the League's mandates system, including *Status of the Inhabitants of Mandated Territory*, 18 AJIL 306 (1924); *Treaties Conferring Rights in Mandated Territories*, 18 AJIL 786; *Some Recent Cases on the Status of Mandated Areas*, 20 AJIL 768 (1926). The minorities system was dealt with, inter alia, by Helmer Rosting, *Protection of Minorities by the League of Nations*, 17 AJIL 641 (1923); Joseph S. Roucek, *Procedure in Minorities Complaints*, 23 AJIL 538 (1929); and Julius Stone, *Procedure Under the Minorities Treaties*, 26 AJIL 502 (1932).

<sup>10</sup> See, e.g., *Minority Schools in Albania*, Advisory Opinion, 1935 PCIJ (ser. A/B) No. 64 (Apr. 6); *Questions Relating to Settlers of German Origin in Poland*, Advisory Opinion, 1923 PCIJ (ser. B) No. 6 (Sept. 10). See also the fascinating advisory opinion *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 1935 PCIJ (ser. A/B) No. 65 (Dec. 4). See generally PABLO DE AZCÁRATE, *LEAGUE OF NATIONS AND NATIONAL MINORITIES* (1945); TENNENT H. BAGLEY, *INTERNATIONAL PROTECTION OF NATIONAL MINORITIES* (1950).

<sup>11</sup> On the mandates system in general, see QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* (1930). See also H. DUNCAN HALL, *MANDATES, DEPENDENCIES AND TRUSTEESHIPS* (1948).

<sup>12</sup> The refusal of South Africa after World War II to relinquish control over the former Southwest Africa Mandate, today's Namibia, generated a series of advisory and contentious proceedings before the International Court of Justice that culminated in 1971 with the advisory opinion *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276* (1970), 1971 ICJ REP. 16 (June 21), wherein the Court confirmed the power of the Security Council to put an end to the mandate.

achievement of “international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” That the UN Charter should have listed this subject among the Organization’s purposes is not surprising, considering that it was drafted in the aftermath of World War II, the Holocaust, and the murder of millions of innocent human beings. But contrary to what might have been expected given this background, the Charter did not impose any concrete human rights obligations on the UN member states. Although a group of smaller countries and nongovernmental organizations (NGOs) attending the San Francisco Conference fought for the inclusion of an international bill of rights in the Charter,<sup>13</sup> these efforts failed, principally because they were opposed by the major powers.<sup>14</sup>

Instead of a bill of rights, the San Francisco Conference adopted some intentionally vague Charter provisions on human rights. The two major human rights provisions, in addition to Article 1(3) referred to above, are Articles 55 and 56. Article 55 reads in part as follows:

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

. . .

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

Article 56 of the Charter provides, in turn, that “[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”<sup>15</sup> The vagueness of these human rights provisions, read together with the nonintervention clause found in Article 2(7) of the Charter,<sup>16</sup> tended for years to hamper serious UN action in confronting human rights violations. State claims based on Article 2(7) were gradually rejected by a majority of the UN membership.<sup>17</sup> But they continued to be regularly made in different UN organs by states that wanted, and in the early days frequently managed, to defeat, or at least weaken, some proposed human rights measures by arguing that how

<sup>13</sup> On the role of NGOs at the San Francisco Conference, see WILLIAM KOREY, *NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: “A CURIOUS GRAPEVINE”* 29 (1998).

<sup>14</sup> For the reasons motivating these powers, see Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 *HUM. RTS. Q.* 703, 706–07 (1997).

<sup>15</sup> In addition to these provisions, the Charter contains Articles 13(1), 62(2), and 68, which authorize the General Assembly and the Economic and Social Council to initiate human rights studies and make recommendations in the human rights field. Note that, in this connection, Article 68 authorized ECOSOC to set up “commissions in economic and social fields and for the promotion of human rights.” This mandate was implemented as soon as the United Nations came into being, with the establishment of the UN Human Rights Commission.

<sup>16</sup> Article 2(7) reads as follows:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

<sup>17</sup> For a collection of early UN debates on this subject, see LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 556–691 (1973). See also ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 58 (1963).

they treated their nationals essentially fell within their domestic jurisdiction, and hence was protected against UN intervention under Article 2(7).<sup>18</sup>

Despite their vagueness, however, the human rights provisions of the Charter did prove to have important consequences.<sup>19</sup> In time, the membership of the United Nations came to accept the proposition that the Charter had internationalized the concept of human rights. This did not mean that as soon as the Charter entered into force, all human rights issues were ipso facto no longer essentially within the domestic jurisdiction of states. It did mean, though, that states were deemed to have assumed some international obligations relating to human rights. Although the full scope of these rights remained to be defined, states could no longer validly claim that human rights as such were essentially domestic in character. Equally important, the obligation imposed by Article 56 on UN member states, which requires them to cooperate with the Organization in the promotion of human rights, provided the United Nations with the requisite legal authority to embark on what became a massive lawmaking effort to define and codify these rights. The centerpiece of this effort was the proclamation in 1948 of the Universal Declaration of Human Rights.<sup>20</sup> The adoption of a large number of human rights conventions followed, including the two International Covenants on Human Rights in 1966. These two treaties, together with the human rights provisions of the Charter and the Universal Declaration, constitute the International Bill of Rights. Although the Universal Declaration was adopted as a nonbinding UN General Assembly resolution and was intended, as its preamble indicates, to provide “a common understanding” of the human rights and fundamental freedoms mentioned in the Charter, it has come to be accepted as a normative instrument in its own right. Together with the Charter, the Universal Declaration is now considered to spell out the general human rights obligations of all UN member states.<sup>21</sup>

### III. UN HUMAN RIGHTS LAW AND PRACTICE

UN human rights law has evolved over the past sixty years along two parallel paths, one based on the UN Charter, the other on the human rights treaties adopted by the Organization. The Charter-based system comprises the human rights principles and institutional mechanisms

<sup>18</sup> For an analysis of these arguments, see Thomas Buergenthal, *Domestic Jurisdiction, Intervention, and Human Rights: The International Law Perspective*, in HUMAN RIGHTS AND U.S. FOREIGN POLICY: PRINCIPLES AND APPLICATIONS 111 (Peter Brown & Douglas MacLean eds., 1977); Felix Ermacora, *Human Rights and Domestic Jurisdiction (Article 7, para. 7 of the Charter)*, 124 RECUEIL DES COURS 371 (1968 II); Louis Henkin, *Domestic Jurisdiction*, in HUMAN RIGHTS, INTERNATIONAL LAW AND DOMESTIC JURISDICTION 21 (Thomas Buergenthal ed., 1977).

<sup>19</sup> For the relevant UN practice under Articles 55(c) and 56, see 2 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 897–943 (Bruno Simma ed., 2002). See also LA CHARTE DES NATIONS UNIES 865–93 (Jean-Pierre Cot & Alain Pellet eds., 2d ed. 1991); Hurst Hannum, *Human Rights*, in UNITED NATIONS LEGAL ORDER 319 (Oscar Schachter & Christopher C. Joyner eds., 1995).

<sup>20</sup> Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948); see John Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21 (Bertrand Ramcharan ed., 1979).

<sup>21</sup> For the different theories that seek to explain the normative status of the Universal Declaration, see LOUIS HENKIN, *THE AGE OF RIGHTS* 19 (1990); THOMAS BUERGENTHAL, DINAH SHELTON, & DAVID STEWART, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 39–43 (3d ed. 2002); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 1988–89 AUSTL. Y.B. INT'L L. 82; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 16–17 (1982).

that different UN organs have developed in the exercise of their Charter powers. The treaty-based system consists of a large number of human rights treaties drafted under UN auspices that codify much of the international human rights law in existence today. Some of these treaties also establish institutional mechanisms to monitor compliance by the states parties with the obligations imposed by these instruments.

### *The Charter-Based System*

The UN Human Rights Council,<sup>22</sup> the successor to the Human Rights Commission, lies at the center of the Charter-based system, followed by the Commission on the Status of Women and various subsidiary bodies of the Council, such as the Sub-Commission on the Promotion and Protection of Human Rights, formerly the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Although the Human Rights Commission took the position into the mid-1960s that it lacked the power to act on violations of human rights brought to its attention, that attitude began to change as more and more newly independent states joined the United Nations and campaigned for UN antiapartheid measures. They argued that the United Nations had the requisite authority to take such action because a state that practiced apartheid could not be said to be “promoting” human rights without discrimination, as required by Articles 55 and 56 of the Charter. This argument gradually prevailed, prompting the General Assembly to call on South Africa to end apartheid and on Southern Rhodesia to do away with its racial discrimination policies. The Economic and Social Council followed up with a series of resolutions on the subject. In one of the earliest, ECOSOC authorized the Human Rights Commission “to make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid as practised in the Republic of South Africa . . . , and racial discrimination as practised notably in Southern Rhodesia.”<sup>23</sup> This narrow mandate was expanded a few years later when ECOSOC empowered the Commission and its subcommission to act on complaints from groups and individuals that revealed “a consistent pattern of gross and reliably attested violations of human rights.”<sup>24</sup> This resolution opened the way for the Commission and subcommission to deal with gross violations of human rights in general, that is, whether or not they involved apartheid or racial discrimination.

These and related ECOSOC resolutions enabled the Human Rights Commission gradually to develop a growing number of UN Charter-based mechanisms for dealing with large-scale human rights violations. Today the system consists of mushrooming rapporteur and special-mission components, as well as the Office of the United Nations High Commissioner for Human Rights with its own bureaucracy.<sup>25</sup> (It is too early to say what changes in this practice, if any, the newly established Human Rights Council will adopt.) These institutions derive their

<sup>22</sup> See GA Res. 60/251 (Mar. 15, 2006) (establishing the Council).

<sup>23</sup> ECOSOC Res. 1235 (XLII), para. 3 (June 6, 1967).

<sup>24</sup> ECOSOC Res. 1503 (XLVIII), para. 1 (May 27, 1970).

<sup>25</sup> See generally BUERGENTHAL, SHELTON, & STEWART, *supra* note 21, at 96–126; Nigel Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 70 (Hurst Hannum ed., 3d ed. 1999). See also BEATE RUDOLF, DIE THEMATISCHEN BERICHT-ERSTATTER UND ARBEITSGRUPPEN DER UN-MENSCHENRECHTSKOMMISSION (2000).

normative legitimacy from the Charter itself and from the Universal Declaration of Human Rights.<sup>26</sup>

### *The Treaty-Based System*

The treaty-based human rights system of the United Nations began with the adoption by the General Assembly of the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948, one day before the proclamation of the Universal Declaration of Human Rights. Since then the United Nations has adopted a large number of human rights treaties.<sup>27</sup> The most important of these are the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. With the exception of the Genocide Convention and the Covenant on Economic, Social and Cultural Rights, each of the foregoing treaties provides for a so-called "treaty body," which consists of a committee of independent experts that monitors compliance by the states parties with the obligations they assumed by ratifying these conventions. Some years after the Covenant on Economic, Social and Cultural Rights entered into force, ECOSOC created a similar body for that Covenant by resolution.<sup>28</sup>

Although the six treaty bodies in existence today are not judicial institutions, they have had to interpret and apply their respective conventions in reviewing and commenting on the periodic reports the states parties must submit to them, and in dealing with the individual complaints that some treaty bodies are authorized to receive. This practice has produced a substantial body of international human rights law.<sup>29</sup> While one can debate the question of the nature of this law and whether or not it is law at all, the fact remains that the normative findings of the treaty bodies have legal significance, as evidenced by references to them in international and domestic judicial decisions.<sup>30</sup>

Over the years numerous states have ratified the human rights treaties the United Nations and its specialized agencies have adopted.<sup>31</sup> These conventions not only have internationalized

<sup>26</sup> See HOWARD B. TOLLEY JR., *THE U.N. COMMISSION ON HUMAN RIGHTS* (1987); Philip Alston, *The Commission on Human Rights, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 126, 138 (Philip Alston ed., 1992) [hereinafter A CRITICAL APPRAISAL]; Asbjørn Eide, *The Sub-Commission on Prevention of Discrimination and Protection of Minorities, in id.* at 211.

<sup>27</sup> See the multivolume, periodically updated UN publication, *HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS*, UN Doc. ST/HR/1/Rev.6, UN Sales No. E.02.XIV.4 (2002).

<sup>28</sup> ECOSOC Res. 17 (May 28, 1985); see Philip Alston, *The Committee on Economic, Social and Cultural Rights, in A CRITICAL APPRAISAL, supra* note 26, at 473; see generally *THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY* (Anne F. Bayefsky ed., 2000).

<sup>29</sup> The vastness of this law, as evidenced by the practice of one treaty body, is reflected in MANFRED NOWAK, *U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* (2d rev. ed. 2005).

<sup>30</sup> See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ REP. 136 (July 9); *Pratt & Morgan v. Attorney Gen. for Jam.*, [1994] 2 App. Cas. (P.C. 1993) (appeal taken from Ct. App. Jam.).

<sup>31</sup> As of September 19, 2006: the Convention on the Prevention and Punishment of the Crime of Genocide, 138 parties; the International Convention on the Prevention of All Forms of Racial Discrimination, 170 parties; the International Covenant on Economic, Social and Cultural Rights, 154 parties; the International Covenant on Civil



the subject of human rights as between the parties to them, but also to the same extent have internationalized the individual human rights these treaties guarantee. Since some of these treaties have been very widely ratified by member states of the international community, they may be viewed as creating an entire body of customary international human rights law. Nonstates parties may therefore find it increasingly difficult to claim that the human rights guarantees these treaties proclaim, particularly those from which derogation is not permitted, impose no legal obligations on them.

### *The General Assembly and the Security Council*

Even in the days when the power of the General Assembly to deal with charges that member states were engaging in large-scale violations of human rights gave rise to lengthy debates based on Article 2(7) of the Charter, the Assembly was nevertheless able to adopt some resolutions calling on at least some of the states to stop these practices. Its early resolutions, however, tended to be rather mild or timid. But as time went by and it relied increasingly on a more expansive reading of the human rights provisions of the Charter and the normative significance of the Universal Declaration, the General Assembly became more assertive and demanding in its resolutions. In the case of particularly egregious violations, such as those involving apartheid, the General Assembly even invited states to impose sanctions.<sup>32</sup>

The nonbinding character of General Assembly resolutions tended to diminish their effectiveness as a tool for putting an end to large-scale violations of human rights. For many years, the Security Council, while having the power under Chapter VII of the Charter to adopt binding resolutions and to order enforcement measures, including economic sanctions and military action, could rarely agree on taking such measures, even in cases involving egregious human rights violations that could readily be characterized as a threat to the peace within the meaning of Article 39 of the Charter. That situation changed to a large extent with the end of the Cold War, which had prevented unanimity among the Council's permanent members. With increasing frequency, the Security Council has exercised its powers under Chapter VII in situations involving massive violations of human rights. What we are seeing today, despite the Council's ambivalence in dealing forcefully with the human tragedy being played out in Darfur, is the gradual emergence of a modern version of collective humanitarian intervention. This development can be attributed to the convergence of two important factors: the growing assertion of power by the Security Council in the post-Cold War era and the expanding willingness of the international community to confront massive violations of human rights with economic sanctions or force, if necessary.<sup>33</sup>

and Political Rights, 157 parties; the Convention on the Elimination of All Forms of Discrimination Against Women, 184 parties; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 141 parties; and the Convention on the Rights of the Child, 192 parties. Figures on ratifications and accession to these and other treaties are available at <<http://www.ohchr.org/english/countries/ratification/index.htm>>.

<sup>32</sup> See generally LOUIS B. SOHN, *RIGHTS IN CONFLICT: THE UNITED NATIONS & SOUTH AFRICA* (1994).

<sup>33</sup> For a thorough analysis of the subject, see THEODOR MERON, *THE HUMANIZATION OF HUMAN RIGHTS* 510–17 (2006). See also Mariano Aznar-Gómez, *A Decade of Human Rights Protection by the Security Council: A Sketch of Deregulation?* 13 EUR. J. INT'L L. 223 (2002); Christopher Le Mon & Rachel Taylor, *Security Council Action in the Name of Human Rights: From Rhodesia to the Congo*, 10 U.C. DAVIS J. INT'L L. & POL'Y 198 (2004).

*Overall Achievement of the United Nations*

The most important contribution of the United Nations to the protection of human rights consists of the many human rights instruments—resolutions, declarations, and conventions—it has adopted since it came into being. These instruments, together with the human rights provisions of the Charter, laid the normative foundation of the contemporary international human rights revolution. They inspired the lawmaking processes that created the European, inter-American, and African human rights systems. They have also influenced, in part at least, the contents of the legal norms under which international criminal tribunals operate today.

The six UN treaty bodies, which currently supervise the implementation of the major UN human rights conventions, have played an important role over the years in strengthening the international human rights system. Although their powers are limited, these bodies have been able gradually to examine ever more intrusively the human rights policies and practices of the states parties to these conventions. This process—the review of the periodic reports these states must submit to the treaty bodies—has required the states publicly to explain and defend their human rights policies every few years. The very knowledge that their human rights policies will be scrutinized in this fashion by one or the other treaty body puts pressure on states to reexamine these policies and may lead to an improvement in the human rights situation in some countries at a minimum. This entire process also makes those states that are not parties to these treaties aware of the progressive internationalization of almost all aspects of their national human rights policies. That, in turn, cannot but have beneficial consequences in at least some countries as far as their human rights situations are concerned.

It must be recognized, however, that the United Nations and its various human rights institutions are largely ineffectual in dealing with individual human rights violations. Here, the regional human rights systems, dealt with below, are more effective. Unfortunately, regional human rights systems have been established in only three regions of the world, even though they are needed in every one. The UN system is better equipped to deal with large-scale violations of human rights, for which it commands the necessary political, military, and public relations resources. The great weakness of the UN system, particularly its Charter-based system, is its susceptibility to politicization. Politicization has resulted in the frequent condemnation of certain violators of human rights while others, some even more blatant, escape criticism. The replacement of the UN Human Rights Commission with the new Human Rights Council was designed to address this problem but is unlikely to resolve it, if only because the United Nations is a political body whose actions are determined by political considerations.<sup>34</sup> The Organization can do only what a majority of its member states want it to do, and many states prefer to do as little as possible about human rights violations, particularly those committed by their friends or allies. This reality is frequently lost sight of when UN human rights action or inaction is criticized.

## IV. REGIONAL HUMAN RIGHTS SYSTEMS

The European Convention on Human Rights ushered in the first regional system for the protection of human rights. It was followed by the inter-American and African systems. All

<sup>34</sup> See Hillel C. Neuer, *So Far, a Profound Disappointment; UN Human Rights Council*, INT'L HERALD TRIB., Sept. 8, 2006, at 8.

three of the existing systems seek in one form or another to supplement the human rights efforts of the United Nations by providing protective mechanisms suited to their regions. In addition to guaranteeing many of the human rights that various UN instruments proclaim, each regional system also codifies those rights to which the region attaches particular importance because of its political and legal traditions, its history and culture.

### *The European Human Rights System*

The European Convention for the Protection of Human Rights and Fundamental Freedoms established what has become the most effective international system for the protection of individual human rights to date. It has also served as a model for the two other regional human rights systems. The Convention traces its origin to the late 1940s, when the states constituting the Council of Europe, then a grouping of Western European states only, concluded that UN efforts to produce a treaty transforming the lofty principles proclaimed in the Universal Declaration of Human Rights into a binding international bill of rights would take many years to come to fruition. Rather than wait, they decided that the Council of Europe should proceed on its own. The justification for not waiting was expressed in the preamble to the European Convention,<sup>35</sup> which stated that the members of the Council of Europe were “resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.”<sup>36</sup>

By 1953, the ten ratifications necessary to bring the Convention into force had been deposited, and a total of forty-six states are now parties to it. This dramatic increase in its membership is due in large measure to the geopolitical transformation of Europe that resulted from the demise of the Soviet Union and the end of the Cold War. Today most European states are members of the Council of Europe and states parties to the Convention, including Russia and some former Soviet Republics, as well as the United Kingdom, France, and Germany. In the meantime, the Convention itself and the system it established have also been significantly transformed.

When the European Convention entered into force, it guaranteed only a dozen basic civil and political rights.<sup>37</sup> The list of these rights has grown significantly over the years with the adoption of additional protocols that have expanded the Convention’s catalog of rights. In the meantime, these rights have been extensively interpreted by the Convention institutions and the national courts of the member states.<sup>38</sup> In the process, the meaning and scope of these rights also have increasingly come to reflect the contemporary needs of European society. The result

<sup>35</sup> For the political reasons prompting this action by the Council of Europe, see ARTHUR H. ROBERTSON & JOHN G. MERRILLS, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (4th ed. 2001).

<sup>36</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, pmbll., Nov. 4, 1950, 213 UNTS 221 [hereinafter *European Convention*].

<sup>37</sup> Various categories of economic and social rights are protected in a separate Council of Europe treaty, the European Social Charter, which entered into force in 1964. See generally DAVID HARRIS & JOHN DARCY, *THE EUROPEAN SOCIAL CHARTER* (2d ed. 2001).

<sup>38</sup> See generally JOCHEN ABR. FROWEIN & WOLFGANG PEUKERT, *EUROPÄISCHE MENSCHENRECHTSKONVENTION: EMRK-KOMMENTAR* (2d ed. 1996); *FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950–2000* (Robert Blackburn & Jörg Polakiewicz eds., 2001); D. J. HARRIS, M. O’BOYLE, C. WARBRICK, & E. BATES, *LAW OF THE EUROPEAN CONVENTION*

is a modern body of human rights law to which other international, regional, and national institutions frequently look when interpreting and applying their own human rights instruments.

In addition, the institutions of the European Convention have undergone extensive changes. The original Convention machinery consisted of a European Commission and Court of Human Rights. The main function of the Commission was to pass on the admissibility of all applications, both interstate and individual.<sup>39</sup> Of the various admissibility requirements, the exhaustion of domestic remedies occupied much of the Commission's time. Because not all states parties to the Convention had been required to accept the jurisdiction of the Court when they ratified the Convention,<sup>40</sup> the Commission also had to deal with cases that were not or could not be referred to the Court. At that time, only states and the Commission had standing to bring cases to the Court; individuals did not.

The institutional structure of the European system was substantially changed with the adoption of Protocol No. 11 to the Convention, which entered into force in 1998. It abolished the Commission and gave individuals direct access to the Court.<sup>41</sup> The Convention thus became the first human rights treaty to give individuals standing to file cases directly with the appropriate tribunal. Today the European Court numbers forty-six judges, that is, a judge for each member state of the Council of Europe. The Plenary Court, which consists of all judges, exercises mainly administrative functions. The judicial work of the Court is performed by three bodies of judges: Committees (three judges), Chambers (seven judges), and the Grand Chamber (seventeen judges). The Committees are authorized to reject, by unanimous vote, individual applications as inadmissible. Chambers deal with the remaining admissibility issues and the merits of most interstate and individual applications. The Grand Chamber has a dual function. Under certain circumstances, particularly when a Chamber is called upon to decide serious questions of interpretation of the Convention or its protocols, it may opt to relinquish its jurisdiction in favor of the Grand Chamber.<sup>42</sup> In certain "exceptional cases," the Grand Chamber may also act as an appellate tribunal and hear cases already decided by a Chamber.<sup>43</sup>

Over time, the European Court of Human Rights for all practical purposes has become Europe's constitutional court in matters of civil and political rights.<sup>44</sup> Its judgments are routinely followed by the national courts of the states parties to the Convention, their legislatures, and their national governments. The Convention itself has acquired the status of domestic law

ON HUMAN RIGHTS (2d ed. 2005); JACOBS AND WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Clare Ovey & Robin White eds., 4th ed. 2006).

<sup>39</sup> Under Article 24 of the Convention, the Commission had automatic jurisdiction to deal with any case referred to it by one state party against another state party. But Article 25 authorized individuals to bring cases to the Commission against a state party only if the state had filed a declaration with the Commission recognizing the right of private petition to do so.

<sup>40</sup> For the Court to have jurisdiction to hear any case referred to it by either the Commission or a state party required a prior declaration by the state party accepting the Court's jurisdiction under the Article 46 that was then in force.

<sup>41</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, 33 ILM 943 (1994); see Andrew Z. Drzemczewski, *The European Human Rights Convention: Protocol No. 11—Entry into Force and First Year of Operation*, 21 HUM. RTS. L.J. 1 (2000).

<sup>42</sup> European Convention, *supra* note 36, as amended, Art. 30, available at <<http://hei.unige.ch/~clapham/hrdoc/docs/ECHR.pdf>>.

<sup>43</sup> *Id.*, Art. 43.

<sup>44</sup> See Christian Walter, *Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess*, 59 HEIDELBERG J. INT'L L. 961 (1999).

in most of the states parties and can be invoked as such in their courts.<sup>45</sup> While at times some of the newer states parties find it difficult to live up to their obligations under the Convention, a substantial majority of states applies the Convention faithfully and routinely.

The success of the European Convention system has brought with it a caseload for the Court that it has found more and more difficult to cope with.<sup>46</sup> To address this problem, in 2004 the Council of Europe adopted Protocol No. 14 to the Convention.<sup>47</sup> Once it enters into force, the Protocol should enable the Court to reduce its caseload substantially by a variety of methods, some of which have not escaped criticism because they are likely to result, so it is claimed, in the automatic rejection of many meritorious cases.<sup>48</sup> It cannot be doubted, however, that the current caseload has become unmanageable, seriously impeding the effective implementation of the Convention.<sup>49</sup>

### *The Inter-American Human Rights System*

When the Charter of the Organization of American States (OAS) was adopted in Bogotá, Colombia, in 1948, it made only general references to human rights. But the same Bogotá conference also proclaimed the American Declaration of the Rights and Duties of Man, though merely in the form of a nonbinding conference resolution. Before the American Convention on Human Rights entered into force in 1978, the human rights provisions of the OAS Charter, read together with the American Declaration, provided the sole, albeit rather weak, legal basis for the protection of human rights by the OAS.<sup>50</sup>

Until 1960, the OAS made no serious effort to create a mechanism for the enforcement of these rights. That year the Inter-American Commission on Human Rights was established. Composed of seven independent experts elected by the General Assembly of the OAS, the Commission was charged with the promotion of the rights proclaimed in the American Declaration. It was to perform this task by preparing country studies and by adopting resolutions of a general character only. Six years later, the Commission was authorized to establish a limited petition system that allowed it to receive individual communications, charging large-scale violations of a selected number of basic rights set out in the American Declaration, including the right to life, equality before the law, freedom of religion, freedom from arbitrary arrest, and the

<sup>45</sup> Jörg Polakiewicz & Valerie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect Is Given to the Convention*, 12 HUM. RTS. L.J. 65, 125 (1991).

<sup>46</sup> The caseload is staggering. In 2005 Lord Henry Woolf reported that in 2004, 44,100 new applications were lodged and that the number of pending cases before the Court—82,100 in 2005—would rise to 250,000 by the year 2010. Lord Woolf, *Review of the Working Methods of the European Court of Human Rights*, 26 HUM. RTS. L.J. 447 (2005).

<sup>47</sup> Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, 26 HUM. RTS. L.J. 88 (2005), available at <<http://conventions.coe.int/Treaty/en/Treaties/Html/194.htm>>.

<sup>48</sup> See Philip Leach, *Access to the European Court of Human Rights—From a Legal Entitlement to a Lottery?* 27 HUM. RTS. L.J. 11 (2006).

<sup>49</sup> M. Eaton & J. Schokkernbroek, *Reforming the Human Rights Protection System Established by the European Convention on Human Rights*, 26 HUM. RTS. L.J. 1 (2005).

<sup>50</sup> On the inter-American human rights system in general, see HÉCTOR FAUNDEZ-LEDESMA, *EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS: ASPECTOS INSTITUCIONALES Y PROCESALES* (2d ed. 1999); THOMAS BUERGENTHAL & DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS* (4th ed. 1995).

right to due process of law.<sup>51</sup> During this period, the Commission was hampered in the exercise of its functions because, rather than being a Charter organ, it was designated an “autonomous entity” of the OAS, which denied it the requisite constitutional status to be taken seriously by the member states. This unsatisfactory state of affairs was remedied in 1970 with the entry into force of the Protocol of Buenos Aires. It amended the OAS Charter and transformed the Commission into a Charter organ whose “principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.”<sup>52</sup>

In the early years of its existence, both as autonomous entity and later as Charter organ, the Commission was kept busy preparing reports on human rights situations in various countries. These reports were grounded in on-site visits and information in petitions presented to it. The Commission adopted its first country reports in the early 1960s.<sup>53</sup> These dealt with the human rights situations in Cuba, Haiti, and the Dominican Republic. Only the Dominican Republic granted permission for a visit to the country, making it the first OAS member state to host a so-called *in loco* or on-site investigation by the Commission. During that on-site visit, the Commission criss-crossed the country, held hearings, and met with different groups of claimants. This modus operandi was subsequently adopted for on-site visits generally.<sup>54</sup> The Commission’s most dramatic on-site investigation took place in Argentina. There it verified the allegations of the massive forced disappearances that had occurred in that country during its “dirty war.” The publication of its report on the Argentine situation had a highly beneficial impact on conditions in that country.<sup>55</sup> For many years, even after the entry into force of the American Convention on Human Rights, the Commission’s *in loco* investigations occupied much of its time, primarily because in the 1960s, 1970s, and early 1980s many Latin American countries continued to be ruled by authoritarian regimes that engaged in widespread violations of human rights. Most of these states did not, of course, ratify the Convention until the installation of democratic regimes in their countries. The investigations and reports of the Commission provided the only means for pressuring these states to improve their human rights conditions.

The American Convention on Human Rights was concluded in San José, Costa Rica, in 1969 and came into force in 1978. Like the European Convention, the American Convention guarantees only civil and political rights.<sup>56</sup> While the list of rights the European Convention

<sup>51</sup> See generally BUERGENTHAL, SHELTON, & STEWART, *supra* note 21, at 228–41.

<sup>52</sup> OAS Charter, *as amended*, Arts. 51, 112(1), now Arts. 53, 106(1), available at <<http://www.oas.org/main/english/>>; see generally Thomas Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AJIL 828 (1975).

<sup>53</sup> These first reports are reproduced in OAS SECRETARIAT, *THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS: 1960–1967*, pt. III (1972).

<sup>54</sup> See Robert Norris, *Observations in Loco: Practice and Procedure of the Inter-American Commission on Human Rights, 1979–1980*, 18 TEX. INT’L L.J. 285 (1984). By 1993, the Commission had carried out more than fifty on-site visits. David Padilla, *The Inter-American Commission on Human Rights of the Organization of American States: A Case Study*, 9 AM. U. J. INT’L L. & POL’Y 95, 104 (1993). These visits continue, although their number has substantially diminished with the growing democratization of the region and the resulting improvement in the human rights situation in most countries.

<sup>55</sup> Inter-Am. Comm’n on Human Rights, Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19, corr.1 (1980).

<sup>56</sup> Economic, social, and cultural rights are dealt with in a parallel treaty of the Organization of American States, namely, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights—the “Protocol of San Salvador”—which entered into force on November 16, 1999. For a review of the various inter-American instruments relating to these rights and the relevant practice under them, see

guarantees has grown with the adoption of further protocols, the drafters of the American Convention opted for a comprehensive instrument that drew heavily on the much more extensive catalog of rights enumerated in the International Covenant on Civil and Political Rights. However, not all the rights guaranteed in the American Convention are derived from the Civil and Political Covenant. Some of them reflect the historical and cultural traditions of the Americas, such as the provision that guarantees the right to life. It provides, *inter alia*, that this right “shall be protected by law and, in general, from the moment of conception.”<sup>57</sup> Delegates from Latin America’s overwhelmingly Catholic countries insisted on this provision during the drafting of the Convention.

The institutional structure of the American Convention is modeled on that of the European Convention as originally drafted, that is, before its Protocol No. 11 entered into force. The American Convention provides for a seven-member Inter-American Commission on Human Rights and an Inter-American Court of Human Rights of seven judges. Because the Commission established by the Convention retains the powers its predecessor exercised as an OAS Charter organ, all OAS member states have the right to nominate and elect the members of the Commission.<sup>58</sup> But only the states parties to the Convention may nominate and elect the judges of the Court. Since to date not all OAS member states have ratified the Convention, the Commission continues to apply the human rights provisions of the Charter and the American Declaration of the Rights and Duties of Man to these states, besides acting as a Convention organ with regard to the states parties to that instrument. Importantly, this dual role of the Commission permits it to deal with massive violations of human rights that, though not within its jurisdiction as a Convention organ, it can address as a Charter organ regardless of whether or not the state in question is a party to the Convention. By contrast, the European Convention applies in principle only to individual human rights violations as such.

By ratifying the American Convention, states are automatically considered to have accepted the jurisdiction of the Commission to hear cases brought against them by individuals.<sup>59</sup> Interstate complaints can be heard by the Commission only if the applicant and respondent states have each filed a separate declaration accepting the Commission’s jurisdiction to receive such complaints. Until Protocol No. 11 to the European Convention on Human Rights entered into force, no other human rights instrument conferred on individuals the favorable status they enjoy under the American Convention. The Inter-American Commission passes on the admissibility of individual and interstate communications. If the matter is not referred to the Inter-American Court, the Commission examines the merits of the case, assists in efforts to work out a friendly settlement, and, failing that, makes findings on the merits. If the state party in question has accepted the jurisdiction of the Court, the Commission or an interested state may refer the case to the Court. Individuals have no standing to do so. Nevertheless, since 2001, once

Fabián Salvioli, *La protección de los derechos económicos, sociales y culturales en el sistema interamericano de derechos humanos*, REVISTA IIDH, Jan.–June 2004, at 101.

<sup>57</sup> American Convention on Human Rights, Art. 4(1), Nov. 22, 1969, 1144 UNTS 123 [hereinafter American Convention]; *see also id.*, Art. 14 (Right of Reply), Art. 7(6) (Right to Personal Liberty). The latter provision proclaims a kind of anticipatory habeas corpus right.

<sup>58</sup> The Inter-American Commission on Human Rights is thus both an OAS Charter organ and a Convention organ.

<sup>59</sup> American Convention, *supra* note 57, Art. 34. The Convention allows not only victims of a violation of the Convention or their representatives to bring a case to the Commission, but also “[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states” of the OAS. *Id.*, Art. 44. This provision proved to be particularly useful during the time in the Americas when forced disappearances were widely practiced by governments, enabling NGOs to file petitions on behalf of the disappeared.

a case has been referred to the Court, individuals have been permitted to appear before it to plead their case.<sup>60</sup> While in the early years of the Court's existence, the Commission tended to refer cases to it rarely, this situation changed in 2001 when it adopted new Rules of Procedure,<sup>61</sup> which provide, with some minor exceptions, for referral to the Court of all cases of noncompliance by states with the Commission's recommendations.<sup>62</sup>

Today the Inter-American Court of Human Rights, which has both contentious and advisory jurisdiction, plays an ever more important role in the inter-American human rights system.<sup>63</sup> Most of the states that have ratified the Convention to date have now also accepted the Court's contentious jurisdiction. The American Convention, moreover, allows OAS member states, whether or not they have ratified the Convention, and all OAS organs to request advisory opinions from the Court, seeking the interpretation of the Convention or of other human rights treaties of the inter-American system. Advisory opinions may also be sought on the compatibility with the Convention of national legislation.<sup>64</sup> Because the Court's case law has grown significantly since the adoption of the Commission's 2001 Rules of Procedure, states find it increasingly necessary to bring their national legislation and judicial practice into conformity with the Convention to avoid being held in violation of it.<sup>65</sup>

The inter-American human rights system still lags behind its European counterpart in protecting human rights. The American continent continues to suffer from widespread poverty, corruption, discrimination, and illiteracy, not to mention archaic judicial systems that are badly in need of reform. The United States and Canada, as well as some of the Commonwealth Caribbean nations, have not yet ratified the Convention. Their absence has had a detrimental effect on the system, which it deprives of the participation of states with strong legal traditions in the human rights field. Although some national courts in the Americas have also been taking a long time to familiarize themselves with the practice of the Convention institutions and to give domestic legal effect to the rulings of the Court, that situation has improved notably in recent years.<sup>66</sup> Moreover, notwithstanding the problems the region faces, substantial progress has undeniably been made over the years in the protection of human rights in the Americas.

### *The African Human Rights System*

The African human rights system evolved in two distinct stages in a manner somewhat similar to that of its inter-American counterpart. The first stage consisted of the adoption in 1981

<sup>60</sup> Inter-Am. Court of Human Rights, Rules of Procedure, Art. 23, Inter-Am. C.H.R. (ser. A) No. 17 (2003).

<sup>61</sup> Dinah Shelton, *New Rules of Procedure for the Inter-American Commission on Human Rights*, 22 HUM. RTS. L.J. 169 (2001); see also Thomas Buergenthal, *Remembering the Early Years of the Inter-American Court of Human Rights*, 37 N.Y.U. J. INT'L L. & POL. 259, 269–73 (2005).

<sup>62</sup> Inter-Am. Comm'n on Human Rights, Rules of Procedure, Art. 44, available at <<http://www.iachr.org/Basicos/basic16.htm>>. These rules also give individuals an opportunity to be heard by the Commission on the question of referral of the case to the Court. *Id.*, Art. 43.

<sup>63</sup> For an overview of the Court's practice, see Manuel E. Ventura-Robles, *La jurisprudencia de la Corte inter-americana de derechos humanos en materia de derechos civiles y políticos*, REVISTA IIDH, July–Dec. 2005, at 37. See also INTER-AM. CT. HUM. RTS., CORTE INTERAMERICANA DE DERECHOS HUMANOS—UN CUARTO DE SIGLO: 1979–2004 (2005).

<sup>64</sup> American Convention, *supra* note 57, Art. 64; see generally JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (2003).

<sup>65</sup> For a collection of recent national court cases dealing with the decisions of the Inter-American Court, see DIÁLOGO JURISPRUDENCIAL, No. 1 (R. Cuéllar & P. Saavedra eds., IIDH, 2006).

<sup>66</sup> *Id.*



by the Organization of African Unity, now the African Union, of the African Charter on Human and Peoples' Rights. It entered into force in 1986 and in the meantime has been ratified by all fifty-three member states of the African Union.<sup>67</sup> The Charter created an African Commission on Human and Peoples' Rights, but not a court. The African Court of Human and Peoples' Rights was established later by means of a separate protocol that came into force in 2004. The Court was formally inaugurated only in 2006.

The catalog of rights that the African Charter guarantees differs from its European and inter-American counterparts in several important respects. The Charter proclaims not only rights but also duties, and it guarantees both individual and peoples' rights. In addition to civil and political rights,<sup>68</sup> the African Charter sets out a series of economic and social rights.<sup>69</sup> The Charter permits the states parties to impose more extensive restrictions and limitations on the exercise of the rights it proclaims than the European and inter-American human rights instruments. It also does not contain a derogation clause, which leaves the question open whether all rights in the African Charter are derogable. The Charter's catalog of rights was heavily influenced by the rights proclaimed in the Universal Declaration of Human Rights and the two International Covenants on Human Rights. African historical traditions and customs are also reflected in some provisions of the Charter, particularly those dealing with duties of individuals and family matters.<sup>70</sup>

The Commission's mandate is "to promote human and peoples' rights and ensure their protection in Africa."<sup>71</sup> It is composed of eleven elected members who serve in their individual capacities. The Commission has promotional and quasi-judicial powers. It discharges its promotional functions by preparing studies, convening conferences and workshops, disseminating information, and collaborating with NGOs.<sup>72</sup> The Commission has the power to make recommendations to governments, calling on them to address human rights problems that have come to its attention from its review of the periodic country reports the states parties are required to submit to it, as well as from other sources, including its own on-site visits and country studies.<sup>73</sup>

The Commission is also empowered to render interpretive opinions and to deal with interstate and individual complaints. The states parties, the African Union, and intergovernmental African organizations recognized by the latter may request advisory opinions from the Commission regarding interpretation of the African Charter on Human and Peoples' Rights.<sup>74</sup>

<sup>67</sup> See generally VINCENT O. ORLU NMEHIELLE, *THE AFRICAN HUMAN RIGHTS SYSTEM* (2001); FATAH OUGUERGOUZ, *THE AFRICAN CHARTER OF HUMAN AND PEOPLES' RIGHTS* (2003).

<sup>68</sup> See Christof Heynes, *Civil and Political Rights in the African Charter*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, 1986–2000*, at 137 (Malcolm D. Evans & Rachel Murray eds., 2002) [hereinafter *AFRICAN CHARTER, 1986–2000*].

<sup>69</sup> See Chidi Anselm Odinkalu, *Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights*, in *AFRICAN CHARTER, 1986–2000*, *supra* note 68, at 178.

<sup>70</sup> See African Charter on Human and Peoples' Rights, pmb., June 27, 1981, 21 ILM 58 (1982) [hereinafter *African Charter*]; see also Frans Viljoen, *The African Charter on Human and Peoples' Rights: The Travaux Préparatoires in the Light of Its Subsequent Practice*, 25 HUM. RTS. L.J. 313, 319 (2004).

<sup>71</sup> African Charter, *supra* note 70, Art. 30; see generally RACHEL MURRAY, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS* (2000).

<sup>72</sup> See Victor Dankwa, *The Promotional Role of the African Commission on Human and Peoples' Rights*, in *AFRICAN CHARTER, 1986–2000*, *supra* note 68, at 335.

<sup>73</sup> See, e.g., Rachel Murray, *Report of the 1999 Session of the African Commission on Human and Peoples' Rights*, 22 HUM. RTS. L.J. 172 (2001).

<sup>74</sup> African Charter, *supra* note 70, Art. 45.

These advisory powers acquire a special significance in light of two Charter provisions. One of these is Article 60, which reads as follows:

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the [African Union], the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.<sup>75</sup>

The other provision is Article 61. It contains the following language:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the [African Union], African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.<sup>76</sup>

These interesting and unique provisions provide the Commission with a valuable legislative tool capable of ensuring that its interpretations of the African Charter keep pace with developments in the international human rights field in general. Through the years, the Commission has increasingly relied on these provisions with a view to strengthening the normative contents of the African Charter.<sup>77</sup>

The powers of the African Commission to deal with interstate and individual communications are much more limited than those conferred by the European and inter-American human rights treaties. The Commission is so constrained in part because its findings with regard to the communications it receives cannot be made public without the permission of the African Union's Assembly of Heads of State and Government, a political body that has traditionally not been inclined to take strong action against serious violators of human rights. The Commission's power to deal with individual petitions is limited, furthermore, to "cases which reveal the existence of a series of serious or massive violations of human and peoples' rights."<sup>78</sup> Thus, what we have here is not really a mechanism for individual petitions as it exists in the two other regional human rights systems. It is, rather, a procedure that permits individuals to file petitions charging massive or persistent violations of human rights, but not individual violations of one or the other right guaranteed by the African Charter. It is worth noting, though, that in the past the African Commission found ways around this problem by hearing claims that on their face may not have met the strict requirements of the above provision.<sup>79</sup>

<sup>75</sup> *Id.*, Art. 60.

<sup>76</sup> *Id.*, Art. 61.

<sup>77</sup> For an analysis of this practice, see Viljoen, *supra* note 70, at 323–24.

<sup>78</sup> African Charter, *supra* note 70, Art. 58(1). Note that this language is quite similar to the language of ECOSOC Resolution 1503, *supra* note 24.

<sup>79</sup> For an analysis of some of this practice, see BUERGENTHAL, SHELTON, & STEWART, *supra* note 21, at 300–09; Frans Viljoen, *Admissibility Under the African Charter*, in *AFRICAN CHARTER, 1986–2000*, *supra* note 68, at 61; Rachel Murray, *Evidence and Fact-Finding by the African Commission*, *in id.* at 100.

The new African Court of Human and Peoples' Rights,<sup>80</sup> whose function it is to "complete the protective mandate" of the African Commission,<sup>81</sup> has contentious and advisory jurisdiction. Its contentious jurisdiction is broader than that of the European and inter-American Courts; it extends to disputes arising not only under the Charter and the Protocol establishing the Court, but also "under any other relevant Human Rights instrument ratified by the States concerned."<sup>82</sup> On its face, this broad language would permit the Court to adjudicate disputes between African states even with regard to non-African human rights instruments to which they are parties. The Court's contentious jurisdiction covers cases filed by the African Commission, states parties that are applicants and respondents in cases heard before the Commission, states parties whose citizens are victims of human rights violations, and African inter-governmental organizations. NGOs with observer status before the Commission and individuals as such may also institute proceedings before the Court, provided the state party against which the case is filed previously recognized that right in a separate declaration.<sup>83</sup>

The Court also has extensive advisory jurisdiction powers.<sup>84</sup> These are spelled out in Article 4(1) of the Protocol, which reads as follows:

At the request of a Member State of the [African Union], the [AU], any of its organs, or any African organization recognized by the [AU], the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.<sup>85</sup>

It remains to be seen how the Court will interpret the phrase "any other relevant human rights instruments" in dealing with requests for advisory opinions. This open-ended language might be read to permit the Court to render advisory opinions relating to any human rights instruments whatsoever. It might also be argued that the reference to "relevant" instruments was intended to indicate that Article 4(1) referred only to human rights instruments relevant to the interpretation of the Charter.

Since the African Court came into being only in 2006, we cannot know how it will interpret the important powers the Protocol confers on it or how long it will take for it to make a significant contribution to the protection of human and peoples' rights in Africa. The future of the Court has been further complicated by the African Union's conclusion of yet another Protocol that calls for the establishment of an African Court of Justice.<sup>86</sup> When this Protocol enters

<sup>80</sup> See generally Julia Harrington, *The African Court on Human and Peoples' Rights*, in AFRICAN CHARTER, 1986–2000, *supra* note 68, at 305; Fatsah Ouguergouz, *The Establishment of an African Court of Human and Peoples' Rights: A Judicial Première for the African Union*, 2003 AFR. Y.B. INT'L L. 79; Anne Pieter van der Mei, *The African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protective Mechanism for Africa?* 18 LEIDEN J. INT'L L. 113 (2005).

<sup>81</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art. 2, June 10, 1998, available at <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>> [hereinafter Protocol].

<sup>82</sup> *Id.*, Art. 3.

<sup>83</sup> *Id.*, Arts. 5, 34(6).

<sup>84</sup> Anne Pieter van der Mei, *The Advisory Jurisdiction of the African Court on Human and Peoples' Rights*, 5 AFR. HUM. RTS. L.J. 27 (2005).

<sup>85</sup> Protocol, *supra* note 81, Art. 4(1).

<sup>86</sup> Protocol of the Court of Justice of the African Union, July 11, 2003, available at <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>.

into force, the new court is supposed to be merged with the African Court of Human and Peoples' Rights. What impact such a merger will have on the latter Court's role is still too early to say. Moreover, the political, economic, and social problems Africa faces are much more severe than the comparable problems that plague the Americas or Europe. In addition to severe poverty and corruption, the African continent continues to be the victim of wars and internal armed conflicts that have killed millions of human beings, while AIDS is ravaging the entire populations of some countries. Africa has also not been able to rid itself of authoritarian regimes, some of which still hold power. It will therefore not be easy in the short term for the African Court and Commission to create an effective regional human rights system.

## V. OTHER DEVELOPMENTS

The Charter of the United Nations and the human rights instruments and machinery it has spawned, together with the three regional human rights institutions described in the preceding sections, mark the centerpiece of the contemporary international human rights system. But there is much more to that system.<sup>87</sup> It comprises, inter alia, the human rights instruments and protection mechanisms adopted by various specialized agencies of the United Nations, among them in particular the International Labour Organization<sup>88</sup> and the United Nations Educational, Scientific and Cultural Organization.<sup>89</sup> Other intergovernmental organizations, notably the Organization for Security and Co-operation in Europe,<sup>90</sup> have also made significant contributions to the protection of human rights in recent decades. Developments in the human rights field that deserve special mention include the continuing normative and institutional efforts to strengthen the enjoyment of internationally proclaimed economic, social, and cultural rights<sup>91</sup> and the protection of minorities and other vulnerable groups, among them internally displaced persons and indigenous populations.<sup>92</sup> As the contents of the Declaration and Programme of Action adopted at the 1993 World Conference on Human Rights in Vienna demonstrated, the contemporary international human rights agenda is an ever-expanding

<sup>87</sup> For a comprehensive overview, see MERON, *supra* note 33.

<sup>88</sup> Virginia A. Leary, *Lessons from the Experience of the International Labour Organisation*, in A CRITICAL APPRAISAL, *supra* note 26, at 580.

<sup>89</sup> Fons Coomans, *UNESCO and Human Rights*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 181 (Raija Hanski & Markku Suksi eds., 1999).

<sup>90</sup> BUERGENTHAL, SHELTON, & STEWART, *supra* note 21, at 205; Thomas Buergenthal, *The CSCE Human Rights System*, 25 GEO. WASH. J. INT'L & ECON. L. 333 (1993); see also John Packer, *The OSCE High Commissioner on National Minorities: Pyrometer, Prophylactic, Pyrovestis*, in MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORBERRY 249 (Nazila Ghana & Alexandra Xanthaki eds., 2005).

<sup>91</sup> See generally ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK (Asbjørn Eide, Catarina Krause, & Allan Rosas eds., 1995); Asbjørn Eide, *Economic and Social Rights*, in HUMAN RIGHTS: CONCEPT AND STANDARDS 109 (Janusz Symonides ed., 2000). See also Philip Alston, *No Need to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant*, in THE FUTURE OF HUMAN RIGHTS IN A CHANGING WORLD: FIFTY YEARS SINCE THE FOUR FREEDOMS ADDRESS: ESSAYS IN HONOR OF TORKEL OPSAHL 79 (Asbjørn Eide & Jan Helgesen eds., 1991); Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?* 98 AJIL 462 (2004).

<sup>92</sup> These topics are dealt with in a number of essays appearing in HUMAN RIGHTS: CONCEPT AND STANDARDS, *supra* note 91, at 231–341. For further material, see THE RIGHTS OF MINORITIES IN EUROPE (Marc Weller ed., 2005); HUMAN RIGHTS PROTECTION FOR REFUGEES, ASYLUM-SEEKERS, AND INTERNALLY DISPLACED PERSONS: A GUIDE TO INTERNATIONAL MECHANISMS AND PROCEDURES (Joan Fitzpatrick ed., 2001).

work in progress.<sup>93</sup> This fact is also readily apparent from the recent developments described below.

### *International Criminal Tribunals*

In the 1990s, following the Rwandan genocide and the horrendous crimes that were then being committed in the Balkan conflict, the international community finally realized that existing human rights mechanisms were not effective in dealing with such crimes and that the creation of international tribunals with jurisdiction to try the individuals responsible for those crimes was essential. As a result, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda,<sup>94</sup> the first such international criminal courts to come into being in more than half a century after the Nuremberg and Tokyo war crimes tribunals. In addition, the need to establish these tribunals on an ad hoc basis in the absence of a permanent international criminal court revived long-dormant efforts to create such a court, which bore fruit in 2002 with the entry into force of the Rome Statute of the International Criminal Court.<sup>95</sup> Today some hundred states are parties to the Rome Statute.

The establishment of these three tribunals, as well as other ad hoc international criminal tribunals,<sup>96</sup> constitutes a further important step in the long struggle to protect human rights. The earlier focus on developing and strengthening the legal norms and institutions that would hold states responsible for the human rights violations by their governments frequently proved to be ineffective in getting at the root of the problem, for it failed to provide adequate mechanisms to punish the individuals who had ordered or committed large-scale violations of human rights. As a rule, the governments that were held liable for the violations had come to power when the culpable regimes were no longer in charge. Moreover, the former leaders who had oppressed the people, and frequently also impoverished the country while enriching themselves, were often living in opulent retirement. All these considerations compelled the conclusion that the traditional remedy needed to be reinforced with international judicial mechanisms allowing the criminal prosecution of the individuals responsible for serious human rights violations that amounted to offenses under international criminal law. This is the mandate of the permanent International Criminal Court, which has its seat in The Hague, Netherlands.

### *Truth Commissions*

Truth commissions are another type of institution that has come into being in recent decades: ad hoc bodies that fit somewhere between traditional human rights institutions and international criminal tribunals. Truth commissions are usually set up to investigate large-scale violations of human rights committed in a country during a protracted civil war or following

<sup>93</sup> See Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24 (Part I) (1993), 32 ILM 1661 (1993).

<sup>94</sup> See generally GUÉNAËL METTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* (2005).

<sup>95</sup> THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002).

<sup>96</sup> For the relevant texts, see *INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS* (Christine van den Wyngaert ed., 2005).

the demise of a particularly brutal regime.<sup>97</sup> In addition to investigating these events, truth commissions are frequently charged with recommending measures for national reconciliation, including the preparation of impartial accounts of the causes that led to a given conflict. The composition of truth commissions has tended to vary from country to country. Some have been national commissions, others have been mixed, consisting of nationals and foreign members, while still others have been international in that they were composed entirely of foreigners.<sup>98</sup> The best-known national truth and reconciliation commissions were those established in Argentina<sup>99</sup> and South Africa.<sup>100</sup> The truth commission in Guatemala,<sup>101</sup> for example, was mixed, whereas the United Nations Truth Commission for El Salvador<sup>102</sup> was composed entirely of foreign nationals. The establishment of the Guatemalan and Salvadoran truth commissions was provided for in the UN-sponsored peace agreements that the insurgents in those two countries concluded with their respective governments.

### *Nongovernmental Organizations*

Another important and relatively recent development can be seen in the phenomenal growth of human rights NGOs.<sup>103</sup> As UN and regional human rights institutions have multiplied, so have NGOs that monitor, promote, and criticize their activities. Some of them were created to advance the protection of human rights in general or in various organizations, such as the United Nations; others concern themselves only with the regional human rights bodies or institutions, for example, the Organization for Security and Co-operation in Europe. Some NGOs are international in character and have offices or links in different regions of the world; others work only at the national level. Depending upon their charters, these organizations perform a variety of functions. They represent petitioners before international judicial and quasi-judicial human rights institutions; they lobby national and international political bodies on human rights issues; and they publicize human rights violations in their own countries or abroad. Some of them focus on one specific issue, such as health; others deal with a whole range of issues. A few NGOs prepare reports on human rights conditions in specific countries. They frequently submit these reports to UN human rights rapporteurs and to members of UN

<sup>97</sup> PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGES OF TRUTH COMMISSIONS* (2001). See also the three-volume *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil Kritz ed., 1995).

<sup>98</sup> Thomas Buergenthal, *Truth Commissions: Functions and Due Process*, in *VÖLKERRECHT ALS WERTORDNUNG—COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT* 103 (Pierre-Marie Dupuy et al. eds., 2006).

<sup>99</sup> Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 160 (Naomi Roht-Arriaza ed., 1995).

<sup>100</sup> Alex Boraine, *The Truth and Reconciliation Commission in South Africa*, in *HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES* 89 (Kamal Hossain et al. eds., 2000); Albie Sachs, *South Africa's Truth and Reconciliation Commission*, 34 *CONN. L. REV.* 1037 (2002); see also Martha Minow, *Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission*, 14 *NEGOTIATION J.* 319 (1998).

<sup>101</sup> Christian Tomuschat, *Clarification Commission in Guatemala*, 23 *HUM. RTS. Q.* 233 (2001).

<sup>102</sup> Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 *VAND. J. TRANSNAT'L L.* 497 (1994); Douglass Cassel, *International Truth Commissions and Justice*, 5 *ASPEN INST. Q.* 77 (1993).

<sup>103</sup> See generally HENRY STEINER, *DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT* (1991). For NGOs in general, see the centennial essay by Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 *AJIL* 348 (2006).

human rights treaty bodies to challenge the claims governments make in their official periodic human rights reports. Similar NGO reports may also be presented to international and national aid agencies that take human rights conditions into account in making country-funding decisions. NGOs regularly advocate the ratification of human rights conventions, the conclusion of additional human rights treaties, and the creation of new human rights mechanisms.<sup>104</sup> Powerful coalitions of NGOs also contributed significantly to garnering governmental support for the establishment of the International Criminal Court<sup>105</sup> and the ratification of its Statute.

As a group, the human rights NGOs have been playing an ever more important role in helping to transform the conglomerate of weak institutions that constitute the international human rights system into an institutional machinery that will make it increasingly more difficult for states to give mere lip service to their international human rights obligations. In this connection, it is worth remembering that the adoption of the large number of international and regional human rights instruments now on the books not only internationalized the subject of human rights; it also legitimated the activities of NGOs in promoting these rights and thus contributed to their growth. Some states still try to characterize their national or some international NGOs as subversive institutions or seek to outlaw them for a variety of other reasons, but these efforts are often hampered by the growing political status and influence of the organizations. Taken together, NGOs have become a powerful pressure group in the service of international human rights.

### *Human Rights in Domestic Legal Orders*

The proliferation of human rights treaties and the emergence of international and regional human rights tribunals with jurisdiction to interpret and apply these treaties have prompted an increasing number of states to accord human rights treaties a special status in their national constitutions.<sup>106</sup> That status facilitates the domestic implementation of the decisions of these tribunals. It also contributes to a legal and political climate in the countries concerned that enables their judiciaries and legislatures to take international and regional human rights obligations into account without having to face some of the constitutional obstacles that have traditionally impeded effective domestic compliance with international judicial and quasi-judicial decisions.<sup>107</sup>

Various countries in Europe and the Americas have pioneered these constitutional changes, influenced in part by their past experience with dictatorial regimes and the emergence in those

<sup>104</sup> For an overview of the diverse activities human rights NGOs perform, see *NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* (Claude Welch ed., 2000). See also KOREY, *supra* note 13. Despite its limiting title, this book provides interesting insights into the diverse human rights activities of contemporary NGOs.

<sup>105</sup> William Pace & Mark Thieroff, *Participation of Non-governmental Organizations, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS* 391 (Roy S. Lee ed., 1999).

<sup>106</sup> Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties, in POLITICS, VALUES AND FUNCTIONS: INTERNATIONAL LAW IN THE 21ST CENTURY: ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN* 197 (Jonathan I. Charney, Donald K. Anton, & Mary Ellen O'Connell eds., 1997), *reprinted in* 36 *COLUM. J. TRANSNAT'L L.* 211 (1997).

<sup>107</sup> See generally Gennady Danilenko, *The New Russian Constitution and International Law*, 88 *AJIL* 451 (1994); Eric Stein, *International Law in Internal Law: Toward Internationalization of Central–Eastern European Constitutions?* 88 *AJIL* 427.

regions of strong human rights systems, which were created in part to prevent the return to power of such regimes. One of the most interesting constitutional provisions in this regard is Article 10(2) of the Spanish Constitution of 1978, which reads as follows: "The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain." In complying with this provision, Spanish courts have looked not only to the language of the Universal Declaration and the human rights treaties to which Spain is a party, but also to the case law of international tribunals interpreting these treaties, in particular the judgments of the European Court of Human Rights. As a practical matter, this approach has had the effect of transforming the European Court's judgments into Spanish constitutional jurisprudence.<sup>108</sup> Other countries, among them Argentina, have conferred constitutional rank on human rights treaties. Argentina did so when it amended its Constitution in 1994 and adopted a new Article 75(22). That provision confers constitutional rank on various international human rights instruments, including the American Convention on Human Rights and the two International Covenants on Human Rights. Also included in that list are the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man. The reference to the latter two instruments, both adopted in the form of nonbinding resolutions, no doubt reflects the view of some states that these declarations have acquired a normative character.<sup>109</sup> Another constitutional development worth noting is the amendment by Costa Rica of its Constitution in 1989, which established a constitutional chamber within the Supreme Court. The legislation implementing the amendment granted the new chamber the power, inter alia, to issue writs of habeas corpus and *amparo* to protect individuals claiming the denial of rights guaranteed them under both the Costa Rican Constitution and any human rights treaty ratified by that state.<sup>110</sup> In this regard, it is also noteworthy that the Austrian law ratifying the European Convention on Human Rights declared the treaty to have the normative rank of a constitutional law.<sup>111</sup>

A large number of countries, particularly in Europe and Latin America, consider many provisions of various human rights treaties, especially those guaranteeing civil and political rights such as the European and American Conventions and the International Covenant on Civil and Political Rights to be self-executing in character. As such, they become directly applicable domestic law.<sup>112</sup> In other countries, incorporating legislation is required to make a treaty

<sup>108</sup> Luis Ignacio Sánchez Rodríguez, *Los tratados internacionales como fuente del ordenamiento jurídico español*, in CURSOS DE DERECHO INTERNACIONAL DE VITORIA-GASTEIZ 139, 168–69 (1984); see also Eduardo García de Enterría, *Valeur de la jurisprudence de la Cour européenne des droits de l'homme en droit espagnol*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION, STUDIES IN HONOUR OF GÉRARD J. WIARDA 221, 224–30 (Franz Matscher & Herbert Petzold eds., 1989).

<sup>109</sup> The Inter-American Court of Human Rights reached the same conclusion with regard to the American Declaration in its Advisory Opinion OC–10/89, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Inter-Am. Ct. H.R. (ser. A) No. 10 (1989).

<sup>110</sup> On Costa Rica's treaty practice, see Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303, 349–50 (1992 IV).

<sup>111</sup> See Manfred Nowak, *Allgemeine Bemerkungen zur Europäischen Menschenrechtskonvention aus völkerrechtlicher und innenstaatlicher Sicht*, in DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION IN DER RECHTSPRECHUNG DER ÖSTERREICHISCHEN HÖCHSTGERICHTE 37, 47–50 (F. Ermacora, M. Nowak, & H. Tretter eds., 1983).

<sup>112</sup> See THE EXECUTION OF STRASBOURG AND GENEVA HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER (T. Barkuysen, M. L. van Emmerik, & P. H. P. H. M. C. van Kempen eds., 1999); ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (Benedetto Conforti & Francesco Francioni eds., 1997).



provision directly applicable. The United Kingdom, for example, promulgated such a law in 1998 with respect to the European Convention on Human Rights.<sup>113</sup> Some other countries have adopted similar measures.<sup>114</sup>

The foregoing national constitutional developments hold great importance for the protection of human rights. They make it possible for international human rights treaties and the decisions of international tribunals applying these instruments to have a direct impact on the domestic administration of justice. That, in the long run, is the best way to ensure the effective implementation of internationally guaranteed human rights.

### *Human Rights in International Relations*

The activities of international and regional human rights institutions, as well as the work of human rights NGOs, have gradually changed governmental perceptions of the role human rights play in contemporary international relations. The decision of the Carter administration to elevate human rights to a high-priority item on the foreign policy agenda of the United States<sup>115</sup> not only reflected the political importance it attached to the protection of human rights. The decision had a domino effect, leading some other governments to take similar positions and helping to transform a subject that had been treated as generally irrelevant from the point of view of Realpolitik into an issue that gradually gained substantial international political significance. As a result, more and more human rights issues began to appear on the agendas of intergovernmental conferences and bilateral diplomatic meetings. As international human rights gained currency, an increasing number of governments established special bureaus in their foreign or justice ministries to deal with such matters, giving the subject domestic bureaucratic relevance and policymaking clout it had not previously enjoyed.

All these recent developments have obviously not put an end to the many violations of human rights that are still victimizing millions of human beings in different parts of the world. It would be a mistake not to recognize, however, that with each passing day states find it politically more costly to engage in or tolerate massive violations of human rights. That phenomenon, in turn, has doubtless influenced many a government and its leaders to desist from pursuing policies likely to have serious economic and political consequences for them. Some of these consequences may consist of the loss of financial assistance from multinational or national funding agencies that today make their grants dependent on a country's human rights policies and practices.<sup>116</sup> Other economic consequences may involve a reluctance of foreign corporations to invest in countries with poor human rights records. Similar considerations may also keep a country out of intergovernmental organizations or groupings, such as the Council

<sup>113</sup> United Kingdom, Human Rights Act, 1998, c. 42.

<sup>114</sup> The United States Senate, by contrast, has declared the provisions of all major human rights treaties ratified by the United States, including the International Covenant on Civil and Political Rights, to be non-self-executing. As a result, American courts are denied the opportunity to apply international human rights treaties to which the United States is a party. This position of the United States, as we have seen, runs counter to the contemporary approach of many countries, among them some leading democratic countries. For an eloquent critique of the U.S. position toward human rights treaties by an eminent American scholar on the subject, see Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AJIL 341 (1995).

<sup>115</sup> See Mark Schneider, *A New Administration's New Policy: The Rise to Power of Human Rights*, in HUMAN RIGHTS AND U.S. FOREIGN POLICY: PRINCIPLES AND APPLICATIONS 3 (Peter G. Brown & Douglas MacLean eds., 1979).

<sup>116</sup> See, e.g., BUERGENTHAL, SHELTON, & STEWART, *supra* note 21, at 386–87.

of Europe and the European Union, that demand strict adherence to human rights standards by applicant countries. Increasingly, too, countries that blatantly disregard their human rights obligations are coming to be seen as international pariahs, a status that invariably hurts their economic development, leads to political isolation, and may result in the imposition of economic sanctions.

## VI. CONCLUSION

As this overview of the evolution of the contemporary international human rights system demonstrates, this branch of international law has experienced phenomenal growth over the past one hundred years. When the first volume of the *American Journal of International Law* was published in 1907, human beings qua human beings had no rights under international law. Today international law accords individuals a plethora of internationally guaranteed human rights. But because so much international human rights law has come into force and so many intergovernmental institutions have been created to give effect to it, one might be led to believe that the system as a whole is functioning well and that it is effective in protecting rights of human beings the world over. That is certainly not true! Although the international human rights system as it exists today is undeniably functioning better than many would have believed possible twenty or thirty years ago, it has not prevented the massive violations that have been, and continue to be, committed in many parts of the world. Equally, though, the system in place today—and here I refer not only to the formal institutions and legal norms, but also to the work being done by NGOs and various human rights bureaucracies both national and intergovernmental—has saved lives, improved the human rights conditions in many countries, and is succeeding in forcing an increasing number of governments to take their human rights obligations more seriously than before. That is progress regardless of how one defines it.

One phenomenon above all others has been a major contributing factor to the growing political impact of human rights on the conduct of international relations and the behavior of governments: the ever more pervasive and readily observable conviction of human beings around the world that they are entitled to the enjoyment of human rights. This phenomenon, I would argue, has taken on almost universal proportions and is attributable to several factors. First is the massive corpus of human rights legislation that the United Nations, its specialized agencies, and various regional organizations have promulgated and publicized over the years. Of equal impact is the growing importance the international community has come to attach to human rights as a priority item on the agendas of international diplomatic conferences and in bilateral and multilateral relations. This development grew out of the decades-long efforts by various NGOs and a handful of governments to call attention to human rights violations, to stigmatize the violators, and, in general, to make international human rights law more effective. Not to be overlooked, finally, is the global electronic communications explosion. It has played and continues to play an important role in focusing the world's attention almost instantaneously on violations of human rights no matter where they occur. While over the years some government leaders in various countries and different extremist political groups have sought in a variety of ways to undermine these developments, their efforts have on the whole been unsuccessful. They have been unable to halt what has become a worldwide movement that has captured the imagination of human beings yearning to be treated humanely and with dignity.