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.....Chapter 3  
**THE MAJOR REGIONAL  
HUMAN RIGHTS  
INSTRUMENTS AND THE  
MECHANISMS FOR THEIR  
IMPLEMENTATION.....**

*Learning Objectives*

- *To familiarize participants with the major regional human rights instruments and their different modes of implementation;*
- *To provide a basic understanding of how these legal resources can be used by legal practitioners, principally at the domestic level but also to some extent at the regional level, for the purpose of bringing complaints before the monitoring organs.*

*Questions*

- *Have you, in the exercise of your professional activities as judges, prosecutors or lawyers, ever been faced with an accused person, defendant, respondent or client alleging violations of his or her rights under regional human rights law?*
- *If so, how did you respond?*
- *Were you aware that regional law for the protection of human rights could provide guidance for solving the problem concerned?*
- *Were you aware that the alleged victim might ultimately bring his or her grievances to the attention of the regional commissions or courts?*
- *If not, would such an awareness have changed your manner of responding to the alleged violations of his or her human rights?*
- *Have you ever brought a case against your country, or some other country, before a regional organ on behalf of an alleged victim of a human rights violation?*
- *If so, what was the outcome of the case?*
- *What was your experience generally of making such a complaint?*
- *Have you any experience of both the universal and regional systems? If so, what differences did you perceive?*

# 1. Introduction

Beginning with the adoption of the European Convention on Human Rights in 1950, the trend to elaborate regional standards continued with the adoption of the American Convention on Human Rights in 1967, which was subsequently followed by the African Charter on Human and Peoples' Rights, adopted in 1981. Various other regional treaties have been elaborated in an effort to render the protection not only of civil and political rights, but also of economic, social and cultural rights, more efficient. In this chapter a presentation will be given of some of the major regional human rights treaties existing in Africa, the Americas and Europe. However, given that these systems for the protection of the human person have been dealt with in depth elsewhere, the present Manual will limit itself to describing their major features.

## 2. African Human Rights Treaties and their Implementation

### 2.1 The African Charter on Human and Peoples' Rights, 1981

The adoption of the African Charter on Human and Peoples' Rights in 1981 was the beginning of a new era in the field of human rights in Africa.<sup>1</sup> It entered into force on 21 October 1986, and as of 29 April 2002 had 53 States parties.

Although strongly inspired by the Universal Declaration of Human Rights, the two International Covenants on human rights and the regional human rights conventions, the African Charter reflects a high degree of specificity due in particular to the African conception of the term "right" and the place it accords to the responsibilities of human beings.<sup>2</sup> The Charter contains a long list of rights, covering a wide spectrum not only of civil and political rights, but also of economic, social and cultural rights.

The African Charter further created the African Commission on Human and Peoples' Rights, "to promote human and peoples' rights and ensure their protection in Africa" (art. 30). In 1998, the Protocol to the Charter on the Establishment of an African Court of Human Rights was also adopted, but, as of 30 April 2002, this Protocol had not yet entered into force, having secured only 5 of the required 15 ratifications. Lastly, work on the elaboration of an additional protocol concerning the rights of women in Africa is in progress within the framework of the African Commission on Human and Peoples' Rights, the Commission being assisted in this task by the Office of the United Nations High Commissioner for Human Rights.<sup>3</sup>

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<sup>1</sup>Fatsah Ouguergouz, *La Charte africaine des droits de l'homme et des peuples – Une approche juridique des droits de l'homme entre tradition et modernité* (Paris, Presses Universitaires de France, 1993 (Publications de l'Institut universitaire de hautes études internationales, Genève)), p. xxv.

<sup>2</sup>Keba Mbaye, *Les droits de l'homme en Afrique* (Paris, Editions A. Pedone/Commission Internationale de Juristes, 1992), p. 161.

<sup>3</sup>See Mutoy Mubiala, "Le Projet du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits de la Femme en Afrique", in *Human Rights*, Spring 2000 (OUNHCHR review), pp. 23-27.

### 2.1.1 The undertakings of the States parties

The States parties to the Charter “shall recognize the rights, duties and freedoms enshrined [therein] and shall undertake to adopt legislative or other measures to give effect to them” (art. 1).

It is further provided that they “shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter, and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood” (art. 25). Moreover, the States parties “shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the ... Charter” (art. 26). These two latter provisions thus emphasize the need for education, information and *an independent administration of justice* in order to ensure the effective protection of human rights.

Lastly, several provisions of the Charter are also couched in the form of duties of the States parties to ensure certain rights, such as, for instance, the “promotion and protection of morals and traditional values recognized by the community”(art. 17(3)) and the right to development (art. 22(2)).

### 2.1.2 The individual and collective rights recognized

The African Charter on Human and Peoples’ Rights recognizes the following civil, political, economic, social and cultural rights of *individual* human beings, in particular:

- ❖ the right to freedom from discrimination on any grounds in the enjoyment of the rights and freedoms guaranteed in the Charter – art. 2;
- ❖ the right to equality before the law and to equal protection of the law – art. 3;
- ❖ the right to respect for one’s life and personal integrity – art. 4;
- ❖ the right to respect for one’s inherent dignity as a human being, including freedom from slavery, the slave trade, torture, cruel, inhuman or degrading punishment and treatment – art. 5;
- ❖ the right to liberty and to the security of one’s person; freedom from arbitrary arrest or detention – art. 6;
- ❖ the right to have one’s cause heard, and “the right to an appeal to competent national organs against acts of violating” one’s human rights; the right to be presumed innocent until proved guilty by a competent court or tribunal; the right to defence; and the right to be tried within a reasonable time by an impartial tribunal; freedom from ex post facto laws – art. 7;
- ❖ freedom of conscience, the profession and free practice of religion – art. 8;
- ❖ the right to receive information and the right to express and disseminate one’s opinions “within the law” – art. 9;
- ❖ the right to freedom of association (art. 10) and the right to assemble freely with others – art. 11;

- ❖ the right to freedom of movement and residence within the borders of a State; the right to leave any country including one's own and to return to one's country; the right to asylum in case of persecution; prohibition of mass expulsions – art. 12;
- ❖ the right to participate freely in the government of one's country, either directly or through freely chosen representatives; the right to equal access to the public service of one's country and to access to public property and services – art. 13;
- ❖ the right to property – art. 14;
- ❖ the right to work and the right to equal pay for equal work – art. 15;
- ❖ the right to enjoy the best attainable state of physical and mental health – art. 16;
- ❖ the right to education, and freely to take part in the cultural life of one's country – art. 17;
- ❖ the right of the family, the aged and the disabled to special measures of protection – art. 18.

Next, the African Charter recognizes the following rights of *peoples*, namely:

- ❖ the right of peoples to equality – art. 19;
- ❖ the right to existence of all peoples, including the right to self-determination; the right of all peoples to assistance in their liberation struggle against foreign domination, “be it political, economic or cultural” – art. 20;
- ❖ the right of all peoples freely to dispose of their wealth and natural resources – art. 21;
- ❖ the right of all peoples to their economic, social and cultural development – art. 22;
- ❖ the right of all peoples to national and international peace and security – art. 23;
- ❖ the right of all peoples “to a general satisfactory environment favourable to their development” – art. 24.

### 2.1.3 The individual duties

Without providing any details, article 27(1) deals with individual duties toward certain *groups* by stipulating, in general terms only, that “every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community”. Next, article 28 concerns the individual's duty towards *other individuals*, providing that “every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance”. Lastly, article 29 enumerates several other specific individual duties, such as the duties:

- ❖ to preserve the harmonious development of the family – art. 29(1);
- ❖ to serve one's national community – art. 29(2);
- ❖ not to compromise the security of the State – art. 29(3);
- ❖ to preserve and strengthen the social and national solidarity – art. 29(4);
- ❖ to preserve and strengthen the national independence and territorial integrity of one's country – art. 29(5);
- ❖ to work to the best of one's abilities and competence, and to pay taxes – art. 29(6);

- ❖ to preserve and strengthen positive African cultural values – art. 29(7); and, finally,
- ❖ the duty to contribute to the best of one’s abilities to the promotion and achievement of African unity – art. 29(8).

### 2.1.4 Permissible limitations on the exercise of rights

The exercise of many of the rights and freedoms guaranteed by the African Charter is conditioned by limitation provisions, which in some cases indicate specific aims for which limitations might be imposed, but which in others simply refer back to the conditions laid down in national law. Article 12(2) thus provides that the right to leave any country including one’s own, and to return to one’s own country, “may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality”. However, everyone has the right to free association “provided that he abides by the law” (art. 10), without there being any indication as to the grounds the national law can legitimately invoke to limit that freedom of association.

### 2.1.5 Derogations from legal obligations

Unlike the International Covenant on Civil and Political Rights and the American and European Conventions on Human Rights, the African Charter does not provide for any right of derogation for the States parties in public emergencies. As indicated in Chapter 1, and, as will be further shown in Chapter 16, this absence has been interpreted by the African Commission on Human and Peoples’ Rights to mean that derogations are not permissible under the African Charter.<sup>4</sup>

*The African Charter on Human and Peoples’ Rights is specific in that it protects not only rights of **individual human beings** but also rights of **peoples**.*

*The Charter also emphasizes the individual’s duties towards certain groups and other individuals.*

*While some provisions of the African Charter allow for **limitations** to be imposed on the exercise of the rights guaranteed, **no derogations are ever allowed** from the obligations incurred under this treaty.*

### 2.1.6 The implementation mechanism

The African Commission on Human and Peoples’ Rights consists of eleven members serving in their individual capacity (art. 31). It has the twofold function, first, of *promoting* human and peoples’ rights, and, second, of *protecting* these rights (art. 30), including the right to receive communications both from States and from other sources.

<sup>4</sup>ACHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, No. 74/92, decision taken at the 18<sup>th</sup> ordinary session, October, 1995, para. 21; for the text see the following web site: <http://www1.umn.edu/humanrts/africa/comcases/74-92.html>.

As to the function of promoting human and peoples' rights, the Commission shall, in the first place, in particular, collect documents, undertake studies and researches on African problems, organize conferences, encourage domestic human rights institutions, and, "should the case arise, give its views or make recommendations to Governments"; second, it shall "formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights"; lastly, it shall cooperate with other African and international institutions concerned with the promotion and protection of these rights (art. 45(1)).

With regard to the Commission's function of ensuring "the protection of human and peoples' rights under conditions laid down by the ... Charter" (art. 45(2)), the Commission not only has competence to receive communications from States and other sources, but is also authorized to "interpret all the provisions of the ... Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU" (art. 45(3)).

- ❖ ***inter-State communications***: if a State party "has good reasons to believe that another State Party to this Charter has violated the provisions" thereof, "it may draw, by written communication, the attention of that State to the matter" (art. 47). The State to which the communication is addressed has three months from the receipt of the communication to submit a written explanation. If the matter has not been "settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure", either State can bring it to the attention of the Commission (art. 48). Notwithstanding these provisions, a State party can refer the matter directly to the Commission (art. 49). However, the Commission can only deal with the matter after all domestic remedies have been exhausted in the case, "unless ... the procedure of achieving these remedies would be unduly prolonged" (art. 50). The States concerned may be represented before the Commission and submit written and oral statements (art. 51(2)). When in possession of all necessary information and "after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights", the Commission shall prepare a report "stating the facts and its findings", which shall be sent to the States concerned and to the Assembly of Heads of State and Government (art. 52). In transmitting its report, the Commission may make to the aforesaid Assembly "such recommendations as it deems useful" (art. 53).
- ❖ ***communications from sources other than those of States parties***: the Charter does not specify whether the Commission is competent to deal with *individual* complaints, as such, but merely provides that, before each session of the Commission, its Secretary "shall make a list of the communications other than those of States Parties ... and transmit them to the members of the Commission, who shall indicate which communication should be considered by the Commission" (art. 55(1)). However, certain criteria have to be fulfilled before the Commission can consider the case. Thus: (1) the communication must indicate the author; (2) it must be compatible both with the Charter of the OAU and with the African Charter on Human and Peoples' Rights; (3) it must not be written "in disparaging or insulting language"; (4) it must not be "based exclusively on news disseminated through the mass media"; (5) it must be submitted only after all domestic remedies have been exhausted, "unless it is obvious that this procedure is unduly prolonged"; (6) it must be submitted "within a reasonable period from the time local remedies are

exhausted”; and, finally (7) the communications must not “deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations”, the Charter of the OAU or the African Charter on Human and Peoples’ Rights (art. 56). There is no specific provision in the Charter allowing individuals or groups of individuals to appear in person before the Commission. Before a substantive consideration is made of a communication, it must be brought to the attention of the State concerned (art. 57). Subsequently, “when it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples’ rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases”; the latter may then request the Commission “to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations” (art. 58(1) and (2)). Lastly, the Charter provides a procedure for emergency cases which shall be submitted by the Commission to the Chairman of the Assembly, “who may request an in-depth study” (art. 58(3)).

- ❖ **periodic reports:** the States parties to the Charter also undertake to submit, every two years, “a report on the legislative or other measures taken with a view to giving effect to” the terms of the Charter (art. 62). Although the Charter provides no explicit procedure for the examination of these periodic reports, the African Commission on Human and Peoples’ Rights has proceeded to examine these reports in public sessions.<sup>5</sup>

*The African Commission on Human and Peoples’ Rights is, in particular, competent to:*

- **promote** human rights by collecting documents, undertaking studies, disseminating information, making recommendations, formulating rules and principles and cooperating with other institutions;
- **ensure the protection** of human and peoples’ rights by receiving (a) inter-State communications; (b) communications other than those of the States parties; and (c) periodic reports from the States parties.

## 2.2 The African Charter on the Rights and Welfare of the Child, 1990

The African Charter on the Rights and Welfare of the Child<sup>6</sup> was adopted in 1990, and entered into force on 29 November 1999. As of 31 May 2000, it had 20 ratifications. The Charter spells out a long list of rights of the child and establishes an African Committee of Experts on the Rights and Welfare of the Child.

<sup>5</sup>See e.g. as to report of Ghana, *The African Commission on Human and Peoples’ Rights Examination of State Reports, 14<sup>th</sup> Session, December 1993: Ghana*, to be found on the following web site: <http://www1.umn.edu/humanrts/achpr/sess14-complete.htm>.

<sup>6</sup>OAU doc. CAB/LEG/24.9/49 (1990).

### 2.2.1 The undertakings of the States parties

The States parties “shall recognize the rights, freedoms and duties enshrined in [the] Charter and shall undertake to take the necessary steps, in accordance with their constitutional processes and with the provisions of the ... Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions” thereof (art. 1(1)). It is noteworthy that “any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the ... Charter shall to the extent of such inconsistency be discouraged” (art. 1(3)).

### 2.2.2 The rights recognized

For the purposes of the African Charter on the Rights and Welfare of the Child, a child means every human being below the age of 18 (art. 2), and, in all actions concerning the child undertaken by any person or authority, *the best interests of the child* shall be the primary consideration (art. 4(1)). The Charter further guarantees the following rights and principles, in particular:

- ❖ the principle of non-discrimination – art. 3;
- ❖ the right to survival and development, including the right to life and prohibition of the death penalty – art. 5;
- ❖ the right to a name and a nationality – art. 6;
- ❖ the right to freedom of expression – art. 7;
- ❖ the right to freedom of association and of peaceful assembly – art. 8;
- ❖ the right to freedom of thought, conscience and religion – art. 9;
- ❖ the right to protection of one’s privacy, family, home and correspondence – art. 10;
- ❖ the right to education – art. 11;
- ❖ the right to leisure, recreation and cultural activities – art. 12;
- ❖ the right to special protection of handicapped children – art. 13;
- ❖ the right to health and health services – art. 14;
- ❖ the right to protection against economic exploitation and hazardous work – art. 15;
- ❖ the right to protection against child abuse and torture – art. 16;
- ❖ the administration of juvenile justice: the right to special treatment of young offenders – art. 17;
- ❖ the right to protection of the family unit – art. 18;
- ❖ the right to parental care and protection -. art. 19;
- ❖ parental responsibilities – art. 20; and
- ❖ the right to protection against harmful social and cultural practices – art. 21.

The African Charter further contains provisions concerning:

- ❖ armed conflicts – art. 22;
- ❖ refugee children – art. 23;
- ❖ adoption – art. 24;
- ❖ separation from parents – art. 25;

- ❖ protection against apartheid and discrimination – art. 26;
- ❖ sexual exploitation – art. 27;
- ❖ drug abuse – art. 28;
- ❖ the sale, trafficking and abduction of children – art. 29; as well as
- ❖ the children of imprisoned mothers – art. 30.

### 2.2.3 The child's duties

According to article 31 of the Charter, “every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community”. Such responsibilities include the duty to work for the cohesion of the family, to serve the national community, to preserve and strengthen social and national solidarity and to contribute to the promotion of African unity.

### 2.2.4 The implementation mechanism

An African Committee of Experts on the Rights and Welfare of the Child shall be established within the Organization in order to promote and protect the rights and welfare of the child (art. 32). It shall consist of eleven independent and impartial members serving in their individual capacity (art. 33).

The Committee shall, in the first place, promote and protect the rights enshrined in the Charter and, second, monitor the implementation and ensure protection of the rights concerned (art. 42). In carrying out the first part of its mandate, it shall, in particular, collect and document information, organize meetings, make recommendations to Governments, formulate rules and principles aimed at enhancing the protection of the rights and welfare of the African child, and cooperate with other African regional and international institutions in the same field (art. 42(a)). It may interpret the terms of the Charter at the request, inter alia, of a State party or institution of the OAU (art. 42(c)). With respect to monitoring of implementation of the Charter, the latter provides for the following two procedures:

- ❖ **the reporting procedure:** every State party undertakes to submit reports on the measures it has adopted to give effect to the provisions of the Charter within two years of the entry into force of the Charter, and thereafter every three years (art. 43(1)). The Charter does not specify how the Committee shall examine these reports;
- ❖ **the complaints procedure:** the Committee may receive communications from any person, group or non-governmental organization (NGO) recognized either by the OAU, a Member State or the United Nations relating to any matter covered by the Charter (art. 44).

Lastly, the Committee may resort to any “appropriate method” of investigating any matter falling within the ambit of the Charter. It shall further submit regular reports on its activities to the Ordinary Session of the Assembly of Heads of State and Government every two years, a report that shall be published after having been considered by the Assembly (art. 45).

*The African Charter on the Rights and Welfare of the Child protects numerous rights which have to be interpreted and applied **in the best interest of the child.***

*The African Committee of Experts on the Rights and Welfare of the Child shall **promote** and **protect** the rights of the child.*

*The implementation mechanism consists of (a) a reporting procedure, and (b) a complaints procedure.*

## 3. American Human Rights Treaties and their Implementation

### 3.1 The American Convention on Human Rights, 1969, and its Protocols of 1988 and 1990

The American Convention on Human Rights, 1969,<sup>7</sup> also commonly called the Pact of San José, Costa Rica, since it was adopted in that capital city, entered into force on 18 July 1978 and, as of 9 April 2002, had 24 States parties, following the denunciation of the treaty by Trinidad and Tobago on 26 May 1998.<sup>8</sup> The Convention reinforced the Inter-American Commission on Human Rights, which since 1960 had existed as “an autonomous entity of the Organization of American States”.<sup>9</sup> It became a treaty-based organ which, together with the Inter-American Court of Human Rights, “shall have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties” to the Convention (art. 33).

In 1988, the General Assembly of the OAS further adopted the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also called the Protocol of San Salvador.<sup>10</sup> This Protocol develops the provisions of article 26 of the Convention whereby the States parties in general terms “undertake to adopt measures, both internally and through international co-operation, ... with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires”. This Protocol entered into force on 16 November 1999 and, as of 9 April 2002, had 12 States parties.<sup>11</sup>

<sup>7</sup>OAS Treaty Series, No. 36.

<sup>8</sup>See the following OAS web site: <http://www.oas.org/juridico/english/Sigs/b-32.html>.

<sup>9</sup>OAS doc. OEA/Ser.L/V/II.83, doc. 14, corr. 1, March 12, 1993, *Annual Report of the Inter-American Commission on Human Rights 1992-1993*, p. 5.

<sup>10</sup>OAS Treaty Series, No. 69.

<sup>11</sup>See: <http://www.oas.org/juridico/english/Sigs/a-52.html>.

Lastly, in 1990 the General Assembly also adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, which entered into force on 28 August 1991.<sup>12</sup> The States parties to this Protocol “shall not apply the death penalty in their territory to any person subject to their jurisdiction” (art. 1). No reservations may be made to this Protocol, although States parties may declare at the time of ratification or accession “that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature” (art. 2(1)). As of 9 April 2002 this Protocol had 8 States parties.<sup>13</sup>

### 3.1.1 The undertakings of the States parties

The States parties to the American Convention on Human Rights “undertake to respect the rights and freedoms recognized [therein] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination” on certain cited grounds (art. 1). These undertakings have been interpreted by the Inter-American Court of Human Rights in particular in the case of *Velásquez*, which concerned the disappearance and likely death of Mr. Velásquez. In the view of the Court the obligation to respect the rights and freedoms recognized in the Convention implies that

“the exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State”.<sup>14</sup>

The obligation to “ensure ... the free and full exercise of those rights and freedoms” thus

“implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent, investigate and punish* any violation of the rights recognized by the Convention and, moreover, if possible attempt to *restore the right violated* and *provide compensation* as warranted for damages resulting from the violation”.<sup>15</sup>

The Court added, however, that

“the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation — it also requires the Government to conduct itself so as to effectively ensure the free and full exercise of human rights”.<sup>16</sup>

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<sup>12</sup>OAS Treaty Series, No. 73.

<sup>13</sup>See <http://www.oas.org/juridico/english/Sigs/a-53.html>.

<sup>14</sup>*I-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, p. 151, para. 165.

<sup>15</sup>*Ibid.*, p. 152, para. 166; emphasis added.

<sup>16</sup>*Ibid.*, para. 167.

As to the issue of *prevention*, the Court specified that

“the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.<sup>17</sup>

This legal duty to prevent human rights violations would moreover include “all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages”.<sup>18</sup>

As defined by the Inter-American Court of Human Rights, the legal duty of the States parties to the Convention to “respect” and to “ensure” is multi-faceted and goes to the very heart of the entire State structure, including the particular conduct of the Governments themselves. A more comprehensive analysis of States’ duties to prevent, investigate, punish and remedy human rights violations is contained in Chapter 15 of this Manual.

*The legal obligation to “ensure” the rights and freedoms contained in the American Convention on Human Rights means that the States parties must prevent, investigate and punish human rights violations and that they must, if possible, restore the rights violated, and provide compensation as warranted for damages.*

### 3.1.2 The rights recognized

As to the civil and political rights guaranteed by the Convention, they comprise the following:

- ❖ the right to juridical personality – art. 3;
- ❖ the right to life, including careful regulation of the death penalty from an abolitionist perspective – art. 4;
- ❖ the right to humane treatment, including freedom from torture and cruel, inhuman or degrading treatment or punishment – art. 5;
- ❖ freedom from slavery, servitude, forced and compulsory labour – art. 6;
- ❖ the right to personal liberty and security, including freedom from arbitrary arrest or detention – art. 7;
- ❖ the right to a fair trial – art. 8;
- ❖ the right to freedom from ex post facto laws – art. 9;
- ❖ the right to compensation in the event of a miscarriage of justice – art. 10;

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<sup>17</sup>Ibid., p. 155, para. 174.

<sup>18</sup>Ibid., para. 175.

- ❖ the right to privacy – art. 11;
- ❖ the right to freedom of conscience and religion – art. 12;
- ❖ the right to freedom of thought and expression – art. 13;
- ❖ the right of reply in case of dissemination of inaccurate and offensive statements – art. 14;
- ❖ the right to peaceful assembly – art. 15;
- ❖ the right to freedom of association – art. 16;
- ❖ the right to marry freely and to found a family – art. 17;
- ❖ the right to a name – art. 18;
- ❖ the rights of the child – art. 19;
- ❖ the right to a nationality – art. 20;
- ❖ the right to property – art. 21;
- ❖ the right to freedom of movement and residence – art. 22;
- ❖ the right to participate in government – art. 23;
- ❖ the right to equality before the law and equal protection of the law – art. 24;
- ❖ the right to judicial protection – art. 25.

Apart from recognizing these civil and political rights, the American Convention on Human Rights also contains an article whereby the States parties in general terms “undertake to adopt measures, both internally and through international co-operation, ... with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires” (art. 26). As the title to this article indicates, it is more concerned with the “Progressive development” of these rights than with their immediate enforcement through judicial means. However, with the entry into force of the Additional Protocol to the Convention in the Area of Economic, Social and Cultural Rights, these rights have been given a more detailed legal definition, although the “full observance” thereof is still to be achieved “progressively” (art. 1). The Additional Protocol recognizes the following economic, social and cultural rights:

- ❖ the principle of non-discrimination in the exercise of the rights set forth in the Protocol – art. 3;
- ❖ the right to work – art. 6;
- ❖ the right to just, equitable and satisfactory conditions of work – art. 7;
- ❖ trade union rights – art. 8;
- ❖ the right to social security – art. 9;
- ❖ the right to health – art. 10;
- ❖ the right to a healthy environment – art. 11;
- ❖ the right to food – art. 12;
- ❖ the right to education – art. 13;
- ❖ the right to the benefits of culture – art. 14;

- ❖ the right to the formation and protection of families – art. 15;
- ❖ the rights of children – art. 16;
- ❖ the right of the elderly to protection – art. 17;
- ❖ the right of the handicapped to protection – art. 18.

### 3.1.3 Permissible limitations on the exercise of rights<sup>19</sup>

The *exercise* of the following rights may be subjected to limitations if *necessary* for specifically enumerated purposes: the right to manifest one’s religion and beliefs (art. 12(3)); the right to freedom of thought and expression (art. 13(2)); the right to the freedoms of assembly and of association (arts. 15, 16(2) and (3)); and the right to freedom of movement and residence, including the right to leave any country, including one’s own (art. 22(3)). Grounds which may justify limitations on the exercise of rights are, among others, the protection of public safety, health, morals, (public) order, national security or the rights and freedoms of others (the legitimate reasons vary depending on the right protected). In addition, the law may, on certain specified grounds, “regulate the exercise of the rights and opportunities” linked to the right to participate in government (art. 23(2)).

As to the *principle of legality*, all limitation provisions stipulate that the limitations imposed must be prescribed by law, established by law, imposed in conformity with the law, or pursuant to law. However, article 30 contains a general provision whereby restrictions on the exercise of rights foreseen in the Convention “may not be applied except in accordance with the laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established”.

The Inter-American Court of Human Rights has analysed the term “laws” found in article 30 in an Advisory Opinion, in which it held that the meaning of this word “in the context of a system for the protection of human rights cannot be dissociated from the nature and origin of that system”, which

“is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power”.<sup>20</sup>

In the view of the Court, it was therefore

“essential that State actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired”.<sup>21</sup>

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<sup>19</sup>For further information on limitations on the exercise of rights, see in particular Chapter 12 of this Manual concerning “Some Other Key Rights: The Freedoms of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly”.

<sup>20</sup>*I-A Court HR, The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986, Series A, No. 6, p. 29, para. 21.*

<sup>21</sup>*Ibid.*, pp. 29-30, para. 22.

The Court then added that perhaps “the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution”.<sup>22</sup> The term “laws” in article 30 thus means “formal law”, namely,

“a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State”.<sup>23</sup>

However, article 30 also links the term “laws” to the “general interest”, which means that “they must have been adopted for the ‘general welfare’ as referred to in article 32(2) of the Convention, a concept, which, in the view of the Court,

“must be interpreted as an integral element of public order (ordre public) in democratic States, the main purpose of which is ‘the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness’”.<sup>24</sup>

As subsequently reaffirmed in its Advisory Opinion on *Habeas Corpus*, there exists, consequently, “an inseparable bond between the principle of legality, democratic institutions and the rule of law”.<sup>25</sup>

With regard to *the principle of a democratic society*, only the limitation provisions concerning the exercise of the right to assembly and the right to freedom of association provide that the limitations must also be “*necessary in a democratic society*” (emphasis added). However, as emphasized by the Inter-American Court of Human Rights in its Advisory Opinion on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* regarding the right to freedom of expression in article 13, the interpretation of the provisions contained in the American Convention on Human Rights is also conditioned by the restrictions laid down in particular in articles 29(c) and 32(2),<sup>26</sup> which respectively provide that “no provision of this Convention shall be interpreted as ... (c) precluding other rights or guarantees that are inherent in the human personality *or derived from representative democracy as a form of government*” (art. 29(c); emphasis added); and that “the rights of each person are limited by the rights of others, by the security of all, and *by the just demands of the general welfare, in a democratic society*” (art. 32(2), emphasis added).

These articles, in particular, define “the context within which the restrictions permitted under Article 13(2) must be interpreted”; and, in the view of the Court, it followed

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<sup>22</sup>Ibid., at p. 30.

<sup>23</sup>Ibid., p. 32, para. 27.

<sup>24</sup>Ibid., p. 33, para. 29.

<sup>25</sup>I-A Court HR, *Habeas Corpus in Emergency Situations* (Art. 27(2), 25(1) and 7(6), Advisory Opinion OC-8/87 of January 30, 1987, Series A, No. 8, p. 40, para. 24.

<sup>26</sup>I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 105, para. 41.

“from the repeated reference to ‘democratic institutions’, ‘representative democracy’ and ‘democratic society’ that the question whether a restriction on freedom of expression imposed by a state is ‘necessary to ensure’ one of the objectives listed in subparagraphs (a) or (b) **must be judged by reference to the legitimate needs of democratic societies and institutions**”.<sup>27</sup>

The Court concluded that, consequently,

“the just demands of democracy must ... guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions”.<sup>28</sup>

*To be lawful under the American Convention on Human Rights, limitations on the exercise of rights must comply with:*

- **the principle of legality**, in that the restrictive measures must be based in law;
- **the principle of a democratic society**, in that the measure imposed must be judged by reference to the legitimate needs of democratic societies and institutions;
- **the principle of necessity/proportionality**, in that the interference with the exercise of the individual’s right must be necessary in a democratic society for one or more of the specified purposes.

### 3.1.4 Permissible derogations from legal obligations

With some modifications as compared to article 4 of the International Covenant on Civil and Political Rights, article 27 of the American Convention on Human Rights also foresees the possibility for the States parties to derogate from the obligations incurred under the Convention. Below is a brief survey of the conditions attached to this right, which will be dealt with in further detail in Chapter 16:

- ❖ **the condition of exceptional threat**: a State party can only resort to derogations “in time of war, public danger, or other emergency that threatens the independence or security of a State Party” (art. 27(1)). This definition is thus worded differently from that under article 4 of the International Covenant and article 15 of the European Convention on Human Rights;
- ❖ **the condition of non-derogability of certain obligations**: article 27(2) of the American Convention provides a long list of provisions from which no suspension can ever be made: article 3 (right to juridical personality); article 4 (right to life); article 5 (right to humane treatment); article 6 (freedom from slavery); article 9

<sup>27</sup>Ibid., p. 106, para. 42; emphasis added.

<sup>28</sup>Ibid., p. 108, para. 44.

(freedom from ex post facto laws); article 12 (freedom of conscience and religion); article 17 (rights of the family); article 18 (right to a name); article 19 (rights of the child); article 20 (right to nationality); article 23 (right to participate in government); and “*the judicial guarantees essential for the protection of such rights*” (emphasis added);<sup>29</sup>

- ❖ *the condition of strict necessity*: a State party may only “take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation” (art. 27(1));
- ❖ *the condition of consistency with other international legal obligations*: the measures of derogation taken by the State party must not be “inconsistent with its other obligations under international law”, such as obligations incurred under other international treaties or customary international law (art. 27(1));
- ❖ *the condition of non-discrimination*: the measures of derogation must “not involve discrimination on the ground of race, colour, sex, language, religion, or social origin” (art. 27(1)); and, finally,
- ❖ *the condition of international notification*: in order to avail itself of the right to derogate under article 27(1), the State party must also comply with the conditions in article 27(3), whereby it “shall immediately inform the other States Parties, through the Secretary-General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination” thereof.

*When derogating from their obligations under article 27 of the American Convention on Human Rights, States Parties must comply with:*

- *the condition of exceptional threat;*
- *the condition of non-derogability of certain obligations;*
- *the condition of strict necessity;*
- *the condition of consistency with other international obligations;*
- *the condition of non-discrimination; and*
- *the condition of international notification.*

### 3.1.5 The implementation mechanism

The inter-American system for the protection of human rights comprises, in the first instance, the Inter-American Commission on Human Rights and, in the second instance, the Inter-American Court of Human Rights for those States parties having accepted its jurisdiction. In the present context the procedures concerned will be explained in general terms only:

<sup>29</sup>The words “judicial guarantees essential for the protection of such rights” have, inter alia, been interpreted in two Advisory Opinions by the Inter-American Court of Human Rights, which will be dealt with in further detail in Chapter 16.

- ❖ ***the competence of the Inter-American Commission on Human Rights:*** the Inter-American Commission is composed of seven members elected in their personal capacity (arts. 34 and 36(1)) whose main functions are to “promote respect for and defence of human rights” by, inter alia, (1) developing an awareness of human rights in the Americas; (2) making recommendations to Governments of the member States, when it considers such action advisable; (3) preparing such studies and reports as it considers advisable in the performance of its duties; and, (4) taking action on petitions and other communications pursuant to its authority under the Convention (art. 41(a), (b), (c) and (f)). The ***right of individual petition*** to the Commission is ***mandatory*** under the Convention, according to which “any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization [of American States] may lodge petitions ... containing denunciations or complaints of violation of this Convention by a State Party” (art. 44). On the other hand, inter-State complaints require a specific declaration whereby the State concerned recognizes the competence of the Commission to examine communications brought against another State party having made the same declaration (art. 45(1) and (2)).

The admission of an individual petition or inter-State communication submitted to the Commission is subject to several requirements, such as the exhaustion of domestic remedies rule (art. 46(1)(a)). Moreover, the petition or communication must be lodged within six months from the date on which the alleged victim was notified of the final judgement, and the subject of the complaint must not be pending in another international proceeding for settlement (art. 46(1)(b) and (c)). Individual petitions must of course also contain information such as the name, address and signature of the alleged victim or his or her legal representative (art. 46(1)(d)). The exhaustion of domestic remedies rule is not, however, applicable (a) where the domestic legislation “does not afford due process of law for the protection of the right or rights that have allegedly been violated”; (b) where the alleged victim has been denied access to domestic remedies; and (c) where there has been “unwarranted delay in rendering a final judgement” (art. 46(2)).

If a petition or communication does not fulfil these conditions or if, for instance, it is “manifestly groundless”, the Commission declares the petition or communication concerned inadmissible (art. 47). Otherwise, it shall be declared admissible, which implies that the Commission will proceed to request more information from the parties in order to be enabled to make a more in-depth analysis of the complaints (art. 48(1)(a)). It can also make an on-the-spot investigation and hear oral statements in addition to written submissions (art. 48(1)(d) and (e)). At this stage the Commission can also declare the petition or communication inadmissible or out of order or unsubstantiated (art. 48(1)(c)). Alternatively, it will “place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention” (art. 48(1)(f)). If a settlement is not reached, the Commission will “draw up a report setting forth the facts and stating its conclusions”, a report that will be submitted to the States parties, “which shall not be at liberty to publish it” (art. 50(1) and (2)). If, after a prescribed period, the matter has not been settled or submitted to the Court, the Commission may “set forth its opinion and conclusions concerning the question submitted for its consideration” and may in cases where the State

concerned fails to take “adequate measures”, ultimately decide to publish its report (art. 51).

With regard to those OAS Member States which have not yet ratified the American Convention on Human Rights, the Commission is competent to receive petitions alleging violations of the American Declaration on the Rights and Duties of Man.<sup>30</sup>

Another interesting aspect of the Commission’s powers is its competence to request advisory opinions from the Inter-American Court of Human Rights (art. 64). The important Advisory Opinion on *Habeas Corpus in Emergency Situations* was thus given by the Court following a request by the Commission.

- ❖ ***the competence of the Inter-American Court of Human Rights:*** as of 16 April 2001, the compulsory jurisdiction of the Court had been accepted by 21 States.<sup>31</sup> The Court consists of seven judges elected in their individual capacity (art. 52). It has its Secretariat in San José, Costa Rica. Before the Court can hear a case, the procedure before the Commission must be completed (art. 61(2)). “In cases of extreme gravity and urgency”, the Court “shall adopt such provisional measures as it deems pertinent”, and, at the request of the Commission, it may in fact also do this with respect to cases not yet submitted to it (art. 63(2)). The Court’s judgments are final and the States parties undertake to comply with the terms thereof “in any case to which they are parties” (arts. 67 and 68(1)).

The enforcement mechanism under the Additional Protocol in the Area of Economic, Social and Cultural Rights differs from the procedures under the Convention in that the States parties only undertake “to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth” therein (art. 19(1) of the Protocol). Only with regard to the right to organize and join trade unions (art. 8(a)) and the right to education (art. 13) does the Protocol provide for application of the complaints procedure before the Commission and Court, and then only in cases where the alleged violation is “directly attributable” to a State party (art. 19(6)).

Both the Commission and the Court have dealt with a considerable number of cases, which can be found in their respective annual reports. The annual report of the Inter-American Commission on Human Rights also provides important information about the Commission’s activities in general, which reach far beyond the framework of the American Convention on Human Rights.

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<sup>30</sup>See article 51 of the *Regulations of the Inter-American Commission on Human Rights*, approved by the Commission at its 660<sup>th</sup> Meeting, 49<sup>th</sup> Session, held on 8 April 1980, and modified at its 70<sup>th</sup> Session, at its 938<sup>th</sup> meeting, held on 29 June 1987, published in OAS doc. OEA/Ser.L/V/II.82, doc. 6, rev. 1, July 1, 1992, *Basic Documents Pertaining to Human Rights in the Inter-American System*, p. 121.

<sup>31</sup>See OAS doc. OEA/Ser.L/V/II.111, doc. 20 rev., *Annual Report of the Inter-American Commission on Human Rights 2000*, Annex 1; the text of this report can be found at the following web site: <http://www.cidh.oas.org/annualrep/2000eng/TOC.htm>.

*The Inter-American Commission on Human Rights is competent to receive petitions concerning alleged human rights violations:*

- *from any person or group of persons, or any legally recognized non-governmental entity; this competence is mandatory (art. 44);*
- *from one State party against another State party, if such competence has been recognized (art. 45).*

*The Inter-American Court of Human Rights is competent to examine cases submitted to it by the States parties and the Commission provided that these cases have first been considered by the Commission (art. 61).*

## 3.2 The Inter-American Convention to Prevent and Punish Torture, 1985

The Inter-American Convention to Prevent and Punish Torture, 1985, entered into force on 28 February 1987, and as of 9 April 2002 had 16 States parties.<sup>32</sup>

### 3.2.1 The scope of the Convention

According to the Convention, “torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.” (art. 2).

The Convention further defines the field of personal responsibility for those committing, instigating or inducing torture or who have failed to prevent it although being able to do so (art. 3). As in the case of the United Nations Convention against Torture, “the existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture” (art. 5). Furthermore, nor can “the dangerous character of the detainee or prisoner” justify the resort to torture (art. 5).

### 3.2.2 The undertakings of the States parties

The Convention provides that “the States Parties shall take effective measures to prevent and punish torture within their jurisdiction”, and “shall ensure that all acts of torture and attempts to commit torture are offences under their criminal law” (art. 6). The Convention further contains provisions, inter alia, with regard to the training of

<sup>32</sup>OAS, Treaty Series, No. 67; for the ratifications see <http://www.oas.org/juridico/english/Sigs/a-51.html>.

police officers (art. 7), impartial investigations of alleged torture (art. 8), the duty to establish jurisdiction over the crime of torture in certain cases (art. 12), and extradition (arts. 13-14).

### 3.2.3 The implementation mechanism

Unlike the United Nations and European torture conventions, the Inter-American Convention does not provide for any specific implementation mechanism. However, under its article 17, “the States Parties shall inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of this Convention”; it is subsequently for the Commission to “endeavour in its annual report to analyze the existing situation in the member States of the Organization of American States in regard to the prevention and elimination of torture” (art. 17). Thus, the Convention does not foresee any possibility for the Commission to make any on-the-spot investigation in a country where it has reason to believe that torture is being practised. However, the Commission may still be able to make such visits, with the agreement of the State concerned, by invoking the general field of competence accorded to it under the Charter of the OAS.

*Under the Inter-American Convention to Prevent and Punish Torture, the States parties must take effective measures to prevent and punish torture within their jurisdiction.*

*As is confirmed by the Convention, the right not to be tortured is non-derogable and no emergency situation of any kind can justify acts of torture.*

## 3.3 The Inter-American Convention on Forced Disappearance of Persons, 1994

The Inter-American Convention on Forced Disappearance of Persons was adopted by the General Assembly of the OAS in 1994 and entered into force on 28 March 1996. As of 9 April 2002 it had ten States parties.<sup>33</sup> This Convention was elaborated in response to the considerable wave of enforced or involuntary disappearances that had occurred in many parts of the Americas in the 1970s and the 1980s in particular.

### 3.3.1 The scope of the Convention

As defined in the Convention, “forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give

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<sup>33</sup>See <http://www.oas.org/juridico/english/Sigs/a-60.html>.

information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees” (art. II).

### 3.3.2 *The undertakings of the States parties*

The States parties undertake, in particular, not to practise, permit or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees; to punish within their jurisdictions those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories; to cooperate with one another in helping to prevent, punish and eliminate the forced disappearance of persons; and to take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in the Convention (art. I; for further details as to the duty to take legislative measures, see also art. III).

The Convention further regulates the duty to establish jurisdiction over cases involving the forced disappearance of persons (art. IV), and provides that such cases shall not be considered political offences for purposes of extradition but shall be deemed extraditable offences (art. V). Moreover, “criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations”, unless there is a norm of a fundamental character preventing the application of this rule; in the latter case, however, “the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the ... State Party” (art. VII). Quite significantly, persons alleged to be responsible for the acts constituting the offence of forced disappearance of persons “may be tried only in the competent jurisdictions of ordinary law in each State, *to the exclusion of all other special jurisdictions, particularly military jurisdictions*” (art. IX; emphasis added).

As in the case of the torture conventions, exceptional circumstances such as a state of war or any other public emergency cannot be invoked to justify the forced disappearance of persons; in such cases, “the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom”. In connection with such procedures, “the competent judicial authorities shall have free and immediate access to all detention centres and to each of their units, and to all places where there is reason to believe the disappeared person might be found, including places that are subject to military jurisdiction” (art. X).

### 3.3.3 *The implementation mechanism*

The Convention provides that “the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statute and Regulations of the ... Commission ... and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures” (art. XIII). An urgent procedure is also provided for cases where the

Inter-American Commission on Human Rights receives a petition or communication concerning an alleged forced disappearance, requiring its Executive Secretariat to “urgently and confidentially address the respective Government” with a request for information as to the whereabouts of the person concerned (art. XIV).

*The Inter-American Convention on the Forced Disappearance of Persons is a reaffirmation that the forced disappearance of persons is an act violating international human rights law. The forced disappearance of persons cannot be justified in any circumstances, not even in emergency situations.*

*Persons accused of being involved in the forced disappearance of persons shall only be tried by ordinary courts of law. They may not be tried by special jurisdictions.*

### 3.4 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, also called “Convention of Belém do Pará”, was adopted in 1994 by the General Assembly of the OAS and entered into force on 5 March 1995. As of 9 April 2002 it had been ratified by 31 countries.<sup>34</sup> This Convention is the only international treaty that exclusively aims at the elimination of gender-based violence.

#### 3.4.1 The scope of the Convention

For the purposes of the Convention, “violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere” (art. 1). As further specified, violence against women shall, inter alia, “be understood to include physical, sexual and psychological violence”, irrespective of whether that violence occurs within the family or domestic unit or within any other interpersonal relationship, or in the community, or is perpetrated or condoned by the State or its agents regardless of where it occurs (art. 2(a)-(c)). The scope of the application is thus comprehensive and encompasses all spheres of society, be they *public or private*.

The Convention further emphasizes women’s right to enjoyment and protection of all human rights contained in regional and international instruments, and the States parties “recognize that violence against women prevents and nullifies” the exercise of civil, political, economic, social and cultural rights (arts. 4-5). Lastly, the Convention provides that the right of every woman to be free from violence includes,

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<sup>34</sup>See <http://www.oas.org/juridico/english/Sigs/a-61.html>.

among others, the right to be free from all forms of discrimination, as well as the right to be valued and educated free of stereotyped patterns of behaviour (art. 6).

### 3.4.2 The undertakings of the States parties

The States parties agree in particular “to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate” violence against women (art. 7), and also “to undertake progressively specific measures”, such as programmes “to promote awareness and observance of the right of women to be free from violence”, “to modify social and cultural patterns of conduct of men and women” and “to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers” (art. 8).

### 3.4.3 The implementation mechanisms

The mechanisms of implementation foreseen by the Convention are threefold:

- ❖ **the reporting procedure:** in the first place, the States parties shall include in their national reports to the *Inter-American Commission of Women*, inter alia, “information on measures adopted to prevent and prohibit violence against women” and any difficulties they have observed in applying those measures (art. 10);
- ❖ **advisory opinions:** the States parties and the Inter-American Commission of Women may request of the Inter-American Court of Human Rights *advisory opinions* on the interpretation of the Convention on the Prevention, Punishment and Eradication of Violence against Women (art. 11); and, finally,
- ❖ **individual petitions:** any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the OAS “may lodge petitions with the *Inter-American Commission on Human Rights* containing denunciations or complaints of violations of Article 7 of this Convention by a State Party”, that is, of its duties to prevent, punish and eradicate violence against women as described in that article (art. 12; emphasis added).

*The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women is the only international treaty exclusively aimed at the elimination of gender-based violence.*

*The Convention covers violence occurring in all spheres of society, whether **public** or **private**.*

*The implementation mechanism consists of: (1) a **reporting procedure** to the Inter-American Commission of Women; and (2) the possibility of submitting **individual petitions** to the Inter-American Commission on Human Rights.*

*Both the States parties and the Inter-American Commission of Women may request **advisory opinions** of the Inter-American Court of Human Rights on the interpretation of the Convention.*

## 4. European Human Rights Treaties and their Implementation

### 4.1 The European Convention on Human Rights, 1950, and its Protocols Nos. 1, 4, 6 and 7

The European Convention on Human Rights was adopted by the Council of Europe in 1950, and entered into force on 3 September 1953.<sup>35</sup> As of 29 April 2002 it had 43 States parties.<sup>36</sup> The Convention originally created both a European Commission and a European Court of Human Rights entrusted with the observance of the engagements undertaken by the High Contracting Parties to the Convention, but with the entry into force of Protocol No. 11<sup>37</sup> to the Convention on 1 November 1998, the control machinery was restructured so that all allegations are now directly referred to the European Court of Human Rights in Strasbourg, France. This Court is the first, and so far only, permanent human rights court sitting on a full-time basis.

The rights protected by the Convention have been extended by Additional Protocols Nos. 1, 4, 6 and 7, all of which will be dealt with below. Protocol No. 12 concerning the prohibition of discrimination was opened for signature on 4 November 2000 in Rome, in the context of the fiftieth anniversary celebrations of the Convention itself, which was signed in the Italian capital on 4 November 1950. Finally, Protocol No. 13 was opened for signature in Vilnius on 3 May 2002. This protocol concerns the abolition of the death penalty *in all circumstances*.

#### 4.1.1 The undertakings of the States parties

The High Contracting Parties “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention” (art. 1). This means, *inter alia*, that they also have to provide everyone whose rights and freedoms guaranteed by the Convention have been violated with “an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity” (art. 13).

#### 4.1.2 The rights guaranteed

The European Convention guarantees the following civil and political rights:

- ❖ the right to life – art. 2;
- ❖ the prohibition of torture, inhuman or degrading treatment or punishment – art. 3;
- ❖ the prohibition of slavery, servitude, and forced or compulsory labour – art. 4;
- ❖ the right to liberty and security – art. 5;

<sup>35</sup>The official name of this treaty is: Convention for the Protection of Human Rights and Fundamental Freedoms, see European Treaty Series (ETS), no.: 005.

<sup>36</sup>For the ratifications of the European Convention on Human Rights and its various Protocols, see <http://conventions.coe.int/>.

<sup>37</sup>ETS no.: 155.

- ❖ the right to a fair trial – art. 6;
- ❖ prohibition of ex post facto laws – art. 7;
- ❖ the right to respect for one’s private and family life – art. 8;
- ❖ the right to freedom of thought, conscience and religion – art. 9;
- ❖ the right to freedom of expression – art. 10;
- ❖ the right to freedom of assembly and association – art. 11;
- ❖ the right to marry and to found a family – art. 12;
- ❖ the right to an effective remedy – art. 13;
- ❖ prohibition of discrimination – art. 14.

Protocol No. 1 was adopted in 1952 and entered into force on 18 May 1954.<sup>38</sup> As of 29 April 2002 it had 40 States parties. This Protocol provides the following rights and undertakings between the States parties thereto:

- ❖ the right to peaceful enjoyment of one’s possessions – art. 1;
- ❖ the right to education and the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions – art. 2;
- ❖ the holding of free elections at reasonable intervals by secret ballot – art. 3.

Protocol No. 4 of 1963 entered into force on 2 May 1968.<sup>39</sup> As of 29 April 2002 it had 35 States parties. Protocol No. 4 added the following rights to be protected:

- ❖ the right not to be deprived of one’s liberty merely on the ground of inability to fulfil a contractual obligation – art. 1;
- ❖ the right to freedom of movement and of residence; the right to leave any country, including one’s own – art. 2;
- ❖ the right not to be expelled from the country of which one is a national and the right not to be refused entry into the State of which one is a national – art. 3;
- ❖ prohibition of the collective expulsion of aliens – art. 4.

Protocol No. 6 of 1983 came into force on 1 March 1985.<sup>40</sup> As of 29 April 2002 it had 40 States parties. Protocol No. 6 concerns the abolition of the death penalty (art. 1), but a State may nonetheless “make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war” (art. 2). No derogations can be made from the provisions of these articles under article 15 of the Convention, nor can any reservations be made to this Protocol (arts. 3-4).

Protocol No. 7, adopted in 1984, entered into force on 1 November 1988.<sup>41</sup> As of 29 April 2002 there were 32 States parties to this Protocol, which extended the scope of the Convention by providing for the following additional protection:

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<sup>38</sup>The official name of this Protocol is: Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention, ETS, no.: 009.

<sup>39</sup>The official name of this Protocol is: Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol, ETS, no.: 046.

<sup>40</sup>The official name of this Protocol is: Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, ETS, no.: 114.

<sup>41</sup>The official name of this Protocol is: Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no.: 117.

- ❖ certain protections against arbitrary expulsion of aliens lawfully resident in the territory of the High Contracting Parties – art. 1;
- ❖ the right to appeal against a criminal conviction – art. 2;
- ❖ the right to compensation in case of a miscarriage of justice – art. 3;
- ❖ the right not to be tried again for the same offence within the jurisdiction of the same State – a provision which cannot be derogated from under article 15 of the Convention – art. 4; and
- ❖ equality of rights and responsibilities between spouses as to marriage, during marriage and in the event of its dissolution – art. 5.

As indicated above, Protocol No. 12<sup>42</sup> to the European Convention provides a general prohibition of discrimination, which is independent of the other rights and freedoms guaranteed by the Convention. According to article 1(1) of the Protocol, “the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Article 1(2) of the Protocol specifies that “no one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1”. As of 29 April 2002, however, this Protocol had not entered into force, having received only one out of the necessary ten ratifications.

### 4.1.3 Permissible limitations on the exercise of rights<sup>43</sup>

Some of the articles of the Convention and its Protocols provide for the possibility to impose restrictions on the exercise of rights in particular defined circumstances. This is the case with articles 8 (the right to respect for one’s private and family life), 9 (the right to freedom of thought, conscience and religion), 10 (the right to freedom of expression) and 11 (the right to peaceful assembly and freedom of association) of the Convention. The same holds true with regard to the right to peaceful enjoyment of one’s possessions in article 1 of Protocol No. 1 and the right to freedom of movement and residence in article 2 of Protocol No. 4.

The restrictions on the exercise of these rights must, however, in all circumstances be imposed “in accordance with the law”, be “provided for by law” or “prescribed by law”; and, with the exception of article 1 of Protocol No. 1, they must also be “necessary in a democratic society” for the particular purposes specified in the various articles, such as, for instance, in the interests of public safety, for the protection of public order, health or morals, the prevention of disorder or crime or the protection of the rights and freedoms of others (the legitimate reasons vary depending on the right protected). It is true that, while the notion of a democratic society is thus not referred to in connection with restrictions that might be imposed on the right to peaceful enjoyment of one’s possessions, the notion of democracy and a democratic constitutional order is ever-present in the Convention and is a precondition for States that wish to join the Council of Europe. It is therefore possible to conclude that

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<sup>42</sup>The official name of this Protocol is: Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no.: 177.

<sup>43</sup>For further information on limitations on the exercise of rights, see in particular Chapter 12 of this Manual concerning “Some Other Key Rights: The Freedoms of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly”.

restrictive measures clearly alien to a democratic society respectful of human rights standards would not be considered to be in “the public interest” within the meaning of article 1 of Protocol No. 1.

The case-law of both the European Court of Human Rights and the now defunct European Commission of Human Rights contains rich and numerous interpretations of the term “*necessity*” in the various limitations provisions, examples of which will be given in Chapter 12. Although “it is for the national authorities to make the *initial* assessment of the reality of the *pressing social need* implied by the notion of ‘necessity’” in the context of freedom of expression, for instance, it is for the Court to give the final ruling on the conformity of any measure with the terms of the Convention, a competence that “covers not only the basic legislation but also the decision applying it, even one given by an independent court”; this European supervision thus also comprises the “aim” and “necessity” of the measure challenged.<sup>44</sup> In exercising its supervisory functions with respect to the right to freedom of expression, for instance, the Court has also repeatedly held that it is obliged “to pay the utmost attention to the principles characterising a ‘democratic society’”.<sup>45</sup> The Court must consequently decide whether the reasons provided by the national authorities to justify the necessity of the interference in the exercise of the right concerned “are relevant and sufficient”.<sup>46</sup> In other cases again it has emphasized that the exceptions to the right to privacy in article 8(2) must be “interpreted narrowly” and that the necessity thereof must be “convincingly established”.<sup>47</sup> It is thus not sufficient that the interference concerned might be useful or that it is simply so harmless that it does not disturb the functioning of a democratic society. On the contrary, the High Contracting Parties are under a legal obligation to provide sufficient reasons to prove the necessity in a democratic society both of the law on which the measure is based and of the measure itself.

*The European Convention on Human Rights and its Protocols 1, 4, 6 and 7 provide extensive protection of the rights and freedoms of the human person at the European level.*

*Limitations on the exercise of certain rights protected by the Convention may be permissible, provided that they comply with the principles of:*

- **legality;**
- *the legitimate needs of a **democratic society**; and*
- **necessity/proportionality**, in that the measures must be necessary in a democratic society for one or more of the specified purposes.

<sup>44</sup>Eur. Court HR, *Handyside judgment of 7 December 1976, Series A, No. 24*, pp. 22-23, paras. 48-49; emphasis added.

<sup>45</sup>*Ibid.*, p. 23, para. 49.

<sup>46</sup>*Ibid.*, pp. 23-24, paras. 49-50.

<sup>47</sup>See *Judgments of Funke, Crémieux and Miaillhe of 25 February 1993, Series A, Nos. 256 A-C*, p. 24, para. 55, p. 62, para. 38 and p. 89, para. 36 respectively.

#### 4.1.4 Permissible derogations from legal obligations

Although differing in some respects from article 4 of the International Covenant on Civil and Political Rights and article 27 of the American Convention on Human Rights, article 15 of the European Convention provides for the possibility of derogations from legal obligations in exceptional situations. In general terms, the conditions are the following:

- ❖ ***the condition of exceptional threat***: a High Contracting Party may resort to derogations “in time of war or other public emergency threatening the life of the nation”. The European Court has interpreted this to mean that the High Contracting Party must face an “exceptional” and “imminent” “situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.<sup>48</sup> In the *Greek case*, the Commission specified that “the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are *plainly inadequate*”.<sup>49</sup> The Court has, moreover, granted Governments a “wide margin of appreciation” in deciding whether they are faced with a public emergency within the meaning of article 15(1).<sup>50</sup> However, in exercising its supervision, the Court “must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation”;<sup>51</sup>
- ❖ ***the condition of non-derogability of certain obligations***: according to article 15(2) of the Convention the following articles cannot be derogated from: article 2 (the right to life), “except in respect of deaths resulting from lawful acts of war”; article 3 (freedom from torture); article 4(1) (freedom from slavery and servitude); and article 7 (no punishment without law). Finally, following the entry into force of Protocols Nos. 6 and 7, no derogations can be made from the provisions concerning the abolition of the death penalty and protection against double jeopardy;
- ❖ ***the condition of strict necessity***: according to article 15(1), a High Contracting Party may only “take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation”. The European Court of Human Rights has held that the High Contracting Parties also enjoy a “wide margin of appreciation” in deciding “how far it is necessary to go in attempting to overcome the emergency”;<sup>52</sup> however, the decisions taken by the domestic authorities are always subjected to supervision at the European level;<sup>53</sup>
- ❖ ***the condition of consistency with other international legal obligations***: the measures of derogation taken by the High Contracting Party must not be “inconsistent with its other obligations under international law”. In the case of

<sup>48</sup> *Eur. Court HR, Lawless Case (Merits), judgment of 1 July 1961, Series A, No. 3*, p. 56, para. 28. The term “imminent” is only present in the French text of the judgment; both texts are equally authentic.

<sup>49</sup> *Eur. Comm. HR, Greek case, Report of the Commission, 12 Yearbook*, p. 72, para. 152; emphasis added.

<sup>50</sup> *Eur. Court HR, Brannigan and McBride judgment of 26 May 1993, Series A, No. 258-B*, p. 49, para. 43.

<sup>51</sup> *Ibid.*, p. 49, para. 43 at p. 50.

<sup>52</sup> *Ibid.*, p. 49, para. 43.

<sup>53</sup> *Ibid.*, pp. 49-50, para. 43.

*Brannigan and McBride*, the European Court of Human Rights had to examine whether the United Kingdom Government had fulfilled the requirement of “official proclamation” under article 4(1) of the International Covenant on Civil and Political Rights; it did so without seeking to define authoritatively the meaning of the terms “officially proclaimed” in article 4 of the Covenant; yet it had to examine whether there was “any plausible basis for the applicant’s argument” that this condition had not been complied with;<sup>54</sup>

- ❖ ***the condition of non-discrimination***: it is noteworthy that article 15 of the European Convention contains no specific prohibition of discrimination, and that this condition is thus exclusively regulated by article 14;
- ❖ ***the condition of international notification***: the High Contracting Party availing itself of the right to derogate “shall keep the Secretary-General of the Council of Europe fully informed of the measures” taken and of “the reasons therefor”; it shall also inform him “when such measures have ceased to operate and the provisions of the Convention are again being fully executed”; if need be, the European Court of Human Rights examines *proprio motu* whether this condition has been complied with.<sup>55</sup>

*When derogating from their obligations under article 15 of the European Convention on Human Rights, the High Contracting Parties must comply with:*

- *the condition of exceptional threat;*
- *the condition of non-derogability of certain obligations;*
- *the condition of strict necessity;*
- *the condition of consistency with other international obligations; and*
- *the condition of international notification.*

#### 4.1.5 The implementation mechanism

As from 1 November 1998, when the restructuring of the control machinery established under the Convention entered into force, all alleged violations of the rights and freedoms guaranteed by the Convention and its Protocols are referred directly to the European Court of Human Rights, which shall “ensure the observance of the engagements undertaken by the High Contracting Parties” (art. 19). The Court is permanent, and consists of a number of judges equal to that of the Contracting Parties, that is, 43 as of 30 April 2002 (art. 20). The Court can sit in committees of three judges, in Chambers of seven judges or in a Grand Chamber of seventeen judges (art. 27(1)).

Apart from being competent to receive and examine *inter-State* complaints (art. 33), the Court “may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols

<sup>54</sup>Ibid., p. 57, para. 72.

<sup>55</sup>See e.g. *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25, p. 84, para. 223.*

thereto” (art. 34). The “High Contracting Parties undertake not to hinder in any way the effective exercise of this right” (art. 34, *in fine*). ***The right to bring inter-State and individual complaints to the Court does not depend on any specific act of acceptance.***

The Court may not, however, deal with an application of any kind unless domestic remedies have been exhausted and the application has been submitted within six months from the date on which the final decision was taken (art. 35(1)). Further criteria of admissibility exist with regard to individual applications, which must not, for instance, be anonymous or “substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information” (art. 35(2)).

The Court decides on the admissibility and merits of the case and, if necessary, undertakes an investigation. After having declared a case admissible, it also places itself “at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto” (art. 38(1)(b)). Hearings before the Court are public, unless it decides otherwise in “exceptional circumstances” (art. 40).

Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional circumstances, request that the case be referred to a Grand Chamber. If the request is accepted, the Grand Chamber shall decide the case by means of a judgment that shall be final (arts. 43-44). Otherwise, the judgment of the Chamber will be final when the parties declare that they have no intention of requesting referral to the Grand Chamber; or three months after the judgment in the absence of such a request; or, finally, when the request for referral has been rejected (art. 44).

The High Contracting Parties “undertake to abide by the final judgment of the Court in any case to which they are parties”; the execution of the final judgment is supervised by the Committee of Ministers of the Council of Europe (art. 46).

*The implementation of the European Convention on Human Rights is monitored by the European Court of Human Rights, which is a permanent and full-time body, sitting in*

- *Committees of 3 judges;*
- *Chambers of 7 judges; or*
- *a Grand Chamber of 17 judges.*

*The Court is competent to receive and examine*

- *inter-State cases; and*
- *applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation of the rights guaranteed by the Convention or its Protocols.*

## 4.2 The European Social Charter, 1961, and its Protocols of 1988, 1991 and 1995

The European Social Charter<sup>56</sup> was adopted in 1961 and entered into force on 26 February 1965. As of 30 April 2002 it had 25 ratifications. The European Social Charter aims at securing a number of social and economic rights, and it is therefore the natural counterpart to the European Convention on Human Rights which guarantees civil and political rights. The Charter sets up a biennial reporting procedure and, following the entry into force of the 1995 Additional Protocol, a system of collective complaints was also created.

### 4.2.1 The undertakings of the States parties

There are three fundamental undertakings that each State has to accept when adhering to the European Social Charter:<sup>57</sup>

- ❖ *first*, it must “consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that Part” (art. 20(1)(a)). Part I of the Charter lists in general terms the nineteen rights and principles that should “be effectively realized” through the national and international means pursued by the Contracting Parties;
- ❖ *second*, it must “consider itself bound by at least five of the following articles of Part II” of the Charter, namely, articles 1, 5, 6, 12, 13, 16 and 19, which respectively concern the right to work, the right to organize, the right to bargain collectively, the right to social security, the right to social and medical assistance, the right of the family to social, legal and economic protection, and the right of migrant workers and their families to protection and assistance (Art. 20(1)(b));
- ❖ *lastly*, it must moreover “consider itself bound by such a number of articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs” (art. 20(1)(c)).

### 4.2.2 The rights recognized

On the specific conditions explained above, the Contracting States undertake “to consider themselves bound by the obligations laid down in the following articles and paragraphs”, which concern:

- ❖ the right to work – art. 1;
- ❖ the right to just conditions of work – art. 2;
- ❖ the right to safe and healthy working conditions – art. 3;
- ❖ the right to a fair remuneration – art. 4;

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<sup>56</sup>ETS, no.: 35 and, for the three Additional Protocols, see ETS, nos.: 128, 142 and 158.

<sup>57</sup>For more details about the European Social Charter, see e.g. David Harris, *The European Social Charter* (Charlottesville, University Press of Virginia, 1984, Procedural Aspects of International Law Series, vol. 17), xvi, 345 pp.; and L. Samuel, *Fundamental Social Rights: Case law of the European Social Charter* (Strasbourg, Council of Europe, 1997), 450 pp. For information about the European Social Charter see also the Council of Europe web site: [www.coe.int/](http://www.coe.int/).

- ❖ the right to organize – art. 5;
- ❖ the right to bargain collectively – art. 6;
- ❖ the right of children and young persons to protection – art. 7;
- ❖ the right of employed women to protection – art. 8;
- ❖ the right to vocational guidance – art. 9;
- ❖ the right to vocational training – art. 10;
- ❖ the right to protection of health – art. 11;
- ❖ the right to social security – art. 12;
- ❖ the right to social and medical assistance – art. 13;
- ❖ the right to benefit from social welfare services – art. 14;
- ❖ the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement – art. 15;
- ❖ the right of the family to social, legal and economic protection – art. 16;
- ❖ the right of mothers and children to social and economic protection – art. 17;
- ❖ the right to engage in a gainful occupation in the territory of other Contracting Parties – art. 18; and, finally,
- ❖ the right of migrant workers and their families to protection and assistance – art. 19.

The 1988 Additional Protocol entered into force on 4 September 1992 and as of 30 April 2002 had ten States parties. By virtue of this Protocol, which does not prejudice the provisions of the European Social Charter itself, the Contracting Parties also undertake to consider themselves bound by one or more of the articles concerning the following rights:

- ❖ the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex – art. 1;
- ❖ the right to information and consultation – art. 2;
- ❖ the right to take part in the determination and improvement of working conditions and the working environment – art. 3; and
- ❖ the right of elderly persons to social protection – art. 4.

### 4.2.3 Permissible limitation on the exercise of rights

The Charter contains a general limitation provision (art. 31) whereby the rights and principles set forth in Parts I and II of the Charter shall not be subject to any restrictions or limitations not already specified therein “except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals”. As in most other limitation provisions in the field of international human rights law, the following three important legal conditions are all present in this provision, namely, the *principle of legality*, the *principle of a democratic society*, and the *principle of proportionality*.

#### 4.2.4 Permissible derogations from legal obligations

The European Social Charter further contains a derogation provision according to which, “in time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law” (art. 30(1)). An Appendix to the Charter which forms an integral part thereof provides that the “term ‘in time of war or other public emergency’ shall be so understood as to cover also the *threat* of war” (emphasis added).

It is noteworthy that, as compared to article 15 of the European Convention on Human Rights, article 27 of the American Convention on Human Rights and article 4 of the International Covenant on Civil and Political Rights, article 30 of the European Social Charter contains neither any prohibition of discrimination nor any non-derogable rights. The scope for permissible restrictions in emergency situations seems thus to be wider than in the field of civil and political rights.

*The European Social Charter, 1961, protects a wide range of social and economic rights. While the Charter provides the contracting States with a certain flexibility, they must consider themselves bound by at least 5 of 7 specified core articles, as well as by an additional 10 articles or 45 numbered paragraphs.*

*The Charter allows for the limitation of the rights contained therein provided that such limitations are consistent with the principles of legality, a democratic society and proportionality.*

*States parties may also be allowed to derogate from their legal obligations under the Charter in times of war, threat of war, or other public emergency. The measures of derogation taken must comply with the principles of strict necessity and consistency with the State’s other international obligations*

#### 4.2.5 The implementation mechanism

The procedure for examining the reports submitted under the European Social Charter was revised by the 1991 Amending Protocol, which had not, however, entered into force as of 30 April 2002. In spite of this, and following a decision taken in December 1991 by the Committee of Ministers, the supervision measures embodied in the Amending Protocol are de facto operational. As amended de facto, the monitoring procedures can consequently be briefly described as follows:

- ❖ ***the reporting procedure***: in the first place, the Contracting Parties undertake to submit biennial reports to the Secretary-General of the Council of Europe on the application of those provisions they have expressly accepted (art. 21); secondly, they have to submit reports on those provisions they have not accepted when requested by the Committee of Ministers to do so (art. 22); the Contracting Parties also have to transmit a copy of these reports to specific national organizations of employers and

trade unions; the Secretary-General himself shall forward a copy of the reports to the international NGOs which have consultative status with the Council of Europe and which have particular competence in the matters governed by the Social Charter. The country reports are then examined by a Committee of Independent Experts (currently named European Committee of Social Rights) consisting of at least nine members. Upon completion of its examination, the Committee of Independent Experts draws up a report containing its conclusions which are to be made public. The country reports as well as, in particular, the conclusions of the Committee of Independent Experts are thereafter submitted to a Governmental Committee composed of one representative of each of the Contracting Parties. The Governmental Committee prepares the decisions of the Committee of Ministers and shall explain why a particular situation should be the subject of recommendations. Its report to the Committee of Ministers shall be made public; the Committee of Ministers shall finally adopt, by a majority of two thirds of those voting, with entitlement to voting limited to the Contracting Parties, on the basis of the report of the Governmental Committee, a resolution covering the entire supervision cycle and containing individual recommendations to the Contracting Parties concerned (arts. 23-28 as amended de facto). Lastly, the Secretary-General communicates the conclusions of the Committee of Ministers to the Parliamentary Assembly of the Council of Europe for the purpose of holding periodic plenary debates (art. 29). The Charter provides for the duty to involve both the International Labour Organization (ILO) and specialized NGOs in the monitoring procedures in a consultative capacity (art. 26 and art. 27 as amended de facto);

- ❖ ***the complaints procedure:*** the Additional Protocol Providing for a System of Collective Complaints entered into force on 1 July 1998, and as of 30 April 2002 had nine States parties. It introduced a procedure whereby international and national organizations of employers and trade unions (as well as certain non-governmental organizations) can submit complaints alleging unsatisfactory application of the Charter (art. 1). The complaint shall be addressed to the Secretary-General of the Council of Europe who shall “notify it to the Contracting Party concerned and immediately transmit it to the Committee of Independent Experts” (art. 5). The procedure before the Committee is primarily written but may also be oral (art. 7). The Committee prepares a report to be submitted to the Committee of Ministers, in which it shall, inter alia, present its conclusions as to whether or not the Contracting Party concerned has ensured the satisfactory application of the Charter provisions (art. 8 (1)). It is ultimately for the Committee of Ministers to adopt a resolution as to whether the Contracting Party has applied the Charter provisions in a satisfactory manner and, if not, to address a recommendation to the Contracting Party concerned (art. 9).

*The European Social Charter, 1961, provides for a reporting procedure, as well as, on a more limited scale, for a collective complaints procedure allowing international and national organizations of employers and trade unions as well as non-governmental organizations to submit complaints alleging an unsatisfactory application of the Charter (Additional Protocol).*

### 4.3 The European Social Charter (revised), 1996

The European Social Charter in its revised version was adopted in 1996 and entered into force on 1 July 1999. As of 30 April 2002 it had 12 ratifications.<sup>58</sup> The revised Social Charter will thus only progressively replace the original Charter, the terms of which it updates and extends. By taking into account new social and economic developments, the revised Charter amends certain existing provisions and adds new ones. As to the new features, they include, in particular, a considerably longer list of rights and principles in Part I than those contained in the old Charter (31 rights and principles as compared to only 19 in the 1961 Charter). In addition to the rights taken from the 1988 Additional Protocol, and which have not been amended, the new important features include:

- ❖ the right to protection in cases of termination of employment – art. 24;
- ❖ the right of workers to protection of their claims in the event of the insolvency of their employer – art. 25;
- ❖ the right to dignity at work – art. 26;
- ❖ the right of workers with family responsibilities to equal opportunities and equal treatment – art. 27;
- ❖ the right of workers’ representatives to protection in the undertaking and facilities to be accorded to them – art. 28;
- ❖ the right to information and consultation in collective redundancy procedures – art. 29;
- ❖ the right to protection against poverty and social exclusion – art. 30; and lastly,
- ❖ the right to housing – art. 31.

To the number of articles comprising the hard core of the revised Charter have been added articles 7 and 20, concerning the right of children and young persons to protection and the right of women and men to equal opportunities and equal treatment in matters of employment and occupation; and the number of core articles that have to be accepted by the Contracting Parties has been increased to six. In addition, they must be bound by not less than 16 articles or 63 numbered paragraphs (Part IV, art. A).

The implementation of the legal obligations of the revised Charter is submitted to the same supervision procedure as the original European Social Charter (Part IV, art. C).

*The European Social Charter (revised), 1996, updates and extends the old Charter, and increases to 6 the number of core rights that must be accepted by the States parties. They must moreover agree to be bound by not less than 16 other articles or 63 numbered paragraphs.*

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<sup>58</sup>ETS no.: 163.

## 4.4 The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>59</sup> was adopted in 1987 and entered into force on 1 February 1989. As of 30 April 2002 it had 42 Contracting Parties. While the European Convention is closely related to the Convention against Torture adopted by the United Nations General Assembly in 1984, which was dealt with in Chapter 2, it has a distinctive feature in that it established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which, as will be seen below, has the power to visit any place of detention within the jurisdiction of the Contracting States.

### 4.4.1 *The undertakings of the States parties and the monitoring mechanism*

The European Convention for the Prevention of Torture contains no definition of the illegal act or practice of torture, but, in its second preambular paragraph, it refers to article 3 of the European Convention on Human Rights, which provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Since the monitoring procedure set up under the European Convention on Human Rights operates only in regard to the lodging of individual or inter-State complaints, it was considered necessary to create “a non-judicial means of a preventive character based on visits” in order to try to eradicate the use of torture in European places of detention (see fourth preambular paragraph).

The purpose of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is therefore “by means of visits [to] examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment” (art. 1). The State party “shall permit visits”, in accordance with the Convention, “to any place within its jurisdiction where persons are deprived of their liberty by a public authority” (art. 2), and, to this end, “the Committee and the competent national authorities ... shall cooperate with each other” (art. 3).

The Committee consists of a number of members equal to that of the States parties, who serve in their individual capacity in an independent and impartial manner (art. 4). “Apart from periodic visits, the Committee may organize such other visits as appear to it to be required in the circumstances” (art. 7). After having notified the Government of the Party concerned of its intention to carry out a visit, the Committee “may at any time visit any place” within the jurisdiction of the relevant State party “where persons are deprived of their liberty by a public authority” (art. 8(1) read in conjunction with art. 2).

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<sup>59</sup>ETS no.: 126.

“In exceptional circumstances, the competent authorities of the Party concerned may make representations to the Committee against a visit at the time or to the particular place proposed by the Committee”, although “such representations may only be made on grounds of national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress” (art. 9(1)). When such representations have been made, the Committee and the State party “shall immediately enter into consultations in order to clarify the situation and seek agreement on arrangements to enable the Committee to exercise its functions expeditiously (art. 9(2)).

Following each visit “the Committee shall draw up a report on the facts found during the visit, taking account of any observations which may have been submitted by the Party concerned”. The report shall then be transmitted to the State party with any recommendations that the Committee considers necessary (art. 10). If the State party “fails to cooperate or refuses to improve the situation in the light of the Committee’s recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter” (art. 10(2)).

Otherwise, both the information collected by the Committee during an on-the-spot visit and its report shall be confidential, although the report shall be published, “together with any comments of the Party concerned”, whenever so requested by the latter (art. 11(1) and (2)).

*The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment complements the European Convention on Human Rights by creating a system of visits for the purposes of preventing and eradicating the use of torture in Europe.*

*To this end, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is authorized both to make periodic visits to the States parties concerned and to organize such other visits as it deems required by the circumstances.*

## 4.5 The Framework Convention for the Protection of National Minorities, 1995

The Framework Convention for the Protection of National Minorities<sup>60</sup> was adopted by the Committee of Ministers of the Council of Europe in 1995, and entered into force on 1 February 1998. As of 30 April 2002 it had 34 States parties. One of the particular features of the Framework Convention is that, at the invitation of the Committee of Ministers, it is open to signature by States that are not members of the Council of Europe (art. 29). This Framework Convention is the first legally binding multilateral instrument devoted to the protection of national minorities in general and it makes clear that the protection of these minorities “forms an integral part of the

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<sup>60</sup>ETS no.: 157.

international protection of human rights, and as such falls within the scope of international cooperation” (art. 1).<sup>61</sup>

The Framework Convention contains, however, “mostly programme-type provisions”, because, as the term “Framework” indicates, “the principles contained in the instrument are not directly applicable in the domestic legal orders of the Member States, but will have to be implemented through national legislation and appropriate governmental policies”.<sup>62</sup> The Convention also establishes that “every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such”, without suffering any disadvantage because of this choice (art. 3(1)).

### 4.5.1 *The undertakings of the States parties*

The undertakings of the States parties vis-à-vis national minorities are defined in Section II of the Framework Convention, and cover a number of important issues, such as, in particular:

- ❖ the right to equality before the law, equal protection by the law and the promotion of full and effective equality in various areas – art. 4;
- ❖ promotion of conditions necessary for the maintenance and development of the culture and the preservation of the essential elements of the identity of national minorities – art. 5;
- ❖ the encouragement of tolerance and intercultural dialogue and the protection of persons who may be subject to threats or acts of discrimination – art. 6;
- ❖ the freedoms of peaceful assembly, association, expression, thought, conscience and religion; the right to manifest beliefs and establish religious institutions – arts. 7-8;
- ❖ the right to freedom of expression, including the right of access to the media – art. 9;
- ❖ linguistic freedoms, such as the right to use one’s minority language in private or in public, and, to the extent possible, also before administrative authorities; “the right to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter” – art. 10;
- ❖ the rights to a name in one’s minority language and to display signs of a private nature visible to the public – art. 11;
- ❖ education: fostering of knowledge of the culture, history, language and religion of the national minorities and of the majority; the right to set up and manage educational institutions – arts. 12-13;
- ❖ the right to learn one’s minority language – art. 14;
- ❖ effective participation of persons belonging to national minorities in cultural, social and economic life as well as in public affairs – art. 15;

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<sup>61</sup>See *Introduction to the Framework Convention for the Protection of National Minorities*, <http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/FCNMIntro.htm>, p. 1.

<sup>62</sup>*Ibid.*, loc. cit.

- ❖ prohibition of forced assimilation in that States “shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the ... Convention” – art. 16;
- ❖ the right to “maintain free and peaceful contacts across frontiers with persons lawfully staying in other States” and the right to participate in the activities of NGOs, both locally and internationally – art. 17.

### 4.5.2 Permissible limitations on the exercise of rights

“Where necessary”, the States parties are allowed to resort only to “those limitations, restrictions or derogations which are provided for in international legal instruments” and, in particular, in the European Convention on Human Rights, and only “in so far as they are relevant to the rights and freedoms flowing from the said principles” (art. 19). In other words, the terms of the Framework Convention cannot be interpreted as adding a further legal basis for imposing limitations on the exercise of rights, or resorting to derogations more extensive than those already allowed, for instance, by article 15 of the European Convention on Human Rights and article 4 of the International Covenant on Civil and Political Rights.

### 4.5.3 The implementation mechanism

The Committee of Ministers of the Council of Europe has the task of monitoring the implementation of the Framework Convention by the Contracting States (art. 24). In carrying out this task, the Committee of Ministers “shall be assisted by an advisory committee, the members of which shall have recognized expertise in the field of the protection of national minorities” (art. 26). The monitoring is based on a reporting procedure, with the Contracting State being required to submit, within one year following the entry into force of the Convention in its respect, “full information on the legislative and other measures taken to give effect to the principles set out” in the Convention, and thereafter, whenever the Committee of Ministers so requests, “any further information of relevance to the implementation” thereof (art. 25).<sup>63</sup>

*The Framework Convention for the Protection of National Minorities is the first legally binding international treaty aimed at protecting national minorities.*

*This Convention contains undertakings vis-à-vis national minorities in areas such as, for instance, the right to equality before the law, freedom of expression, freedom of religion, freedom of association and assembly, linguistic freedoms, education, promotion of culture and national identity, and the encouragement of tolerance and intercultural dialogue.*

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<sup>63</sup>For more details of this monitoring procedure, see “Rules on the monitoring arrangements under articles 24 to 26 of the Framework Convention for the Protection of National Minorities”, Resolution (97)10, adopted by the Committee of Ministers on 17 September 1997; for the text see the Council of Europe web site: <http://www.coe.int/>.

## 5. Concluding remarks

This Chapter has provided some basic information about the rights protected by the major treaties existing in Africa, the Americas and Europe, and has also provided a general introduction to the regional monitoring mechanisms. These treaties have contributed to important changes in the laws of many countries, and, in view of the large number of States having ratified, acceded or adhered to them, they are also becoming particularly important for the work of judges, prosecutors and lawyers, who may have to apply them in the exercise of their professional duties. Many of the provisions of the general treaties have been extensively interpreted, *inter alia* with regard to the administration of justice and treatment of persons deprived of their liberty; and this case-law constitutes an important source of information and guidance for judges and lawyers.

