

A COMPARATIVE ANALYSIS OF INDIVIDUAL PETITION IN REGIONAL AND GLOBAL HUMAN RIGHTS PROTECTION MECHANISMS

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I INTRODUCTION

This article assesses the position of the individual as a participant in the international legal process by reference to the individual petition mechanisms of the main regional (European, American, and African) and global (United Nations treaty-based and Charter-based) human rights systems. A review of historical examples of individual petition procedures in the first part of this article will reveal their previously exceptional and state-centred nature. Examination of the modern human rights systems in terms of institutional structure, access, available remedies, compliance and overall effectiveness will make it possible to determine whether the position of the individual has changed conceptually and practically in international law. Although the individual petition mechanisms of the modern human rights systems all suffer from shortcomings, their difference from historical examples and their continued growth confirms the individual as a rights-bearing subject of international law.

II EXAMPLES IN HISTORY

Traditionally, individuals have only rarely been able to bring international claims in their own name against states. The involvement of individuals in the international dispute settlement process was generally limited to the exercise of diplomatic protection by states in respect of ill-treatment of their nationals by other states. The individual was effectively regarded as the ‘property’ of his/her state,¹ which state was permitted at its discretion to sue another state for injuring him/her.² However, the establishment of mechanisms permitting individuals to hold states accountable internationally was not entirely unheard of. In the time of the Holy Roman Empire

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¹ ‘By taking up the case of one of its subjects and by resorting to diplomatic action or international “judicial” proceedings on his behalf, a State is in reality asserting its own rights - its rights to ensure, in the person of its subjects, respect for the rules of international law’: *Mavrommatis Palestine Concessions (Greece v UK) (Judgment)* [1924] PCIJ (ser A) No 2, 12; See also *Panevezys-Saldutiskis Railway (Estonia v Lithuania) (Merits)* [1939] PCIJ (ser. A/B) No 76, 16; Repeated in *Nottebohm (Liechtenstein v. Guatemala) (Second Phase)* [1955] ICJ Rep 4, 24; Reaffirmed in *Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Second Phase)* ICJ Rep para 78: ‘for it is its own right that the State is asserting’.

² ‘The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It remains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case’: *Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Second Phase)* ICJ Rep 79.

— the modern state-system's gestation period — individuals could bring grievances against princes to the attention of the Pope.³ Those early systems will be examined in order to underline their differences from the present human rights bodies.

A *Central American Court of Justice (CACJ)*

The first international court able to receive complaints from individuals in their own right⁴ was the CACJ, established in 1907 as part of a plan to create and maintain peace between five Central American states with a long history of violence.⁵ The CACJ was established to 'decide every difference or difficulty that may arise amongst them, of whatsoever nature it may be'⁶ and was obliged to hear cases brought by individuals of one state against the government of another.⁷ None of the five cases brought by individuals to the CACJ succeeded.⁸ Of those five cases, four could be said to be of a human rights character. Two failed on grounds of non-exhaustion of local remedies, even though these remedies were useless or impossible to exhaust.⁹ In the other two cases the CACJ held that there was insufficient proof of the allegations or that the claim was without foundation.¹⁰

³ L Ali Khan, *The Extinction of Nation-States: a World without Borders* (1996) 16. For an examination of the similarities between the roles of the Pope and the Emperor and those of international tribunals see FH Hinsley, *Sovereignty* (2nd ed, 1986) 171.

⁴ There already existed 'mixed claims commissions' for use in disputes between various Latin American states (Mexico and Venezuela in particular) and the major powers (USA, Britain, and Germany in particular). However, although these commissions were designed to settle disputes of private origin, claims had to be brought in the name of a State, and were expressly in the exercise of diplomatic protection. See W. Paul Gormley, *The Procedural Status of the Individual Before International and Supranational Tribunals* (1966) 36-37.

⁵ Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador convened in 1907 to conclude a *General Treaty of Peace and Amity* and a *Convention for the Establishment of the Central American Court of Justice*. The texts of these documents are reprinted in 'Treaty and Conventions of the Central American Peace Conference' (1908) 2 *American Journal of International Law (Supplement)* 219, 231 <<http://www.heinonline.org>> at 2 September 2003. For more information see Ramirez, *Cinco Años de la Corte De Justicia Centroamericana* (1918).

⁶ *Convention for the Establishment of the Central American Court of Justice* art 1; similar wording is found in article 1 of the *General Treaty of Peace and Amity*.

⁷ *Convention for the Establishment of the Central American Court of Justice* art 2.

⁸ The Court, which was to apply 'principles of international law' (*Convention for the Establishment of the Central American Court of Justice* art 11), considered that 'the fundamental rights and powers of the human individual in civil life are placed under the protection of the principles governing the commonwealth of nations, as international rights of man': *Dr. Pedro Andres Fornos Diaz v The Government of the Republic of Guatemala*, CACJ, March 6 1909, in 'Decisions Involving Questions of International Law' (1909) 3 *American Journal of International Law* 737, 743. The four cases of a human rights character dealt with:

- a) allegations of false arrest and imprisonment: *Dr. Pedro Andres Fornos Diaz v. The Government of the Republic of Guatemala*, CACJ, 6 March 1909 (the *Diaz* Case);
- b) unlawful conditions of detention, interference with private possessions and correspondence and expulsion: *Felipe Molina Larios v Honduras*, CACJ, 10 December 1913 (the *Larios* case). The complainant also alleged unlawful imprisonment;
- c) denial of enjoyment of equal civil rights to nationals of a contracting state: *Salvador Cerda v Costa Rica*, CACJ, 14 October 1911 (the *Cerda* case) (under the *General Treaty of Peace and Amity*, the contracting parties were obliged to ensure that citizens of other contracting parties enjoyed 'the same civil rights as are enjoyed by nationals': art 6);
- d) expulsion and denial of equal rights to the citizen of a contracting party: *Alejandro Bermúdez Nuñez v Costa Rica*, CACJ, 7 April 1914 (the *Nuñez* case).

For summaries of all the cases brought by individuals heard by the Court, see Manley O Hudson, 'The Central American Court of Justice' (1932) 26 *American Journal of International Law* 759, 770.

⁹ See the discussion of the *Diaz* case and the *Larios* case in Manley O Hudson, 'The Central American Court of Justice' (1932) 26 *American Journal of International Law* 759. In the *Diaz* case the Court said that it could not accept such an argument because it would amount to defamation of Guatemala. In the *Larios* case the Court made its decision despite the fact that the complainant was not allowed back into Honduras to pursue any remedies.

¹⁰ See the discussion of the *Cerda* case and the *Nuñez* case in Manley O Hudson, 'The Central American Court of Justice' (1932) 26 *American Journal of International Law* 759.

B Post World War One Agreements

The peace treaties at the end of World War One created three notable mechanisms allowing individual petition: the Mixed Arbitral Tribunals, the Minority Protection System, and the Mandate System. First, the Mixed Arbitral Tribunals in the main permitted nationals of the Allied Powers to claim against governments of enemy states¹¹ for losses of an economic character suffered during the conflict.¹² Second, the Minority Protection System was established through a series of multilateral¹³ and bilateral¹⁴ arrangements imposed on (in the main) the defeated states to protect minorities within their borders. These were ultimately supervised by the Council of the League of Nations which established an individual petition procedure.¹⁵ However, the individual was regarded merely as a source of information and did not participate in the procedure.¹⁶ Petitions were handled in practice through informal and confidential meetings between the Minorities Section of the League of Nations and the offending state.¹⁷ Occasionally cases moved to the Permanent Court of International Justice for advisory opinions, or as contentious cases. However, petitioners were also without a role in these proceedings.¹⁸ Third, the Mandate System was established by the League of Nations Covenant essentially to supervise the colonial possessions of the defeated states after World War One. A Mandate Commission was established to act upon individual petitions regarding misconduct by the mandatory state.¹⁹ As with the Minority Protection System, the individual was regarded merely as a source of information and could not be heard officially by

¹¹ Germany, Austria, Bulgaria, Hungary and Turkey.

¹² For the text of the relevant articles of the Treaties of Versailles, St. Germain, Neuilly, Trianon and Lausanne, see Paul F Simonson, *Private Property and Rights in Enemy Countries* 280-289, cited in Carl Aage Nørgaard, *The Position of the Individual in International Law* (1962) 230. Similar arrangements were made after World War II. The Supreme Court of Restitution was established in 1952 pursuant to the *Convention on the Settlement of Matters Arising out of the War and Occupation*: see Carl Aage Nørgaard, *The Position of the Individual in International Law* (1962) 242. This Convention was concluded between the United States, the United Kingdom and France on one side and Germany on the other.

¹³ Special clauses were inserted into the Peace Treaties of Versailles, Neuilly, St. Germain and Trianon, obliging Poland, Czechoslovakia, Greece, Romania and Yugoslavia to protect minorities within their borders: see League of Nations *Official Journal* (1925), 950 and *Procès-Verbal of the 5th session of the Council* (1920) 25, 191, cited in Carl Aage Nørgaard, *The Position of the Individual in International Law* (1962) 120.

¹⁴ The *Upper Silesian Convention* (also known as the *Geneva Convention*) established a similar system between Germany and Poland: 9 LNTS, arts 562-606.

¹⁵ 'Special Supplement: Documents Relating to the Protection of Minorities, League of Nations' (also known as the 'Tittoni Report'), (1929) No 73 League of Nations *Official Journal* 20, 51.

¹⁶ The system was designed 'to avoid at all costs an arrangement under which the state concerned and the petitioning minority would appear before the Council as parties in a trial': P de Azcárate, *League of Nations and National Minorities. An Experiment* (1945) 104.

¹⁷ 65% of cases were handled by the Minority Section in this way: see Joost Herman, *The League of Nations and its Minority Protection Programme in Eastern Europe: Revolutionary, Unequalled and Underestimated*, in *The League Of Nations, 1920-1946: Organisation And Accomplishments: A Retrospective Of The First Organisation For The Establishment Of World Peace* (1996) 49, 53.

¹⁸ *Covenant of the League of Nations* (1919) arts 36, 37, 65; *Statute of the Permanent Court of International Justice* (1920). See also Carl Aage Nørgaard, *The Position of the Individual in International Law* (1962) 112. There were a handful of PCIJ advisory opinions delivered, referred to the Court both by the Council under the League system and Germany and Poland under the bilateral system.

¹⁹ *Covenant of the League of Nations* (1919) arts 22, 22(9). Article 22 (1) states that mandatory states are responsible for the 'well-being and development' of their trust territories.

the Commission.²⁰ The Mandatory state was present at the petition's consideration.²¹

The overriding consideration in establishing these procedures was the regulation of relations between states, rather than granting individuals the capacity to protect themselves at the international level. They were designed to deal with post-conflict situations, to redress past damage and to prevent future violence, and the role of the individual in these procedures was limited in accordance with those aims. This is seen most clearly in the fact that none of the procedures permitted individuals to sue their own state.²² Particular characteristics of each body also confirm this. The Mixed Arbitral Tribunals for example were not generally open to nationals of defeated states.²³ The CACJ interpreted its jurisdiction with regard to individual claims so narrowly that no such case ever succeeded. It is interesting to compare the approach of the CACJ to that of contemporary human rights bodies, which will not expect petitioners to exhaust ineffective local remedies,²⁴ and require accused states to rebut plausible evidence rather than placing the burden of proof entirely on the victim.²⁵ The CACJ based itself on the consideration that 'every limitation of [a state's] autonomy must be regarded "as an exceptional right and be construed in its narrowest sense, in the manner most suitable to the nation on which it has been imposed and causing the least detriment to its natural liberty"'.²⁶

Individual petition appeared as an exceptional invasion of state sovereignty, secondary to the general aim of the treaty, which was to preserve inter-state peace. It was not seen as creating recourse for individual victims for its own sake, and as such there was no provision for individuals to sue their own state. The Minority and Mandate Systems merely regarded individuals as sources of information. Both systems served different political functions. The Minority System 'was merely one part of a larger system designed to facilitate the peaceful adjustment of political relations; hence, the guarantee of minority rights was envisaged as a political function'.²⁷ The Mandate System was designed to 'legalize retrospectively the redistribution of ex-German and ex-Turkish dependencies agreed upon in secret

²⁰ This changed with the creation of the International Trusteeship System, established by article 75 of the *Charter of the United Nations* (1945), which replaced the existing Mandate System: see *Rules of Procedure of the Trusteeship Council*, UN Doc T/1/Rev. 6, r 79, 80 and 77.

²¹ Carl Aage Nørgaard, *The Position of the Individual in International Law* (1962) 124-125.

²² While an individual could complain of the behaviour of a mandatory in regard to his territory, these States were regarded as holding the territory in trust, and the populations thus not considered to be nationals: *Covenant of the League of Nations* (1919) art 22.

²³ Though this was not universally the case: see Nørgaard, above n 21, 231.

²⁴ '[T]he rule of exhaustion of domestic remedies... is based on the assumption... that there is an effective remedy available in respect of the alleged breach in the domestic system': *Akdivar and others v Turkey* (1996) vol IV Eur Court HR para 65. This approach is followed by all the regional bodies and treaty-bodies discussed below. There is no requirement for the exhaustion of local remedies in respect of procedures under the UN Charter.

²⁵ United Nations Human Rights Committee, *Annual Report* (2000-2001) UN Doc A/56/40, vol I para 126: 'Under the Optional Protocol, the Committee bases its Views on all written information made available by the parties'. This implies that if a State party does not provide an answer to an author's allegations, the Committee will give due weight to an author's uncontested allegations as long as they are substantiated.

²⁶ The Central American Court of Justice, quoting Fiore's *Codified International Law*, No. 150 in *Dr. Pedro Andres Fornos Diaz v The Government of the Republic of Guatemala*, CACJ, 6 March 1909 (the *Diaz Case*).

²⁷ Inis L Claude, *National Minorities, An International Problem* (1969) 21.

treaties during World War I'.²⁸ Nørgaard's remark about the Mixed Arbitral Tribunals can probably be extended to the other bodies discussed:

However important [they]... were in the development of the position of the individual in international law, it cannot be denied that they were created as an exceptional means in an exceptional situation.²⁹

These limited exceptions to the exclusivity of the state in international dispute settlement were merely tools for regulating inter-state relations. Although individuals could press claims in their own right, rather than relying on the exercise of diplomatic protection, such mechanisms were only established to assist in maintaining peaceful relations between states. The mechanisms were not created for the sake of improving the situation of *individuals* in relation to states.

The human rights bodies examined below differ significantly from the processes discussed above. They are the first mechanisms to allow individuals to bring an international claim against their own state or other states in whose jurisdiction they reside. They exist primarily to further the well-being of individuals, rather than to regulate inter-state relations, and in principle are not limited in life-span or subject matter to address a particular passing problem.³⁰

III REGIONAL MECHANISMS

A Institutional Structure

All the regional systems have had or will have both a commission and a court. The European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention)³¹ was amended in 1998 by Protocol 11.³² This amendment abolished the European Commission, leaving the European Court of Human Rights (the European Court) as the sole adjudicatory body for the European system. The Inter-American system (the American system) possesses both a Commission and a Court in two overlapping systems under the Charter of the Organisation of American States (OAS)³³ and the American Convention on Human Rights (the American Convention).³⁴ The African system also has both a commission and a court under the African Charter on Human and Peoples' Rights

²⁸ George Thullen, *Problems of the Trusteeship System, A Study of Political Behaviour in the United Nations* (1964) 11.

²⁹ Nørgaard, above n 21, 236.

³⁰ See the United Nations Human Rights Committee, *Continuity of Obligations*, General Comment 26, UN Doc CCPR/C/21/Rev.1/Add.8/Rev.1, 8/12/97, para. 4: 'The rights established in the Covenant belong to the people living in the territory of the State party... once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them'.

³¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

³² Protocol 11, *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

³³ *Charter of the Organisation of American States* (1948), 119 UNTS 4, created the OAS.

³⁴ *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123, art 33, 62 (entered into force 18 July 1978); see also *Statute of the Inter-American Commission on Human Rights* (1979) GA OAS Res 447, art 1, 20 <<http://www.cidh.oas.org/basic.htm>> at 2 September 2003.

(the African Charter),³⁵ established by the Organisation of African Unity (OAU), though the court is not yet functioning.³⁶

B Access

There is no need to be an actual victim of a violation to bring a claim in the American³⁷ and African³⁸ systems, and claims may be brought by third parties, including Non-Governmental Organisations (NGOs).³⁹ The European system limits standing to those claiming to be victims, but NGOs often provide assistance in bringing claims.⁴⁰ The European Court has extended its protection to legal persons such as companies, political parties and NGOs,⁴¹ but the American and African systems do not appear to have done so.⁴²

All three systems have an element of compulsory jurisdiction. All contracting parties of the European Convention must accept the compulsory jurisdiction of the Court, and since the abolition of the European Commission, victims have direct access.⁴³ The Inter-American Commission on Human Rights (the American Commission) may hear claims from victims in any OAS member state concerning violations of selected articles of the Declaration of the Rights and Duties of Man (DRM),⁴⁴ as well as claims concerning violations of the American Convention with regard to those state parties. Remarkably, the power to adjudicate individual claims in respect of OAS member states not party to the American Convention was not expressly granted by the OAS, and although initially contested by some states, appears now to have been accepted. Access to the Inter-American Court on Human Rights (the American Court) is limited to those claiming against state parties to the

³⁵ *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (entered into force 21 October 1986).

³⁶ *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights*, opened for signature 9 June 1998, Doc. OAU/LEG/EXP/AFCHGPR/PRPT/III, 6 IHRR 3 (1999) 891 (entered into force 25 January 2004). As yet, there have been no judges elected or rules of procedure drawn up for the Court.

³⁷ *American Declaration on the Rights and Duties of Man* (1948) art 1, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992),

<<http://www.cidh.oas.org/basic.htm>> at 2 September 2003; *American Convention on Human Rights* art 1(2).

³⁸ The provisions only refer to physical persons.

³⁹ *Rules of Procedure of the Inter-American Commission on Human Rights* (2000) art 23, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*. <<http://www.cidh.oas.org/basic.htm>> at 2 September 2003; *African Charter on Human and Peoples' Rights* art 55. Of the 47 communications published by the African Commission in its last five Annual Activity Reports, only 9 have not been brought by NGOs.

⁴⁰ See Marek Nowicki, *Non-Governmental Organisations (NGOs) Before the European Commission of Human Rights* in Villiger Salvia (ed) *The Birth of European Human Rights Law, Liber Amicorum Carl Aage Nørgaard* (1998) 267-8, 296.

⁴¹ See *Autronic AG v Switzerland* (1990) 178 Eur Crt HR 9 (ser A); *Open Door and Dublin Well Woman v Ireland* (1992) 246 Eur Crt HR (ser A); *United Communist Party of Turkey and others v Turkey* (1998) VI Eur Crt HR.

⁴² The Inter-American Commission on Human Rights has expressly rejected this in *Tabacalera Boquerón SA v Paraguay* (1997), Rep 47/97 Inter-Am Cmm H R paras 24-5, 36-37. See *Cantos v Argentina (Preliminary Objections)* (2001) Inter-Am Ct H R (ser C) no. 85 para 29, for a limited exception.

⁴³ These changes were implemented by Protocol 11 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

⁴⁴ *Statute of the Inter-American Commission on Human Rights* art 20; The Inter-American Court on Human Rights has stated that the *American Declaration on the Rights and Duties of Man* is legally binding on OAS members: *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights* (Advisory) (1989) no. 10 (ser A) paras 35-45.

American Convention who have expressly accepted the Court's jurisdiction.⁴⁵ Claimants must have their cases decided by the American Commission before being able to proceed to the Court.⁴⁶ Changes to the Commission's Rules of Procedure mean that cases where the state is found in violation will almost always proceed to the Court.⁴⁷ The African Commission on Human and Peoples' Rights (the African Commission) is able to receive petitions regarding violations by state parties to the African Charter without their prior consent. It has been suggested that this is probably because it was not foreseen that the African Commission would interpret its powers so as to exercise this adjudicatory function.⁴⁸ It appears that individuals will have limited direct access to the African Court on Human and Peoples' Rights (the African Court), and that the normal course for claims will be to pass first through the African Commission, as in the American system.⁴⁹

Only the European system presently offers legal aid to claimants,⁵⁰ although the African Court may provide free legal representation.⁵¹ Claimants in the African and American systems are forced to rely on NGOs to cover fees associated with their claim, or to provide counsel.⁵² Although the American Commission is known to help defray victims' legal and travel costs, its limited funds mean this does not occur as a matter of course.⁵³ Each system offers some legal protection of petitioners, witnesses and counsel from intimidation by national authorities (though this protection exists only in the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights in the African system).⁵⁴

⁴⁵ *American Convention on Human Rights* art 62. Together with the rules of procedure which allow victims standing independently of the Commission, this effectively gives individuals autonomous access to the Court.

⁴⁶ *American Convention on Human Rights* arts 48, 50; There presently exists a Draft Optional Protocol to the *American Convention* permitting individuals direct access to the Court once the Commission has processed the claim: *Draft Optional Protocol to the American Convention on Human Rights* (2001) OAE (ser P) AG/CP/doc.629/01.

⁴⁷ It has now become 'practically impossible' not to send a case to the Court, both because states very rarely comply with the three month time limit, and because the Commission finds it 'very difficult to explain why it will not send a case to the Court': Veronica Gomez (speech delivered at Nottingham University's Human Rights Centre, 20 June 2002).

⁴⁸ *African Charter on Human and Peoples' Rights* arts 55-56; Chidi Anselm Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359.

⁴⁹ *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights* art 5(3): the Court 'may entitle' individuals to institute cases before it; Harrington, 'The African Court on Human and Peoples' Rights' in Evans and Murray (eds), *The African Charter on Human and Peoples' Rights, The System in Practice, 1986-2000* (2002), 305, 315, 319.

⁵⁰ *Rules of the European Court of Human Rights*, Chapter X, 'Legal Aid', <<http://www.echr.coe.int/Eng/General.htm>> at 3 September 2003.

⁵¹ *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights* art 10(2).

⁵² Gomez, above n 47.

⁵³ *Ibid.*

⁵⁴ The European system: 27 members of the Council of Europe have ratified the *European Agreement Relating to Persons Participating in Proceedings of the European Court of Human Rights*, opened for signature 5 March 1996, ETS 161; The African system: see *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights* art 10(3); The Inter-American system: see *Rules of Procedure of the Inter-American Commission on Human Rights* (2000) art 6, *Rules of Procedure of the Inter-American Court of Human Rights* art 50, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*.

Guidance on making applications may be found on the internet for each system,⁵⁵ although the effectiveness of this depends on a claimant's ability to access the internet, their computer literacy, and the ability to read one of the website's languages.

Claimants are entitled to present their cases in their own right. Formerly the European and American systems permitted claimants such autonomous access only before their Commissions. Cases that went on to the Court were taken by the Commission, which allowed the claimant to form part of its delegation, but did not necessarily conduct the case according to his or her wishes.⁵⁶ This appears to be the procedure envisaged when the African Court comes into being.⁵⁷ The European and American systems now allow the claimant to make autonomous representations before their Courts (although technically, only the American Commission and state parties may seize the American Court).⁵⁸ The American Commission still retains its role before the Court, despite the ability of the claimant to participate autonomously.⁵⁹ Interestingly a state now faces representations from both the Commission and the claimant,⁶⁰ though the wording of the Court's Rules brings into question whether the Commission's role alters where the applicant is unable to provide for autonomous representation.⁶¹

All three Courts may receive written or oral evidence, and will usually hold oral hearings where witnesses may be examined and cross-examined.⁶² Oral hearings are less common before the African and American Commissions, with most cases heard by correspondence.⁶³ The language of proceedings is limited to one of the

<<http://www.cidh.oas.org/basic.htm>> at 2 September 2003. Note that it is doubtful whether members of the Inter-American system consider themselves bound as this does not feature in the *American Convention on Human Rights*.

⁵⁵ Information for applicants in the European system is available in all the languages of member states: <<http://www.echr.coe.int/>> at 3 September 2003. Information for applicants in the Inter-American system is available in English, Spanish, French and Portuguese: <<http://www.cidh.oas.org/denuncia.eng.htm>> at 3 September 2003. Information on applications to the African Commission may be found in English and French: <http://www.achpr.org/ACHPR_inf_sheet_no.3.doc> at 3 September 2003.

⁵⁶ See statement of the European Court in *Lawless v Ireland* (1961) 2 Eur Crtr HR (ser A) 24.; See also rule 33(3)(d) of the 1983 version of the European Court's *Rules of Procedure*; See also Harris, Warbrick and O'Boyle, *Law of the European Convention on Human Rights* (1999) 661. On the American system see Buergethal, *International Law of Human Rights in a Nutshell* (2nd ed, 1995) 154.

⁵⁷ The African Commission has automatic access: *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights* art 5(3).

⁵⁸ *American Convention on Human Rights* art 61. Though note the Draft Optional Protocol, above n 46.

⁵⁹ *Rules of Procedure of the Inter-American Court of Human Rights* art 22, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* <<http://www.cidh.oas.org/basic.htm>> at 2 September 2003.

⁶⁰ *Ibid*; it had been suggested that this role might diminish or disappear due to financial constraints as more cases are brought before the Court: Gomez, above n 49. However, the Commission continues to participate in proceedings, and the OAS has approved budget increases for both the Commission and Court for 2004: *Resolution of the Permanent Council of the OAS*, 29 January 2003, CP/RES.835.

⁶¹ Article 33(3) of the Court's *Rules of Procedure* mandates the Commission to act 'on behalf of' the applicant.

⁶² *European Convention for the Protection of Human Rights and Fundamental Freedoms* arts 36, 40; *Rules of the European Court of Human Rights* r 63, 65, 68; *Rules of Procedure of the Inter-American Court of Human Rights* art 42; For the African Court see *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights* art 26.

⁶³ *Rules of Procedure of the Inter-American Commission on Human Rights* art 60. Of the 22 cases (merits) featured in its 2000 Annual Report, eight contained hearings: the Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2000*, OEA/Ser.L/V/II.111 doc. 20 rev.; Article 120 of the *Rules of Procedure of the African Commission on Human and Peoples' Rights* appears to provide only for written proceedings, but commentators indicate otherwise: see Ahmed Motala, 'Non-Governmental Organisations in

official languages in all three systems, but interpreters are made available for those with difficulty.⁶⁴

C Remedies

All three systems employ both interim and final orders. Interim orders may be made where there exists danger of irreparable harm, and are usually utilised where there is danger of loss of life. Remarkably, although there is no express provision in the European Convention granting the Court,⁶⁵ or the American Convention granting the Commission, such powers, both bodies have determined that interim measures are binding on states.⁶⁶ The final judgments of the European, American and African Courts are binding in the sense that states have undertaken to comply with them.⁶⁷ Both the European and American Courts routinely award legal costs incurred in bringing a claim to a vindicated claimant,⁶⁸ but there is no mention of this power in the Protocol establishing the African Court. All three courts are empowered to award reparations (including for intangible loss such as distress and anxiety), though the European and American courts may consider that a mere declaration of a violation is a sufficient remedy.⁶⁹ Aside from directing compensation, the European Court will not give states specific directions as to administrative⁷⁰ or legislative⁷¹

the African System' in Evans and Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice* (2002) 246, 258. See also Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (2000) 20: '[a] number of parties do attend the sessions to present their case, although this is not obligatory and the hearing will take place even if only one party is present'.

⁶⁴ *Rules of the European Court of Human Rights* r 34; *Rules of Procedure of the Inter-American Court of Human Rights* art 20; *Rules of Procedure of the Inter-American Commission on Human Rights* art 22; *Rules of Procedure of the African Commission on Human and Peoples' Rights*, 13 February 1998, AFR/COM/HPR.I (II), r 34, 35 <<http://sim.law.uu.nl/SIM/Library/books.nsf>> at 3 September 2003.

⁶⁵ There is no express power in the European Convention regarding the grant of interim measures. This power exists only in the *Rules of the European Court of Human Rights*: r 39(1).

⁶⁶ In *Mamatkulov and Abdurasulovic v Turkey* (2003) Eur Ct HR 88-111, the European Court connected the binding quality of its interim measures to Article 36 of the *European Convention*, the right to an effective remedy; The American Commission has stated that to ignore its requests for interim measures in such as way as to deprive victims of their right to petition the Commission and cause 'serious and irreparable harm to those individuals... is inconsistent with the state's human rights obligations': cited in Veronica Gomez, 'The Inter-American System: Recent Cases' (2001) 1 *Human Rights Law Review* 319, 330. The power of the African Commission with respect to interim measures stems from rule 111 of the *Rules of Procedure of the African Commission on Human and Peoples' Rights*. It is probably sensible to conclude, in the absence of an express opinion of the African Commission, and having regard to the fact that the power is not contained in the *African Charter* itself, that it does not consider them binding.

⁶⁷ *European Convention for the Protection of Human Rights and Fundamental Freedoms* art 46(1); *American Convention on Human Rights* art 68(1). *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights* art 30.

⁶⁸ This includes costs incurred at the domestic level. See, eg, European Court: *Zimmermann and Steiner v Switzerland (Merits and Just Satisfaction)* (1983) 66 Eur Ct HR (ser A) 36; *Loayza Tamayo v Peru (Reparations)* (1998) Inter-Am. Ct. H.R. (ser C) no 42 para 178.

⁶⁹ The European system: see, eg, *Le Compte, Van Leuven and De Meyere v Belgium (Merits)* (1981) 43 Eur Ct HR (ser A) para 16; *Abdulaziz, Cabales and Balkandali v UK (Merits and Just Satisfaction)* (1985) 94 Eur Ct HR (ser A) paras 95, 96. The American Court appears to order compensation more readily than the European Court: see, eg, *Ivcher Bronstein v Peru (Judgment)* (2001) Inter-Am. Ct. H.R. (ser C) no. 84 para 183; *Velazquez Rodriguez Case (Compensatory Damages)* (1989) Inter-Am. Ct. H.R. (ser. C) no. 7 para 36.

⁷⁰ Such as the annulment of disciplinary actions: *Albert and Le Compte v Belgium (Merits)* (1983) 58 Eur Ct HR (ser A) para 9; or a direction to institute criminal proceedings: *Ireland v United Kingdom* (1978) 25 Eur Ct HR (ser A) para 187.

⁷¹ 'The Court notes that the Convention does not empower it to order Switzerland to alter its legislation; the Court's judgment leaves to the State the choice of the means to be used in its domestic legal system to give effect to its obligation': *Belilos v Switzerland* (1988) 132 Eur Ct HR (ser A) para 78.

action, leaving it to the state party itself to decide how best to give effect to the finding of a violation. However, this is partly compensated for by the supervision of the Council of Europe's Committee of Ministers (see below).⁷² The American Court will direct states to take particular administrative and legislative action, such as to conduct an investigation or amend legislation.⁷³

States have not undertaken to abide by the recommendations issued by either the African or American Commissions. However, the American Court considers states to be bound by the Commission's decisions, at least with regard to those cases decided under the American Convention.⁷⁴ The American Commission will often recommend the payment of adequate reparation but does not specify an amount. Like the Court it will make directions to the state as to administrative and legislative measures it should take, such as conducting an investigation, holding a retrial, releasing an individual from detention or making specific changes to its laws.⁷⁵ The African Commission rarely directs payment of compensation and will not specify an amount.⁷⁶ More often it will recommend a particular course of action such as the release of detainees or the repeal of legislation.⁷⁷

D Compliance

Compliance with decisions is monitored by bodies composed of state representatives. The European Court's decisions are supervised by the Council of Europe's Committee of Ministers⁷⁸ and also more recently its Parliamentary Assembly. As it delivers its decisions the Court transmits them to the Committee of Ministers, where they remain on the agenda until the state has shown that it has taken both the specific measures ordered by the Court and general measures to prevent the violation recurring in future.⁷⁹ The Committee of Ministers may receive information regarding the execution of the judgment from the vindicated claimant,

⁷² The Committee of Ministers recently 'encouraged' State parties 'to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention': Committee of Ministers of the European Court of Human Rights, *Re-examination or Reopening of Certain Cases at Domestic Level Following Judgments of the European Court of Human Rights* (2000) Recommendation no. R, adopted 19 January 2000, reprinted in 21 *Human Rights Law Journal* (2000) No. 4-7, 272.

⁷³ See, eg, *Velásquez Rodríguez Case (Compensatory Damages)* (1989) Inter-Am Ct HR (ser C) no. 7 para 34; *Caballero-Delgado and Santana v Colombia (Merits)* (1995) Inter-Am Ct HR (ser C) no. 22 para 181.

⁷⁴ See *Loayza Tamayo v Peru (Merits)* (1997) Inter-Am. Ct. H.R. (ser. C) no 33 paras 78-82: 'by ratifying [the American Convention], States Parties engage themselves to apply the recommendations made by the Commission in its reports'.

⁷⁵ See, eg, *Dayra María Levoyer Jiménez v Ecuador* (2001) Rep 66/01 Inter-Am. Cmm. H.R. para 123; *Joseph Thomas v Jamaica* (2001) Rep 127/01 Inter-Am. Cmm. H.R. sVII; *Milton García Fajardo et al v Nicaragua* (2000) Rep 100/01 Inter-Am. Cmm. H.R. para 113 in Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2001*, OEA/Ser.L/V/II.114, doc. 5 rev.

⁷⁶ For a rare instance see *Malawi African Association v Mauritania* (2001) No 54/91, 8 IHRR 1, 268.

⁷⁷ See, eg, *Constitutional Rights Project (in respect of Wahab Akamu, G Adegba and others) v Nigeria* (1996) No 60/91, 3 IHRR 132; *Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon* (1999) No. 39/90, 6 IHRR 819; *Civil Liberties Organisation, Legal Defence Centre, Legal Defence Assistance Project v Nigeria* (2002) No. 218/98, 9 IHRR 266.

⁷⁸ *European Convention for the Protection of Human Rights and Fundamental Freedoms* art 46(2).

⁷⁹ See, eg, *Modinos v Cyprus (Merits and Just Satisfaction)* (1993) 259 Eur Crt HR (ser A): the government paid compensation to the claimant in 1993, but the Committee remained seized of the matter until 2001, when Turkey informed it of changes to its legislation decriminalising consensual homosexual sexual intercourse in private. <http://cm.coe.int/stat/E/Public/2001/adopted_texts/resDH/2001resdh_152.htm> at 3 May 2002.

and will address resolutions to states on specific cases with respect to their status of compliance. The strong terms of these resolutions are unmatched by other regional or UN-based systems.⁸⁰ The Parliamentary Assembly has also begun to follow-up the implementation of judgments of the European Court, requesting information from violating states through questions in special committees and in Parliamentary sessions.⁸¹

In contrast, decisions in the American and African systems are transmitted via annual reports to the deliberative bodies of the OAS⁸² and the African Union (AU),⁸³ as well as to the parties to the case when the decision is handed down. The Assemblies of these organisations then tend to adopt a resolution endorsing the reports in general terms. The OAS Assembly will urge states generally to comply with decisions on individual petitions.⁸⁴ During the late 1970s the OAS Assembly addressed situations brought to its attention by the American Commission's annual reports,⁸⁵ but it has been suggested that this was due to pressure from the Carter Government in the United States to support the Commission's work.⁸⁶ Outside this timeframe, it has tended to be the Commission rather than recalcitrant states that have attracted disapproval from the Assembly.⁸⁷ The OAS Assembly resolutions from recent years make no mention of individual judgments or decisions. These resolutions merely extend to urging 'the member States to continue their collaboration with the Commission and the support for those efforts',⁸⁸ and to 'reiterate that the judgments of the Inter-American Court of Human Rights are final and may not be appealed and that the States Parties to the Convention undertake to comply with the rulings of the Court in all cases to which they are party'.⁸⁹ Only in rare cases (and at the insistence of the Court) has the OAS Assembly urged states to

⁸⁰ See, eg, Committee of Ministers, *Non-Execution of the judgment in the case of Loizidou v Turkey* (2000) Interim Resolution DH, in (2000) 21 *Human Rights Law Journal* 272.

⁸¹ See, eg, Parliamentary Assembly of the Council of Europe, *Execution of Judgments of the European Court of Human Rights*, Res 1226 (2000) para. 11, in (2000) 21 *Human Rights Law Journal* 273.

⁸² *Charter of the Organisation of American States* art 91(f); *Statute of the Inter-American Commission on Human Rights* art 18(f); *Statute of the Inter-American Court of Human Rights* (1979) GA OAS Res 448, art 30 <<http://www.cidh.oas.org/basic.htm>>; *Rules of Procedure of the Inter-American Court of Human Rights* art 25(6).

⁸³ The Organisation of African Unity (OAU) has been replaced by the African Union: see the *Constitutive Act of the African Union*, opened for signature 11 July 2000, entered into force 26 May 2001

<http://www.au2002.gov.za/docs/key_oau/index.html> at 3 September 2003; *African Charter on Human and Peoples' Rights* art 54; *Rules of Procedure of the African Commission on Human and Peoples' Rights* r 79.

⁸⁴ See, eg, Organisation of American States, AG/RES. 1783, 5 June 2001 para. 5; See similarly, Organisation of American States, AG/RES.1715, 5 June 2000 para. 4; AG/RES. 1660 (XXIX-O/99) 7/6/99 para. 3; AG/RES. 1606 (XXVIII-O/98) 3/6/98 para. 2.

⁸⁵ For an assessment of the General Assembly's attitude, see Veronica Gomez, 'The Interaction between the Political Actors of the OAS, the Commission and the Court' in Harris and Livingstone (eds), *The Inter-American System of Human Rights* (1998) 173, 192-201.

⁸⁶ David Harris, 'Regional Protection of Human Rights: The Inter-American Achievement' in David Harris and Stephen Livingstone (eds), *The Inter-American System of Human Rights* (1998) 1, 21.

⁸⁷ Veronica Gomez, 'The Interaction between the Political Actors of the OAS, the Commission and the Court,' above n 85, 191.

⁸⁸ See Organisation of American States, AG/RES. 1783, 5 June 2001 para 5; Organisation of American States AG/RES.1715, 5 June 2000 para 4; Organisation of American States, AG/RES. 1660, 7 June 1999 para 3; Organisation of American States, AG/RES. 1606, 3 June 1998 para 2.

⁸⁹ Organisation of American States, AG/RES. 1827, 5 June 2001 para 4; see also Organisation of American States, AG/RES. 1716, 5 June 2000 para 4.

comply with judgments.⁹⁰ It appears to have made comments regarding compliance with Court judgments only in the past two years. With regard to the African system, it appears that the OAU Assembly does not even mention individual petitions.⁹¹ It is doubtful whether supervision of compliance will be more robust with the AU (which has replaced the OAU), even though the AU Treaty states that one of the objectives of the organisation is to 'promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments'.⁹² Nsongurua Udombana suggests that any improvements are merely a

cosmetic exercise by the OAU's Member States to impress Western donor countries and international financial institutions... in order to attract more development assistance and receive some debt palliatives.⁹³

The American Court and Commission, and the African Commission, do exercise follow-up functions by soliciting reports from the parties on compliance and issuing decisions thereon.⁹⁴ While the African Commission exercises this function in an ad hoc manner, the American Commission and Court include information on all cases in their annual reports.⁹⁵

Comprehensive studies on the rate of compliance for the three systems do not appear to exist, but it is possible to form a general impression. Decisions of the European Court seem to have secured changes to legislation and compensation in the majority of cases,⁹⁶ with the problem of repetitive violations limited to a few states.⁹⁷ It appears that only in very few cases have serious refusal or delay to comply occurred for political reasons.⁹⁸ The American system appears to secure compliance in a small minority of cases,⁹⁹ while the African Commission has been even less successful.¹⁰⁰

⁹⁰ The OAS Assembly appears to have passed one such resolution: see *Baena Ricardo y Otros v Panama (Competence)* (2003) Inter-Am. Ct. H.R. (ser. C) no 104 para. 111.

⁹¹ In its Resolutions on the African Commission on Human and Peoples' Rights, it makes no mention of decisions from individual petitions or even a general statement about the need for compliance.

⁹² *Constitutive Act of the African Union* art 3(e).

⁹³ See Nsongurua Udombana, 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights' (2002) 17 *American University International Law Review* 1177, 1198, 1200.

⁹⁴ *Rules of Procedure of the Inter-American Commission on Human Rights* art 46(1); *Statute of the Inter-American Court of Human Rights* art 30.

⁹⁵ The African Commission is known to have sent letters to States requesting information on compliance, and has recommended sending delegates in person to gain information from states. It has occasionally stated its intention to verify compliance with recommendations during an *in loco* visit, but from reading the cases this does not appear to be usual practice, and it would probably have difficulty conducting regular *in loco* visits to all states to whom it had made recommendations: see Rachel Murray, *The African Commission on Human and Peoples' Rights and International Law* (2000) 21.

⁹⁶ For a discussion of the studies on efficacy, see Mark Janis, Richard Kay and Anthony Bradley, *European Human Rights Law* (2nd ed, 2000) 84-86. For a list of changes in legislation see European Court of Human Rights, *Effects of Judgments or Cases 1959-1998* <<http://www.echr.coe.int/Eng/EDocs/EffectsOfJudgments.html>> at 3 May 2002. This source also states: '[t]o date States which have been ordered to make payments under Article 50 have consistently done so'.

⁹⁷ Rapporteur Erik Jurgens, *Report on the Execution of Judgments of the European Court of Human Rights* (2000) 21 *Human Rights Law Journal* 275.

⁹⁸ *Ibid* paras 39-42.

⁹⁹ Of the 18 cases which the Commission visited in its 2001 annual report, it considered that no states had complied in full with its recommendations, two had complied in part, 13 had replied with information requested by the Commission, but had not complied with any recommendations, and three had neither furnished any information, nor complied: Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on*

E Comment

Of the three, the victim appears to be best placed under the European system, where there is direct access to the Court, legal aid, and a high likelihood of compliance with judgments. In terms of individual access, the African and American models do appear to be following the institutional progression of the European model, with both the African and American systems having created a Court. Each system initially placed the individual in a relatively weak position by limiting access to its Court. Formerly under the European Convention, only a member state or the Commission could bring cases to the European Court. The European Court stated that the Commission delegation could be aided by someone of its choice, which in practice became the victim's counsel.¹⁰¹ This also became the practice of the American Commission before the American Court (see above). Later (in 1983) the European Court changed its Rules of Procedure and permitted the victim separate representation once the case had been referred to the Court, effectively making the applicant a party to the proceedings.¹⁰² The entry into force of the Ninth Protocol to the European Convention also granted the applicant the ability to refer the case to the Court after the Commission's decision.¹⁰³ The same steps have been taken within the American system. The individual is now in effect granted standing by changes to the American Court's Rules of Procedure, while changes to the American Commission's Rules effectively grant individuals the ability to refer cases themselves. However, the inevitability of the American Commission referring almost all cases of violations to the American Court means that without an increase in resources, the system will be in danger of collapsing under the weight of its own success, just as the European system formerly (see below).

As discussed above, both the American and African systems have effectively developed compulsory jurisdiction in relation to their commissions. With respect to the American Commission this extends to all member states of the OAS, which are bound by the DRM. While this is a remarkable achievement it cannot be a satisfactory substitute for the compulsory jurisdiction of a regional court. Such compulsory jurisdiction was established in the European system with the entry into

Human Rights 2001, OEA/Ser./L/V/II.114, doc. 5 rev. The 2000 Annual Report of the American Court reveals a similar pattern. Out of the ten judgments where the Court reviewed compliance, in only one did there appear to be partial compliance: Inter-American Court of Human Rights, *Annual Report of the Inter-American Court of Human Rights 2000*, Section II 'Status of Compliance with the Judgments of the Court' <http://www.corteidh.or.cr/publicaciones_ing/contents2000.html> at 27 May 2002.

¹⁰⁰ The African Commission has stated that save for one, 'the attitude of State Parties... has been to generally ignore its recommendations': in Rachel Murray, above n 95, 21. At the 22nd session of the Commission, the Chairman of the Commission is reported to have said that 'none of the decisions on individual communications taken by the Commission and adopted by the Assembly has ever been implemented': see Rachel Murray, *Report on the 1997 Sessions of the African Commission on Human and Peoples' Rights – 21st and 22nd Sessions: 15-25 April and 2-11 November 1997* (1998) 19 *Human Rights Law Journal* 169-70.

¹⁰¹ *Lawless v Ireland* (1961) 2 Eur Cr HR (ser A) 24.

¹⁰² See David Harris, Colin Warbrick and Michael O'Boyle, *Law of the European Convention on Human Rights* (1999) 661.

¹⁰³ Ninth Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 140 (entered into force 1 October 94).

force of Protocol 11 to the European Convention.¹⁰⁴ It is to be hoped that the American and African models will continue to follow this trend and make individual petition before their judicial bodies compulsory.

In terms of compliance, neither the American nor African systems seem to apply much pressure on individual states to comply with decisions and judgments. In this respect one can compare the resolutions of the African and American Assemblies with documents produced by the European Council's Committee of Ministers and the Parliamentary Assembly. As seen above, those of the Committee of Ministers address specific states over specific violations and persist in engaging the state until satisfactory remedial action is taken. By contrast, the American and African Assemblies deliver only general exhortations to comply with the decisions of human rights bodies.

It is important to note that the American and African Commissions have also dedicated much work to drafting country reports addressing the causes of widespread human rights violations.¹⁰⁵ While in doing so they may receive information from individuals, these procedures are not intended to grant individualised remedies.¹⁰⁶ However, this function does allow a clearer assessment of problems affecting whole states or regions, and thus has the potential to benefit a wider group of individuals. Country reports are arguably a better response than judgments on individual cases when violations are widespread and rooted in problems with governance and the organisation of power as a whole.¹⁰⁷ Although some thematic reporting existed previously, the European system had no means of addressing gross or systematic violations of human rights until the establishment of the Commissioner for Human Rights in 1999.¹⁰⁸ This may reflect the fact that until this time such serious and large-scale violations were thought to be uncommon among member states. However, with the advent of new member states from Eastern Europe such a facility has become necessary.¹⁰⁹ The work of the Council of Europe is also complemented by European Union membership requirements for candidate states. Candidates are required to satisfy certain human rights

¹⁰⁴ Eleventh Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 155 (entered into force 1 November 1998).

¹⁰⁵ *African Charter on Human and Peoples' Rights* art 58(1), 46; see Harris, above n 88, 2-3; see also Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' in Harris and Livingstone (eds), *The Inter-American System of Human Rights* (1998) 31, 62.

¹⁰⁶ See, eg, Mission to Mauritania, The African Commission on Human and Peoples' Rights, *10th Annual Activity Report 1996/1997*, Annex IX sIII <http://www.up.ac.za/chr/ahrdb/acomm_10th.html#b2> at 7 September 2003.

¹⁰⁷ The country report will provide the detail to gauge the situation in the whole country, but will not usually deal with individual violations. An individual petition will only identify the harms done to a section of society at most, but will allow the chance to produce an individualised remedy. Mingling them will allow both.

¹⁰⁸ Established by the Committee of Ministers, European Court of Human Rights, Res (99) 50; The Commissioner has so far produced 28 'visit' reports:

<http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/By_series/Visit_Reports/index.asp#TopOfPage> at 4 April 2004.

¹⁰⁹ Of the 21 visit reports produced, 14 concern States in Eastern Europe that have joined the Council of Europe relatively recently:

<http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/By_series/Visit_Reports/index.asp#TopOfPage> at 4 April 2004.

standards,¹¹⁰ as well as adopt the *aquis communautaire*, which includes the European Convention.¹¹¹ While it appears that the standards set and the accompanying monitoring are not particularly rigorous,¹¹² it does guarantee the compulsory jurisdiction of the European Court in respect of these states without particular deference to their free consent.

IV UN CHARTER-BASED MECHANISMS

United Nations organs are able to receive and act on individual petitions under two separate mechanisms, those established under the UN Charter and those created by separate UN-sponsored human rights treaties.

A Institutional Structure

The UN Charter mechanisms operate through the Commission on Human Rights (the CHR)¹¹³ and its Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission).¹¹⁴ The CHR is composed of 53 state representatives and meets for six weeks annually to discuss human rights issues.

The CHR may engage states under a confidential or a public procedure. Communications generally begin in the confidential '1503 procedure'.¹¹⁵ When the Sub-Commission receives communications which reveal a 'consistent pattern of gross and reliably attested violations of human rights' it may draw up a confidential report which it then passes on to the CHR to discuss in private sessions.¹¹⁶ The CHR generally uses this as an opportunity to commence dialogue with the state in question, and may appoint a special rapporteur, or transfer consideration to the public '1235 procedure'.¹¹⁷ Under the 1235 procedure the CHR and the Sub-Commission may conduct 'a thorough study', which they will usually do through the establishment of a special rapporteur.¹¹⁸

¹¹⁰ *Treaty on European Union*, opened for signature 7 February 1992, OJ C325, art 49 (entered into force 1 November 1993): only a state 'which respects the principles set out in Article 6 (1) may apply to become a member of the Union'. Article 6(1) states that the Union is founded on, amongst other things, 'respect for human rights and fundamental freedoms'.

¹¹¹ Council of Europe, *The Council of Europe's Contribution to the Enlargement of the European Union, Acquis of the European Union Under Title IV of the TEC and Title VI of the TEU (2001)*, SdC (2002) 3, 33.

¹¹² Marek Nowak called the 1997 report 'rather superficial and related more to the *de jure* rather than to the *de facto* situation': see Marek Nowak, 'Human Rights Conditionality in the EU' in Alston (ed), *The EU and Human Rights (2000)*.

¹¹³ Articles 60 and 68 of the *Charter of the United Nations* established the Economic and Social Council, which then created the CHR to 'promote human rights'.

¹¹⁴ Established by the CHR under ECOSOC Res 9 (II), 21 June 1946. Its name was changed from the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1999.

¹¹⁵ The 1503 Procedure enables two bodies of the UN — the Sub-Commission on the Promotion and Protection on Human Rights and the CHR — to examine complaints which appear to show consistent patterns of gross and reliably attested human rights violations: United Nations Commission on Human Rights, *The 1503 Procedure*, E/RES/1503 (XLVIII), amended by E/RES/2000/3.

¹¹⁶ *Ibid.*, para 2.

¹¹⁷ See United Nations Blue Book Series, *The United Nations and Human Rights 1945-1995* (1995) 246.

¹¹⁸ United Nations Commission on Human Rights, E/RES/1235 (XLII), 6 June 1967, reprinted in United Nations Blue Book Series, above n 116, para. 3.

B Access

Communications to the CHR or its Sub-Commission under the 1503 procedure are written, and participation of the individual is usually limited to the transmission of the initial communication.¹¹⁹ The only publicity surrounding the 1503 procedure is the naming of those states under consideration.¹²⁰

The CHR and the Sub-Commission have created working groups and special rapporteurs to conduct thematic and country specific studies under the 1235 procedure. In drawing up their reports they may receive information from individuals. In general, country rapporteurs will not react to such communications as individual cases. Instead they tend to regard them simply as information which assists in building a picture of the situation in that state.¹²¹ However, thematic rapporteurs will engage governments on specific communications received.¹²² Proceedings are written, which does not allow the individual to present a case in person, but the petitioner is kept informed of government replies, and will often be given the opportunity to answer the state's response to the communication.¹²³

To facilitate access for the individual, the Office of the High Commissioner for Human Rights has produced web pages in English, French and Spanish, detailing how the procedures work and providing 'model questionnaires' to be used to submit a communication to any of the bodies or procedures discussed. Although a welcome move, as mentioned above there are problems of accessibility.¹²⁴

C Remedies

The Charter-based procedures are not geared towards providing individualised remedies, with both the 1503 and 1235 procedures being triggered only by large-scale violations. Of course, once a rapporteur or working group is established they may act on individual cases, but most of the rapporteurs exercise a 'diplomatic' rather than quasi-judicial function with regard to communications.¹²⁵ They pass on the communications to the governments in question and solicit a reply. They do not

¹¹⁹ Office of the High Commissioner for Human Rights, *Fact Sheet*, No 7/Rev. 1 <<http://www.unhchr.ch/html/menu6/2/fs7.htm#1503>> at 4 September 2003.

¹²⁰ It seems 83 states have so far been considered: Office of the High Commissioner for Human Rights, *States examined under the 1503 Procedure by the Commission on Human Rights (as up to 2003)*, <<http://www.unhchr.ch/html/menu2/8/stat1.htm>> at 4 September 2003.

¹²¹ See *Report of the Special Rapporteur: Situation of human rights in the Democratic Republic of the Congo 2001*, UN Doc E/CN.4/2001/40 para 11.

¹²² See 'Summary of communications transmitted to Governments and replies received' in *Addendum to the Report of the Special Rapporteur on Torture 2000*, UN Doc E/CN.4/2002/76/Add.1; *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression 2002*, UN Doc E/CN.4/2002/75/Add.2.

¹²³ *Ibid.*

¹²⁴ See website of the United Nations High Commissioner for Human Rights <<http://www.unhchr.ch/html/menu2/8/question.htm>> at 14 June 2002; see also *Report of the Special Rapporteur on Sudan 2002*, UN Doc E/CN.4/2002/46 para. 23.

¹²⁵ For example, the Special Rapporteur on Human Rights Defenders is mandated to establish 'cooperation and conduct dialogue... on the promotion and effective implementation of the Declaration [on Human Rights Defenders]': United Nations Commission on Human Rights, Res 2000/61 para 3(b).

exercise an adjudicatory function in formulating findings or recommendations for the state to follow.¹²⁶ Obviously, a request for a reply cannot be equated with a request to comply with standards or provide a remedy.¹²⁷

However, the Working Group on Arbitrary Detention (WGAD), and to a lesser extent the Working Group on Enforced or Involuntary Disappearances (WGEID), exercise a quasi-judicial role comparable to that of one of the regional Commissions or UN treaty bodies. One reason for this difference might be the wording of their mandates, which empower them to 'investigate' cases falling within their purview.¹²⁸ However, the WGAD does not speak of 'victims', but rather 'sources',¹²⁹ and issues 'opinions' instead of 'decisions'.¹³⁰ It does not use the word 'violation' as often as one might expect, preferring to state that there has been 'non-observance' or 'contravention', or simply to say that the detention was arbitrary.¹³¹ The CHR and United Nations General Assembly (GA) tend to emphasise the non-binding nature of any views and requests for action issued by these bodies by drawing attention to their 'humanitarian' value.¹³² Despite the use of cautious language (an obvious attempt to assuage state fears), the opinions appear in substance as legally reasoned decisions, containing a brief recital of the facts and legal reasoning. The WGAD makes both general recommendations for governments to take necessary steps to remedy the situation, and more specific recommendations such as the punishment of those responsible,¹³³ or the release of those detained.¹³⁴

Both the country and thematic rapporteurs and working groups have an 'urgent action' procedure,¹³⁵ which serves a similar function but is of a different nature to

¹²⁶ See 'Summary of communications transmitted to Governments and replies received' in *Addendum to the Report of the Special Rapporteur on Torture* 2002, UN Doc E/CN.4/2002/76/Add.1; *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* 2002, UN Doc E/CN.4/2002/75/Add.2; *Report of the Special Rapporteur on the Independence of Judges and Lawyers* 2002, UN Doc E/CN.4/2002/72.

¹²⁷ For example, the Working Group on Enforced or Involuntary Disappearances considers its work complete once it has received 'clarification' from the government as to the whereabouts or fate of the victim: *Report of the Working Group on Enforced or Involuntary Disappearances* 2002, UN Doc E/CN.4/2002/79 para. 3.

¹²⁸ See United Nations Commission on Human Rights, *Question of Enforced or Involuntary Disappearances*, Res 2001/46, UN Doc E/CN/RES/2001/46 para 9; United Nations Commission on Human Rights, *Question of Arbitrary Detention*, Res 2000/36, UN Doc E/CN.4/RES/2000/36 para 12; The mandates of other rapporteurs however are less specific and contain promotional functions: see, eg, United Nations Commission on Human Rights, *Human Rights Defenders*, Res 2000/61, UN Doc E/CN.4/RES/2000/61 para 3.

¹²⁹ Office of the High Commissioner for Human Rights, Fact Sheet 26 *The Working Group on Arbitrary Detention* s4B <<http://www.unhcr.ch/html/menu6/2/fs26.htm>> at 14 June 2002.

¹³⁰ *Ibid*; see also Commission on Human Rights, *Question of Arbitrary Detention*, Res 1997/50, UN Doc E/CN.4/RES/1997/50 para 7.

¹³¹ See *Report of the Working Group on Arbitrary Detention* 2000, Addendum One, UN Doc E/CN.4/2001/14/Add.1.

¹³² See United Nations Commission on Human Rights, *Question of Arbitrary Detention*, Res 2000/36, UN Doc E/CN.4/RES/2000/36 para 6.

¹³³ See Opinion No. 24/1999 para 13 and Opinion No. 27/1999 para 13, in *Report of the Working Group on Arbitrary Detention* 1999, Addendum One, UN Doc E/CN.4/2000/4 /Add.1.

¹³⁴ Opinion No. 30/1999 para 19, in *Report of the Working Group on Arbitrary Detention* 1999, Addendum One, UN Doc E/CN.4/2000/4 /Add.1.

¹³⁵ See Office of the High Commissioner for Human Rights, 'Urgent action' procedure under extra-conventional mechanisms <<http://www.unhcr.ch/html/menu2/7/ua.htm>> at 4 June 2002; See also, Office of the High

the interim measures of the regional Commissions and global Committees.¹³⁶ Where a serious violation of human rights is thought to be imminent, a request for urgent action may be addressed to one of the rapporteurs, groups or representatives in that area. They in turn may then appeal to the government concerned to guarantee the rights of the alleged victim. The CHR has also emphasised the ‘humanitarian’ character of action taken under this procedure.¹³⁷

D Compliance

The degree of compliance is extremely difficult to gauge; most bodies do not issue findings with which states comply. A fairly high proportion of states reply to special rapporteurs when requested.¹³⁸ The WGAD does not indicate the proportion of compliance with its views, but its requests for reply seem to meet with a good degree of success.¹³⁹

Informed by the reports of its special rapporteurs (SRs) and working groups (WGs), the CHR — and subsequently the GA — may engage states through discussions (confidential where this is done under the 1503 procedure) and resolutions. Not all states ‘graduate’ from reports to CHR resolutions or GA resolutions.¹⁴⁰ Those resolutions addressing particular states, while based in the main on information from the SRs and WGs, only occasionally refer to compliance with cases being dealt with by them, and then in general terms.¹⁴¹ Those resolutions concerning thematic issues will not name particular governments but rather make a general exhortation to ‘the Governments concerned’ to cooperate.¹⁴² Incentive to comply may be hampered by the fact that there is no institutional distinction between the SRs and WGs and the CHR. The SRs and WGs do not so much act as supervisory bodies producing decisions, but rather inform the CHR, which then as a supervisory body itself decides if and how to engage states.

Commissioner for Human Rights, Special Rapporteur on extrajudicial, summary or arbitrary executions, *Methods of Work*, <http://www.unhcr.ch/html/menu2/7/b/execut/exe_meth.htm#ua> at 11 June 2002;

¹³⁶ Sir Nigel Rodley, former Special Rapporteur on Torture, points out that interim measures exist to preserve the possibility of a decision on the merits of a case. Urgent appeals however are preventive, existing simply to prevent loss of life, irrespective of the legality of a situation: Sir Nigel Rodley, (Speech delivered at the Annual Conference of the Association of Human Rights Institutes, Essex University, 20 September 2003).

¹³⁷ United Nations Commission on Human Rights, *Question of Arbitrary Detention*, Res 1994/32, UN Doc E/CN.4/RES/1994/32 para 8.

¹³⁸ Eg *Report of the Special Rapporteur on Torture 2001*, UN Doc E/CN.4/2002/76 para 10: 37 out of 73 States replied when requested in 2001; *Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions 2002*, UN Doc E/CN.4/2002/74 paras 12-19: 45 out of 61 States replied when requested in 2002.

¹³⁹ Only 3 of 22 states did not reply when requested in 2002: *Report of the Working Group on Arbitrary Detention 2002*, UN Doc E/CN.4/2002/77 paras 7-23.

¹⁴⁰ Philip Alston, ‘The Commission on Human Rights’ in Philip Alston (ed), *The United Nations and Human Rights* (1992) 126, 181; It has been noted that ‘[m]any Assembly resolutions have simply repeated or paraphrased language adopted by the Commission. An informal tradition appears to have developed that major innovations or reopening of work done by subsidiary organs should generally be avoided by the Assembly’: Quinn, ‘The General Assembly into the 1990s’ in Philip Alston (ed), *The United Nations and Human Rights* (1992) 55, 63.

¹⁴¹ See, eg, *Question of Human Rights in Afghanistan*, GA Res 55/119, UNGAOR, 55th Session, UN Doc A/Res/55/119 (2000) para 16; *Human Rights Situation in Iraq*, GA Res 55/115, UN GAOR, 55th Session, UN Doc A/Res/55/115 (2000) para 4(i).

¹⁴² See *Question of Enforced or Involuntary Disappearances*, GA Res 55/103, UN GAOR, 55th Session, UN Doc A/Res/55/103 (2000) para 14; See also *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 55/89, UNGAOR, 55th Session, UN Doc A/Res/55/89 (2000) para 19.

There does not appear to be a comprehensive study of the impact of these procedures at the national level, with most examples being anecdotal.¹⁴³ GA resolutions remark on cases of improvement but it is not possible to tell if this is due to the efforts of the Charter-based procedures.¹⁴⁴ Clearly, any improvement is dependent on the willingness of the state to cooperate.¹⁴⁵ For example, changes in Argentina in the 1980s have been attributed more to internal pressures and the Falklands War than the action of the CHR.¹⁴⁶ On the other hand, it has been stated that it was only after the UN SRs visited Chile that some of the more dramatic improvements occurred.¹⁴⁷

E Comment

The Charter-based mechanisms minimise individual participation. Because the procedures are aimed at examining an overall situation, rather than a particular case, the individual's communication is a form of evidence. A communication that does not reveal widespread human rights violations is insufficient to trigger the 1503 or 1235 procedures. The individual is a 'source' of information, not a party to a dispute. Perhaps with the exception of the WGAD, even the more individualised approaches of the SRs do not really perceive the individual as a party to a dispute. The WGEID describes its role as a mere

channel of communication between families of the disappeared persons and the Governments concerned, with a view to ensuring that sufficiently documented and clearly identified individual cases are investigated and the whereabouts of the disappeared persons clarified.¹⁴⁸

In this sense the procedures bear similarities to the Mandate and Minority Protection Systems of the League of Nations, though these were much more limited in their scope and less intrusive.

The most remarkable achievement is that of the WGAD, which acts almost like the Human Rights Committee of the International Covenant on Civil and Political

¹⁴³ David Weissbrodt and Maria Bartolomei, 'The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983' (1991) 75 *Minnesota Law Review* 1009, 1009-1010.

¹⁴⁴ See for example *Situation of Human Rights in the Sudan*, GA Res 55/116, UN GAOR, 55th Session, UN Doc A/Res/55/116 (2000) para 1; *Situation of human rights in the Democratic Republic of the Congo*, GA Res 55/117, UN GAOR, 55th Session, UN Doc A/Res/55/117 (2000) para 1; *Situation of Human Rights in Myanmar*, GA Res 56/231, UN GAOR, 56th Session, UN Doc A/Res/56/231 (2001) paras 1-3.

¹⁴⁵ Iran and Iraq have in the past been intransigent in the face of public action under the 1235 procedure: Frank Newman and David Weissbrodt, *International Human Rights: Law, Policy and Process*, (2nd ed, 1996) 209. See *Human Rights Situation in Iraq*, GA Res 55/115, UN GAOR, 55th Session, UN Doc A/Res/55/115 (2000) preamble, para 5.

¹⁴⁶ Ronald Dworkin, 'Nunca Más: the Report of the Argentine National Commission on the Disappeared' (1986) in Americas Watch Report, *Truth and Partial Justice in Argentina* (1987) 8.

¹⁴⁷ Henry Shelton, 'Utilization of Fact-Finding Missions To Promote and Protect Human Rights: The Chile Case' (1981) 2 *Human Rights Law Journal* 1, 35. See also *Protection of Human Rights in Chile*, GA Res 36/157, UN GAOR, 36th Session, UN Doc A/Res/36/157 (1981).

¹⁴⁸ *Report of the Working Group on Enforced or Involuntary Disappearances* 2002, UN Doc E/CN.4/2002/79, 10; See also *Question of Enforced or Involuntary Disappearances*, GA Res 55/103, UN GAOR, 55th Session, UN Doc A/Res/55/103 (2000) para 10.

Rights. It hears claims against states in a quasi-judicial manner without those states having expressly consented to such intrusive procedures. When looked at from this perspective, the Charter bodies are remarkable. They apply the standards of the Universal Declaration of Human Rights¹⁴⁹ and other international documents, which were not originally intended to be legally binding, to all states regardless of their express consent.¹⁵⁰ They may also apply standards contained in treaties to which states are parties, even if that state has not consented to the individual petition procedure by the relevant treaty body.¹⁵¹

The work of the Charter bodies has been called the

most dynamic and innovative part of the UN work in the field of human rights. Their current expansion and institutionalization reflect changes in the position of the individual in the international system and the role of the United Nations. They are far more intrusive than any treaty on which states are likely to agree.¹⁵²

The WGAD does this with greater force than the other bodies. This could be attributed in part to their weaker mandates, as well as their lack of resources and the large number of claims with which they are faced:

The special rapporteurs have become overwhelmed with their increasing workload and limited resources. Another problem is that since their reports are so broad, and list violations occurring around the world, situations in particular countries often do not receive the attention they deserve.¹⁵³

While individual participation in the Charter-based procedures could be increased, individual petition should not exist for its own sake. Where gross and systematic violations are common it may be better to prioritise broader thematic and country-based procedures, which take a more holistic approach to addressing the root causes of systematic abuse and may be of benefit to larger groups of victims. What is important is the end result: individuals are protected. The CHR has itself stated that its success 'is measured by its ability to make a difference to the lives of individuals'.¹⁵⁴ Also, the CHR and GA may be inappropriate forums to discuss and analyse cases of individual abuse. Due to time constraints, the composition of these bodies, and their deliberative nature, the CHR and GA are more appropriately concentrated on cases of large-scale abuse that are clear-cut and receive overwhelming condemnation.¹⁵⁵

¹⁴⁹ *International Bill of Human Rights*, GA Res 217 (III), UN GAOR, 3rd Session, 1948.

¹⁵⁰ For example, the Working Group on Enforced or Involuntary Disappearances is mandated to assess state conduct in light of the Declaration on the Protection of All Persons from Enforced Disappearance: see United Nations Commission on Human Rights, *Question of Enforced or Involuntary Disappearances*, Res 2001/46, UN Doc E/CN.4/Res/2001/46.

¹⁵¹ See United Nations Commission on Human Rights, *Question of Arbitrary Detention*, Res 1997/50, UN Doc E/CN.4/RES/1997/50 para 5.

¹⁵² Allison L Jernow, 'Ad Hoc and Extra-Conventional Means for Human Rights Monitoring' (1996) 28 *New York University Journal of International Law and Politics* 785, 786.

¹⁵³ Newman and Weissbrodt, above n 145, 210.

¹⁵⁴ United Nations Commission on Human Rights, *Commission on Human Rights*, <<http://www.unhcr.ch/html/menu2/2/chrintro.htm>> at 5 July 2002.

¹⁵⁵ Weissbrodt and Bartolomei, above n 143, 1026-1031.

The principal weakness of these bodies derives from their political nature. The CHR and GA have not acted against all violating states. Van Boven comments that:

[f]orceful and fully legitimate action of the United Nations with respect to the human rights situation in Chile is not followed by similar types of action of principal United Nations organs relating to 'Chile-like situations' in other countries of Latin America. Apartheid in South Africa is rightly condemned with vigour but massacres committed in independent South African States are passed over in silence. It is no surprise that reproaches of selectivity, double standard, conspiracy of silence etc. are constantly in the air.¹⁵⁶

An examination of GA resolutions shows that fewer than thirty states have been subject to address by the GA for failure to observe human rights. Bayefsky points out that of the resolutions passed by the CHR, '[s]ixty percent... concerned only two states [presumably South Africa and Israel]. Omitted from the list entirely are states such as China and Syria'.¹⁵⁷ Clearly, condemnation of states by those organs of the UN composed of governments is highly politicised. It has been pointed out that South Africa was subject to sustained attack in the GA because unlike other states with poor human rights records, it was not part of a large voting block in the UN, and was consequently unable to protect its own interests.¹⁵⁸

As to the effectiveness of these mechanisms, it is probably fair to conclude with a comment by Ramcharan, who states that

[t]hrough the dialogue and contacts undertaken... the United Nations is able to bring an international *presence* to bear upon a situation; to *assist* governments to overcome difficulties they may be experiencing; to *mitigate* and possibly to *contribute to improvement* and change in a situation; perhaps to prevent violations from increasing and even reducing those violations; and to help in some individual cases.¹⁵⁹

V UN TREATY-BODY MECHANISMS

A Institutional Structure

Five of the United Nations-sponsored human rights treaties presently allow individuals to bring claims against violating states: the International Covenant on

¹⁵⁶ Theo van Boven, 'United Nations and Human Rights, A Critical Appraisal' in Cassese (ed), *UN Law/Fundamental Rights: Two Topics in International Law* (1979) 119, 127.

¹⁵⁷ Remarks by Anne Bayefsky in Janet Lord, 'Human Rights: Implementation Through the UN System' (1995) 89 *ASIL Proceedings* 225, 226; Morris Abram declares that '[a] glance at the Commission's agendas from the past twenty years reveals that the lion's share of its attention has been directed at three country targets: South Africa, Chile and Israel': Morris Abram, 'Appearance v Reality: The Treatment of Israel in the UN Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities', in Janet Lord, 'Human Rights: Implementation Through the UN System' (1995) 89 *ASIL Proceedings* 231, 232.

¹⁵⁸ Denise Prevost, 'South Africa as an Illustration of the Development in International Human Rights Law' (1999) *South African Year Book of International Law* 211, 213.

¹⁵⁹ Bertrand Ramcharan, *The Concept and Present Status of the International Protection of Human Rights: Forty Years After the Universal Declaration*, (1989) 138.

Civil and Political Rights (ICCPR),¹⁶⁰ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹⁶¹ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹⁶² the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁶³ and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).¹⁶⁴ Due to their similarities, they will be examined together.

B Access

All of the treaties require positive action by states that accept the jurisdiction of the relevant committee to receive individual petitions, either through a declaration under the main treaty or accession to a separate instrument.¹⁶⁵ Only victims or their designated representatives may submit claims,¹⁶⁶ and protection is limited to physical persons.¹⁶⁷

Communications may be submitted in any language but decisions are issued only in the official languages of the UN.¹⁶⁸ Proceedings will normally be written.¹⁶⁹ Only the Committee on the Elimination of Racial Discrimination (CERD) and the Committee Against Torture (CommAT) have made provision for oral hearings and

¹⁶⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976).

¹⁶¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹⁶² *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

¹⁶³ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13, art 22 (entered into force 3 September 1981).

¹⁶⁴ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, GA Res 45/198, 1990, (entered into force 1 July 2003).

¹⁶⁵ *Optional Protocol to the International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art 22; *International Convention on the Elimination of All Forms of Racial Discrimination* art 14; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, GA Res 54/4, 1999; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* art 77.

¹⁶⁶ *Optional Protocol to the International Covenant on Civil and Political Rights* art 1; *International Convention on the Elimination of All Forms of Racial Discrimination* art 14 (1); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art 22; *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* art 2; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* art 77(1).

¹⁶⁷ This is apparent from the texts of the treaties.

¹⁶⁸ Alfred de Zayas, 'Petitioning the United Nations' (2001) 95 *ASIL Proceedings* 82, 84; Human Rights Committee, *Rules of Procedure of the Human Rights Committee*, U.N. Doc. CCPR/C/3/Rev.3 (1994) ¶ 29; Committee on the Elimination of Racial Discrimination, *Rules of Procedure of the Committee on the Elimination of Racial Discrimination*, UN Doc CERD/C/35/Rev.3, 01/01/89 ¶ 30; *Rules of Procedure of the Committee on the Elimination of Discrimination against Women* in Report of the Committee on the Elimination of Discrimination against Women, Annex I, A/56/38, ¶ 26; The Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Rules of Procedure of the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc CAT/C/3/Rev.4., ¶ 30.

¹⁶⁹ *Optional Protocol to the International Covenant on Civil and Political Rights* art 5; *Rules of Procedure of the Human Rights Committee* ¶ 91, 93, 94; *International Convention on the Elimination of All Forms of Racial Discrimination* article 14(6)(b); *Rules of Procedure of the Committee on the Elimination of Racial Discrimination* ¶ 92(1), 94; *Rules of Procedure of the Committee on the Elimination of Discrimination against Women* ¶ 69(3), 69(4), 69(5), 69(8); *Rules of Procedure of the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶ 109.

these are recent changes. They will probably not occur with great frequency given cost and time implications.¹⁷⁰ Additional information may be requested from either party during the process,¹⁷¹ and the individual is able to reply to any information submitted by the state.¹⁷² While legal aid is not available, this may be balanced by the fact that proceedings will usually be written, and there is no requirement that the petitioner be assisted by legal counsel.¹⁷³

C Remedies

The case law of CERD and CommAT is relatively small,¹⁷⁴ permitting a comprehensive review of the recommendations it makes. Neither the Commission on Migrant Workers nor the Commission on the Elimination of Discrimination Against Women (CommEDAW) have yet issued any views on cases. The caselaw of the Human Rights Committee (HRC) is far more prolific, and thus examination has been limited to a review of remedies in its annual report of 2001.¹⁷⁵ A committee will on occasion declare a violation, without a recommendation for further action.¹⁷⁶ However, it will usually invite the state to take some form of action to: provide a particular judicial remedy at the domestic level (such as opening an investigation, prosecuting and punishing those responsible for violations, or creating a civil remedy);¹⁷⁷ reform its legislation;¹⁷⁸ prevent similar violations in the future;¹⁷⁹ disseminate the Committee's views in an appropriate language;¹⁸⁰ refrain from taking particular action (such as deportation);¹⁸¹ release victims;¹⁸² guarantee the security of a victim;¹⁸³ or reinstate the victim in a particular

¹⁷⁰ de Zayas, above n 168, 85.

¹⁷¹ *Rules of Procedure of the Human Rights Committee* r 80, 91(4); *Rules of Procedure of the Committee on the Elimination of Racial Discrimination* r 92(1); *Rules of Procedure of the Committee on the Elimination of Discrimination against Women* r 58, 69(8); *Rules of Procedure of the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* r 109, 111(4).

¹⁷² *Rules of Procedure of the Human Rights Committee* r 93(3), 91(6); *Rules of Procedure of the Committee on the Elimination of Racial Discrimination* r 94(4); *Rules of Procedure of the Committee on the Elimination of Discrimination against Women* r 69(9); *Rules of Procedure of the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* r109(10).

¹⁷³ de Zayas, above n 168, 84.

¹⁷⁴ To date, CERD has delivered 22 decisions, of which it appears only 5 contained findings of violations. CommAT has delivered 87 decisions, of which it appears only 18 contained findings of violations: see <<http://www.unhchr.ch/tbs/doc.nsf>> at 27 June 2002.

¹⁷⁵ The cases of the HRC are taken from Human Rights Committee, *Annual Report of the Human Rights Committee* 2001, UN Doc A/56/40, vol I paras 167-174. Up to July 2000, the HRC had delivered 346 decisions on the merits: see Bayefsky, above n 160, 506.

¹⁷⁶ See, eg, the decision of CommAT in *Abad v Spain* (1996) Comm. No. 59/1996, UN Doc CAT/C/20/D/59/1996 para 9.

¹⁷⁷ See *Blazek et al. v. Czech Republic* (2001) Case No. 857/1999, UN Doc CCPR/C/72/D/857/1999; *Mansaraj et al. v. Sierra Leone* (2001) Case No. 839/1998, UN Doc CCPR/C/72/D/839/1998; *LK v Netherlands* (1991) Comm. No. 4/1991, CERD/C/42/D/4/1991 para 6.8; *Ristic v Yugoslavia* (1998) Comm. No. 113/1998, CAT/C/26/D/113/1998 para 9.6.

¹⁷⁸ See, eg, *Blazek et al. v. Czech Republic* (2001) Case No. 857/1999, UN Doc CCPR/C/72/D/857/1999

¹⁷⁹ *Nedzibi v Austria* (1991) Comm. No. 8/1991, UN Doc CAT/C/11/D/8/1991 para 15.

¹⁸⁰ See, eg, *Blazek et al. v. Czech Republic* (2001) Case No. 857/1999, UN Doc CCPR/C/72/D/857/1999.

¹⁸¹ See, eg, *Winata v. Australia* (2001) Case No. 930/2000, UN Doc CCPR/C/72/D/930/2000.

¹⁸² See, eg, *Mansaraj et al. v. Sierra Leone* (2001) Case No. 839/1998, UN Doc CCPR/C/72/D/839/1998.

¹⁸³ See, eg, *Chongwe v. Zambia* (2000) Case No. 821/1998, UN Doc CCPR/C/70/D/821/1998.

post.¹⁸⁴ Occasionally compensation¹⁸⁵ or payments of legal costs are directed.¹⁸⁶ Neither CommAT nor CERD have to date recommended the payment of legal costs by the state, and the HRC appears to do so only rarely. CommAT has not yet recommended compensation. The HRC can also be praised for its strength in allowing a complaint alleging that the views of the committee in respect of the same individual had not been complied with.¹⁸⁷

The committees may request states to take interim measures.¹⁸⁸ Their attitudes vary as to the binding nature of interim measures. CommAT has expressed its deep concern regarding a state's failure to follow interim measures, as such a failure may jeopardise its final decision.¹⁸⁹ The HRC seems to indicate that failure to follow interim measures may violate the state's obligations.¹⁹⁰

The bodies issue 'views', 'suggestions', 'decisions' or 'recommendations'.¹⁹¹ States have not undertaken expressly to abide by these, and in this sense it may be said that the committees' pronouncements are non-binding. While this may be true in strict legal terms, both commentators and the HRC itself have expressed the view that that committee's recommendations do carry some weight. Christian Tomuschat states that

[l]egally, the views formulated by the Human Rights Committee are not binding on the State party concerned which remains free to criticize them. Nonetheless, any State party will find it hard to reject such findings in so far as they are based on

¹⁸⁴ See, eg, *Mazou v. Cameroon* (2001) Case No. 630/1995, UN Doc CCPR/C/72/D/630/1995; *Yilmaz Dogan v Netherlands* (1984) Comm. No. 1/1984, CERD/C/36/D/1/1984 para 10.

¹⁸⁵ See, eg, *Laptsevich v. Belarus* (2000) Case No. 780/1997, UN Doc CCPR/C/68/D/780/1997; *Habassi v Denmark* (1997) Comm. No. 10/1997, UN Doc CERD/C/54/D/10/1997 para 11.2;

¹⁸⁶ See, eg, *Laptsevich v. Belarus* (2000), Case No. 780/1997, UN Doc CCPR/C/68/D/780/1997.

¹⁸⁷ *Pinto v Trinidad and Tobago* (1996) Case No. 512/1992, UN Doc CCPR/C/57/D/512/1992, noted in Ineke Boerefijn, 'Follow-up of the Views of the United Nations Treaty Bodies' in Barkhuysen, Emmerik, Kempen (eds), *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (1999) 101, 111-112. The European Court has refused to re-examine a previously decided case and note a continued or new violation: see *Olsson v Sweden (No 2)* (1992) 250 Eur Crt HR (ser A).

¹⁸⁸ *Rules of Procedure of the Human Rights Committee* r 86; *Rules of Procedure of the Committee on the Elimination of Racial Discrimination* r 94(3); *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* art 5, *Rules of Procedure of the Committee on the Elimination of Discrimination against Women* r 63; *Rules of Procedure of the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* r 110(3).

¹⁸⁹ *TPS v Canada* (1997) Comm. No. 99/1997, UN Doc CAT/C/24/D/99/1997 paras 15.6, 15.7. CommAT reminded the State that it had accepted its obligations under the CAT voluntarily. See also *Chipana v Venezuela* (1998) Comm. No. 110/1998, UN Doc CAT/C/D/110/1998 para 8.

¹⁹⁰ The HRC stated that executing a claimant whose case was pending, in breach of an interim order, was a 'grave breach' of the *Optional Protocol to the International Covenant on Civil and Political Rights*: United Nations, 'Human Rights Commission on Complaints of Violations from Individuals' (Press Release, 4 September 2003) <<http://www.unhchr.ch/hurricane/hurricane.nsf/view01/B2D753B2B50A38C5C1256D970044C974?opendocument>> at 6 September 2003.

¹⁹¹ *Optional Protocol to the International Covenant on Civil and Political Rights* art 5(4); *Rules of Procedure of the Human Rights Committee* r 94(3); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art 22(7); *Rules of Procedure of the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* r 112(4); *International Convention on the Elimination of All Forms of Racial Discrimination* art 14(7)(b); *Rules of Procedure of the Committee on the Elimination of Racial Discrimination* r 95(3); *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* art 7(3); *Rules of Procedure of the Committee on the Elimination of Discrimination against Women* r 72(5); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* art 77(7). Interestingly, while CAT (art 22(7)) states that CommAT will issue 'views', CommAT's *Rules of Procedure* (r 112(4)) state that it shall issue 'decisions'.

orderly proceedings during which the defendant party had ample opportunity to present its submissions.¹⁹²

Michael Steiner believes that the HRC

has taken the position that absence of a provision in the Protocol describing views as 'binding' cannot mean that a state may freely choose whether or not to comply with them. Views carry a normative obligation for states to provide the stated remedies, an obligation that stems from the provisions of the Covenant and Protocol.¹⁹³

The HRC's reasoning is as follows:

Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party... information about the measures taken to give effect to the Committee's Views.¹⁹⁴

It seems reasonable to conclude from this statement that the HRC considers its views binding.

D Compliance

Some of the committees will follow-up the implementation of their views,¹⁹⁵ and steps are being taken to establish a central follow-up procedure.¹⁹⁶ The HRC includes information gathered through follow-up in its annual report. Between 1991 and 2001 the HRC Special Rapporteur for follow-up views had received replies in respect of 198 views, with no reply in respect of 75 views. Many petitioners had also informed the HRC that recommendations had not been implemented, though 'in rare instances, the author of a communication has informed the Committee that the State party had given effect to the Committee's recommendations, although the State party had not itself provided that information'.¹⁹⁷ The HRC further states that

¹⁹² Christian Tomuschat, 'Evolving Procedural Rules: The United Nations Human Rights Committee's First Two Years of Dealing with Individual Communications' (1980) 1 *Human Rights Law Journal* 249, 255.

¹⁹³ Michael Steiner, 'Individual Claims in a World of Mass Violations: What Role for the Human Rights Committee?' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000) 15, 30.

¹⁹⁴ *Sooklal v Trinidad and Tobago* (2000) Comm No. 928/2000, UN Doc CCPR/C/73/D/928/2000 para. 7; See also *Ääreläand Näkkäläjärvi v Finland* (1997) Comm No. 779/1997, UN Doc CCPR/C/73/779/1997 paras 8.2-9; *Simpson v Jamaica* (1996) Comm No. 695/1996, UN Doc CCPR/C/73/D/695/1996 paras 9-10.

¹⁹⁵ Meeting of the Chairpersons of the Human Rights Committee, the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Committee on the Elimination of Discrimination against Women, *Review of Recent Developments to the Work of the Treaty Bodies, Status of the Annual Appeal 2001*, 8 June 2001, UN Doc HRI/MC/2001/2 para 17.

¹⁹⁶ A result of the recommendations of the Thirteenth Meeting of Chairpersons on the Human Rights Treaty Bodies, *Effective functioning of human rights mechanisms: treaty bodies*, follow-up 6 June 2002, UN Doc HRI/MC/2002/2 para 25.

¹⁹⁷ United Nations Human Rights Committee, above n 25, paras 177-178.

[r]oughly 30 per cent of the replies received could be considered satisfactory in that they display the State party's willingness to implement the Committee's views or to offer the applicant an appropriate remedy. Other replies cannot be considered satisfactory because they either do not address the Committee's recommendations at all or merely relate to one aspect of them. Certain replies simply indicate that the victim has failed to file a claim for compensation within statutory deadlines and that no compensation can therefore be paid to the victim.¹⁹⁸

Neither CommAT nor CERD include in their annual reports information on the degree of compliance with, or follow-up on, their recommendations. It may be sensible to assume that it would not differ significantly from that of the HRC.¹⁹⁹ The follow-up process is facilitated by cooperation that has emerged between the Charter-based and treaty-based mechanisms dealing with individual complaints,²⁰⁰ although this does not yet appear to be systematic in nature and is constrained by limited resources.²⁰¹ The committee most active in this appears to be CommAT, followed by CommEDAW. The concluding observations of these bodies occasionally congratulate or exhort the state (as appropriate) regarding its response to the communications on individual cases sent by a particular rapporteur, and any invitation it has extended or failed to extend to them to conduct a visit.²⁰² CommAT has also requested information from a state in its periodic report on action the state has taken to implement the recommendations of the Special Rapporteurs on Torture.²⁰³ Similarly the HRC is noted on one occasion to have questioned a state delegation on what the state had done to give effect to the recommendations of an extra-treaty procedure.²⁰⁴

The Committees submit an annual report to the Third Committee of the GA,²⁰⁵ which does not seem to use this as an opportunity to pressure particular states about their compliance with decisions on individual petitions. While it generally exhorts

¹⁹⁸ *Ibid.*

¹⁹⁹ During the 57th CHR deliberations on enhancing the effectiveness of the treaty bodies, the representative of Poland stated (but apparently without references) that '70 per cent of the States parties that had accepted a complaints mechanism had never been the subject of a complaint. In only 20 per cent of cases in which a violation had been disclosed had the State been willing to provide a remedy': Thirteenth Meeting of Chairpersons of the Human Rights Treaty Bodies, *Informal Note on the Deliberations of the Commission on Human Rights at its fifty-seventh Session on Agenda Item 18 (a)*, 7 May 2001, UN Doc HRI/MC/2001/Misc.1 para 6.

²⁰⁰ See, eg, Record of the Joint Meeting of the Chairpersons of the Human Rights Treaty Bodies and the Ninth Meeting of Special Rapporteurs/Representatives, Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights, 24 May 2002, UN Doc HRI/MC/2002/Misc.3 paras 11-28.

²⁰¹ *Implementation of Recommendations of the Second Joint Meeting of the Chairpersons and Special Mandate Holders*, 8 June 2001, UN Doc HRI/MC/2001/Misc.3 para 16.

²⁰² See, eg, Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Concluding Observations* (Indonesia), 22 November 2001, UN Doc CAT/C/XXVII/Concl.3 paras 9(h), 10(l); Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Concluding Observations* (Cameroon), 6 December 2000, UN Doc A/56/44 para 63(b), 65(c);

²⁰³ Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Concluding Observations* (Brazil), UN Doc A/56/44 para 120(i).

²⁰⁴ There appears to be no documented evidence of this apart from its mention in the record of the Joint Meeting of the Chairpersons of the Human Rights Treaty Bodies and the Ninth Meeting of Special Rapporteurs/Representatives, Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights, 24 May 2002, UN Doc HRI/MC/2002/Misc.3 para 15.

²⁰⁵ *International Covenant on Civil and Political Rights* art 45; *International Convention on the Elimination of All Forms of Racial Discrimination* art 9(2); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art 24; *Convention on the Elimination of All Forms of Discrimination Against Women* art 21.

states to 'take duly into account' the HRC's views under the Optional Protocol to the ICCPR, it has failed to mention compliance with the decisions of CommAT or CERD.²⁰⁶ Committee representatives are not given an official role in the presentation of the report and may only appear as part of a state delegation.²⁰⁷ While the GA does formulate resolutions with regard to particular states, often in strong terms, these are based almost invariably on information from SRs, WGs, and the CHR. In 2000 the GA addressed resolutions to Afghanistan, Haiti, Democratic Republic of Congo, Sudan, Iraq, Iran, the countries in the Balkans, Myanmar, and Cambodia.²⁰⁸ In its resolution on Iran, the GA referred to the information contained in the concluding observations of the HRC and CERD.²⁰⁹ In its resolution on Myanmar, the GA strongly urged the government to implement the recommendations of CommEDAW (which must have been a reference to its concluding observations, as CommEDAW has not issued any views on individual petitions).²¹⁰ There does not appear to be any reference in GA resolutions to compliance with individual petitions under the treaties.

E Comment

The committees are able to deliver legally reasoned decisions, with recommendations for remedial action. These command great moral authority because states have expressly consented to them (through a declaration or ratification of a separate instrument), and they are arguably legally binding (see the statements of the HRC). Unlike the Charter procedures, the committees attempt to place the individual on an equal footing with states in the procedures they follow, allowing each the opportunity to respond to the other's claims. The individual's position would be further improved if there existed provision for legal aid and an increase in oral participation in hearings. While this may make issues easier to clarify, resources are not available. The relative informality of the procedures before the committees keeps the cost of an international application low. However, the applicant will still have to cover costs incurred while satisfying the preliminary requirement to exhaust local remedies. This consideration makes it desirable for the

²⁰⁶ *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 56/143, UN GAOR, 56th Session, UN Doc A/Res/56/143; *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 55/81, UNGAOR, 55th Session, UN Doc A/Res/55/81.

²⁰⁷ Follow-up, see paras. 3-5.

²⁰⁸ Respectively: *Question of Human Rights in Afghanistan*, GA Res 55/119, UN GAOR, 55th Session, UN Doc A/Res/55/119; *Situation of Human Rights in Haiti*, GA Res 55/118, UN GAOR, 55th Session, UN Doc A/Res/55/118; *Situation of Human Rights in the Democratic Republic of the Congo*, GA Res 55/117, UN GAOR, 55th Session, UN Doc A/Res/55/117; *Situation of Human Rights in the Sudan*, GA Res 55/116, UN GAOR, 55th Session, UN Doc A/Res/55/116; *Human Rights Situation in Iraq*, GA Res 55/115, UN GAOR, 55th Session, UN Doc A/Res/55/115; *Situation of Human Rights in the Islamic Republic of Iran*, GA Res 55/114, UN GAOR, 55th Session, UN Doc A/Res/55/114; *Situation of Human Rights in parts of South-Eastern Europe*, GA Res 55/113, UN GAOR, 55th Session, UN Doc A/Res/55/113; *Situation of Human Rights in Myanmar*, GA Res 55/112, UN GAOR, 55th Session, UN Doc A/Res/55/112; *Situation of Human Rights in Cambodia*, GA Res 55/95, UN GAOR, 55th Session, UN Doc A/Res/55/95.

²⁰⁹ Preamble to *Situation of Human Rights in the Islamic Republic of Iran*, GA Res 55/114, UN GAOR, 55th Session, UN Doc A/Res/55/114 para 6.

²¹⁰ *Situation of Human Rights in Myanmar*, GA Res 55/112, UN GAOR, 55th Session, UN Doc A/Res/55/112 para 117.

committees to include recommendations for the state to pay legal costs in successful cases. Also, although it is encouraging to see the ease of accessibility of information regarding the committees on the internet, this is limited by an understanding of one of the UN's official languages as well as computer literacy and access to the internet. Overall the procedures of the committees are more favourable to individuals than those of the CHR. However, because the committees are part-time²¹¹ and lack resources, they have a growing backlog of cases.²¹² A claim under the treaty system will probably take longer to finalise than under the CHR, with compliance not guaranteed anyway. The greater problem is the absence of express state commitment to follow these views, and the lack of adequate supervision by the political bodies.

VI CONCLUSION

The UN treaty bodies resemble the African and American Commissions in their proceedings (they are written), their remedies (because they direct a specific course of legislative or administrative action but are less likely to direct or less specific about the payment of costs or reparation), their enforcement mechanisms (because they have political bodies which fail to address specific states for their compliance with specific decisions), and their part-time nature.²¹³ Both those UN Charter and UN treaty mechanisms which provide information on compliance seem to have a marginally higher success rate than the American system and a far greater success rate than the African system.

The Charter-based mechanisms have the advantage of applying to all members of the UN without the need for prior consent. This is similar to the American Commission in respect of the DRM, although the Commission produces reasoned decisions and recommends remedial action. Clearly, from a procedural standpoint, an individual is better placed under the UN treaty system than the Charter-based system. However, the problem of the growing backlog means that to have one's case dealt with promptly it may be necessary to proceed where possible through the SRs and WGs.

The American and African systems appear to be evolving in a similar direction to the European model in establishing courts — which the American system did not possess at the outset — and allowing the individual to participate independently of the commissions.²¹⁴ The European model presently seems the most successful in

²¹¹ *Rules of Procedure of the Human Rights Committee* r 2; *Rules of Procedure of the Committee on the Elimination of Racial Discrimination* r 1; *Rules of Procedure of the Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* r 2.

²¹² With respect to the HRC, see the Thirteenth Meeting of Chairpersons on the Human Rights Treaty Bodies, above n 199, paras 21-22; see also the United Nations Human Rights Committee, above n 25, para 98; see also Steiner, above n 193, 32-33.

²¹³ *Evaluation of the Workings of the Inter-American System for the Protection and Promotion of Human Rights with a View to its Improvement and Strengthening*, OAS AG/RES 1828 (XXXI-O/01), 31st Session paras 1(c), 1(a), 2(a); *Rules of Procedure of the African Commission on Human and Peoples' Rights* r 2.

²¹⁴ See also Dinah Shelton, 'New Rules of Procedure for the Inter-American Commission on Human Rights' (2001) 22 *Human Rights Law Journal* 169.

securing compliance with individual decisions and places the individual in the most favourable position. This is not to say that the European system is ideal, and it does not seem unreasonable to conclude that the Council of Europe has drawn on the experience of the other regional and global bodies' use of country reports in establishing the Commissioner on Human Rights.

There are two major differences between the European system and the other systems. First, there is the effectiveness of the enforcement body that engages states on a case-by-case basis, and second, the full-time nature of the body. It is suggested that even if the other systems are reformed in these two respects the current problems will remain, as the real difficulty lies in the willingness of states to follow human rights norms in the first place, or to remedy violations after the event. This view, that the effectiveness of an international tribunal will depend on the existence of domestic pressure on the government, is also supported by Laurence Helfer and Anne-Marie Slaughter, who use the European Court and European Court of Justice as models for a theory of 'effective supranational adjudication'.²¹⁵

It is questionable whether it would make a difference to the systems to have more specialised enforcement bodies like the Committee of Ministers of the Council of Europe, which belongs to an organisation largely dedicated to promoting human rights.²¹⁶ In the UN, it is the Third Committee of the GA which formulates resolutions on human rights. Although specialising in dealing with social, humanitarian and cultural issues, its enforcement is not particularly rigorous. Ultimately, compliance will depend on the will of both impugned states and those enforcing decisions rather than the nature of the body to which they belong.

Indeed, that states should be expected or permitted to supervise themselves might seem altogether illogical. Their status as guardians of the very system designed to keep their power in check reflects the state-centred nature of international law. Yet perhaps it is appropriate because political power — and with it any prospect of enforcement — lies with states. It may be sensible to conclude that compliance is always going to depend on the mood or attitude of the states involved. It is not that the European system is the ideal, but rather that as states become more open and accountable towards their own people, they appear to become less able to object to outside supervision of their human rights. In this vein, Dinah Shelton has noted that while to

²¹⁵ Laurence Helfer & Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *Yale Law Journal* 273, 387:

[T]he ECJ and the ECHR have exploited the opportunities granted them by the provision of supranational jurisdiction. They have built strong bridges to private litigants, creating a constituency for their judgments that is interested and able to pressure domestic government institutions to take heed and comply with those judgments. They also have forged direct relationships with different domestic institutions: The ECJ deliberately wooed national courts, and the ECHR earned support from courts, administrative agencies, and some national legislators.

²¹⁶ See Council of Europe, *An Overview*,

<http://www.coe.int/T/E/Communication_and_Research/Contacts_with_the_public/About_Council_of_Europe/An_overview/> at 6 September 2003.

some extent, the adoption of Protocol 11 by the Council of Europe influenced developments in the OAS... the democratization that took place in the Americas in the early 1990s was the most significant factor that stimulated consideration of new procedures to respond to a growing caseload [of the Court].²¹⁷

Most states in the European system do not commit gross and systematic violations of human rights (though note Russia with regard to Chechnya, or the Czech Republic with regard to the Roma).²¹⁸ This may mean that states are willing to be forceful with each other in the Committee of Ministers because they do not need to benefit from a mutually protective silence. For example, Nsongurua Udombana points out that

[s]ince the OAU has historically been led by Heads of States who have been responsible for massive human rights abuses, inter-state condemnation of violations was not likely in such a context... The bottom line generally has been: 'Watch me kill my people and I will watch you kill yours.'²¹⁹

Likewise, in the American system, the Assembly has more frequently criticised the Commission for highlighting human rights violations than it has the violating states. Thus, supervision of compliance by states cannot be said to weaken the system per se.

It is also questionable whether much difference would be made by having full-time rather than part-time bodies. Although the European Court has become full-time, partly to deal with its backlog of cases, 'the backlog has continued to grow'.²²⁰ The European Court has compulsory jurisdiction over individuals in 44 states, which generated almost 30,000 registered claims in 2002.²²¹ The committees have a far greater reservoir of potential victims, numbering over 1.5 billion in over 100 states. Yet the committees currently register less than 100 cases each year — perhaps explained by unfamiliarity among potential applicants with their existence and workings.²²² Each treaty body is capable of delivering only about 30 views per year and there is at present an estimated three year backlog.²²³ Even full-time bodies would not be able to deal with the potential number of claims. One suggestion might be that the solution lies at the national level, something which has been recognised by the UN.²²⁴ The delays facing the European Court in issuing judgments have provoked a new protocol to the European Convention, permitting

²¹⁷ Dinah Shelton, above n 214, 169.

²¹⁸ Report of the European Commissioner for Human Rights on his visit to the Russian Federation (Chechnya and Ingushetia, 4th March 2003, CommDH (2003) 5; Report of the European Commissioner for Human Rights on his visit to the Czech Republic, 15th October 2003, CommDH(2003) 10.

²¹⁹ Udombana, above n 93, 1216-1217.

²²⁰ Jean-Paul Costa, *The European Court of Human Rights and its Recent Case Law*, 38 *Texas International Law Journal Special* (2003), 455, 456.

²²¹ See Council of Europe, *European Court of Human Rights, Survey of Activities* (2002) 31

<<http://www.echr.coe.int/Eng/EDocs/2002SURVEY.pdf>> at 4 April 2004.

²²² Anne Bayefsky, *The UN Human Rights Treaty System, Universality at the Crossroads* (2001) 108, 111.

²²³ Steiner, above n 193, 32-33.

²²⁴ Report of the Secretary General, *Strengthening of the United Nations: an agenda for further change*, 9 September 2002, UN Doc A/57/397: 'Building strong human rights institutions at the country level is what in the long run will ensure that human rights are protected and advanced in a sustained manner. The emplacement or enhancement of a national protection system in each country, reflecting international human rights norms, should therefore be a principal objective of the Organisation'.

the Court to ‘screen out’ those cases where the applicant has not suffered ‘significant disadvantage’ and which do not raise important issues of law.²²⁵ Figures indicate that this crisis is not due to a disproportionately high number of cases being brought in relation to the newer members of the Council of Europe, where domestic protection is perhaps weaker than among its older members. Long-term member states in fact generate as many applications as new ones.²²⁶ Thus, while it may be true that better national protection can avoid overburdening the international supervision mechanisms, models for national protection cannot be found among the member states of the Council of Europe.

Although this paper addresses the strengths of the individual petition system, it should be remembered that individual petition should not exist for its own sake. Ultimately what is important is that individuals are protected. Individual petition is therefore of limited use where violations are widespread and systematic. In this circumstance, it makes more sense to address the underlying cause. The European system has been criticised in the past for the ‘almost minute attention the Convention bodies devote to comparatively minor matters or “legal niceties”’ and the absence of a mechanism to examine widespread violations.²²⁷ In a world where such violations are still common, the use of wider thematic and country reporting can perhaps better provide relief to larger groups of victims.

Despite the practical difficulties associated with an individual bringing an international claim, it cannot be denied that the procedures discussed have serious legal implications for the position of the individual in international law. In 1928 the Permanent Court of International Justice stated that ‘the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the parties of some definite rules creating individual rights’.²²⁸ Hersch Lauterpacht interprets this as a

resounding blow to the dogma of the impenetrable barrier separating individuals from international law ... no considerations of theory can prevent the individual from becoming the subject of international rights if States so wish.²²⁹

Lauterpacht points out that the ‘existence of a right and the power to assert it by judicial process are not identical’.²³⁰ Where international law confers rights on

²²⁵ *Preliminary Draft Protocol No. 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*: see *Interim Activity Report of the Steering Committee for Human Rights* (2002), UN Doc CDDH(2002)026, Addendum I Final. See Appendix V regarding Article 35(3).

²²⁶ During 2000-2002: the States with the highest number of applications lodged against them were: France (approximately 3000), Germany (approximately 1500), Italy (between 7000 and 10000, though most of these were repeat violations of Article 6), Poland (between 3000 and 4000), Romania (approximately 2000), Russia (between 2000 and 4000), Turkey (between 1000 and 3000), Ukraine (between 1500 and 2500), and the United Kingdom (approximately 1500): see Council of Europe, above n 221, 32-33.

²²⁷ Peter Leuprecht, ‘Symposium: International Human Rights at Fifty - Innovations In The European System Of Human Rights Protection: Is Enlargement Compatible With Reinforcement?’ (1998) 8 *Transnational Law and Contemporary Problems* 313, 317.

²²⁸ *Jurisdiction of the Courts of Danzig* [1928] PCIJ (ser B) No 15, 17.

²²⁹ Hersch Lauterpacht, ‘The Subjects of the Law of Nations, Part 2’ (1948) 64 L.Q.R. 97, 98-99.

²³⁰ Hersch Lauterpacht, ‘The Subjects of the Law of Nations, Part 1’ (1947) 63 L.Q.R. 438, 445.

individuals, the absence of international machinery allowing them to bring international claims against states cannot prevent individuals being considered subjects of international law. It is argued that international law has taken a further step from this point in two respects. First, the multiplication of international procedures permitting individuals to bring claims against states. Second, the fact that these have developed through a level of state consent more apparent than real. Were such developments owed to express treaty provisions or the free consent of states they would be less remarkable. Bruno Simma's comment in relation to the Charter bodies holds true for the other mechanisms as well:

[D]ecisive human rights bridgeheads in areas of formerly unfettered domestic jurisdiction of states... have been gained less by force of treaty-making than by... soft law processes on the modest hard-law basis of a few very general Charter provisions.²³¹

The American and Charter-based systems apply international standards in individual claims where there is no state consent other than to the founding treaty of an intergovernmental organisation, which made no discernible provision for such mechanisms. Those states wishing to join the European Union have been obliged to submit first to the compulsory jurisdiction of the European Court, and the African Commission hears individual petitions where no such express power existed in the African Charter. Additionally one can see human rights bodies expanding the participation of individuals in proceedings through the alteration of their rules of procedure. While not always freely given,

acceptance by states of the individual petitions procedures, which have granted the individual the right to call states to account, confirm ... the position of the individual as a bearer of rights and as a subject of international law.²³²

²³¹ Bruno Simma, 'A Hard Look at Soft Law' (1988) 82 *American Society of International Law Proceedings* 377, 380.

²³² De Zayas, above n 168, 86.