49. At the beginning of the annual cycle of the Council, Regional Groups would be invited to appoint a member of the consultative group, who would serve in his/her personal capacity. The Group will be assisted by the Office of the High Commissioner for Human Rights.

50. The consultative group will consider candidates included in the public list; however, under exceptional circumstances and if a particular post justifies it, the Group may consider additional nominations with equal or more suitable qualifications for the post. Recommendations to the President shall be public and substantiated.

51. The consultative group should take into account, as appropriate, the views of stakeholders, including the current or outgoing mandate-holders, in determining the necessary expertise, experience, skills, and other relevant requirements for each mandate.

52. On the basis of the recommendations of the consultative group and following broad consultations, in particular through the regional coordinators, the President of the Council will identify an appropriate candidate for each vacancy. The President will present to member States and observers a list of candidates to be proposed at least two weeks prior to the beginning of the session in which the Council will consider the appointments.

53. If necessary, the President will conduct further consultations to ensure the endorsement of the proposed candidates. The appointment of the special procedures mandate-holders will be completed upon the subsequent approval of the Council. Mandate-holders shall be appointed before the end of the session.

The criteria which mandate-holders should meet according to HRC Resolution 5/1 were clarified as follows in Decision 6/102 of the Human Rights Council:

**Human Rights Council, Decision 6/102. Follow-up to Human Rights Council Resolution 5/1 (27 September 2007):**

1. Qualifications: relevant educational qualifications or equivalent professional experience in the field of human rights. Good communication skills in one of the UN languages.
2. Relevant expertise: knowledge of international human rights instruments, norms and principles; as well as knowledge of institutional mandates related to the United Nations or other international or regional organizations work in the area of human rights; proven work experience in the field of human rights.
3. Established competence: nationally, regionally or internationally recognized competence related to human rights.
4. Flexibility/readiness and availability of time to perform effectively the functions of the mandate and to respond to its requirements, including attending Human Rights Council sessions.

## 4.3 The code of conduct for special procedures of the Human Rights Council

Because of their independence and the flexibility with which they fulfil their mandate, as well as their ability to react immediately in urgent situations, particularly when they are an individual rather than a working group, the special procedures have not

been popular with all States. Country-specific mandates in particular have created bitter feelings among States which have been subject to such monitoring. When the Human Rights Council was established, certain governments considered that the work of special procedures should be better codified, particularly in order to ensure that they remain within the limits set by the terms of the mandate. On 18 June 2007, acting on the basis of a proposal initially submitted by Algeria on behalf of the African Group, the Human Rights Council adopted Resolution 5/2, Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council. The Code of Conduct purports to define 'the standards of ethical behaviour and professional conduct that special procedures mandate-holders of the Human Rights Council ... shall observe whilst discharging their mandates'. It recalls the principles of independence, truthfulness, loyalty and impartiality inherent in their mandate. Certain provisions of the Code of Conduct have been discussed intensively. Although the Code of Conduct confirms that the mandate-holders are entitled to privileges and immunities as provided for under relevant international instruments, including section 22 of Article VI of the Convention on the Privileges and Immunities of the United Nations, it also stipulates that 'the mandate-holders shall carry out their mandate while fully respecting the national legislation and regulations of the country wherein they are exercising their mission' (Article 4, para. 3). Under the Code of Conduct mandate-holders are also requested to 'give representatives of the concerned State the opportunity of commenting on mandate-holders' assessment and of responding to the allegations made against this State, and annex the State's written summary responses to their reports' (Article 8(d)); in addition, in presenting their views in public, they are expected to 'indicate fairly what responses were given by the concerned State'. Under Article 12 of the Code of Conduct, mandate-holders shall '(a) bear in mind the need to ensure that their personal political opinions are without prejudice to the execution of their mission, and base their conclusions and recommendations on objective assessments of human rights situations; (b) in implementing their mandate, therefore, show restraint, moderation and discretion so as not to undermine the recognition of the independent nature of their mandate or the environment necessary to properly discharge the said mandate'.

In the course of the discussions leading to the adoption of the Code of Conduct, the Co-ordination Committee of the Special Procedures presented a Note (dated 13 April 2007) in which it offered its views about the proposed code. The Note questioned the usefulness of the initiative of adopting a code of conduct. It also remarked that, if the objective of the Code of Conduct were to enhance the effectiveness of the special procedures, it would then be 'indispensable' to 'also address the responsibilities of Governments in terms of their cooperation with the Special Procedures system. This necessary balance [between the obligations of mandate-holders and those of governments] would best be achieved through the addition of an extra section' in the code identifying such responsibilities. The Note contained other, more detailed comments. For instance, as regards the obligation of mandate-holders to respect the national legislation of the countries in which they effectuate their missions, it proposed to add 'to the extent that these laws and regulations are consistent with human rights and the

effective performance of the mandate holder's official functions'. Particular concern was expressed about the provisions, in a draft version of the Code of Conduct, which referred to the need to verify facts before relying on them:

**Note by the Special Procedures' Co-ordination Committee in Response to Discussions on a Code of Conduct and Annex: Possible Elements of a Code of Conduct (13 April 2007):**

The reference to verification of facts ... by mandate-holders is inappropriate in various respects. First, the primary task of mandate-holders is to identify situations of concern, rather than to act as judges who are able to verify facts. The role of the mandate-holder is to ensure a dialogue with the Government in relation to alleged violations. The act of verification or denial is one for the Government or for the courts of the relevant State, or for regional or UN human rights courts or treaty bodies. Second, the role of mandate-holders is generally described in the relevant resolutions as being humanitarian, rather than judicial, in nature. A requirement that every fact be 'verified' in any formal sense would ensure that almost no allegations, however well substantiated, could be relied upon by the mandate-holder. It would establish a higher standard of proof than applies even in criminal proceedings in the vast majority of countries. In essence, the use of the term 'verify' confuses the obligations of the Government with that of the mandate-holder. The provision should instead require mandate-holders to 'establish the facts, based on information which they believe to be objective and reliable'.

Article 8 of the Code of Conduct as adopted by the Human Rights Council takes into account this latter concern:

**Human Rights Council, Resolution 5/2, Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council (18 June 2007, Art. 8):**

In their information-gathering activities the mandate-holders shall:

(a) Be guided by the principles of discretion, transparency, impartiality, and even-handedness;
(b) Preserve the confidentiality of sources of testimonies if their divulgation could cause harm to individuals involved;
(c) Rely on objective and dependable facts based on evidentiary standards that are appropriate to the non-judicial character of the reports and conclusions they are called upon to draw up;
(d) Give representatives of the concerned State the opportunity of commenting on mandate-holders' assessment and of responding to the allegations made against this State, and annex the State's written summary responses to their reports.

Following a number of instances in which individual mandate-holders of the Human Rights Council were accused, sometimes explicitly, of not complying with the Code of Conduct – concerns were expressed particularly by the non-aligned movement (NAM) and from the African Group – certain members of the Human Rights Council considered it necessary to strenghen their ability to ensure full respect for the Code of Conduct.

A first step was taken on 18 June 2008, when the Council adopted a Statement by its President entitled Terms in Office of Special Procedure Mandate-holders, in which it was announced that the President of the Human Rights Council would henceforth convey to the Council information brought to his/her attention including, *inter alia*, by States and/or by the Co-ordination Committee of Special Procedures, concerning cases of persistent non-compliance by a mandate-holder with the provisions of the HRC Resolution 5/2, especially prior to the renewal of mandate-holders in office. The Statement noted that, on the basis of such information, the Council would act upon it as appropriate; in the absence of such information, the terms in office of the mandate-holders shall be extended for a second three-year term by the Council.

Further tensions linked to specific mandate-holders and, particularly, to the role of country-specific rapporteurs or independent experts, led the Human Rights Council to adopt Resolution L.8 on 12 June 2009 (A/HRC/11/L.8). In that Resolution, the Human Rights Council 'reaffirms that the Code of Conduct for special procedures mandate holders is aimed at strengthening the capacity of mandate holders to exercise their functions while enhancing their moral authority and credibility, and that it requires supportive action by all stakeholders'. The Resolution 'recalls that it is incumbent on special procedures mandate holders to exercise their functions in full respect for and strict observance of their mandates, as outlined in the relevant Council resolutions establishing such mandates, without challenging or questioning them, as well as to comply fully with the provisions of the Code of Conduct, and that it is incumbent on the Office of the United Nations High Commissioner for Human Rights to further assist special procedures in that regard'. This followed attacks made in particular on the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston. Mr Alston conducted a mission to Kenya on 16–25 February 2009. Upon returning, he held a press conference, summarized as follows by the UN News Service:

**UN News Service – UN rights expert calls on Kenya to confront 'widespread' police killings (25 February 2009):**

A United Nations independent human rights expert today called on the President of Kenya to acknowledge, and take steps to end, what he called 'systematic, widespread and carefully planned' police killings in the East African country.

'Effective leadership on this issue can only come from the very top, and sweeping reforms to the policing sector should begin with the immediate dismissal of the Police Commissioner', Philip Alston, the UN Special Rapporteur on extrajudicial executions, said in a press statement released at the conclusion of a ten-day fact-finding mission.

'Further, given his role in encouraging the impunity that exists in Kenya, the Attorney General should resign so that the integrity of the office can be restored', he added.

Mr Alston, ... who reports to the UN Human Rights Council in an independent, unpaid capacity, concluded that police killings 'are committed at will and with utter impunity', after travelling the country and conducting interviews with over 100 victims and witnesses.

He concluded that death squads were set up upon the orders of senior police officials to exterminate the Mungiki, an underground religious sect reported by media to be responsible for a range of criminality in the capital, Nairobi.

He said he also found compelling evidence that the police and military committed organised torture and extrajudicial executions against civilians during a 2008 operation to flush out a militia known as the Sabaot Land Defence Force (SLDF).

'For two years, the SLDF militia terrorized the population and the Government did far too little. And when the Government did finally act, they responded with their own form of terror and brutality, killing over 200 people', he said, advocating for an independent investigation.

With respect to accountability for violence that followed disputed elections at the beginning of 2008, the Special Rapporteur stated that the Special Tribunal for Kenya was 'absolutely indispensable to ensure that Kenya does not again descend into chaos during the 2012 elections'.

He called on civil society and the international community to take a firm stand on the tribunal's establishment, adding that the International Criminal Court (ICC) should take up the case concurrently, on a parallel track.

Among other recommendations, Mr Alston called for the establishment of a civilian police oversight body, the centralization of records of police killings, and the payment of compensation for the victims of those unlawfully killed.

In addition to victims and witnesses, the Special Rapporteur also met during his visit with senior Government officials and representatives of the Kenya National Commission on Human Rights and independent national human rights institutions.

Ten days after these statements were made, on 5 March 2009, Oscar Kamau King'ara and John Paul Oulu were assassinated in Nairobi by people believed to be police officers. Both were witnesses the Special Rapporteur had spoken to during his recent mission. The Kenyan civil society organizations linked the killing of the two activists to the information they had given to Mr Alston.

At the interactive dialogue which took place at the Human Rights Council when the Special Rapporteur presented his report on Kenya, the Egyptian Ambassador, speaking on behalf of the African Group, accused Mr Alston of violating the Code of Conduct. On 10 June 2009, Mr Alston addressed the following letter to the President of the Human Rights Council:

**Letter to the President of the Human Rights Council from the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston (10 June 2009):**

Excellency,

I would like to take this opportunity to respond to the statement made on 8 June by the representative of Egypt on behalf of the African Group regarding alleged violations of the Code of Conduct in relation to my report on Kenya.

In its official statement to the Council on 3 June 2009, in response to my report, the Government of Kenya did not raise any issues concerning the Code of Conduct. Instead, it expressed its support for the process. In relation to my report, as well as those of other Special Procedures, it stated: 'We have found most of the recommendations contained in these reports on Kenya constructive and useful, and remain committed to fulfilling our obligations under the international instruments which we are party to.'

In the same statement, it added: 'It is intended that in the constitutional review process some of the concerns raised by Prof Alston ... will be addressed.'

However, at the end of a subsequent ministerial statement the Government did raise Code objections. These were then taken up in the African Group statement presented to the Council on 8 June. It is my understanding that the alleged violations of the Code of Conduct focused on the following concerns:

(a) It was stated that a press conference was held at the end of the mission without first consulting with the Government. The African Union statement also accuses me of announcing my report publicly before 'sharing it with the Government of Kenya'. These statements are factually wrong. My report states clearly in para. 2: 'A briefing on the contents of my preliminary findings was provided in person to the [then] Minister of Justice and a copy of the conclusions and recommendations presented at the press conference was provided well in advance to both the principal liaison officer for the mission, at the Ministry of Justice, as well as to the Ministry of Foreign Affairs.'

I would like to highlight that the holding of a Press Conference at the end of a mission is absolutely standard practice for all Special Rapporteurs and is not at all 'unprecedented', as claimed by the Government of Kenya.

(b) It was stated that I had not cooperated with the Kenyan Government during the mission. There was no such concern expressed to me by the Government at any stage during the mission. The allegation was only raised after the receipt of my final report in which I thanked the Government for its overall cooperation, but indicated that I did not consider that the police had cooperated in a meaningful way with my fact-finding endeavours, as required by my mandate.

(c) It has been stated that my recommendation that the Police Commissioner should be replaced, and that the Attorney General should resign, were 'illegal'. The African Group statement indicates that the Code of Conduct does not allow any Special Procedure 'to interfere in the appointment of public officials, let alone constitutional ones, in any country'. The Code of Conduct does not in fact address this issue. Where strong evidence provided to the Special Rapporteur indicates that a Police Commissioner is found to have presided over death squads with direct responsibility for the extrajudicial executions of at least several hundred persons, it would seem appropriate to recommend such a course of action to the Government of the day. This is not, however, to 'interfere in the appointment of public officials'. The recommendation is one for the Government itself to accept or reject.

(d) The Spokesman for Police Commissioner accused me of not writing my own report but instead using a text provided to me by the Kenyan National Commission on Human Rights (KNCHR). This statement is taken further by the African Group which says that my report is 'identical' to one written by the KNCHR and that, at a side event in Geneva on June 4, I 'admitted' that my own report had been given to me by the KNCHR. These claims are completely

unfounded. There is not a single sentence in my report which has been plagiarized from the many reports prepared by the KNCHR. The members of that organization never provided me with as much as a single phrase or a paragraph which they wished to see included in my report. If they had, I would have rejected it as an interference with my independence. And the suggestion that I admitted such plagiarism at the side event is entirely false. I did no such thing.

I trust that the above will be of assistance in clarifying the actual manner in which my report was prepared in consultation with the concerned country.

Please accept, Excellency, the assurances of my sincere consideration.

[signed] Philip Alston

## 4.4 The tools used by the special procedures of the Human Rights Council

Although the tools used by the special procedures of the Human Rights Council are diverse and, because of their variety, defy systematization, three tools are relied upon most frequently by the special procedures established as individual mandates, particularly Special Rapporteurs and Independent Experts. These are communications sent to countries; country missions; and annual reports submitted to the Human Rights Council and, for some mandate-holders, to the General Assembly, where they are then presented before the Third Committee.

(a) Communications

When mandate-holders receive credible information about human rights violations or about the risk of violations, they may correspond with the government concerned to seek clarification about such allegations. This takes the form of a letter addressed to the State's permanent mission to the UN in Geneva, through the Office of the High Commissioner for Human Rights that supports the work of the special procedures. In principle, mandate-holders do not disclose from whom the information was received, which constitutes a protection from retaliation or reprisals. Victims of alleged violations or individuals or organizations having a direct knowledge of the alleged violations may correspond with the mandate-holder concerned, without there being an obligation to exhaust any domestic remedies available: the communications procedure is not a quasi-judicial procedure, rather it is a means to provide immediate protection to the victims, by drawing the attention of the government to certain situations.

Such communications may take the form either of urgent appeals or of letters of allegation. Urgent appeals are made 'in cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either (*sic*) imminent or ongoing damage of a very grave nature to victims that cannot be addressed in a timely manner by the procedure under letters of allegation' (*Manual of Operations of the Human Rights Council Special Procedures* (August 2008), para. 43). Letters of allegation are used to communicate information about violations that are said to have already occurred and whose impact on the alleged victim can no longer be changed.

Whereas urgent appeals normally require a substantive response within thirty days – although in certain circumstances the mandate-holder may make a public statement prior to receiving that response – governments generally have two months to respond to letters of allegation. Each mandate-holder submits to the Human Rights Council, with his/her annual report, a report on the communications with governments; it is now envisaged that a joint report on communications will be prepared, which should facilitate the identification of patterns related to the co-operation (or lack thereof) of certain countries with the Special Procedures of the Human Rights Council. In 2008, letters of allegation represented 22 per cent of the total number of communications sent to governments by the special procedures; joint letters of allegation represented 23 per cent of that total; urgent appeals represented 12 per cent; and joint urgent appeals, 43 per cent.

***Manual of Operations of the Human Rights Council Special Procedures* (August 2008), paras. 28–37:**

28. Most Special Procedures provide for the relevant mandate-holders to receive information from different sources and to act on credible information by sending a communication to the relevant Government(s). Such communications are sent through diplomatic channels, unless agreed otherwise between individual Governments and the Office of the High Commissioner for Human Rights, in relation to any actual or anticipated human rights violations which fall within the scope of their mandate.

29. Communications may deal with cases concerning individuals, groups or communities, with general trends and patterns of human rights violations in a particular country or more generally, or with the content of existing or draft legislation considered to be a matter of concern. Communications related to adopted or draft legislation may be formulated in various ways, as required by the specificities of each mandate.

30. Communications do not imply any kind of value judgment on the part of the Special Procedure concerned and are thus not per se accusatory. They are not intended as a substitute for judicial or other proceedings at the national level. Their main purpose is to obtain clarification in response to allegations of violations and to promote measures designed to protect human rights ...

36. In light of information received in response from the Government concerned, or of further information from sources, the mandate-holder will determine how best to proceed. This might include the initiation of further inquiries, the elaboration of recommendations or observations to be published in the relevant report, or other appropriate steps designed to achieve the objectives of the mandate.

37. The text of all communications sent and responses received thereon is confidential until such time as they are published in relevant reports of mandate-holders or mandate-holders determine that the specific circumstances require action to be taken before that time. Periodic reports issued by the Special Procedures should reflect the communications sent by mandate-holders and annex the governments' responses thereto. They may also contain observations of the mandate-holders in relation to the outcome of the dialogue with the Government. The names of alleged victims are normally reflected in the reports, although

exceptions may be made in relation to children and other victims of violence in relation to whom publication of names would be problematic.

**Office of the High Commissioner for Human Rights, Special Procedures Facts and Figures 2008 (2009):**

The decision to intervene is at the discretion of the special procedure mandate holder and depends on criteria established by him or her, as well as the criteria laid out in the Code of Conduct adopted by the Human Rights Council (Resolution 5/2 of 18 June 2007). Criteria generally relate to the reliability of the source and the credibility of information; the details provided; and the scope of the mandate itself. Further information is frequently requested from sources. Communications should not be politically motivated, abusive or based solely on media reports. Mandate holders may send joint communications when the case falls within the scope of more than one mandate. The OHCHR's Special Procedures Division Quick Response Desk coordinates communications and keeps relevant databases updated.

(b) Country visits

Although the mandate-holders of the Human Rights Council routinely travel abroad to hold consultations or take part in seminars or other public events, they may also conduct official missions in order to examine the situation of human rights (as related to their mandate) at national level. Such missions request the consent of the State in which they take place, and they lead to a report being prepared on the country, which is presented to the Human Rights Council after the government concerned has been provided an opportunity to comment. Mandate-holders typically ask to be invited to the country on official mission, although occasionally a government may take the initiative of inviting a mandate-holder to visit the country. A number of countries (sixty-three on 31 December 2008) have issued standing invitations to Special Procedures – increasingly as a result of pledges made when presenting a candidacy to be elected to the Human Rights Council – but even concerning those countries, the dates of the visit must be agreed with the authorities before they can take place. In 2008, special procedures mandate-holders conducted fifty-three fact-finding missions to forty-eight countries.

**Office of the High Commissioner for Human Rights, Special Procedures Facts and Figures 2008 (2009):**

During such missions, the experts assess the general human rights situation in a given country, as well as the specific institutional, legal, judicial, administrative and *de facto* situation under their respective mandates. During the country visit the experts will meet with national and

local authorities, including members of the judiciary and parliamentarians; members of the national human rights institution, if applicable; non-governmental organizations, civil society organizations and victims of human rights violations; the UN and other inter-governmental agencies; and the press when giving a press-conference at the end of the mission. After their visits, special procedures' mandate-holders issue a mission report to the Human Rights Council including their findings and recommendations.

**Terms of Reference for Fact-finding Missions by Special Rapporteurs/ Representatives of the Commission on Human Rights (Appendix V, E/CN.4/1998/45):**

During fact-finding missions, special rapporteurs or representatives of the Commission on Human Rights, as well as United Nations staff accompanying them, should be given the following guarantees and facilities by the Government that invited them to visit its country:

(a) Freedom of movement in the whole country, including facilitation of transport, in particular to restricted areas;
(b) Freedom of inquiry, in particular as regards:

(i) Access to all prisons, detention centres and places of interrogation;
(ii) Contacts with central and local authorities of all branches of government;
(iii) Contacts with representatives of non-governmental organizations, other private institutions and the media;
(iv) Confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty, considered necessary to fulfil the mandate of the special rapporteur; and
(v) Full access to all documentary material relevant to the mandate;

(c) Assurance by the Government that no persons, official or private individuals who have been in contact with the special rapporteur/representative in relation to the mandate will for this reason suffer threats, harassment or punishment or be subjected to judicial proceedings;
(d) Appropriate security arrangements without, however, restricting the freedom of movement and inquiry referred to above;
(e) Extension of the same guarantees and facilities mentioned above to the appropriate United Nations staff who will assist the special rapporteur/representative before, during and after the visit.

(c) Annual reports

Probably the most visible contribution of special procedures at international level are the reports they submit, at least on an annual basis, to the Human Rights Council, and – for some, but not all special procedures – to the General Assembly (Third Committee).

In 2008, the special procedures' mandate-holders submitted 135 reports to the Human Rights Council (120 by thematic mandate-holders), including 79 annual reports and 56 country visits reports, and 19 reports to the General Assembly. The annual reports contain an overview of the activities conducted by the mandate-holder in fulfilment of his/her mandate, and a set of recommendations addressed to governments or, occasionally, to other actors, including to the UN agencies. The reports are discussed in an 'interactive dialogue' with the delegates to the Human Rights Council or the Third Committee of the General Assembly. This interactive dialogue is based on an initial presentation by the mandate-holders, followed by the observations of the governments, and final remarks by the mandate-holder.

***Manual of Operations of the Human Rights Council Special Procedures* (August 2008), paras. 84–6:**

84. Mandate-holders report on their activities on a regular basis to the relevant United Nations bodies, and particularly the HRC and the GA. With regard to the recommendations contained in their reports, mandate holders should ensure that they recommendations do not exceed their mandate or the mandate of the HRC. Recommendations may also serve to bring to the attention of the Council any suggestions of the mandate holder which will enhance his or her capacity to fulfill the mandate ...

86. An inter-active dialogue constitutes an important element in the presentation of reports by mandate-holders. Mandate holders present their reports to the HRC, and in some cases to the GA, and States are given the opportunity to respond to the contents of the reports and to pose questions to the mandate holders. Such dialogues are considered to be an integral part of cooperation between mandate holders and States.

## 10.1. Questions for discussion: the UN Charter-based mechanisms

1. When they present their candidacy to the Human Rights Council, States make 'pledges', which then may be relied upon in the context of the Universal Periodic Review. To what extent does this ensure that the Human Rights Council will be composed only of States dedicated to the promotion and protection of human rights? Consider the pledges made by the United States when applying for membership of the Council in April 2009. Are such pledges a significant progress?
2. How significant is the risk of overlap between the role of the Human Rights Council and that of the UN human rights treaty bodies and the special procedures established by the Human Rights Council? Which safeguards should be put in place to ensure that the UPR does not develop into an appeals chamber for States unwilling to recognize the authority of the findings of independent human rights experts? Consider the following summary of how the risk of overlap and, hence, competition, could be avoided:

**Sir Nigel Rodley, 'The United Nations Human Rights Council, Its Special Procedures, and Its Relationship with the Treaty Bodies: Complementarity or Competition?' in K. Boyle (ed.),** *New Institutions for Human Rights Protection* **(Oxford University Press, 2009), p. 49 at p. 55:**

One [suggestion], considered but not retained during the discussions leading to the institution-building package, would have focused UPR on the extent to which states had actually implemented recommendations of the treaty bodies and special procedures ... Another suggestion ... would have been for UPR to avoid reviewing an issue covered by a treaty obligation with regard to which the state is up to date with its reporting obligations, limiting such a consideration to the activities of the state to give effect to the recommendations. Yet a further variation ... would have been for the outcome to avoid arriving at 'conclusions' in respect of the treaty obligations just mentioned, restricting the outcome to recommendations. This was based on the probability that competing assessments of human rights performance as could be expected to be reflected in 'conclusions' could be more harmful to the promotion of human rights than would non-identical recommendations on how to address a specific human rights problem.

3. Does the UPR serve to undermine the human rights obligations of States rather than to strengthen them? Consider the response of the United Kingdom to the suggestion by Switzerland that they should accept that any person detained by their armed forces is under UK jurisdiction (Recommendation 16). The United Kingdom states that it does not accept this recommendation, although it corresponds, arguably, to an obligation under international human rights law (see chapter 2). How serious is this difficulty?
4. Could the emergence of the UPR be interpreted as a shift from a 'vertical' supervision of human rights, as performed by independent expert bodies, to a 'horizontal' supervision of human rights, by the States themselves? To what extent is the UPR evidence of such a shift occurring? How significant is it, for instance, that a number of the recommendations addressed to States undergoing the UPR relate to the reservations they have made to the human rights treaties they have ratified, whereas it is precisely because of the failure of the States to monitor effectively the reservations entered by other parties to multilateral treaties that the Human Rights Committee took the view that it could assess the validity of the reservations to the International Covenant on Civil and Political Rights?
5 According to Resolution 60/251 of the General Assembly, the Human Rights Council shall be reviewed within five years of its establishment, and the Council itself is directed to undertake a review of its work in 2011 or 2012. Which benchmarks should such a review rely upon? How should the effectiveness of the Council in fulfilling its functions be evaluated? Could you propose indicators for such an evaluation?

# 11

# Regional Mechanisms of Protection

## INTRODUCTION

This chapter reviews a number of questions raised by the protection of human rights at a regional level. It does not offer a systematic treatment of how the Universal Declaration of Human Rights has been implemented in the regional context; nor does it examine in detail the working methods or case law of regional human rights courts or expert bodies established at regional level. This case law has been presented in chapters 3–7, which examined the content of States' obligations to respect, protect and fulfil human rights without discrimination. In those chapters, the contribution of regional courts or non-judicial bodies has been analysed alongside that of bodies established at the international level, in order to describe the content of the emerging *jus commune* in the field of human rights. As to the overall context, it has been briefly recalled in chapter 1, section 2, which discussed the role of human rights in the Council of Europe, the Organization of American States, and the African Union.

Instead, this chapter aims to review a set of core questions raised at regional level, that remained unaddressed in the previous chapters. It is divided into three sections, corresponding respectively to the Council of Europe, the Organization of American States, and the African Union (formerly Organization of African Unity). The materials presented seek to identify some of the challenges that regional courts have been facing. They address the role of these jurisdictions in the development of the *jus commune* of human rights, as well as the solutions these courts have developed to ensure the effective implementation of their judgments. In addition, the section on the Council of Europe provides a presentation of the role of the European Committee on Social Rights (ECSR), established under the European Social Charter. The ECSR is chosen as an illustration of one expert body established at regional level, operating roughly along the lines of the UN human rights treaty bodies: the discussion addresses the relationship between the function of the Committee in receiving reports from the States parties to the Charter and its function in receiving collective complaints, and the nature of the collective complaints mechanism itself.

The European Court of Human Rights and the Inter-American Court of Human Rights constitute the two most mature and well-developed systems of judicial protection

of human rights at regional level (among the most useful recent textbooks on the European Convention on Human Rights and the contribution of the European Court of Human Rights, see S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006); D. Harris, M. O'Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights*, second edn (Oxford University Press, 2009); and P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, fourth edn (Antwerp: Intersentia, 2006); for important studies on the Inter-American human rights system, see T. Buergenthal and D. Shelton (eds.), *Protecting Human Rights in the Americas: Cases and Materials*, fourth edn (Kehl am Rhein: N. P. Engel, 1995); T. Buergenthal, *La protección de los derechos humanos en las Américas* (Madrid: Instituto Interamericano de Derechos Humanos, 1990); S. Davidson, *The Inter-American Court of Human Rights* (Aldershot: Dartmouth, 1992); S. Davidson, *The Inter-American Human Rights System* (Aldershot: Dartmouth, 1997); D. Harris and S. Livingstone (eds.), *The Inter-American System of Human Rights* (Oxford: Oxford University Press and Clarendon Press, 1998); L. Hennebel, *La Convention américaine des droits de l'homme. Mécanismes de protection et étendue des droits et libertés* (Brussels: Bruylant, 2007); C. Medina Ortega, *The Battle of Human Rights: Gross Systematic Violations and the Inter-American System* (Leiden: Martinus Nijhoff, 1988)). Both the European and Inter-American courts have a long and largely successful record behind them: the European Court of Human Rights delivered its first judgment on the merits in 1961, while the first judgment of the Inter-American Court of Human Rights intervened in 1989. For these two Courts, as we shall see, the questions of effective implementation of their judgments and their ability to function effectively in the context of an exponential increase in the number of applications they receive have become of vital importance.

In contrast, the African Court of Human and Peoples' Rights is still in its infancy: the Protocol to the African Charter on Human and Peoples' Rights on the African Court of Human and Peoples' Rights (Ouagadougou Protocol) was signed in 1998, and entered into force on 25 January 2004; the first judges to sit on the Court were elected in 2006, but at the time of writing, the Court had only delivered one judgment, on 15 December 2009, on a communication filed in August 2008. As to the African Commission on Human and Peoples' Rights, although it was established in 1987 following the entry into force, on 21 October 1986, of the 1981 African Charter on Human and Peoples' Rights (Banjul Charter), its powers are limited under the Charter and its visibility has remained relatively low (for the most significant studies on the development of the African Charter of Human and Peoples' Rights, see E. A. Ankumah, *The African Commission: Practice and Procedures* (The Hague: Martinus Nijhoff, 1996); M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: the System in Practice 1986–2000* (Cambridge University Press, 2002); R. Murray, *Human Rights in Africa: From the OAU to the African Union* (Cambridge University Press, 2004); M. Mubiala, *Le système régional africain de protection des droits de l'homme* (Brussels: Bruylant, 2005); N. S. Rembe, *Africa and Regional Protection of Human Rights: a Study of the African Charter on Human and Peoples' Rights. Its Effectiveness*

*and Impact on the African States* (Rome: Leoni editore, 1985); K. M'Baye, *Les droits de l'homme en Afrique* (Paris: CIJ, Pedone, 1992); O. C. Eze, *Human Rights in Africa: Some Selected Problems* (Lagos: Nigerian Institute of International Affairs, Macmillan Nigeria Publishers, 1984); F. Viljoen, *International Human Rights Law in Africa* (Oxford University Press, 2007); and F. Viljoen, 'The African Regional Human Rights System' in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: a Textbook* (Turku: Åbo Akademi University Institute for Human Rights, 2009, p. 503)).

## 1 THE EUROPEAN SYSTEM OF PROTECTION OF HUMAN RIGHTS

### 1.1 The original system: before Protocol No. 11 restructuring the control machinery of the European Convention on Human Rights

In its original version as adopted on 4 November 1950 within the framework of the newly established Council of Europe (for the context in which the Convention was adopted, see chapter 1, section 2.1.), the European Convention on Human Rights (ECHR) established both the European Commission and the European Court of Human Rights. The Commission's competence was to receive applications submitted either by alleged victims of violations of the Convention or, more rarely, by States, and to examine their admissibility, including whether they were 'manifestly ill-founded', i.e. obviously lacking merit. If it considered the application admissible, the Commission then prepared a report in which it stated its opinion as to whether the Convention had been violated, and it directed the case either to a political body, the Committee of Ministers of the Council of Europe, or to the European Court of Human Rights.

The procedure thus established was revolutionary at the time for two reasons. First, inter-State applications were allowed, making it possible for each State party to the Convention to file an application against another State party, even when the violation alleged does not affect its nationals (as in the classic case of diplomatic protection), and without having to show otherwise that it has been prejudiced by the alleged violation: thus, a form of *actio popularis* was instituted in favour of the States parties to the Convention, leading the European Court on Human Rights to remark that 'the Convention comprises more than mere reciprocal engagements between Contracting States' since it 'creates, over and above a network of mutual, bilateral undertakings, objective obligations which ... benefit from a "collective enforcement"' (Eur. Ct. H.R., *Ireland v. United Kingdom* judgment of 18 January 1978, Series A No. 25, p. 90). Second, for the first time, individuals had access to a remedy before an international procedure, although they were not initially allowed to file a direct application with the Court (that was the sole prerogative of the European Commission, who played a role similar to that of an Advocate General before the Court), and although initially both the possibility for individuals to file applications before the Commission and the jurisdiction of the Court were optional. Under Article 32 ECHR, when the State concerned had not recognized the jurisdiction of the Court, or when, three months after the notification of the report submitted by the Commission on the merits, the case had not been transmitted

to the Court for resolution (both the Commission and the State party concerned could choose to bring the case before the Court), the Committee of Ministers of the Council of Europe (thus a political organ) was allowed to take a decision as to whether or not the Convention had been violated. The considerations that guided the adoption of this compromise in the original text of the ECHR have been summarized as follows:

**Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (1994):**

6. The idea of a European Convention on Human Rights to be implemented by a Court to which individuals would have access can be traced back to the Congress of Europe, convened by the International Committee of Movements for European Unity and held at The Hague from 8 to 10 May 1948. In their 'Message to Europeans' adopted at the final plenary session, the Congress delegates pledged *inter alia*:

'2. We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition;

3. We desire a Court of Justice with adequate sanctions for the implementation of this Charter;'

The Resolution adopted by the Congress on the proposal of its Political Committee should also be noted:

'The Congress –

6. Is convinced that in the interest of human values and human liberty, the [proposed] Assembly should make proposals for the establishment of a Court of Justice with adequate sanctions for the implementation of this Charter [of Human Rights], and to this end any citizen of the associated countries shall have redress before the Court, at any time and with the least possible delay, of any violation of his rights as formulated in the Charter.'

7. The idea of a Human Rights Charter and a Court of Justice was subsequently examined in depth by the European Movement, which on 12 July 1949 submitted the text of a draft European Convention on Human Rights to the Committee of Ministers. This text notably made provision not only for a Court but also for a Human Rights Commission, to which litigants would first have to submit their case. It was foreseen that this body would be empowered to reject without investigation petitions from individuals who had failed to exhaust domestic remedies and that, moreover, its authorisation would be required for an individual to initiate proceedings before the Court.

The proposal for a Human Rights Commission, in addition to a Court, was made to counter the criticism that the latter would be inundated with frivolous litigation and its facilities exploited for political ends. The subsequent debates in the Consultative (now renamed 'Parliamentary') Assembly and the bodies established by the Committee of Ministers to draw up the Convention confirmed that these fears were deeply felt.

8. The creation of a European Commission of Human Rights was in fact not a contentious issue during the drafting of the Convention. On the other hand, there was considerable opposition to the creation of a Court, it being argued that it would not correspond to a real need of the member States. Articles 46 and 48 of the Convention [providing that the jurisdiction of the Court is optional] represented a compromise between this position and that of those States which felt the creation of a Court was essential (the controversy over whether individuals should have the right to address petitions to the Commission was, of course, settled in a similar way).

9. The net result was the tripartite structure, which entered into force on 3 September 1953: the Commission – to consider the admissibility of petitions, to establish the facts, to promote friendly settlements and, if appropriate, to give an opinion as to whether or not the petitions reveal a violation of the Convention; the Court – to give a final and binding judgment on cases referred to it by the Commission or by a Contracting Party concerned; the Committee of Ministers – to give a final and binding decision on cases which cannot be referred to the Court or which, for one reason or another, are not referred to it.

## 1.2 The system reformed: Protocol No. 11 restructuring the control machinery of the European Convention on Human Rights

Significant changes were made to the Convention in recent years. In 1994, with the entry into force of Protocol No. 9, individuals were authorized to refer a case directly to the Court, at least insofar as their application was filed against a State party to the Protocol. On 1 November 1998, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, entered into force, bringing about fundamental changes to the supervisory system. One single and permanent Court was established, taking over the responsibilities previously assumed by the Commission, although one of the functions of the latter – to provide the Court with an independent opinion on the case pending before it, in the manner of an Advocate General – was abandoned. In contrast with the earlier system, but consistent with what had become the general practice among the States parties to the Convention (which, by the time Protocol No. 11 was adopted, had all made a declaration accepting the filing of individual communications and the jurisdiction of the Court), both the jurisdiction of the Court and its competence to receive individual applications became compulsory for all the States parties to the Convention. While the Committee of Ministers preserved its role in supervising compliance with the judgments of the Court – now under Article 46(2) ECHR – it was deprived of the quasi-judicial function it had previously exercised under Article 32 of the original Convention.

### (a) The admissibility phase

Under the current system, then, individual applications are filed directly with the Court. Any victim of the violation alleged may file an application: the victim may be an individual, a non-governmental organization, or a group of individuals, but only the individual(s) or organization directly aggrieved shall have access to the Court. Thus, although in some exceptional cases the family members of the victim may act on his/her behalf, no form of *actio popularis* is admitted (Art. 34 ECHR). In addition, although this occurs comparatively much more rarely, inter-State applications are allowed (Art. 33 ECHR). The admissibility criteria are set out in Article 35 of the Convention:

**European Convention on Human Rights, Article 35 – Admissibility criteria**

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any application submitted under Article 34 that:

- is anonymous; or
- is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

a. the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
b. the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

The condition according to which the local remedies available should be exhausted prior to the filing of an application before an international court corresponds to a general principle of international law (on this rule in international law, see C. F. Amerasinghe, *Local Remedies in International Law* (Cambridge University Press, 1990); A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies. Its Rationale in the International Protection of Human Rights* (Cambridge University Press, 1983)). Whether or not the alleged victim should have used a particulary remedy available before domestic authorities, however, depends on whether such remedy is effective. There exists, thus, a complementarity between the requirement imposed on the State to provide an effective remedy and the rule requiring the exhaustion of local remedies prior to the filing of an application before the Court. This complementarity clearly expresses the principle of subsidiarity of international judicial supervision, which the European Court of Human Rights often refers to. It has been made explicit by the European Court of Human Rights, for instance, in the 2000 judgment of *Kudła* v. *Poland*.

The background to the *Kudła* v. *Poland* case may be described as follows. The ECHR contains both a provision containing a number of guarantees related to the right to a fair trial, that applies to all criminal accusations and disputes relating to civil rights or obligations (Art. 6 ECHR), and a provision guaranteeing access to an effective remedy for any person making an arguable claim that he/she is a victim of a violation of the rights established in the Convention (Art. 13 ECHR) (on the right to an effective remedy, see chapter 8, section 1.1.). In its earlier case law, the European Court of Human Rights considered that, since Article 6 ECHR (fair trial) is more detailed than the right to an effective remedy of Article 13 ECHR, the guarantees afforded by the latter provision

are 'absorbed' by those stipulated in the former, in situations where both provisions are equally applicable – i.e. in criminal procedures or in procedures relating to civil rights and obligations that arguably also may result in violations of the ECHR. The implication, the Court considered, was that in those cases only Article 6 ECHR should apply: any invocation of Article 13 ECHR would be redundant, as it could not offer the individual a higher degree of protection. Revisiting its previous doctrine on the subject, the Court in *Kudła* holds instead that, where the requirement that trials be conducted within a reasonable time (stipulated in Article 6 ECHR as part of broader fair trial guarantees) is allegedly not complied with, the individual should be guaranteed access to an 'effective remedy' under Article 13 ECHR: the 'effective remedy' clause thus complements the protection afforded under Article 6 ECHR, as far as the 'reasonable time' requirement is concerned. The Court explains its decision by the contribution that access to effective domestic remedies can make to alleviating the workload of the Court, in accordance with the principle of subsidiarity underlying the relationship between national authorities and international judicial supervision in the Convention.

**European Court of Human Rights (GC), *Kudła* v. *Poland* (Appl. No. 30210/96) judgment of 26 October 2000, para. 152:**

[T]he place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum.

By virtue of Article 1 (which provides: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'), the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Articles 13 and 35 §1 of the Convention.

The purpose of Article 35 §1, which sets out the rule on exhaustion of domestic remedies, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, as a recent authority, *Selmouni* v. *France* [GC], No. 25803/94, §74, ECHR 1999-V). The rule in Article 35 §1 is based on the assumption, reflected in Article 13 (with which it has a close affinity), that there is an effective domestic remedy available in respect of the alleged breach of an individual's Convention rights (*ibid.*).

In that way, Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux préparatoires* (see the *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, vol. II, pp. 485 and 490, and vol. III, p. 651), is to provide a means whereby individuals can obtain relief at national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.

(b) The merits phase and the supervision of the execution of judgments

In practice, a large percentage of applications filed with the Court (above 90 per cent in a typical year) are rejected at the admissibility stage. In the new system

established in 1998 by Protocol No. 11, the decision finding an application inadmissible may be adopted either by a Chamber of seven judges, or by a committee of three judges, if they are unanimous, and without justification. In addition, since the entry into force on 1 June 2010 of Protocol No. 14 (CETS No. 194), it is possible for a single judge, assisted by rapporteurs who are members of the Court's registry, to declare cases inadmissible, including if 'the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal' (Art. 35, para. 3, b)). If an application is found admissible, a judgment on the merits may be adopted by a Chamber or, if the question of interpretation or application of the Convention is one that is already the subject of a well-established case law of the Court, a committee of three judges, in the revised system introduced by Protocol No. 14. After a judgment on the merits is delivered by a Chamber, a period of three months is open, during which any party may request that the case be referred to a Grand Chamber of seventeen judges; the request for a referral is examined by a panel of five judges, who are directed by the Convention to accept the request 'if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance' (Art. 43(2) ECHR). In practice, few requests for referral are accepted. The judgments delivered by the Court thus become final either (1) if it is adopted by a committee of three judges acting unanimously, or (2) three months after the delivery of the judgment by a Chamber, unless a party has requested a referral to the Grand Chamber, or (3) if the request for a referral is rejected, or (4) if the judgment is delivered by the Grand Chamber.

In cases where the Court arrives at the conclusion that the Convention has been violated, the supervision of the execution of the judgments is left to the Council of Europe Committee of Ministers. Before adopting a resolution which closes the file, the Committee examines whether the State had paid the amount awarded by the Court as a 'just satisfaction' to the victim, or whether the victim has been replaced in the situation he/she would have found him/herself in the absence of a violation of the Convention (*restitutio in integrum*). In addition, it examines whether the State has taken general measures to ensure that new, similar violations of the Convention will not recur in the future.

**Committee of Ministers of the Council of Europe, Supervision of the execution of judgments of the European Court of Human Rights, second annual report, April 2009:**

16. The scope of the execution measures required is defined in each case primarily on the basis of the conclusions of the [European Court of Human Rights – ECtHR] in its judgment and relevant information about the domestic situation. In certain situations, it may be necessary to await further decisions by the ECtHR clarifying outstanding issues (e.g. decisions declaring new,

similar complaints inadmissible as general reforms adopted are found to be effective or decisions concluding that the applicant continues to suffer the violation established or its consequences).

17. As regards the payment of just satisfaction, the execution conditions are usually laid down with considerable detail in the ECtHR's judgments (deadline, recipient, currency, default interest, etc.) ...

18. As regards the nature and scope of other execution measures, whether individual or general, the judgments usually remain silent. These measures have thus in principle, as has been stressed also by the ECtHR on numerous occasions, to be identified by the state itself under the supervision of the [Committee of Ministers of the Council of Europe – CM]. Besides the different considerations enumerated in the preceding paragraph, national authorities may find additional guidance *inter alia* in the rich practice of other states as developed over the years, and in relevant CM recommendations (e.g. Recommendation (2000)2 on the re-examination or reopening [of certain cases at domestic level following judgments of the European Court of Human Rights] or (2004)6 on the improvement of domestic remedies [for this Recommendation, see chapter 8, section 1.1.]).

19. This situation is explained by the principle of subsidiarity, by virtue of which respondent states have freedom of choice as regards the means to be employed in order to meet their obligations under the ECHR. However this freedom goes hand-in-hand with the CM's control so that in the course of its supervision of execution the CM may also, where appropriate, adopt decisions or interim resolutions to express concern, encourage and/or make suggestions with respect to the execution.

20. In certain circumstances, however, it might happen that the ECtHR in its judgment provide itself guidance as to relevant execution measures. The ECtHR has thus recently provided recommendations as to individual or even general measures it considered as appropriate. Furthermore, sometimes the ECtHR directly orders the taking of the relevant measure. The first cases of this kind were decided by the ECtHR in 2004–2005: in both the ECtHR ordered the release of applicants who were being arbitrarily detained [see *Assanidze* v. *Georgia*, judgment of 8 April 2004 and *Ilascu* v. *Moldova and the Russian Federation*, judgment of 13 May 2005. The Court had previously developed some practice in this direction in certain property cases by indicating in the operative provisions that States could choose between restitution and compensation – see e.g. the *Papamichalopoulos and others* v. *Greece* judgment of 31 October 1995 (Art. 50)]. Moreover, in the context of the 'pilot' judgment procedure the ECtHR examines more in detail the causes of certain systemic problems likely to lead to, or having already led to, a massive influx of new applications and provides certain recommendations as to general measures, most importantly as regards the necessity of setting up efficient domestic remedies. The ECtHR has in certain 'pilot' judgments [see, for instance, *Broniowski* v. *Poland* (Appl. No. 31443/96; Grand Chamber judgment of 22 June 2004 – pilot judgment procedure brought to an end on 6 October 2008 (see below in this section)); *Hutten-Czapska* v. *Poland* (Appl. No. 35014/97, Grand Chamber judgment of 19 June 2006 and Grand Chamber friendly settlement of 28 April 2008)] also ordered that such remedies be set up and has 'frozen' its examination of all pending applications while waiting that the remedies start to function.

With the increase over the last decade of the number of applications to the Court, the supervisory role of the Committee of Ministers has become a heavy burden. According to the second annual report of the Committee of Ministers on the supervision of the

execution of judgments of the European Court of Human Rights, in 2008, 1,384 new judgments finding violations of the Convention on Human Rights were brought before the Committee for supervision of their execution. This brought the number of pending cases to 6,614. The compensation awarded to the victims in these new judgments amounted to some €55.5 million.

One particularly delicate issue in recent years has been whether, in order to execute the judgments of the European Court of Human Rights faithfully, States should allow a derogation to the principle of *res judicata*, and agree to reopen a case closed at domestic level. For example, where a person has been sentenced to a term in prison following a trial found by the European Court of Human Rights to have been held under unfair conditions, in violation of Article 6 ECHR, should a new trial be held? Where divorce proceedings have been conducted under rules found by the Court to be discriminatory, should those proceedings be reopened? The Committee of Ministers adopted the following recommendation on this issue:

**Recommendation No. R (2000) 2 of the Committee of Ministers to Member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights (adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies):**

The Committee of Ministers, ... [n]oting that under Article 46 of the Convention on Human Rights and Fundamental Freedoms the Contracting Parties have accepted the obligation to abide by the final judgment of the European Court of Human Rights in any case to which they are parties and that the Committee of Ministers shall supervise its execution;

Bearing in mind that in certain circumstances the above-mentioned obligation may entail the adoption of measures, other than just satisfaction awarded by the Court in accordance with Article 41 of the Convention and/or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (*restitutio in integrum)*;

Noting that it is for the competent authorities of the respondent State to decide what measures are most appropriate to achieve *restitutio in integrum*, taking into account the means available under the national legal system;

Bearing in mind, however, that the practice of the Committee of Ministers in supervising the execution of the Court's judgments shows that in exceptional circumstances the re-examination of a case or a reopening of proceedings has proved the most efficient, if not the only, means of achieving *restitutio in integrum;*

I. Invites, in the light of these considerations the Contracting Parties to ensure that there exist at national level adequate possibilities to achieve, as far as possible, *restitutio in integrum*;

II. Encourages the Contracting Parties, in particular, 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, especially where: (i) the injured party continues to suffer very serious negative

consequences because of the outcome of the domestic decision at issue, which are not adequately remedied by the just satisfaction and cannot be rectified except by re-examination or reopening, and (ii) the judgment of the Court leads to the conclusion that (a) the impugned domestic decision is on the merits contrary to the Convention, or (b) the violation found is based on procedural errors or shortcomings of such gravity that a serious doubt is cast on the outcome of the domestic proceedings complained of.

In order to encourage swift and full compliance with the judgments of the Court, the Committee of Ministers has recommended that the Council of Europe Member States establish a national 'co-ordinator' to ensure appropriate follow-up and co-ordination of all relevant actors at domestic level, including parliaments:

**Recommendation CM/Rec(2008)2 of the Committee of Ministers to Member States on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights (adopted by the Committee of Ministers on 6 February 2008 at the 1,017th meeting of the Ministers' Deputies):**

The Committee of Ministers, ...

b. Reiterating that judgments in which the Court finds a violation impose on the High Contracting Parties an obligation to:
   - pay any sums awarded by the Court by way of just satisfaction;
   - adopt, where appropriate, individual measures to put an end to the violation found by the Court and to redress, as far as possible, its effects;– adopt, where appropriate, the general measures needed to put an end to similar violations or prevent them.

c. Recalling also that, under the Committee of Ministers' supervision, the respondent state remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention to abide by the final judgments of the Court;

d. Convinced that rapid and effective execution of the Court's judgments contributes to enhancing the protection of human rights in member states and to the long-term effectiveness of the European human rights protection system; ...

g. Noting ... that there is a need to reinforce domestic capacity to execute the Court's judgments;

h. Underlining the importance of early information and effective co-ordination of all state actors involved in the execution process and noting also the importance of ensuring within national systems, where necessary at high level, the effectiveness of the domestic execution process; ...

Recommends that member states:

1. designate a co-ordinator – individual or body – of execution of judgments at the national level, with reference contacts in the relevant national authorities involved in the execution process. This co-ordinator should have the necessary powers and authority to:
   - acquire relevant information;
   - liaise with persons or bodies responsible at the national level for deciding on the measures necessary to execute the judgment; and

– if need be, take or initiate relevant measures to accelerate the execution process;

2. ensure, whether through their Permanent Representation or otherwise, the existence of appropriate mechanisms for effective dialogue and transmission of relevant information between the co-ordinator and the Committee of Ministers;
3. take the necessary steps to ensure that all judgments to be executed, as well as all relevant decisions and resolutions of the Committee of Ministers related to those judgments, are duly and rapidly disseminated, where necessary in translation, to relevant actors in the execution process;
4. identify as early as possible the measures which may be required in order to ensure rapid execution;
5. facilitate the adoption of any useful measures to develop effective synergies between relevant actors in the execution process at the national level either generally or in response to a specific judgment, and to identify their respective competences;
6. rapidly prepare, where appropriate, action plans on the measures envisaged to execute judgments, if possible including an indicative timetable;
7. take the necessary steps to ensure that relevant actors in the execution process are sufficiently acquainted with the Court's case law as well as with the relevant Committee of Ministers' recommendations and practice;
8. disseminate the vademecum prepared by the Council of Europe on the execution process to relevant actors and encourage its use, as well as that of the database of the Council of Europe with information on the state of execution in all cases pending before the Committee of Ministers;
9. as appropriate, keep their parliaments informed of the situation concerning execution of judgments and the measures being taken in this regard;
10. where required by a significant persistent problem in the execution process, ensure that all necessary remedial action be taken at high level, political if need be.

(c) Treating large-scale violations: the 'pilot' judgments

The difficulties raised at the level of the execution of judgments, however, are simply one indicator of the much broader problem facing the system of the European Convention on Human Rights, as a result of the increase in the number of applications it receives. This increase is particularly marked since the entry into force of Protocol No. 11 on 1 November 1998: more than 90 per cent of the Court's judgments since it was set up in 1959 have been delivered between 1998 and 2008, although this figure should be put in perspective since there are important differences between the States parties – more than half the judgments delivered by the Court between 1998 and 2008 concerned four of the Council of Europe's forty-seven Member States (Turkey takes the lead (1,857 judgments), followed by Italy (1,789 judgments), France (613 judgments) and Poland (601 judgments)) (*The European Court of Human Rights. Some Facts and Figures, 1998–2008* (Strasbourg: Council of Europe, 2008)). On 31 August 2009, 113,850 applications were pending before the Court; it is estimated that the backlog increases by about 1,000 applications each month. One of the answers to this problem was to develop the

practice of 'pilot judgments', when an individual application appears to raise an issue of general importance, concerning potentially a large number of individuals. This technique was applied for the first time in the 2004 case of *Broniowski* v. *Poland*:

**European Court of Human Rights (GC), *Broniowski* v. *Poland* (Appl. No. 31443/96) judgment of 22 June 2004:**

[The case originates in Poland's failure to implement compensatory measures in respect of persons repatriated from the 'territories beyond the Bug River' in the aftermath of the Second World War who had had to abandon their property. According to the Polish Government, the anticipated total number of people entitled to such measures is nearly 80,000. One of them is the applicant, whose grandmother owned property in what was formerly part of Poland, but became part of Ukraine after Poland's eastern border had been redrawn along the Bug River (other parts of those eastern provinces went to Belarus and to what is now Lithuania). Although Poland had undertaken to compensate those who had been 'repatriated' from the 'territories beyond the Bug River' and had had to abandon their properties, and since 1946 had allowed for compensation in kind, the entry into force of the Local Government Act of 10 May 1990 and the enactment of further laws reduced the pool of State property available to the Bug River claimants – in particular, by excluding the possibility of enforcing their claims against State agricultural and military property. As a result, the State Treasury has been unable to fulfil its obligation to meet the compensation claims: the land available was insufficient to meet the demand. In addition, Bug River claimants have frequently been either excluded from auctions of State property or have had their participation subjected to various conditions.

On 19 December 2002 the Polish Constitutional Court declared the provisions that excluded the possibility of enforcing the Bug River claims against State agricultural and military property unconstitutional. However, following this judgment, the State agencies administering State agricultural and military property suspended all auctions, considering that further legislation was required to deal with the implementation of the judgment. The Law of 12 December 2003 was subsequently adopted (it entered into force on 30 January 2004). Under this new legislation, the Polish State's obligations towards the applicant, and all other Bug River claimants who had ever obtained any compensatory property under the previous legislation, was deemed to have been discharged. Claimants who had never received any such compensation were awarded 15 per cent of their original entitlement, subject to a ceiling of 50,000 Polish zlotys.

In its judgment, the Court expressly draws attention to the existence of a systemic problem underlying the violation of the European Convention of Human Rights in the applicant's case. As this problem is seen as likely to generate large numbers of similar cases, the Court calls upon the Polish authorities to take the necessary measures to secure the property right in question in respect of the remaining Bug River claimants. Thus, while holding, unanimously, that there had been a violation of Article 1 of Protocol No. 1 (protection of property) to the Convention, the Court also notes that the violation originates in a systemic problem connected with the malfunctioning of Polish legislation and practice caused by the failure to set up an effective mechanism to implement the 'right to credit' of Bug River claimants. It emphasizes that Poland should take appropriate legal measures and administrative practices, in order to secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu.]

189. It is inherent in the Court's findings that the violation of the applicant's right guaranteed by Article 1 of Protocol No. 1 originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons. The unjustified hindrance on the applicant's 'peaceful enjoyment of his possessions' was neither prompted by an isolated incident nor attributable to the particular turn of events in his case, but was rather the consequence of administrative and regulatory conduct on the part of the authorities towards an identifiable class of citizens, namely the Bug River claimants.

The existence and the systemic nature of that problem have already been recognised by the Polish judicial authorities ... Thus, in its judgment of 19 December 2002 the Constitutional Court described the Bug River legislative scheme as 'caus[ing] an inadmissible systemic dysfunction' ... Endorsing that assessment, the Court concludes that the facts of the case disclose the existence, within the Polish legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions. It also finds that the deficiencies in national law and practice identified in the applicant's individual case may give rise to numerous subsequent well-founded applications.

190. As part of a package of measures to guarantee the effectiveness of the Convention machinery, the Committee of Ministers of the Council of Europe adopted on 12 May 2004 a Resolution (Res(2004)3) on judgments revealing an underlying systemic problem, in which, after emphasising the interest in helping the State concerned to identify the underlying problems and the necessary execution measures (seventh paragraph of the preamble), it invited the Court 'to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments' (paragraph I of the resolution). That resolution has to be seen in the context of the growth in the Court's caseload, particularly as a result of series of cases deriving from the same structural or systemic cause.

191. In the same context, the Court would draw attention to the Committee of Ministers' Recommendation of 12 May 2004 (Rec(2004)6) on the improvement of domestic remedies, in which it is emphasised that, in addition to the obligation under Article 13 of the Convention to provide an individual who has an arguable claim with an effective remedy before a national authority, States have a general obligation to solve the problems underlying the violations found [see below, immediately following this judgment]. Mindful that the improvement of remedies at the national level, particularly in respect of repetitive cases, should also contribute to reducing the workload of the Court, the Committee of Ministers recommended that the Contracting States, following Court judgments which point to structural or general deficiencies in national law or practice, review and, 'where necessary, set up effective remedies, in order to avoid repetitive cases being brought before the Court'.

192. Before examining the applicant's individual claims for just satisfaction under Article 41 of the Convention, in view of the circumstances of the instant case and having regard also to the evolution of its caseload, the Court wishes to consider what consequences may be drawn for the respondent State from Article 46 of the Convention. It reiterates that by virtue of Article 46 the High Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, execution being supervised by the Committee of Ministers. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the

respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta* v. *Italy* [GC], Nos. 39221/98 and 41963/98, §249, ECHR 2000–VIII).

193. The Court has already noted that the violation which it has found in the present case has as its cause a situation concerning large numbers of people. The failure to implement in a manner compatible with Article 1 of Protocol No. 1 the chosen mechanism for settling the Bug River claims has affected nearly 80,000 people ... There are moreover already 167 applications pending before the Court brought by Bug River claimants. This is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery.

Although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State's obligations under Article 46 of the Convention, in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause. Such measures should therefore include a scheme which offers to those affected redress for the Convention violation identified in the instant judgment in relation to the present applicant. In this context the Court's concern is to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection. Once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate (see *Bottazzi* v. *Italy* [GC], No. 34884/97, §22, ECHR 1999–V, *Di Mauro* v. *Italy* [GC], No. 34256/96, §23, ECHR 1999–V, and the Committee of Ministers' Interim Resolution ResDH(2000)135 of 25 October 2000 (Excessive length of judicial proceedings in Italy: general measures); see also *Brusco* v. *Italy* (dec.), No. 69789/01, ECHR 2001–IX, and *Giacometti and others* v. *Italy* (dec.), No. 34939/97, ECHR 2001–XII), the necessary remedial measures in accordance with the subsidiary character of the Convention, so that the Court does not have to repeat its finding in a lengthy series of comparable cases.

194. With a view to assisting the respondent State in fulfilling its obligations under Article 46, the Court has sought to indicate the type of measure that might be taken by the Polish State in order to put an end to the systemic situation identified in the present case. The Court is not in a position to assess whether the December 2003 Act ... can be treated as an adequate measure in this connection since no practice of its implementation has been established as yet. In any event, this Act does not cover persons who – like Mr Broniowski – had already received partial compensation, irrespective of the amount of such compensation. Thus, it is clear that for this group of Bug River claimants the Act cannot be regarded as a measure capable of putting an end to the systemic situation identified in the present judgment as adversely affecting them.

Nevertheless, as regards general measures to be taken, the Court considers that the respondent State must, primarily, either remove any hindrance to the implementation of the right of the numerous persons affected by the situation found, in respect of the applicant, to have been in breach of the Convention, or provide equivalent redress in lieu. As to the former option, the respondent State should, therefore, through appropriate legal and administrative measures, secure the effective and expeditious realisation of the entitlement in question in respect of the remaining Bug River claimants, in accordance with the principles for the protection of property rights laid down in Article 1 of Protocol No. 1, having particular regard to the principles relating to compensation ...

**Committee of Ministers of the Council of Europe, Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies (adopted by the Committee of Ministers on 12 May 2004, at its 114th session) (Appendix) [see also excerpts of this Recommendation in chapter 8, section 1.1.]:**

**Remedies following a 'pilot' judgment**

13. When a judgment which points to structural or general deficiencies in national law or practice ('pilot case') has been delivered and a large number of applications to the Court concerning the same problem ('repetitive cases') are pending or likely to be lodged, the respondent state should ensure that potential applicants have, where appropriate, an effective remedy allowing them to apply to a competent national authority, which may also apply to current applicants. Such a rapid and effective remedy would enable them to obtain redress at national level, in line with the principle of subsidiarity of the Convention system.

14. The introduction of such a domestic remedy could also significantly reduce the Court's workload. While prompt execution of the pilot judgment remains essential for solving the structural problem and thus for preventing future applications on the same matter, there may exist a category of people who have already been affected by this problem prior to its resolution. The existence of a remedy aimed at providing redress at national level for this category of people might allow the Court to invite them to have recourse to the new remedy and, if appropriate, declare their applications inadmissible.

15. Several options with this objective are possible, depending, among other things, on the nature of the structural problem in question and on whether the person affected by this problem has applied to the Court or not.

16. In particular, further to a pilot judgment in which a specific structural problem has been found, one alternative might be to adopt an ad hoc approach, whereby the state concerned would assess the appropriateness of introducing a specific remedy or widening an existing remedy by legislation or by judicial interpretation.

17. Within the framework of this case-by-case examination, states might envisage, if this is deemed advisable, the possibility of reopening proceedings similar to those of a pilot case which has established a violation of the Convention, with a view to saving the Court from dealing with these cases and where appropriate to providing speedier redress for the person concerned. The criteria laid out in Recommendation Rec(2000)2 of the Committee of Ministers might serve as a source of inspiration in this regard.

18. When specific remedies are set up following a pilot case, governments should speedily inform the Court so that it can take them into account in its treatment of subsequent repetitive cases.

19. However, it would not be necessary or appropriate to create new remedies, or give existing remedies a certain retroactive effect, following every case in which a Court judgment has identified a structural problem. In certain circumstances, it may be preferable to leave the cases to the examination of the Court, particularly to avoid compelling the applicant to bear the further burden of having once again to exhaust domestic remedies, which, moreover, would not be in place until the adoption of legislative changes.

Another illustration of the 'pilot judgment' procedure involves the failure to enforce the judgments of domestic courts in Russia. This was the issue at stake in *Burdov* v. *Russia (No. 2)*. The judgment states in its operative part:

**European Court of Human Rights, *Burdov* v. *Russia (No. 2)* (Appl. No. 33509/04), judgment of 15 January 2009:**

6. [The Court] *Holds* that the respondent State must set up ... an effective domestic remedy or combination of such remedies which secures adequate and sufficient redress for non-enforcement or delayed enforcement of domestic judgments in line with the Convention principles as established in the Court's case law;

7. *Holds* that the respondent State must grant such redress, within one year from the date on which the judgment becomes final, to all victims of non-payment or unreasonably delayed payment by State authorities of a judgment debt in their favour who lodged their applications with the Court before the delivery of the present judgment and whose applications were communicated to the Government ...;

8. *Holds* that pending the adoption of the above measures, the Court will adjourn, for one year from the date on which the judgment becomes final, the proceedings in all cases concerning solely the non-enforcement and/or delayed enforcement of domestic judgments ordering monetary payments by the State authorities.

(d) Co-operation in the execution of judgments

The implementation of the judgments of the Court would be greatly encouraged if the States parties were provided positive incentives to move towards implementing the reforms the findings of violation seem to require. An encouraging development in this regard is described in the following terms in the second annual report of the Committee of Ministers on the supervision of the execution of judgments of the Court:

**Committee of Ministers of the Council of Europe, Supervision of the execution of judgments of the European Court of Human Rights, second annual report, April 2009:**

3. The 2008 tendency has been to increase the importance attached to co-operation activities. Such activities, involving permanent representations and national authorities on the one side

and the Secretariat of the Council of Europe, in particular the Department for the execution of the judgments of the ECtHR, on the other have thus increased considerably. The aim is to catalyse the execution process so that fewer problems, requiring in depth CM [Committee of Ministers of the Council of Europe] attention arise. In addition, in case of problems, the improved preparation of cases which results from these co-operation activities facilitates the debates in the Committee and the adoption of adequate responses.

4. This new approach notably includes increased efforts to propose to states, wherever needed, different forms of assistance in defining and/or implementing the necessary execution measures, notably taking into account interesting practices of other states. Whereas such activities were previously only undertaken on an infrequent ad hoc basis, such activities have now become a more regular feature of the supervision of execution. Activities may be limited to the respondent state, but may also encompass groups of states with similar problems. The CM has allowed a special budget for this purpose starting in 2007, clearly signalling its increased importance: the 2007 expenses were just over 52000 euros, the 2008 totalled almost 66000. This increase is, of course, reflected in the number of activities, which also increased by over 20 per cent from 2007 to 2008. The 2009 budget totals 90000 euros. Activities include, in particular, high level discussions with competent authorities, expert opinions on legislation and training sessions either in the country concerned or in Strasbourg.

5. In addition, a most important development is the new Human Rights Trust Fund set up in 2008 whose mission, inter alia, is to assist in ensuring full and timely execution of judgments of the ECtHR. The Fund, a Norwegian initiative, has approved its first projects. The Assembly of the Fund's Contributors has recently allocated almost 785000 euros to the financing of execution-related activities in certain key areas: the non-execution of domestic court judgments in six countries and the responses to violations of the ECHR by security forces in Chechnyan Republic.

**Box 11.1.** **The monitoring of social rights under the European Social Charter**

*The original European Social Charter.* When it was initially adopted in 1961 (C.E.T.S. No. 35; 529 U.N.T.S. 89; entered into force on 26 February 1965), the European Social Charter (ESC) was intended to be the counterpart in the field of economic and social rights to the European Convention on Human Rights, the major achievement of the Council of Europe in the field of human rights. Yet, the ESC has been largely overshadowed by the Convention, and largely ignored, even within specialized circles, until the mid 1990s. The conclusions adopted by the Committee of Independent Experts tasked with supervising compliance with the Charter were relatively obscure and hardly publicized. The Committee of Independent Experts also remained largely subordinated to the Governmental Committee of the Social Charter and, ultimately, to the Committee of Ministers of the Council of Europe, resulting in an ambiguous mechanism of control, neither fully judicial nor purely political. The system provided neither for individual nor for collective complaints, relying solely instead on the reports the States parties were to submit on their implementation of the Charter. The Charter also presented certain characteristics which seemed definitively to set it apart from other human rights instruments implementing the Universal Declaration of Human Rights: it had a scope of application *ratione personae* limited

to the nationals of the States parties; it adopted an à la carte approach, allowing each State, within certain limits, to select the provisions of the Charter which it will accept to be bound by, upon acceding to the Charter; and certain of its guarantees were considered to be satisfied if the great majority of the intended beneficiaries were protected, even though some might not be.

*The 'revitalization' of the European Social Charter.* Much of this changed in the 1990s, following the 'revitalization' of the Charter through the formation of an ad hoc committee (CHARTE-REL) (see particularly D. Harris, 'A Fresh Impetus for the European Social Charter', *International and Comparative Law Quarterly*, 41 (1992), 659; and D. Harris and J. Darcy, *The European Social Charter*, second edn (New York: Transnational Publishers, 2001)). The CHARTE-REL Committee first prepared a Protocol Amending the European Social Charter, which was opened for signature in Turin on 21 October 1991 (Protocol amending the European Social Charter (C.E.T.S., No. 142); see M. Mohr, 'The Turin Protocol of 22 October 1991: a Major Contribution to Revitalizing the European Social Charter', *European Journal of International Law*, 3 (1992), 362). Although the Turin Protocol has never entered into force (since it did not secure all the ratifications required), the clarifications it intended to bring to the relations between the Committee of Independent Experts and the Governmental Committee – reserving to the former, in effect, the exclusive competence to interpret and apply the Charter – have in fact been implemented in practice, to the extent that this did not necessarily require an amendment of the Charter, but rather an understanding, by each of these bodies, of its role in the supervisory system of the Charter. Other changes to the supervisory system proposed under the Turin Protocol, including the increase in the number of members of the Committee of Independent Experts, the abolition of the role of the Parliamentary Assembly of the Council of Europe in the supervision of the Charter, the changes in the Committee of Ministers' voting rules for recommendations addressed to the States parties, or the improved role of social partners and non-governmental organizations in the supervisory system, were also implemented in practice.

In 1995, also as part of the 'revitalization' process, an Additional Protocol to the European Social Charter Providing for a System of Collective Complaints was adopted (C.E.T.S. No. 158, opened for signature in Strasbourg on 9 November 1995; see M. Jaeger, 'The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints', *Leiden Journal of International Law*, 10 (1997), 69, and for an evaluation of the first years of functioning, see R. Churchill and U. Khaliq, 'The Collective Complaints System of the European Social Charter: an Effective Mechanism for Ensuring Compliance with Economic and Social Rights?', *European Journal of International Law*, 15 (2004), 417). This instrument allows non-governmental organizations and organizations of employers and of workers to seek a declaration that certain laws and policies of the States parties are not compatible with their commitments under the Charter, without having to exhaust any local remedies which may be available to those aggrieved by such measures. Despite its many innovative features, the Protocol gathered the five ratifications it needed to enter into force on 1 July 1998; on 1 September 2009 it had attracted twelve ratifications.

Finally, in 1996, agreement was reached on a Revised European Social Charter (C.E.T.S. No. 163, opened for signature in Strasbourg on 3 May 1996; entered into force on 1 July 1999). The Revised Charter does not bring changes to the control mechanism of the original Charter,

but it enriches the list of the rights protected, and includes rights such as the right to protection against poverty and social exclusion (Art. 30) and the right to housing (Art. 31), clearly placing the Revised European Social Charter at the forefront of instruments protecting economic and social rights in international law. On 1 September 2009, twenty-eight Member States of the Council of Europe had ratified the Revised European Social Charter.

*The reporting procedure*. The reporting under the European Social Charter relies mainly on the European Committee of Social Rights (ECSR), which the Charter refers to as the Committee of Independent Experts. The Committee now comprises fifteen members. These are 'experts of the highest integrity and of recognised competence in national and international social questions' (Art. 25(2) of the 1961 Charter, as amended by the Turin Protocol ) elected by the Committee of Ministers of the Council of Europe. From 2007, States are to submit one annual report on 31 October of each year, covering in turn employment, training and equal opportunities (group 1 of the provisions of the Charter: Arts. 1, 9, 10, 15, 18, 20, 24 and 25); health, social security and social protection (group 2: Arts. 3, 11, 12, 13, 14, 23 and 30); labour rights (group 3: Arts. 2, 4, 5, 6, 21, 22, 26, 28 and 29); and children, families, migrants (group 4: Arts. 7, 8, 16, 17, 19, 27 and 31). This ensures that each provision of the Charter will be reported on once every four years.

The ECSR adopts conclusions on the reports submitted by States parties to the Charter on the implementation of the provisions they have accepted, often also relying on sources other than those of the State reports and the comments made on those reports by organizations of workers and employers, including in particular information from the International Labour Organization. The conclusions of the ECSR are to provide an assessment 'from a legal standpoint [of] the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned' (Art. 24(2) of the 1961 Charter, as revised by the Turin Protocol). These conclusions in turn are submitted to the Governmental Committee. This body is composed of representatives of each of the States parties, although representatives of international organizations of employers and workers (presently the European Trade Union Confederation (ETUC), the International Organization of Employers (IOE) and the Union of the Confederations of Industry and Employers of Europe (UNICE)) attend their meetings in a consultative capacity and take an active part in the discussions. The role of the Governmental Committee is, not to overrule the assessment of the ECSR, but to 'select, giving reasons for its choice, on the basis of social, economic and other policy considerations, the situations which should, in its view, be the subject of recommendations to each Contracting Party concerned' by the Committee of Ministers (Art. 27(3) of the 1961 Charter, as revised by the Turin Protocol). Neither the ECSR nor the Governmental Committee are full-time bodies: the ECSR meets eight to ten times a year for one-week sessions, and the Governmental Committee at even less regular intervals. Finally, the Committee of Ministers of the Council of Europe receives the report of the Governmental Committee. On that basis, it votes, by a two-thirds majority of the votes cast – the vote being reserved to the States parties to the Charter – 'a resolution covering the entire supervision cycle and containing individual recommendations to the Contracting Parties concerned' (Art. 28(1) of the 1961 Charter, as revised by the Turin Protocol). Recommendations addressed to individual States for failure to comply with the

Charter remain very exceptional in practice: only three such recommendations were adopted between 2002 and 2008 (concerning Turkey, the United Kingdom, and Ireland).

*The Collective Complaints Protocol*. The 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (CCP) provides for the possibility for social partners and non-governmental organizations to file complaints alleging the unsatisfactory application of the Charter. According to Article 1 CCP, the organizations which may use this mechanism are: (a) international organizations of employers and trade unions (the ETUC, the UNICE and the IOE); (b) other international non-governmental organizations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee, comprising at present sixty-seven organizations; and (c) 'representative' national organizations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint, such 'representativeness' being determined by the ECSR, 'in the absence of any criteria on a national level, [on the basis of] factors such as the number of members and the organisation's actual role in national negotiations' (Explanatory Report to the CCP, para. 23). In addition, States parties to the CCP may declare that they recognize the right of any other representative national non-governmental organization within their jurisdiction which has particular competence in the matters governed by the Charter, to lodge complaints against them in the area in which they have such competence (Art. 2 CCP).

Remarkably, and in contrast to most similar procedures for the settlement of disputes between private parties and States, the CCP does not require that the local remedies available to the complainant organization be exhausted before a collective complaint is filed with the ECSR. The explanation is that the collective complaints procedure – which is modelled on the procedure established within the International Labour Organization (ILO) before the Freedom of Association Committee – is not meant to address specific (or individual) instances of violation of the European Social Charter. Instead, 'complaints may only raise questions concerning non-compliance of a state's law or practice with one of the provisions of the Charter. Individual situations may not be submitted' (Explanatory Report to the CCP, para. 31): it is to this feature, and not to the nature of the organizations authorized to file a complaint, that the adjective 'collective' refers. For the same reason, a complaint may be declared admissible 'even if a similar case has already been submitted to another national or international body'; and 'the fact that the substance of a complaint has been examined as part of the "normal" government reports procedure does not in itself constitute an impediment to the complaint's admissibility' (*ibid.*). This has been confirmed in the admissibility decision adopted on the first collective complaint to have been filed under the CCP, where the ECSR noted:

**European Committee on Social Rights, *International Commission of Jurists* v. *Portugal*, Complaint No. 1/1998, decision on the admissibility of 10 March 1999, para. 10:**

The object of [the collective complaints] procedure, which is different in nature from the procedure of examining national reports, is to allow the Committee to make a legal assessment of the situation of a state in the light of the information supplied by the complaint and the adversarial procedure to which it gives rise. Neither the fact that the Committee has already examined this

situation in the framework of the reporting system, nor the fact that it will examine it again during subsequent supervision cycles do not [*sic*] in themselves imply the inadmissibility of a collective complaint concerning the same provision of the Charter and the same Contracting Party.

Following the decision on admissibility, the ECSR examines the evidence and arguments presented by the complainant organization and the defending State, taking also into account any observations submitted by other States parties to the Protocol or by the ETUC, the UNICE or the IOE. The Committee then adopts a report containing its conclusions as to whether or not the State concerned has complied with the Charter. This report is transmitted to the Committee of Ministers and made public either when the Committee of Ministers adopts a resolution on the basis of the report, or no more than four months following the transmission of the report. The resolution of the Committee of Ministers based on the report drawn up by the ECSR is adopted by a majority of the States parties to the Charter voting. While the Committee of Ministers must act on the basis of the determinations of the ECSR concerning the merits of the complaint, the resolution 'may be based on social and economic policy considerations' (Explanatory Report, para. 46). In addition, Article 9(1) of the CCP provides that if the ECSR finds that the Charter has not been complied with, 'the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned'. In fact, and despite this clear wording, only once did the Committee of Ministers adopt an individual recommendation following a finding of non-compliance with the Charter based on a collective complaint. The compliance rate with the decisions adopted by the ECSR is nevertheless quite high, in large part thanks to the complementarity between the collective complaints procedure and the periodical State-reporting mechanism described above: the States whose legislation or policies are found to have violated to Charter are to provide information on the measures taken to comply with the recommendation of the Committee of Ministers in their next periodical report submitted under Article 21 of the Charter.

The decision adopted on the merits in the case of *International Commission of Jurists* v. *Portugal* sheds some light on the distinct approach adopted by the ECSR upon receiving collective complaints. This approach contrasts with its more cautious attitude in the context of the examination of State reports, when efforts over long periods of time seem to be required from States in order to implement fully the requirements of the Charter (see, however, the approach followed in case of *Autism-Europe* v. *France*, Collective Complaint No. 13/2002, presented in chapter 7, section 3.3., b)). Article 7 para. 1 of the European Social Charter provides that, 'with a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake: 1. to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education'. The International Commission of Jurists (ICJ) alleged in its complaint that Portugal was in violation of this obligation, since despite the prohibition of child labour in Portuguese legislation, 'a large number of children under the age of 15 years continue to work illegally in many economic sectors, especially in the north of the country'. Portugal on the other hand questioned ICJ's interpretation of Article 7 para. 1 of the Charter, and affirmed in particular that 'although some instances of child labour still exist within the state, it would be unfair to conclude that the situation in Portugal fails

to comply with Article 7 para. 1 in the light of the measures implemented to eradicate this problem'. The ECSR took the view that well-intended efforts were not enough, however. It suggested that, at least in the context of collective complaints, it would consider the obligations imposed under the Charter as obligations of result, and not of means:

**European Committee of Social Rights, *International Commission of Jurists* v. *Portugal*, Complaint No. 1/1998, decision on the merits, 9 September 1999:**

33. [The] Committee notes first that, according to the information provided by the Government and mentioned by the Committee in Conclusions XIII-5, in Portugal only young people who are already aged fifteen (as of 1 January 1997) and who have completed compulsory schooling of nine years may be employed in light work. Accordingly, any work, including light work, performed by a child under the age of fifteen is illegal. The statutory measures adopted in Portugal to implement Article 7 para. 1 are rigorous, which the Committee can only welcome.

34. However, the Committee observes from the evidence contained in the file that in Portugal, children under the age of fifteen actually perform work. It notes that the Government does not dispute this. In order to seek to establish the exact dimensions of this problem and its characteristics, it may take account of all information submitted by the parties, whatever the period it relates to. In the present case, it considers it sufficient to rely on the results of the 1998 survey which provides the most recent evidence and the validity of which is not disputed by the International Commission of Jurists, even if its interpretation of the results differs from that given by the Government.

35. It emerges from this survey that in September 1998 several thousand children under the age of fifteen years performed work in breach of the requirements of Article 7 para. 1 of the Charter and Portuguese law. The Committee considers in particular that the 25,000 children who, out of an estimated total of 27,500, performed unpaid work as part of helping out the family must be taken into account under Article 7 para. 1.

36. The Committee notes further that, according to the survey, a not insignificant number of children under the age of fifteen years who declared that they performed an economic activity work in the agricultural (66%), manufacturing (7.1%) and construction (2.7%) sectors. These sectors may, by their very natures, give rise to certain types of work which may have negative consequences on the children's health as well as on their development.

37. The Committee observes lastly that, taking all sectors together, the duration of work declared exceeds that which may be considered compatible with children's health or schooling: 31.6% of the children concerned worked on average for more than 4 hours per day across all sectors. This percentage is particularly high in the construction sector and the manufacturing sector where, respectively, 66.6% and 42% of the children concerned worked on average for more than four hours per day. The Committee notes that among the children aged between 6 and 14 years who performed paid work, just 68% attended school.

38. With particular regard to child labour as part of helping the family out, which occurs mainly in agriculture and the restaurant sector, according to the Government, the Committee has no reason to presume that by its nature or the conditions in which it is performed (duration, working hours) it can in all cases be considered light work within the meaning of Article 7 para. 1.

39. The Committee then considers whether the measures taken by the Government rectify the situation criticised.

40. It acknowledges that the Government, especially in recent years, has taken many legal and practical measures to combat child labour, tackling its many diverse and complex causes. These measures have brought about a progressive reduction in the number of children working illegally, an improvement which is not in dispute. However, it is clear that the problem has not been resolved.

41. The Committee acknowledges that many measures have been taken by the Government to increase the efficiency of the Labour Inspectorate. It observes that in 1997 labour inspectors carried out 1,462 visits in enterprises and found 167 children under the age of 16 years working illegally there. In 1998, they carried out 2,475 visits in enterprises and found 191 cases of children under the age of 16 working illegally. The Committee considers that, in the light of the results of the 1998 survey and the fact that the existing legislation and rules cover family businesses, these figures are modest.

42. As regards the allegation of the ICJ that the Labour Inspectorate is corrupt, which is vigorously disputed by the Government, it is not supported by evidence.

43. Finally, as the Government recognises, efforts must be maintained to increase the effectiveness of supervision of children's work within the family and in private dwellings. The Committee is aware of the difficulty of this task, which involves the Labour Inspectorate or the educational and social services as appropriate ...

45. The Committee concludes that the situation in Portugal is not in conformity with Article 7 para. 1.

**Dissenting opinion of Mr Alfredo Bruto da Costa:**

By adopting a conclusion focused on the 'situation in Portugal', the Committee did not respond to what is demanded from it in Article 8 of the Additional Protocol. The article refers to a conclusion 'as to whether or not the Contracting Party concerned has ensured the satisfactory application of the provision', which relates more to the performance of the Contracting Party than to the actual situation. Furthermore, the term 'satisfactory' admits a certain flexibility that the assessment of the compliance in terms of 'yes or no' does not.

The Committee adopts a static and narrow concept of 'legality', ignoring the natural and unavoidable viscosity of social changes, and the need of taking account of the dynamic aspect of social problems. Hence the fact that the progress achieved in the area (child work) in Portugal is mentioned but is not properly evaluated by the Committee.

Indeed, of all information on the quantitative dimension of the problem mentioned in the 'various documents' provided by the ICJ, the Committee only quotes the number of 200 000 working children in 1992. On the other hand, it refers to the number of 27 500 working children that, according to a survey undertaken by the Portuguese Government, existed in 1998. The Committee did not take sufficient account of the dramatic fall from 200 000 to 27 500 working children (a decrease of around 86%) over a period of 6 years in terms of assessing whether or not the Contracting Party has ensured a 'satisfactory application of the provision'. Rather, the conclusion seems to go no further than observing that 'the problem has not been solved' and, therefore, that the situation is not in conformity with the article concerned.

## 2 THE INTER-AMERICAN SYSTEM OF PROTECTION OF HUMAN RIGHTS

### 2.1 The powers of the Inter-American Commission on Human Rights

The Inter-American system for the protection of human rights was first institutionalized with the establishment of the Inter-American Commission on Human Rights (IACHR) in 1959, by Resolution VIII adopted at the Fifth Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States (for the broader context in which human rights were integrated within the work of the OAS, see chapter 1, section 2.2.). The Commission was created as a body of seven independent members, tasked with the furtherance of respect for human rights in the OAS Member States. The Statute of the IACHR, which was adopted the following year (OEA/Ser. L.5/VI.4, 1 December 1960), provided that the IACHR would make recommendations to the Governments of the OAS Member States for the adoption of appropriate measures to further observance of human rights, and that it should receive information from the Member States in order to allow it to exercise this function. The IACHR was conceived as an advisory body to the OAS, whose main role should consist in the preparation of reports and studies for the promotion of human rights. However, despite a relatively fragile basis in its original Statute, the IACHR soon developed into an enquiry mechanism, based on the reports submitted to the Commission by the Member States and on the petitions it received. At the time, the Commission could only base itself on the American Declaration of the Rights and Duties of Man, adopted at Bogota in 1948 alongside the Charter of the Organization of American States. Yet, the Commission soon added references to the other international human rights treaties to which the OAS Member States were parties. Reports on the situation of human rights in specific countries were particularly frequent during the 1970s and 1980s, confronting the OAS political organs with human rights violations which, the Commission hoped, they would react to – which in fact they seldom did.

The powers of the Commission were significantly enhanced in 1965 when it received the competence to examine individual communications, and to prepare on that basis a report containing its opinion as to whether or not the State concerned had violated its human rights obligations. This power remains of significance today, since it allows the Commission to adopt opinions on alleged violations committed by OAS Member States that (such as the United States or Canada) are not parties to the American Convention on Human Rights. The enlargement of the powers of the Commission significantly raised the stakes of the debate about whether or not the Declaration should be treated as having a binding status. The Inter-American Court of Human Rights addressed the issue at the request of the Government of Colombia which asked whether the Court could render advisory opinions regarding the interpretation of the American Declaration of the Rights and Duties of Man. Article 64(1) of the 1969 American Convention on Human Rights provides that the Court may be consulted 'regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states'. In its request for an Advisory Opinion, Colombia submitted that

it 'understands, of course, that the Declaration is not a treaty. But this conclusion does not automatically answer the question. It is perfectly reasonable to assume that the interpretation of the human rights provisions contained in the Charter of the OAS, as revised by the Protocol of Buenos Aires, involves, in principle, an analysis of the rights and duties of man proclaimed by the Declaration, and thus requires the determination of the normative status of the Declaration within the legal framework of the inter-American system for the protection of human rights.' This position was opposed, in particular, by the United States. The Court answered in convoluted terms:

**Inter-American Court of Human Rights, 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 Opinion OC-10/89, 14 July 1989, Series A, No. 10 (1989):**

34. [It] must be recalled that the American Declaration was adopted by the Ninth International Conference of American States (Bogotá, 1948) through a resolution adopted by the Conference itself. It was neither conceived nor drafted as a treaty. Resolution XL of the Inter-American Conference on the Problems of War and Peace (Chapultepec, 1945) expressed the belief that in order to achieve the international protection of human rights, the latter should be listed and defined 'in a Declaration adopted as a Convention by the States'. In the subsequent phase of preparation of the draft Declaration by the Inter-American Juridical Committee and the Ninth Conference, this initial approach was abandoned and the Declaration was adopted as a declaration, without provision for any procedure by which it might become a treaty (Novena Conferencia Internacional Americana, 1948, Actas y Documentos. Bogotá: Ministerio de Relaciones Exteriores de Colombia, 1953, vol. I, pp. 235–236). Despite profound differences, in the Sixth Committee of the Conference the position prevailed that the text to be approved should be a declaration and not a treaty (see the report of the Rapporteur of the Sixth Committee, Novena Conferencia Internacional Americana, 1948, Actas y Documentos. Bogotá: Ministerio de Relaciones Exteriores de Colombia, 1953, vol. V, p. 512).

In order to obtain a consensus, the Declaration was conceived as 'the initial system of protection considered by the American states as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable (American Declaration, Fourth Considerandum)'.

This same principle was confirmed on September 26, 1949, by the Inter-American Committee of Jurisconsults, when it said: 'It is evident that the Declaration of Bogotá does not create a contractual juridical obligation, but it is also clear that it demonstrates a well-defined orientation toward the international protection of the fundamental rights of the human person (C.J.I., Recomendaciones e informes, 1949–1953 (1955), p. 107. See also US Department of State, Report of the Delegation of the United States to the Ninth International Conference of American States, Bogotá, Colombia, March 30–May 2, 1948, at 35–36 (Publ. No. 3263, 1948)).'

35. The mere fact that the Declaration is not a treaty does not necessarily compel the conclusion that the Court lacks the power to render an advisory opinion containing an interpretation of the American Declaration.

36. In fact, the American Convention refers to the Declaration in paragraph three of its Preamble which reads as follows: 'Considering that these principles have been set forth in the Charter of the Organization of the American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.'

And in Article 29(d) which indicates [that]: 'No provision of this convention shall be interpreted as: d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.'

From the foregoing, it follows that, in interpreting the Convention in the exercise of its advisory jurisdiction, the Court may have to interpret the Declaration.

37. The American Declaration has its basis in the idea that 'the international protection of the rights of man should be the principal guide of an evolving American law' (Third Considerandum). This American law has evolved from 1948 to the present; international protective measures, subsidiary and complementary to national ones, have been shaped by new instruments. As the International Court of Justice said: 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation' *(Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31). That is why the Court finds it necessary to point out that to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.

38. The evolution of the here relevant 'inter-American law' mirrors on the regional level the developments in contemporary international law and especially in human rights law, which distinguished that law from classical international law to a significant extent. That is the case, for example, with the duty to respect certain essential human rights, which is today considered to be an *erga omnes* obligation (*Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, I.C.J. Reports 1970, p. 3. For an analysis following the same line of thought see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) *supra* 37, p. 16 ad 57; cfr. *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, p. 3 ad 42).

39. The Charter of the Organization refers to the fundamental rights of man in its Preamble (paragraph three) and in Arts. 3(j), 16, 43, 47, 51, 112 and 150; Preamble (paragraph four), Arts. 3(k), 16, 44, 48, 52, 111 and 150 of the Charter revised by the Protocol of Cartagena de Indias), but it does not list or define them. The member states of the Organization have, through its diverse organs, given specificity to the human rights mentioned in the Charter and to which the Declaration refers.

40. This is the case of Article 112 of the Charter (Art. 111 of the Charter as amended by the Protocol of Cartagena de Indias) which reads as follows: 'There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters. An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.'

Article 150 of the Charter provides as follows: 'Until the inter-American convention on human rights, referred to in Chapter XVIII (Chapter XVI of the Charter as amended by the Protocol of Cartagena de Indias), enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights.'

41. These norms authorize the Inter-American Commission to protect human rights. These rights are none other than those enunciated and defined in the American Declaration. That conclusion results from Article 1 of the Commission's Statute, which was approved by Resolution No. 447, adopted by the General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979. That Article reads as follows: '1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter. 2. For the purposes of the present Statute, human rights are understood to be: a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto; b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.' ...

42. The General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS. For example, in Resolution 314 (VII-O/77) of June 22, 1977, it charged the Inter-American Commission with the preparation of a study to 'set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man.' In Resolution 371 (VIII-O/78) of July 1, 1978, the General Assembly reaffirmed 'its commitment to promote the observance of the American Declaration of the Rights and Duties of Man', and in Resolution 370 (VIII-O/78 ) of July 1, 1978, it referred to the 'international commitments' of a member state of the Organization to respect the rights of man 'recognized in the American Declaration of the Rights and Duties of Man'. The Preamble of the American Convention to Prevent and Punish Torture, adopted and signed at the Fifteenth Regular Session of the General Assembly in Cartagena de Indias (December, 1985), reads as follows: 'Reaffirming that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights.'

43. Hence it may be said that by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

44. In view of the fact that the Charter of the Organization and the American Convention are treaties with respect to which the Court has advisory jurisdiction by virtue of Article 64(1), it follows that the Court is authorized, within the framework and limits of its competence, to interpret the American Declaration and to render an advisory opinion relating to it whenever it is necessary to do so in interpreting those instruments.

45. For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's

Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

46. For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered, however, that, given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto.

47. That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it within the framework of the principles set out above.

However important the functions of the Inter-American Commission on Human Rights *vis-à-vis* all the OAS Member States, it is only with the adoption of the American Convention on Human Rights (sometimes referred to as the Pact of San José, Costa Rica) on 22 November 1969 and with its entry into force on 18 July 1978 that the Inter-American system truly provided for a jurisdictional system of control of the human rights obligations of the OAS Member States, although of course only for the parties to the Convention. Although the ACHR establishes a new body, the Inter-American Court of Human Rights, the IACHR also has a role under this instrument. Its Statute as currently in force describes in the following terms the functions of the Inter-American Commission on Human Rights: while Article 19 describes its role under the ACHR (also referred to in Arts. 44–51 of the ACHR), and thus only applies to States parties to the Convention, Articles 18 and 20 describe the powers of the Commission *vis-à-vis* OAS Member States that are not parties to the ACHR, and this includes a competence to examine individual communications:

**Statute of the Inter-American Commission on Human Rights, approved by Resolution No. 447 taken by the General Assembly of the OAS at its ninth regular session, held in La Paz, Bolivia, October 1979:**

**Article 18**

The Commission shall have the following powers with respect to the member states of the Organization of American States:

a. to develop an awareness of human rights among the peoples of the Americas;
b. to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights;
c. to prepare such studies or reports as it considers advisable for the performance of its duties;
d. to request that the governments of the states provide it with reports on measures they adopt in matters of human rights;

e. to respond to inquiries made by any member state through the General Secretariat of the Organization on matters related to human rights in the state and, within its possibilities, to provide those states with the advisory services they request;
f. to submit an annual report to the General Assembly of the Organization, in which due account shall be taken of the legal regime applicable to those States Parties to the American Convention on Human Rights and of that system applicable to those that are not Parties;
g. to conduct on-site observations in a state, with the consent or at the invitation of the government in question; and
h. to submit the program-budget of the Commission to the Secretary General, so that he may present it to the General Assembly.

### Article 19

With respect to the States Parties to the American Convention on Human Rights, the Commission shall discharge its duties in conformity with the powers granted under the Convention and in the present Statute, and shall have the following powers in addition to those designated in Article 18:

a. to act on petitions and other communications, pursuant to the provisions of Articles 44 to 51 of the Convention;
b. to appear before the Inter-American Court of Human Rights in cases provided for in the Convention;
c. to request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons;
d. to consult the Court on the interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American states;
e. to submit additional draft protocols to the American Convention on Human Rights to the General Assembly, in order to progressively include other rights and freedoms under the system of protection of the Convention, and
f. to submit to the General Assembly, through the Secretary General, proposed amendments to the American Convention on Human Rights, for such action as the General Assembly deems appropriate.

### Article 20

In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18:

a. to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man;
b. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and,
c. to verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

In order to fulfil its duties under Article 18 of its Statute, the Inter-American Commission on Human Rights also decided to appoint a number of Rapporteurs, on issues such as the rights of indigenous peoples and the rights of women, the rights of children, or the rights of Afro-descendants and against racial discrimination.

## 2.2 The powers of the Inter-American Court of Human Rights

The Inter-American Court of Human Rights was established as a jurisdiction composed of seven members, elected by the States Parties to the ACHR, in the General Assembly of the OAS, from a panel of candidates proposed by those states (Art. 53 ACHR). It has two functions.

(a) The advisory function

One function of the Court is to deliver advisory opinions 'regarding the interpretation of [the ACHR] or of other treaties concerning the protection of human rights in the American states', at the request of the OAS Member States or of the organs established under the OAS Charter (Art. 64(1) ACHR); the Court may also provide any OAS Member State, at its request, with 'opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments' (Art. 64(2) ACHR). In practice, this advisory competence has proved of great importance, as illustrated by the references made in this volume to a number of advisory opinions delivered by the Inter-American Court. In the following opinion, the Court describes the raison d'être of its advisory function:

**Inter-American Court of Human Rights, Restrictions to the Death Penalty (Art. 4(2) and (4) of the American Convention on Human Rights), Advisory Opinion OC-3/83, 8 September 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3 (1983):**

[Guatemala objected to the Inter-American Court of Human Rights agreeing to deliver an advisory opinion at the request of the Inter-American Commission on Human Rights, since the request concerned questions of interpretation that were in dispute between that country and the Commission. Guatemala contended that, although the Commission may in principle seek an advisory opinion from the Court regarding the interpretation of any article of the Convention as provided in Article 64(1) of the Convention, if that opinion were to concern a given State directly, the Court could not render the opinion unless the State in question has accepted the tribunal's jurisdiction pursuant to Article 62(1) of the Convention. The Court disagreed:]

31. The Convention distinguishes very clearly between two types of proceedings: so-called adjudicator or contentious cases and advisory opinions. The former are governed by the provisions of Articles 61, 62 and 63 of the Convention; the latter by Article 64 ...

32. In contentious proceedings, the Court must not only interpret the applicable norms, determine the truth of the acts denounced and decide whether they are a violation of the Convention imputable to a State Party; it may also rule 'that the injured party be ensured the enjoyment of his right or freedom that was violated' [Art. 63(1) ACHR]. The States Parties to such proceeding are, moreover, legally bound to comply with the decisions of the Court in contentious cases [Art. 68(1) ACHR]. On the other hand, in advisory opinion proceedings the

Court does not exercise any fact-finding functions; instead, it is called upon to render opinions interpreting legal norms. Here the Court fulfills a consultative function through opinions that 'lack the same binding force that attaches to decisions in contentious cases' (I/A Court H.R., 'Other Treaties' Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of 24 September 1982. Series A No. 1, para. 51; *cf.* Interpretation of Peace Treaties, 1950 I.C.J. 65).

33. The provisions applicable to contentious cases differ very significantly from those of Article 64, which govern advisory opinions. Thus, for example, Article 61(2) speaks of 'case' and declares that 'in order for the Court to hear a *case*, it is necessary that the procedures set forth in Articles 48 to 50 shall have been completed (emphasis added).' These procedures apply exclusively to 'a petition or communication alleging violation of any of the rights protected by this Convention' [Art. 48(1) ACHR]. Here the word 'case' is used in its technical sense to describe a contentious case within the meaning of the Convention, that is, a dispute arising as a result of a claim initiated by an individual (Art. 44) or State Party (Art. 45), charging that a State Party has violated the human rights guaranteed by the Convention.

34. One encounters the same technical use of the word 'case' in connection with the question as to who may initiate a contentious case before the Court, which contrasts with those provisions of the Convention that deal with the same issue in the consultative area. Article 61(1) provides that 'only States Parties and the Commission shall have a right to submit a case to the Court'. On the other hand, not only 'States Parties and the Commission', but also all of the 'Member States of the Organization' and the 'organs listed in Chapter X of the Charter of the Organization of American States' may request advisory opinions from the Court [Art. 64(1) ACHR]. There is yet another difference with respect to the subject matter that the Court might consider. While Article 62(1) refers to 'all matters relating to the interpretation and application of this Convention', Article 64 authorizes advisory opinions relating not only to the interpretation of the Convention but also to 'other treaties concerning the protection of human rights in the American states'. It is obvious, therefore, that what is involved here are very different matters, and that there is no reason in principle to apply the requirements contained in Articles 61, 62 and 63 to the consultative function of the Court, which is spelled out in Article 64.

35. Article 62(3) of the Convention – the provision Guatemala claims governs the application of Article 64 – reads as follows: 'The jurisdiction of the Court shall comprise all *cases* concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the *case* recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement (emphasis added).'

It is impossible to read this provision without concluding that it, as does Article 61, uses the words 'case' or 'cases' in their technical sense.

36. The Court has already indicated that situations might arise when it would deem itself compelled to decline to comply with a request for an advisory opinion. In Other Treaties (cited above, para. 32), the Court acknowledged that resort to the advisory opinion route might in certain situations interfere with the proper functioning of the system of protection spelled out in the Convention or that it might adversely affect the interests of the victim of human rights violations. The Court addressed this problem in the following terms: 'The advisory jurisdiction of the Court is closely related to the purposes of the Convention. This jurisdiction is intended to assist the American States in fulfilling their international human rights obligations and to assist

the different organs of the inter-American system to carry out the functions assigned to them in this field. It is obvious that any request for an advisory opinion which has another purpose would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court (*ibid*., para. 25)'.

37. The instant request of the Commission does not fall within the category of advisory opinion requests that need to be rejected on those grounds because nothing in it can be deemed to interfere with the proper functioning of the system or might be deemed to have an adverse effect on the interests of a victim. The Court has merely been asked to interpret a provision of the Convention in order to assist the Commission in the discharge of the obligation it has as an OAS Charter organ 'to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters' (OAS Charter, Art. 112).

38. The powers conferred on the Commission require it to apply the Convention or other human rights treaties. In order to discharge fully its obligations, the Commission may find it necessary or appropriate to consult the Court regarding the meaning of certain provisions whether or not at the given moment in time there exists a difference between a government and the Commission concerning an interpretation, which might justify the request for an advisory opinion. If the Commission were to be barred from seeking an advisory opinion merely because one or more governments are involved in a controversy with the Commission over the interpretation of a disputed provision, the Commission would seldom, if ever, be able to avail itself of the Court's advisory jurisdiction. Not only would this be true of the Commission, but the OAS General Assembly, for example, would be in a similar position were it to seek an advisory opinion from the Court in the course of the Assembly's consideration of a draft resolution calling on a Member State to comply with its international human rights obligations.

39. The right to seek advisory opinions under Article 64 was conferred on OAS organs for requests falling 'within their spheres of competence'. This suggests that the right was also conferred to assist with the resolution of disputed legal issues arising in the context of the activities of an organ, be it the Assembly, the Commission, or any of the others referred to in Chapter X of the OAS Charter. It is clear, therefore, that the mere fact that there exists a dispute between the Commission and the Government of Guatemala regarding the meaning of Article 4 of the Convention does not justify the Court to decline to exercise its advisory jurisdiction in the instant proceeding.

40. This conclusion of the Court finds ample support in the jurisprudence of the International Court of Justice. That tribunal has consistently rejected requests that it decline to exercise its advisory jurisdiction in situations in which it was alleged that because the issue involved was in dispute the Court was being asked to decide a disguised contentious case (see, e.g. *Interpretation of Peace Treaties*, *supra* para. 32; *Reservations to the Convention on Genocide*, 1951 I.C.J. 15; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16; *Western Sahara*, *supra* 25). In doing so, the Hague Court has acknowledged that the advisory opinion might affect the interests of States which have not consented to its contentious jurisdiction and which are not willing to litigate the matter. The critical question has always been whether the requesting organ has a legitimate interest to obtain the opinion for the purpose of guiding its future actions (*Western Sahara*, *supra* para. 25, p. 27).

41. The Commission, as an organ charged with the responsibility of recommending measures designed to promote the observance and protection of human rights (OAS Charter, Art. 112; Convention, Art. 41; Statute of the Commission, Arts. 1 and 18), has a legitimate institutional

interest in the interpretation of Article 4 of the Convention. The mere fact that this provision may also have been invoked before the Commission in petitions and communications filed under Articles 44 and 45 of the Convention does not affect this conclusion. Given the nature of advisory opinions, the opinion of the Court in interpreting Article 4 cannot be deemed to be an adjudication of those petitions and communications.

42. ... [T]he Commission enjoys, in general, a pervasive legitimate institutional interest in questions bearing on the promotion and protection of human rights in the inter-American system, which could be deemed to confer on it, as a practical matter, 'an absolute right to request advisory opinions within the framework of Article 64(1) of the Convention' (*ibid.*, para. 16). Viewed in this light, the instant request certainly concerns an issue in which the Commission has a legitimate institutional interest.

43. The advisory jurisdiction conferred on the Court by Article 64 of the Convention is unique in contemporary international law. As this Court already had occasion to explain, neither the International Court of Justice nor the European Court of Human Rights has been granted the extensive advisory jurisdiction which the Convention confers on the Inter-American Court (Other Treaties, *supra* para. 32, paras. 15 and 16). Here it is relevant merely to emphasize that the Convention, by permitting Member States and OAS organs to seek advisory opinions, creates a parallel system to that provided for under Article 62 and offers an alternate judicial method of a consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process. It would therefore be inconsistent with the object and purpose of the Convention and the relevant individual provisions, to adopt an interpretation of Article 64 that would apply to it the jurisdictional requirements of Article 62 and thus rob it of its intended utility merely because of the possible existence of a dispute regarding the meaning of the provision at issue in the request.

(b) Individual petitions

The Court may adopt judgments on cases submitted to it either by a State party to the ACHR, or by the Inter-American Commission of Human Rights, provided the defending State party has recognized the jurisdiction of the Court – which, at the time of writing, all States parties to the Convention had done. According to Article 44 ACHR, 'Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.' This provision thus allows for a form of *actio popularis* to denounce violations of the ACHR to the Commission. Upon receiving such a petition, the Commission may decide that the case raises a situation of extreme gravity and urgency, in which case it may request the Inter-American Court of Human Rights to adopt any provisional measures 'when necessary to avoid irreparable damage to persons' (Art. 63(2) ACHR). The procedure is divided in two phases.

*The admissibility phase*

The Commission shall first determine whether the petition is admissible. Article 46 ACHR provides that a petition shall only be considered admissible by the Commission

if 'the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law', although under Article 46(2) this requirement does not apply when (a) 'the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated'; (b) 'the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them'; or (c) 'there has been unwarranted delay in rendering a final judgment under the aforementioned remedies'. The Inter-American Court of Human Rights has recalled that the rule of prior exhaustion of local remedies is 'a prerequisite established in favor of the State, which may waive its right, even tacitly, and this occurs, inter alia, when it is not timely invoked' (*Fairén Garbi and Solís Corrales* case, judgment of 15 March 1989, Series C No. 6, para. 109). Therefore, when a State does not invoke the failure to exhaust local remedies before the Commission, it is estopped from raising the same objection before the Court. This is in accordance with the understanding of the function of the rule of prior exhaustion of local remedies in human rights instruments, as noted by Judge A. A. Cançado Trindade in his concurring opinion:

**Inter-American Court of Human Rights, *Gangaram Panday* case, Preliminary Objections, judgment of 4 December 1991, (Ser. C) No. 12 (1994):**

38. This requirement [to exhaust local remedies] 'allows the state to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction' (American Convention, Preamble) (*Velásquez Rodríguez* Case, Judgment of July 29, 1988. Series C No. 4, para. 61; *Godínez Cruz* Case, Judgment of January 20, 1989, Series C No. 5, para. 64; *Fairén Garbi and Solís Corrales* Case, Judgment of March 15, 1989. Series C No. 6, para. 85).

The Court has stated that: 'Generally recognized principles of international law indicate, first, that this is a rule that may be waived, either expressly or by implication, by the State having the right to invoke it, as this Court has already recognized (see *Viviana Gallardo et al.*, Judgment of November 13, 1981, No. G 101/81. Series A, para. 26). Second, the objection asserting the non-exhaustion of domestic remedies, to be timely, must be made at an early stage of the proceedings by the State entitled to make it, lest a waiver of the requirement be presumed. Third, the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective' (*Velásquez Rodríguez* Case, Preliminary Objections, *supra* 18, para. 88; *Fairén Garbi and Solís Corrales* Case, Preliminary Objections, *supra* 18, para. 87; *Godínez Cruz* Case, Preliminary Objections, *supra* 38, para. 90. See also *In the Matter of Viviana Gallardo et al.*, No. G 101/81. Series A) ...

39. The Court notes that the Government did not interpose the objection of non-exhaustion of domestic remedies before the Commission ... This constitutes a tacit waiver of the objection. The Government also failed to indicate in a timely fashion the domestic remedies that, in its opinion, should have been exhausted or how they would be effective.

40. Consequently, the Court considers that the Government is untimely when it now seeks to invoke the objection of non-exhaustion of domestic remedies that it should have interposed before the Commission but did not.

**Concurring opinion of Judge Antônio Augusto Cançado Trindade:**
11. The specificity or special character of human rights treaties and instruments, the nature and gravity of certain human rights violations and the imperatives of protection of the human person stress the need to avoid unfair consequences and to secure to this end a necessarily distinct (more flexible and equitable) application of the local remedies rule in the particular context of the international protection of human rights. This has accounted for, in the present domain of protection, the application of the principles of good faith and estoppel in the safeguard of due process and of the rights of the alleged victims, the distribution of the burden of proof as to exhaustion of local remedies between the alleged victim and the respondent Government with a heavier burden upon the latter. This comes to acknowledge that generally recognized principles of international law, referred to in the formulation of the local remedies rule in human rights treaties and instruments, necessarily undergo some degree of adaptation or adjustment when enshrined in those treaties and instruments, given the specificity of these latter and the special character of their ultimate object and purpose.

In its Advisory Opinion OC-11/90, the Inter-American Court had already adopted a generous reading of the requirement of prior exhaustion of domestic remedies. The Commission had submitted two questions to the Court. One was whether the requirement of the exhaustion of domestic legal remedies applies to an indigent, who because of economic circumstances is unable to avail himself of the legal remedies within a country. Another one was whether the same requirement applied where a person is unable to retain representation due to a general fear in the legal community, and therefore cannot avail himself of the legal remedies provided by law in a country. The Advisory Opinion usefully highlights the link between the obligation of the State to provide effective remedies and the application of the requirement to exhaust local remedies:

**Inter-American Court of Human Rights, *Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights)*, Advisory Opinion OC-11/90 of 10 August 1990 requested by the Inter-American Commission on Human Rights:**

18. Article 46(2) makes no specific reference to indigents, the subject of the first question, nor to those situations in which a person has been unable to obtain legal representation because of a generalized fear in the legal community to take such cases, which the second question addresses.

19. The answers to the questions presented by the Commission thus depend on a determination of whether a person's failure to exhaust domestic remedies in the circumstances posited falls under one or the other exception spelled out in Article 46(2). That is, whether or under what circumstances a person's indigency or inability to obtain legal representation because of a generalized fear among the legal community will exempt him from the requirement to exhaust domestic remedies.

20. In addressing the issue of indigency, the Court must emphasize that merely because a person is indigent does not, standing alone, mean that he does not have to exhaust domestic

remedies, for the provision contained in Article 46(1) is of a general nature. The language of Article 46(2) suggests that whether or not an indigent has to exhaust domestic remedies will depend on whether the law or the circumstances permit him to do so.

21. In analyzing these issues, the Court must bear in mind the provisions contained in Articles 1(1), 24 and the relevant parts of Article 8 of the Convention [concerning respectively the obligation to respect the rights of the Convention without discrimnation, *inter alia*, on grounds of economic status; the right to equal protection; and the right to a fair trial].

22. The final section of Article 1(1) prohibits a state from discriminating on a variety of grounds, among them 'economic status'. The meaning of the term 'discrimination' employed by Article 24 must, then, be interpreted by reference to the list enumerated in Article 1(1). If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigency), prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law.

23. '[P]rotection of the law' consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention. The obligation to respect and guarantee such rights, which Article 1(1) imposes on the States Parties, implies, as the Court has already stated, 'the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights (*Velásquez Rodríguez* Case, Judgment of July 29, 1988, Series C No. 4, para. 166; *Godínez Cruz* Case, Judgment of January 20, 1989, Series C. No. 5, para. 175)'.

24. Insofar as the right to legal counsel is concerned, this duty to organize the governmental apparatus and to create the structures necessary to guarantee human rights is related to the provisions of Article 8 of the Convention. That article distinguishes between 'accusations[s] of a criminal nature' and procedures 'of a civil, labor, fiscal, or any other nature'. Although it provides that '[e]very person has the right to a hearing, with due guarantees ... by a ... tribunal' in both types of proceedings, it spells out in addition certain 'minimum guarantees' for those accused of a criminal offense. Thus, the concept of a fair hearing in criminal proceedings also embraces, at the very least, those 'minimum guarantees'. By labeling these guarantees as '*minimum guarantees*', the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing.

25. Sub-paragraphs(d) and (e) of Article 8(2) indicate that the accused has a right 'to defend himself personally or to be assisted by legal counsel of his own choosing' and that, if he should choose not to do so, he has 'the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides ...' Thus, a defendant may defend himself personally, but it is important to bear in mind that this would only be possible where permitted under domestic law. If a person refuses or is unable to defend himself personally, he has the right to be assisted by counsel of his own choosing. In cases where the accused neither defends himself nor engages his own counsel within the time period established by law, he has the right to be assisted by counsel provided by the state, paid or not as the domestic law provides. To that extent the Convention guarantees the right to counsel in criminal proceedings. But since it does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his *economic status* if, when in need of legal counsel, the state were not to provide it to him free of charge.

26. Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing. Any state that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.

27. Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article.

28. For cases which concern the determination of a person's 'rights and obligations of a civil, labor, fiscal, or any other nature', Article 8 does not specify any 'minimum guarantees' similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for 'due guarantees'; consequently, the individual here also has the right to the fair hearing provided for in criminal cases. It is important to note here that the circumstances of a particular case or proceeding – its significance, its legal character, and its context in a particular legal system – are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.

29. Lack of legal counsel is not, of course, the only factor that could prevent an indigent from exhausting domestic remedies. It could even happen that the state might provide legal counsel free of charge but neglect to cover the costs that might be required to ensure the fair hearing that Article 8 prescribes. In such cases, the exceptions to Article 46(1) would apply. Here again, the circumstances of each case and each particular legal system must be kept in mind.

30. In its advisory opinion request, the Commission states that it 'has received certain petitions in which the victim alleges that he has not been able to comply with the requirement of the exhaustion of remedies set forth in the domestic legislation because he cannot afford legal assistance or, in some cases, the obligatory filing fees'. Upon applying the foregoing analysis to the examples set forth by the Commission, it must be concluded that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies. The same would be true of cases requiring the payment of a filing fee. That is to say, if it is impossible for an indigent to deposit such a fee, he cannot be required to exhaust domestic remedies unless the state provides some alternative mechanism.

31. Thus, the first question presented to the Court by the Commission is not whether the Convention guarantees the right to legal counsel as such or as a result of the prohibition of discrimination for reason of economic status (Art. 1(1)). Rather, the question is whether an indigent may appeal directly to the Commission to protect a right guaranteed in the Convention without first exhausting the applicable domestic remedies. The answer to this question given what has been said above, is that if it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies. That is the meaning for the language of Article 46(2) read in conjunction with Articles 1(1), 24 and 8.

32. The Court will now turn to the second question. It concerns the exhaustion of domestic remedies in situations where an individual is unable to obtain the necessary legal representation due to a general fear in the legal community of a given country. The Commission explains that, according to what some complainants have alleged, '[t]his situation has occured where an atmosphere of fear prevails and lawyers do not accept cases which they believe could place their own lives and those of their families in jeopardy'.