Regional Human Rights Protection Systems Outside Europe

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Katarzyna Zombory

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Editor and Author

Katarzyna Zombory
Director of Research, Central European Academy, Hungary

Authors

Jakub J. Czepek
University Professor, Cardinal Stefan Wyszynski University in Warsaw, Poland; Member of the UN Subcommittee on Prevention of Torture (SPT) and Head of SPT Jurisprudence Group

Anna Dąbrowska
University Professor, Faculty of Law and Administration, Kazimierz Pułaski University of Radom

Lilla Garayová
Vice-Dean and Professor, Pan-European University, Faculty of Law, Slovakia

Rebecca Lilla Hassanová
Assistant Professor, Pan-European University, Faculty of Law, Slovakia

Tena Konjević
Teaching Assistant, Faculty of Law Osijek, University of Osijek; Lecturer, Zagreb School of Economics and Management, Croatia; Junior Researcher, Central European Academy in Budapest, Hungary

Cocou Marius Mensah
Assistant Professor, University of Maribor, Faculty of Law, Slovenia

Marta Osuchowska
University Professor, Cardinal Stefan Wyszynski University in Warsaw, Poland

Andrzej Pogłódek
Associate Professor, Cardinal Stefan Wyszyński University in Warsaw, Poland

Robert Tabaszewski
Assistant Professor, Faculty of Law, Canon Law and Administration, John Paul II Catholic University of Lublin, Poland

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Close to Home: Introductory Thoughts on the Emergence of Regional Human Rights Systems

Katarzyna ZOMBORY

Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world (...) Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.
Eleanor Roosevelt[1]

ABSTRACT

This paper examines the development of universal and regional human rights systems as constituent elements of the international human rights architecture. It demonstrates how the creation of the universal human rights framework under the auspices of the United Nations, particularly its protracted formation, ideological compromises, and limited enforcement mechanisms, gave rise to the emergence of regional human rights systems. While grounded in the principles of the Universal Declaration of Human Rights, regional systems in the Americas, Europe, and Africa have adapted universal norms to distinct historical, cultural, and socio-economic contexts and have introduced judicial enforcement mechanisms. The paper argues that regional human rights systems do not undermine universality but instead operationalise it by translating the universally shared human rights framework into local contexts.

KEYWORDS

Universal Declaration of Human Rights, regional human rights systems, Inter-American system of human rights, African system of human rights, Asian perspective on human rights

1. The International Bill of Rights – A Universal Standard With Regional Roots

Between 1947 and 1948, a drafting committee of the United Nations Commission on Human Rights (UNCHR), composed of nine members representing different legal

1 Chair of the Drafting Committee established by the UN Commission on Human Rights to draft the Universal Declaration of Human Rights, at the presentation in the United Nations, New York, on 27 March 1958, source: Office of the High Commissioner for Human Rights, 2012.

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traditions and cultural perspectives, successfully crafted a landmark international document – the Universal Declaration of Human Rights (UDHR).[2] Proclaimed by the UN General Assembly as a 'common standard of achievement' for all peoples and nations in the field of human rights protection, the UDHR appealed to every individual and organ of society to strive to 'promote respect for these rights and freedoms, and by progressive measures (...) to secure their universal and effective recognition and observance.' The UDHR, together with the Charter of the United Nations,[3] has established itself as a fundamental element of the international order and, despite its non-treaty nature, has over time acquired the status of customary international law, binding on all states.[4] The UDHR's incorporation into customary international law reflects the existence of a general and consistent practice of states, which they follow from a sense of legal obligation. This achievement would not have been possible without a broad consensus among nations with diverse cultural, religious, historical and legal traditions, affirming that certain fundamental principles are intrinsic to human nature and inherent in human dignity, thus universally shared across all cultures.

The UDHR was followed by the adoption of two international treaties, which elaborated upon its catalogue of human rights and equipped them with binding force: the 1966 International Covenant on Civil and Political Rights (ICCPR)[5] and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).[6] The UDHR, together with the ICCPR and the ICESCR, constitutes the International Bill of Rights. This framework is based on the premise that all human rights are universal, indivisible, interdependent and interrelated. While the universality of human rights provides that everyone is born with and possesses the same rights, regardless of age, gender and religious, cultural or ethnic background, the principles of indivisibility and interdependence emphasise that all rights are equally important and that none can be fully enjoyed without the others. Accordingly, the UN has stressed that all states, regardless of their political, economic and cultural systems, have the duty to respect all human rights and freedoms equally and with the same emphasis. However, along with promoting the universality and interdependence of human rights, the UN has

2 Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, General Assembly resolution 217/A.
3 Charter of the United Nations, adopted in San Francisco on 26 June 1945, XV UNCIO 335.
4 Shelton and Carozza, 2013, p. 6; O'Boyle and Lafferty, 2013, p. 204.
5 International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, UN Treaty Series No. 14668.
6 International Covenant on Economic, Social and Cultural Rights, adopted in New York on 16 December 1966, UN Treaty Series No. 14531.

consistently underscored that the significance of national and regional particularities and diverse historical, cultural and religious backgrounds must be borne in mind.[7]

The adoption of the International Bill of Rights was not without challenges. Despite the strong commitment and efforts of the international community to establish a universal framework of human rights anchored 'in the dignity and worth of the human person, and in the equal rights of men and women and of nations large and small' (Preamble of the UN Charter), this vision could not be realised within a short period. Nearly two decades elapsed between the UNCHR undertaking the work on a preliminary draft of the international bill in 1947[8] and the adoption of two international treaties in 1966. It took another decade before these treaties entered into force in 1976. The UN's long-stalled and protracted efforts to complete the International Bill of Rights gave significant impetus for the development of regional human rights systems,[9] given that a regional consensus could be reached more quickly.

Due to significant differences of views on certain legal issues, such as the nature of state obligations regarding the implementation of various human rights, it was not possible to incorporate all the rights and freedoms recognised in the UDHR into a single treaty, the Covenant on Human Rights, as initially envisaged.[10] Thus, it was decided to compose two separate treaties, one focusing on civil and political rights and the other encompassing economic, social and cultural rights. Nonetheless, both treaties were to contain as many similar provisions as possible and be opened for signature at the same time to emphasise the unity of their aim – to ensure respect for and observance of all human rights.[11] The key difference between the two documents lies in the nature and immediacy of the obligations they imposed on states parties. While the ICCPR required the states to give immediate effect to the rights and freedoms included therein and ensure their enforceability, the full realisation of the rights contained in the ICESCR was to be achieved progressively and was dependent on states' resources. Consequently, only the ICCPR was initially accompanied by an Optional Protocol, allowing for a mechanism of individual complaints, a protocol which was opened for signature in 1966 alongside the ICCPR and ICESCR.[12] The Optional Protocol, allowing individuals to file complaints under the ICESCR, was adopted more than

7 See, for example: UN General Assembly Resolution 421 (V) on the Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights, 4 December 1950, A/RES/421(V), Preamble of Part E; UN General Assembly Resolution 60/251 creating the UN Human Rights Council, 15 March 2006, A/RES/60/251; Vienna Declaration and Programme of Action adopted on 25 June 1993 by the World Conference on Human Rights in Vienna.

8 The first session of the Commission on Human Rights was held in New York between 27 January and 10 February 1947 (E/259).

9 Shelton and Carozza, 2013, p. 12.

10 UN General Assembly Resolution 543 (VI) on the Preparation of two Draft International Covenants on Human Rights, 5 February 1952, A/RES/543(VI), Preamble.

11 Ibid., para. 1.

12 Optional Protocol to the International Covenant on Civil and Political Rights, adopted on 16 December 1966 by General Assembly resolution 2200A (XXI), entered into force on 23 March 1976.

four decades later in 2009.[13] The ideological and conceptual disagreement, although constructively overcome by splitting the normative content of the UDHR into two treaties, revealed that the universal human rights system could not be equipped with a strong enforcement mechanism.[14] The judicial supervision of the implementation of internationally guaranteed human rights, allowing for judicial procedures of redress, needs to be ensured at the regional levels.

Apart from the divergence in perspectives on legal concepts, the ideological background of the drafters, too, influenced the creation of the universal International Bill of Rights. Among the fundamental questions surrounding the conceptual approach to human rights, which emerged during the UDHR's drafting, was whether the cornerstone document should be founded on religious values or be secular. While some countries insisted on inserting a reference to God or natural law, as a source of the natural rights inherent to all human beings, the representatives of the Soviet Union and China strongly supported the concept of positive rights and insisted, in the name of universalism, on the removal of all allusions to nature and God from the UDHR.[15] The latter approach prevailed; as a result, the foundations of the universal system of human rights protection were intentionally designed to remain neutral. Nonetheless, the UDHR's Preamble and Article 1 convey principles underpinned by the natural rights theory.[16]

The following anecdote vividly illustrates the intercultural challenges faced by the UDHR's drafters throughout their work:

> 'Humphrey [Director of the UN Division of Human Rights, Australia – author's note] and Roosevelt [Chairwoman of the Commission on Human Rights, US] each recalled the group meeting only once during which the deep philosophical divisions between Malik [Rapporteur of the Commission on Human Rights, Lebanon] and Chang [Vice-Chair of the Commission on Human Rights, China] became apparent. Malik, a devout Christian, believed the question of rights should be approached through Christian precepts, especially the teachings of St. Thomas Acquinas. Chang argued for a broader approach and suggested, tongue in cheek, that Humphrey, before he prepared the first draft, go to China for six months to study Confucianism. Roosevelt, who on her own

13 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted on 10 December 2008 by General Assembly resolution A/RES/63/117, entered into force on 5 May 2013.

14 Lerner, 2024, pp. 25–26; Shelton and Carozza, 2013, p. 12.

15 Li-Ann, 2024, p. 4. [Online]. Available at: https://research.un.org/en/undhr/draftingcommittee (Accessed: 21 May 2025).

16 Article 1 of the UDHR: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood' For an excellent analysis of the relation between natural law and the notion of the inherent rights of man in the context of the adoption of the International Bill of Rights, see: Lauterpacht, 2013, pp. 2–53.

admission found herself somewhat out of her depth in these difficult discussions, remained silent and poured tea.'[17]

The UDHR's drafting process witnessed several ideological debates. The supporters of the individualist approach, notably from Western countries influenced by the liberal theory, opted for an individualist approach to human rights, while those with a socialist worldview argued in favour of the collectivist vision of rights, according to which the rights of the collective dominate those of an individual. The final text reflects a fundamentally individualistic stance. Nevertheless, at some points, it is reminiscent of the collectivist worldview, such as in the wording of the right to property under Article 17, which recognises that property can be owned individually as well as communally. The communitarian perspective is prominently present in Article 29, which stresses that everyone has duties to the community, and the free and full development of personality is possible only in a community. This second-to-last provision of the UDHR reflects the recognition that human beings are not solely autonomous, isolated individuals; rather, they belong to larger communities, such as the family, social group and nation – an approach closely aligned with certain regional perspectives and hierarchy of values, especially in African and Asian contexts.

The character of the socio-economic rights revealed another strong ideological divide within the UNCHR, which influenced the drafting process. While normative provisions on social welfare were not unusual in certain regions, such as the Soviet Union and Latin American states, in other legal cultures, such as the United States and other Western democracies, socio-economic guarantees were perceived as aspirational goals, not enforceable rights.[18] While the North Atlantic nations sought to exclude the socio-economic rights from the UDHR, the representatives of the Latin American states put forward compelling arguments in favour of their inclusion, arguing that these rights were essential for genuine equality and should be afforded equal importance alongside civil and political rights. The final version included several provisions related to socio-economic and cultural rights, such as the right to work, equal pay, favourable working conditions and the right to form trade unions (Article 23), the right to an adequate standard of living (Article 24), and to participate in the cultural life (Article 25). However, as noted, instead of completing the International Bill of Rights as a binding instrument, the divergence of views on the legal nature of different human rights led to the creation of two separate human rights treaties.

Although the works of the Drafting Committee of the UNCHR became a forum for various legal and ideological debates, the UDHR protects traditions of various political communities and accommodates diverse ideological and cultural influences.[19] Together with the ICCPR and the ICESCR, which were drafted in the spirit and based

17 Hobbins, 1989, p. 10.
18 Li-Ann, 2024, p. 43.
19 Ibid., p. 44.

on the principles of the UDHR,[20] it can be rightly considered as a 'common standard of achievement for all peoples and all nations'.

2. From the International Bill of Rights to Regional Standards

In parallel with efforts to create a universal human rights framework, the post-World War II international community witnessed the end of the colonial era. Along with the recognition of the right of peoples to self-determination and gradual decolonisation, multiple new states emerged on the international stage. Delegates from outside the Anglo-European context played a significant role in shaping the International Human Rights Law. These developments challenged the previously dominant practice of public international law, shaped primarily by Anglo-European states, as the engagement with newly independent states exposed the full implications and meaning of a truly universal standard.[21]

The regional human rights systems emerged at the end of World War II, as part of the global movement for human rights, inspired by the UN Charter and the UDHR.[22] However, different historical backgrounds and varying social and political conditions led to diverse perspectives across continents, resulting in different focus areas, each influenced by particular human rights concerns and specific regional approaches to human rights protection.

Chronologically, the first regional system of human rights protection was created in the Americas. Its origins can be traced back to the second half of the 19th century and to the regional forum of cooperation among the American states, which met periodically to develop a shared system of legal norms and institutions during the so-called Pan American Conferences. The Conferences laid the foundations for the establishment of the Organization of American States (OAS), which would later become the Inter-American system of human rights. Several references to human rights were included in the OAS Charter (Charter of Bogotá) of 1948[23] and in the Inter-American Declaration on the Rights and Duties of Man,[24] which was signed several months before the adoption of the UDHR at the universal level. The American Convention on Human Rights (ACHR),[25] the binding human rights 'constitution' of the Americas, adopted in 1969, was modelled on the UN International Bill of Rights and

20 UN General Assembly Resolution 421 (V) on the Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights, Preamble to Part E.

21 Li-Ann, 2024, p. 42.

22 Shelton and Carozza, 2013, p. 12.

23 Charter of the Organization of American States, adopted at Bogotá on 30 April 1948 by the Ninth International Conference of American States, UN Treaty Series No. 1609.

24 Inter-American Declaration on the Rights and Duties of Man, adopted at Bogotá in 1948 by the Ninth International Conference of American States.

25 American Convention on Human Rights (Pact of San José), adopted at San José on 22 November 1969, UN Treaty Series vol. 1144, No. 17955.

the Council of Europe's (CoE) human rights regime; however, its drafters adapted it to regional circumstances.[26] As a result, the Inter-American framework for human rights protection reflects the region's historical, cultural, social and political context. It is grounded, *inter alia*, in the long-standing tradition of regional solidarity, developed during the independence movements in Latin America in the 19th century, on the importance of social justice, especially for protecting vulnerable and historically disadvantaged groups, such as indigenous peoples, women and children.[27] The jurisprudence of the Inter-American human rights bodies concerning economic, social, cultural and environmental rights has become a cornerstone of the regional human rights framework in Latin America, a region marked by significant social inequalities and political instability, along with the lasting impact of European colonisation.[28]

The European system of human rights developed under the auspices of the CoE, a regional organisation established in 1949. The human rights agenda was an important part of the post-World War II reconstruction of Europe. It was based on the idea that regional cooperation among European states could help sustain peace and prevent future conflicts. This underlaid the creation of the regional human rights framework, anchored in the European Convention of Human Rights,[29] adopted in 1950 by the CoE, while providing a foundation for economic collaboration within the European communities and the broader process of European integration. The specificity of the European system of human rights is grounded in the Western European traditions of democracy and the legacy of safeguarding individual freedoms and rights. This legacy is most prominently reflected in the 1789 Declaration of the Rights of Man and of the Citizen, adopted during the French Revolution, whose roots can be traced back to the religious freedoms guaranteed by certain Central European states, like Poland and Hungary, as early as the 16th century.[30]

On the African continent, the emergence of a regional human rights system began later than in the Americas and Europe and was strongly connected to decolonisation. This process was characterised, on the one hand, by the struggles for self-determination of peoples and independence from the colonial empires and, on the other hand, by efforts to achieve national cohesion.[31] The African human rights system has developed under the auspices of the Organisation of African Unity (OAU), a regional intergovernmental organisation, which operated between 1963 and 1999 and in 2002 was replaced by its successor, the African Union. The first binding human rights treaty on the continent, the African Charter of Human and Peoples Rights (Banjul Charter),

26 Pasqualucci, 2013, p. 4.
27 Shelton and Carozza, 2013, p. 12.
28 Ferrer Mac-Gregor, 2024, p. 217; Pasqualucci, 2013, p. 4.
29 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), adopted in Rome on 4 November 1950 under the auspices of the Council of Europe, UN Treaty Series No. 2889, vol. 213.
30 The Hungarian Edict of Torda (1568) recognised religious freedoms and allowed local communities in Transylvania to freely elect their preachers. The Confederation of Warsaw (1573) guaranteed religious freedom and tolerance in the Polish-Lithuanian Commonwealth.
31 Shelton and Carozza, 2013, p. 12.

was adopted in 1981. It is regarded as the first human rights treaty to integrate various categories of human rights, including civil and political rights, economic, social and cultural rights, and group and peoples' rights, in a single instrument, without distinguishing their justiciability or implementation.[32] The Preamble of the Banjul Charter affirms the importance of the African approach to the protection of human rights and freedoms, acknowledging that the states parties were inspired by their historical tradition and the values of African civilisation, which were foundational to their reflection on the concept of human and peoples' rights. The African human rights framework is distinctive for its parallel recognition of individual and collective rights and a strong emphasis on the idea that the enjoyment of rights is inherently linked to the performance of duties. The emphasis on economic, social and cultural rights is another important feature, reflecting the socio-economic conditions of the continent, particularly in Sub-Saharan Africa, which faces extreme poverty, inadequate access to drinking water and the presence of various vulnerable groups, such as inhabitants of rural and deprived urban areas, refugees and internally displaced persons, persons with disabilities and families living with HIV.[33]

Unlike other regions, Asia does not yet have a unified human rights system covering the entire region. This is largely due to the absence of a common regional identity among its extremely diverse range of religions and cultures. There are ongoing efforts at the sub-regional level, including the work of the Association of Southeast Asian Nations (ASEAN) and the South Asian Association for Regional Cooperation (SAARC), both of which have human rights mandates. However, overall, this region has not adopted a general document on fundamental human rights and freedoms. Aside from the lack of a shared identity, this can be explained by the deliberate non-acceptance of the idea of human rights protection, related to the discourse known as the 'Asian values' debate.[34] This vision suggests that due to cultural differences between Asia and other regions of the world, cultural values and concepts, such as democracy and individual human rights, which are accepted in Western countries, are not applicable in the Asian context, which is inherently communitarian.[35] Nevertheless, several events in Asia in the second half of the 20th century, such as the occupation of Tibet, the rule of the Khmer Rouge in Cambodia and the authoritarian military rule in Burma (Myanmar), have demonstrated that the universal idea of human rights protection has profoundly influenced Asian societies, where the concept serves as an important reference for those demanding fundamental political changes.[36]

The regional socio-economic contexts and human rights concerns specific to each continent have provided a significant impetus for the emergence and development of regional human rights systems. As Dinah Shelton notes, regional human rights

32 Ssenyonjo, 2011, p. 359.
33 Ibid., pp. 360–361.
34 Yamamoto, 2024, p. 127.
35 Ibid.; King, 2011, p. 103.
36 King, 2011, pp. 103–104.

systems combine elements of uniformity and diversity in their evolution.[37] They all emerged alongside the development of the International Bill of Rights and took inspiration from universal norms. However, each region had distinct challenges and concerns. As the regional regulatory frameworks evolved, they interacted and influenced each other's evolution; each regional system draws on the jurisprudence of the others and changes its procedures based on their experiences.[38] The functioning of regional human rights courts – the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights – is a particularly valuable result of the regional human rights systems and a significant contribution to the global human rights protection, given that judicial enforcement of human rights has not been envisioned at the universal level.

There exists an important conceptual and theoretical justification for the role of regional human rights systems within the international human rights framework. Sumner Twiss argues that when human rights are affirmed at the international and intercultural level, two kinds of justification are present.[39] Globally, an international 'practical moral consensus' has developed that certain behaviours are required, while others should be prohibited. Locally, encompassing individual traditions, each tradition should draw upon 'its own set of moral categories as appropriate to its particular philosophical or religious vision' to justify its participation in this global consensus. In other words, different cultures should identify the aspects of their traditions and history that endorse and affirm the need for upholding human rights standards.

However, some view the concept of an orientation toward local affirmation of human rights as a threat to the universality of human rights and place it on a similar footing with cultural relativism, which has been unequivocally rejected by international human rights law.[40] Although there is no straightforward solution for the reconciliation of the universal concept of human rights with different regional, cultural and religious sensitivities, it is important to remember that the universal system of human rights has been created at the crossroads of different world cultures. The UDHR was proclaimed as a 'common standard of achievement' because it attempted to identify the common elements of the world's main religious, moral and political systems to set a shared vision of universal aspirations for how people should treat

37 Shelton and Carozza, 2013, p. 12.
38 Ibid.
39 Twiss, 1998, pp. 35–36, cit. by King, 2011, p. 105.
40 UN Special Rapporteur in the field of cultural rights, 2018, paras. 48–55; Yamamoto, 2024, pp. 129–130.

each other.[41] Hence, the idea of the UDHR and International Bill of Rights depends on the regional contexts to provide the foundations for achieving its objectives, that is, an effective implementation of the international human rights framework, not one that attempts to replace particular regional cultural traditions.[42] This perspective echoes the words of Eleanor Roosevelt, who chaired the UN Drafting Committee, that universal human rights take root locally and require collective effort to uphold them 'close to home' before any progress can be achieved globally.

3. The Regional Human Rights Protection Systems Outside Europe

The book entitled *The Regional Human Rights Protection Systems Outside Europe* seeks to provide foundational knowledge and a deeper understanding of major human rights mechanisms beyond the European human rights framework: the Inter-American, African, Islamic and Asian human rights mechanisms. Regional human rights systems play an increasingly significant role in the global human rights architecture. However, for several legal scholars in Europe, mechanisms other than the CoE's framework remain relatively unfamiliar.

The book is divided into four parts. The first part focuses on the Inter-American system, while the second addresses the African regional framework. The third part broadens the scope to cover Islamic and Asian perspectives, including an analysis of the approach within the Commonwealth of Independent States (CIS). The fourth part offers a comparative analysis of the cross-influence between the Inter-American and European human rights systems, emphasising the importance of understanding different regional human rights frameworks.

The contributors to this volume are scholars from Central and Eastern Europe, each with a specialised focus on international human rights law. Their research on regional human rights systems beyond Europe was supported through valuable collaboration with peer reviewers whose deep understanding of these regions is based on professional experience and close academic ties to respective human rights systems.

41 Tse-Chien Pan, 2024, p. 50. Yasuaki Onuma, in his influential book on the transcivilisational perspective on international law, questions the universal validity and legitimisation of human rights, referring to them as a Western, European-centric concept, which is alien to non-Western people. He questions the civilizational meaning of human rights in human history and ponders about the relationship between human rights and diverse civilisations and cultures. He puts forward the concept of transcivilisational perspective on human rights, which would require the international community to doubt the universal validity of human rights and re-conceptualise them from various perspectives of cultures, religions and different civilisations. According to Onuma, such re-conceptualisation of human rights could persuade non-Western nations to accept and adhere to human rights, contributing to grounding human rights in diverse societies. For more on the compelling vision of transcivilisational perspective on human rights, see: Onuma, 2010, pp. 370–462.

42 Tse-Chien Pan, 2024, pp. 50–51.

The contributions in Part I, *The Inter-American System of Human Rights*, begin with Robert Tabaszewski (Chapter 1), who provides a comprehensive analysis of the evolution of the human rights system within the OAS, exploring its historical roots and current architecture. The study highlights landmark documents, including the 1948 American Declaration of the Rights and Duties of Man and the 1969 ACHR. In his study, Tabaszewski reflects on the ongoing challenges and future directions for the Inter-American human rights framework, as it adapts to contemporary issues, such as digital rights and the rights of vulnerable groups.

Jakub Czepek (Chapter 2) provides a detailed analysis of the Inter-American Commission on Human Rights (IACmHR), a principal human rights body and an organ of the OAS, established in 1959. Czepek explores its legal background, scope of competence and procedural mechanisms, emphasising its role as a 'gatekeeper' to the Inter-American Court of Human Rights (IACtHR), as all cases in the Inter-American framework must first be examined by the IACmHR before reaching the judicial organ. Rebecca Lilla Hassanova (Chapter 3) describes the IACtHR. She outlines its legal anchorage and its contentious and advisory jurisdiction, emphasising its function in holding the states parties to the ACHR accountable for human rights violations. Marta Osuchowska (Chapter 4) undertakes the colossal task of identifying the main human rights concerns and systematising the recurring issues in the jurisprudence of the Inter-American human rights bodies. Osuchowska delves into the particular challenges faced by the Western Hemisphere, including the rights of indigenous peoples, women and children, and issues related to environmental protection and economic inequality. She discusses the important role of the IACtHR in addressing first-generation human rights violations, such as the right to life, liberty and personal security, alongside newer human rights concerns, such as collective property rights and safeguarding cultural rights.

Part II, *The African System of Human Rights*, begins with Lilla Garayová (Chapter 5), who examines the development of the African regional human rights system. Garayová traces its origins to the post-World War II movement towards regional human rights frameworks, emphasising the influence of Africa's colonial history and distinct social context. She explores what influenced the creation of the landmark African human rights instruments, such as the 1981 African Charter on Human and Peoples' Rights, the 1990 African Charter on the Rights and Welfare of the Child and protocols addressing specific issues, including women's rights, rights of persons with disabilities and the rights of older persons.

Tena Konjević further develops the discussion on human rights in Africa by exploring the legal environment of the African Commission on Human and Peoples' Rights (ACmHPR). In her contribution (Chapter 6), she provides an overview of its mandate, including the competence to receive and examine state and individual communications. Konjević reflects on the ongoing challenges faced by the ACmHPR, such as a limited possibility of enforcing compliance with its decisions, financial constraints and limited public awareness. Anna Dąbrowska (Chapter 7) discusses the African Court on Human and Peoples' Rights (ACtHPR), which is an institution of

fundamental significance to the African system of human rights protection, established to support and complement the ACmHPR. Dąbrowska traces back the origin of the ACtHPR to historical and political processes in the 1960s and 1970s, a period of decolonisation. She explores the ACtHPR's broad jurisdiction, which extends beyond the interpretation and application of the Banjul Charter to include other human rights instruments ratified by African states.

Cocou Marius Mensah (Chapter 8) identifies and explores the main challenges of human rights protection in Africa. Mensah examines landmark cases within the African human rights system, focusing on issues, such as gender inequality, child labour, forced marriages and the impact of climate change, which disproportionately affect vulnerable populations. He argues that there is a pressing need for effective implementation to protect fundamental rights across the continent.

Part III, *The Islamic, Asian and CIS Perspective on Human Rights Protection*, consists of a single contribution by Andrzej Pogłódek (Chapter 9). The chapter explores lesser-known non-European regional human rights systems, such as those of the Arab-Muslim, ASEAN, SAARC and CIS frameworks. Pogłódek argues that several of these human rights regimes, particularly those in the Arab-Muslim and ASEAN contexts, were established partly in opposition to the universal human rights system, reflecting cultural, religious and historical particularities. He notes that, unlike their European, Inter-American and African counterparts, these frameworks do not provide for mechanisms of individual complaints and human rights bodies to enforce human rights.

Part IV, *Connecting Worlds: Interactions Between the Inter-American and European Human Rights Systems*, consists of a single contribution by Jakub Czepek. Czepek's second input in this volume (Chapter 10) marks the high point of the debate on regional human rights protection systems, by offering a valuable, in-depth comparison of two major regional frameworks, the Inter-American and European human rights protection systems, focusing on the jurisprudence of their respective judicial bodies, the ECtHR and the IACtHR. Czepek demonstrates that both systems are anchored in the values enshrined in the UDHR; however, they have evolved with distinct legal and institutional frameworks, shaped by different historical contexts. He argues that the ECtHR's jurisdiction and influence have significantly shaped global human rights standards, while the IACtHR has developed unique approaches to reparations and state obligations, particularly through the doctrine of 'conventionality control'. He demonstrates that although the ECtHR had a significant influence on the IACtHR, the latter does not follow the European jurisprudence blindly; instead, it carefully incorporates doctrines and case law that are consistent with its regional legal environment. Although the influence of the IACtHR on the ECtHR is less apparent, some essential developments, such as the concept of positive obligations and the legal treatment of enforced disappearances, have significantly shaped European human rights jurisprudence, demonstrating the reciprocal relationship between the two major regional human rights systems.

This volume brings together experts to provide foundations of regional human rights systems outside Europe, set against the background of the regions' historical,

cultural and political context. Primarily intended as a textbook for students of the Human Rights and Rule of Law (HRRL) LL.M. course,[43] this book serves as a valuable resource for scholars, practitioners and officials seeking a single volume on the contributions and challenges of the world's regional human rights frameworks, and the role of regional factors and cultural contexts within the global human rights framework.

This volume is a part of the book series *Human Rights – Children's Rights*, which is inspired by the idea that the universality and indivisibility of human rights might accommodate regional perspectives on human rights protection; perspectives which should not be mistaken for cultural relativism. Different collective identities and sensitivities and diverse historical backgrounds might lead to different emphasis on certain human rights issues, reflecting the distinct cultural and legal heritage of Central and Eastern Europe. A defining characteristic of this book series is its focus on the legal systems and jurisprudence of primarily Central and Eastern European countries, understood as a 'cultural space spanning the Baltic, Adriatic and Black Seas'.

The Editor would like to express her gratitude to the outstanding authors and peer reviewers who contributed to this volume and to all those who envisioned and supported the research project, especially Professors János Ede Szilágyi, Anikó Raisz and Tímea Barzó.

Katarzyna Zombory
Editor

43 The curriculum of the HRRL LL.M course is based on comprehensive research, including the use of comparative legal research covering 16 countries, to provide an authoritative yet accessible treatment of the foundations and fundamentals of international human rights law. The HRRL LLM curriculum consists of the following volumes: *The Universal Protection of Human Rights*; *The European Convention on Human Rights*; *Regional Human Rights Protection Systems Outside Europe*; *The Protection of Human Rights in the European Union with Special Regard to the Central and Eastern European Related CJEU Case-law and FRA Practice*; *Human Rights from a Central and Eastern European Perspective Vol. I (Bulgaria, Croatia, Czechia, Hungary, Poland, Romania, Slovakia, Slovenia)*; *Human Rights from a Central and Eastern European Perspective Vol. II (Albania, Bosnia and Herzegovina, Georgia, Moldavia, Montenegro, North Macedonia, Serbia, Ukraine)*; *Human Rights Protection of Vulnerable Groups*; *Human Rights and Environmental Protection from a Central and Eastern European Perspective*; *International Criminal Law, Humanitarian Law and Refugee Law from the Perspective of Human Rights*; *Rule of Law: Supranationalisation* (series of articles); *Rule of Law: Constitutional Identity* (series of articles).

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Part I
Inter-American System of Human Rights

| Chapter 1 |

Legal Framework for Human Rights Protection in Americas

Robert Tabaszewski

ABSTRACT

This study presents the development of the legal framework for human rights protection in the Americas. It addresses the historical context of continental integration. Key to this foundation were the Pan-American Congresses and the establishment of the International Union of American Republics at the turn of the 19th and 20th centuries, initiating a framework for human rights protection in the region. The institutionalisation of protective mechanisms for individual rights is traced back to 1948, marking a pivotal development for the OAS. The analysis focuses on key legal instruments, such as Bogotá Charter, American Declaration of the Rights and Duties of Man and American Convention on Human Rights, along with additional Protocols and a set of specialised conventions, including the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women and others. This study offers insights into how the OAS integrates new sets of norms and judicial mechanisms, such as the Inter-American Court, to meet contemporary human rights challenges across the continent. It also briefly considers how recent post-pandemic legal and institutional developments have influenced the evolution of human rights protection in the Americas.

KEYWORDS

Inter-American System, Inter-American Court, Human Rights Law, American Convention, Legal Instruments, Human Rights Treaties

1. Introduction

This study aims to present the context and legal framework within the Inter-American system of human rights (excluding institutional and practical aspects, which are addressed in subsequent chapters of this volume). The Inter-American system rests upon historically established principles of cooperation among the American states and the political and legal structures developed by the Organization of American States (OAS), founded in 1948.[1] Therefore, it is pertinent to demonstrate that the Amer-

1 Grossman, 2008, p. 1267.

Robert Tabaszewski (2026) 'Legal Framework for Human Rights Protection in Americas' in Zombory, K. (ed.) *Regional Human Rights Protection Systems Outside Europe.* Miskolc–Budapest: Central European Academic Publishing, pp. 31–59. https://doi.org/10.71009/2026.kz.rhrpsoe_1

ican continent's focus on human rights emerged in the Pan-American movement, a precursor to the OAS. The human rights protection system developed within this organisation is rooted in fundamental documents crafted by the OAS Member States.[2] This framework created a noteworthy mechanism of legal protection, which afforded each individual within the jurisdiction of American states a means of redress.

To illustrate the functioning of human rights within the Inter-American system, the following research questions have been formulated:

1. Which key historical events have influenced the development of human rights protections within the Inter-American system?
2. How effectively does the Inter-American system uphold human rights, relying on evolving legal instruments, from informal declarations to specialised treaties?
3. How do human rights protection mechanisms in the Inter-American system align with global trends in the evolution of legal instruments and mechanisms?
4. Does the Inter-American system have tools for the protection of human rights?

The study employs research methods typical of legal scholarship, including dogmatic analysis, historical inquiry and legal-comparative analysis, which enable a comprehensive examination of this regional human rights system. The codification process of human rights norms across the Americas was similar to Europe. In addition, the analysis takes into account selected legal and institutional adjustments that emerged in the post-COVID-19 context, which influenced the contemporary functioning of the Inter-American human rights system. Initially, these norms emerged within the constitutions and domestic laws of newly established American states, alongside the creation of treaty-based regulations between nations.[3] Institutional developments gradually followed, evolving from Pan-American conferences to enduring organisations, such as the OAS. However, primarily, it was political rather than legal.[4]

2 Organization of American States (OAS). 2024. About the OAS [Online]. Available at: https://www.oas.org (Accessed: 26 October 2024).
3 Orzeszyna *et al.*, 2023, p. 2.
4 See: Herz, 2011, pp. 5–27; Shelton and Carozza, 2013, pp. 52–53.

2. The Role of the Pan-American Union in the Development of the Inter-American System of Human Rights

On the American continent, the idea of political integration gained traction as early as 1826, when Simón Bolívar convened the Panama Congress.[5] The alliance's main goal was to protect the integrity and independence of Latin American states, which feared the intervention by colonial powers.[6] The outcome of the Panama Congress, convened without the participation of the US, was the signing of the Treaty of Union, League and Perpetual Confederation on 15 June 1826, among the Republics of Colombia, Central America, Peru and the United Mexican States.[7] This treaty provided for joint defensive actions in the event of external aggression and fostered unity and cooperation among the American states.[8] It marked the first document directly addressing human rights, wherein the American states committed to combating and preventing slave trade. It imposed a duty of cooperation to use 'all their forces and means towards the total abolition and eradication of the African slave trade, whilst maintaining the current prohibitions of such commerce'.[9] Although the Treaty did not fully enter into force due to political differences among the states, civil rights were embedded in the constitutions of individual American countries. References to civil rights can be found in Pan-American documents enacted before the Panama Congress.[10]

5 In his renowned letter to Henry Cullen, a British merchant based in Jamaica, Bolívar emphasised the need for solidarity and unity in the face of threats from European powers. Bolívar aimed to mitigate conflicts among the newly independent Latin American states and create an alliance that would ensure harmony and cooperation across the region. See: Bolívar, 1815. Available at: https://www.bolivarpensador.com/carta-de-jamaica (Accessed: 26 Oct. 2024); Carozza, 2003, p. 284.

6 González, 2020; Orzeszyna *et al.*, 2023, p. 92.

7 Tratado de Unión, Liga y Confederación Perpetua (1826), Signed in Panama City, June 15.

8 Dobrzycki, 2002, p. 175.

9 Additionally, the states agreed that 'slave traders and vessels carrying slaves from Africa under the flag of the Contracting States shall be deemed to commit the crime of piracy, under conditions specified in a special agreement'. See: Article 27 of the Treaty.

10 The Constitution of Gran Colombia of 30 August 1821, for instance, guaranteed personal freedom, equality before the law, the right to property and freedom of speech and the press. Similarly, as early as the Mexican Constitution of 4 October 1824, civil liberties were guaranteed, including the recognition of human rights, the abolition of slavery and the guarantee of personal liberty. This constitution protected freedoms such as speech, the press, assembly and the right to a fair trial, while safeguarding private property and prohibiting monopolies. References to human rights appeared in subsequent documents as well, such as the Constitution of Bolivia on 19 November 1826, the Constitution of Peru on 12 November 1823 and the Constitution of Chile on 25 May 1833. The idea of civil rights permeated later constitutions, including the Argentine Constitution of 1 May 1853, one of the most progressive of its time. See: Constitución de la República de Colombia, Rosario de Cúcuta: B. Espinosa, Impresor de Gob. Gral. Available at: https://hdl.loc.gov/loc.law/llscd.78341644 (Accessed 26 October 2024); Constitución de la República de Bolivia, 19 November 1826; Constitución de la República del Perú, 12 November 1823; Constitución Política de la República de Chile. 25 May 1833; Constitución de la Nación Argentina. Available at: https://bcn.gob.ar/ (Accessed: 26 October 2024). See: Moses, 1891, pp. 1–47; Carozza, 2003, p. 284.

By the late 19th century, the idea of political and economic rapprochement among Latin American states and the establishment of a shared system grounded in respect for individual rights emerged through the Pan-American movement and periodic international Congresses of Latin American states.[11] The acceleration of integration processes has been attributed to a shift in US policy towards the region.[12] At the time, the US aimed to assume the role of guardian of the area, extending President James Monroe's 1823 doctrine,[13] to protect American interests from the rising European influence on the Western Hemisphere.[14] This policy shift was primarily driven by expanding economic and geopolitical interests and concerns regarding the threat posed by European powers.[15]

In 1881, US Secretary of State James G. Blaine initiated an invitation to all independent states of the Americas for a special Congress to discuss methods of preventing conflicts between nations in the Western Hemisphere.[16] Blaine's concept, founded on two pillars – peace preservation and the promotion of intercontinental trade – was not realised due to political instability in Latin American countries. However, at the initiative of the subsequent US Secretary of State, Thomas F. Bayard, the First International Conference of American States was held in Washington from 1889 to 1890, with Blaine in attendance. Representatives from the US and 17 states (except the Dominican Republic) attended, with the conference opening on 2 October 1889 and concluding on 19 April 1890.[17] All the sessions were conducted behind closed doors, where delegates discussed the maintenance of peace across the Americas and the prohibition of conquest.[18] A notable achievement for the US was the acceptance of the American treaty law as a model for relations among American states, as had been

11 Following the success of the Panama Congress, further Congresses were organised, including those in Tacubaya in 1840 and two in Lima, the first held between 1847 and 1848 and the second between 1864 and 1865. The 1870s and 1880s saw two specialised Congresses: The Congress of Jurists in Lima (1877–1879) and the South American Congress of Private International Law in Montevideo (1888–1889). These Spanish-speaking conferences created complex networks of multilateral negotiations in which Latin American countries demonstrated their solidarity and commitment to protecting shared values, aiming to safeguard sovereignty against foreign influence. However, they did not result in the creation of lasting legal institutions to guarantee individual rights protection and regional stability. Dobrzycki, 2002, p. 50; Llorens, 2016, pp. 149–151.

12 See: Gutiérrez, 2010, pp. 87–108.

13 Orzeszyna *et al.*, 2023, p. 92.

14 Mace 1999, pp. 21–22; Smith, 1996; Schoultz, 1998; Buzan and Wæver, 2009, p. 308.

15 Buzan and Wæver, 2009, p. 308; LaFeber 1993, p. 60.

16 Byrne Lockey, 1939, p. 4; Dobrzycki, 2002, p. 51.

17 International Institute of International Legal Studies, 1966, p. XXI; Dobrzycki, 2002, p. 52.

18 Numerous recommendations were adopted, covering the standardisation of weights and measures, the construction of an intercontinental railway, commercial regulations and patent and trademark law. Dobrzycki, 2002, p. 53.

agreed upon earlier at the Montevideo Congress.[19] However, the establishment of an International American Bank, despite the Congress's formal recommendation, did not come to fruition.[20]

The most tangible outcome of the First International Conference of American States was the establishment of the International Union of American Republics (*Unión de las Repúblicas Americanas*) on 14 April 1890, which became the world's largest regional organisation.[21] From a formal-legal perspective, the Union constituted an association of Member States from the Americas, founded by the resolution of the First International American Conference.[22] The Union encompassed nearly the entire Western Hemisphere, excluding European colonies and Canada as a dominion.[23] The executive body of the Union was the Information Bureau, known as the Secretariat.[24] According to the resolutions of the Conference, the Union's duration was set for 10 years, with the possibility of extension for another term. During this period, no Member State of the Union was permitted to withdraw. Furthermore, a significant achievement was the establishment of a forum for the exchange of views and cooperation between the states of the Americas, a unique accomplishment in contrast to other world regions. In 1900, steps were taken to organise a second conference, with Mexico, then seen as a symbol of success and a model for other countries in the region, as the venue.[25] The primary objective was to sustain the spirit of cooperation among the American states, particularly by building regional ties and creating a shared legal space.[26]

Among the key achievements of the Second Conference was the agreement of the American states to accede to the Hague Convention and be included in the arbitration procedure established by the Permanent Court of Arbitration in The Hague.[27]

19 The recommendations adopted at the Washington Conference in 1890 include the following: Adaptation of a uniform system of weights and measures, Communication on the Atlantic, Communication on the Gulf of Mexico and the Caribbean Sea, Communication on the Pacific, Inter-continental railway, International American Bank, International law, International Monetary Union, Nomenclature of merchandise, Sanitary regulations and Treaties for the protection of patents and trademarks.

20 Dobrzycki, 2002, p. 54.

21 Meyer, 2014; Orzeszyna *et al.*, 2023, p. 92.

22 Battaglia, 2004, p. 12.

23 Dobrzycki, 2002, p. 55.

24 Washington, D.C., in the US, was chosen as the Bureau's headquarters. Initially, the Secretariat served informational functions, focusing on the collection and distribution of data that could facilitate cooperation between the countries of the region. The Bureau published the Bulletin of the International Bureau of the American Republics alongside annual reports and periodicals on various countries within the region. An annual budget of $36,000 was allocated to start the operations of the Bureau. See: Cordero Torres, 1955, pp. 67–68; Labourdet, 1980, pp. 147–164.

25 The proceedings of the Second International Conference of American States took place from 22 October 1901 to 31 January 1902. Orzeszyna *et al.*, 2023, p. 92.

26 Dobrzycki, 2002, p. 55.

27 Permanent Court of Arbitration (1899) Hague Convention for the Pacific Settlement of International Disputes, The Hague, July 29. Available at: https://pca-cpa.org/en/documents/hague-conventions (Accessed: 26 October 2024).

The states joined the treaty on the extradition of criminal offenders and committed to protect against international anarchism.[28] However, due to opposition from the US, not all states adopted the proposed treaty on the rights of foreigners and consensus was not reached on a shared arbitration procedure for American states.[29] Nonetheless, the Mexico Conference confirmed the potential for consensus among the region's states and underscored that Latin American countries shared common values.[30] Another outcome was the renaming of the existing Commercial Bureau to the International Bureau of the American Republics.[31]

The strengthening of ties among Pan-American states continued during successive periodic conferences and was crucial for establishing stable relations between the American nations. The Third Pan-American Conference was held from 23 July to 27 August 1906 in Rio de Janeiro, resulting in the adoption of 19 resolutions and conventions that advanced previous agreements.[32] During this meeting, the decision was made to construct a permanent headquarters for the Pan-American movement.[33] Significant organisational changes to the institutional structure of the Pan-American movement were introduced at the Fourth Conference, held from 12 July to 30 August 1910. The former International Union of American Republics was renamed the Union of American Republics and the Secretariat was reconstituted as the Pan-American Union, set to operate permanently.[34] The fifth meeting of American states was held in Santiago, Chile, from 25 March to 3 May 1923, delayed due to World War I. At this conference, the states adopted the Gondry Treaty, aimed at avoiding conflicts among American states,[35] condemning 'armed peace' (excessive armament) and introducing the 'cooling off' principle to prevent the escalation of tensions.[36] Furthermore, it was agreed to continue work on the codification of the Inter-American law based on Alejandro Alvarez's draft.[37]

28 Pan-American Union (1901) Treaty on the Extradition of Criminal Offenders and Protection Against International Anarchism, adopted at the Second Pan-American Conference, Mexico City.

29 A concrete outcome of the Conference was the creation of a permanent platform for negotiating and aligning the shared interests of the American states, which played a crucial role in furthering relations across the Western Hemisphere. See: Dobrzycki, 2002, p. 60.

30 This was so, even though, at the time, some countries, including Mexico as the host of the conference, opposed US proposals, viewing them as a display of dominance in line with the American Monroe Doctrine.

31 Dobrzycki, 2002, p. 60.

32 Orzeszyna *et al.*, 2023, p. 92; Dobrzycki, 2002, p. 61.

33 Brown Scott, 1931, pp. 113–122.

34 Pan-American Union (1910) IV International Conference of American States.

35 Gondra Treaty (1923) "Treaty to Avoid or Prevent Conflicts between the American States," Organization of American States.

36 Orzeszyna *et al.*, 2023, p. 92; Dobrzycki, 2002, p. 65.

37 Divergences between the American states and the US emerged during the Sixth Inter-American Conference in Havana, held from 16 January to 20 February 1928, where US President Calvin Coolidge attended in person for the first time. Burr and Hussey, 1955, pp. 81–82.

During the sessions, the Code of Private International Law[38] was adopted, along with the Convention on Asylum[39] and the Convention on the Rights and Duties of States in the Event of Civil Wars.[40] The Inter-American Commission of Women was established as well, an institution that exists to this day.[41] The primary point of contention was the principle of non-interference in the internal affairs of states and the outcomes of the Pan-American Congress of Jurists report from 1927. These conflicts were resolved at a special conference convened between December 1929 and January 1930,[42] where the General Inter-American Conciliation Convention[43] and the General Inter-American Arbitration Treaty were adopted.[44]

The 1930s marked a period during which American states emphasised issues of security and peace. The Seventh Pan-American Conference in Montevideo, held from 3 to 26 December 1933, was dominated by discussions on economic and political threats to regional stability.[45] Among the conference's successes were the drafting of the Convention on Political Asylum[46] and the Convention on the Rights and Duties of States.[47] However, the proposed Code of Peace by the Mexican delegation, which envisioned the establishment of a supervisory body in the form of an Inter-American tribunal, did not secure sufficient support.[48] In 1936, a special conference dedicated to the reinforcement of peace was convened in Buenos Aires from 1 to 23 December at the initiative of US President, Franklin D. Roosevelt. Roosevelt proposed the creation of an American League of Nations, the first regional organisation for fostering an atmosphere of understanding and cooperation among the states of the Western Hemisphere.[49]

The conference resulted in the adoption of the Convention on the Preservation and Protection of Peace,[50] introducing the principle of consultation, and the Conven-

38 Pan-American Union (1928) Código de Derecho Internacional Privado (Bustamante Code). Available at: https://www.oas.org/juridico/spanish/mesicic3_ven_anexo3.pdf (Accessed: 26 October 2024).
39 Pan-American Union (1928) Convention on Asylum. Available at: https://www.oas.org (Accessed: 27 October 2024).
40 Pan-American Union (1928) Convención sobre Derechos y Deberes de los Estados en Caso de Luchas Civiles. Available at: https://www.oas.org (Accessed 26 October 2024).
41 Orzeszyna *et al.*, 2023, p. 92; Dobrzycki, 2002, pp. 66, 175.
42 Dobrzycki, 2002, p. 67.
43 Convención General de Conciliación Interamericana (1929) Conferencia Internacional Americana de Conciliación y Arbitraje, Washington, D.C., Organization of American States.
44 Tratado General de Arbitraje Interamericano (1929) Conferencia Internacional Americana sobre Conciliación y Arbitraje, Washington, D.C., Organization of American States.
45 Orzeszyna *et al.*, 2023, p. 92.
46 Pan-American Union (1933) Convención sobre Asilo Político.
47 Pan-American Union (1933) Convention on the Rights and Duties of States.
48 Dobrzycki, 2002, pp. 69–70, 175; Orzeszyna *et al.*, 2023, p. 92.
49 Dobrzycki, 2002, p. 71.
50 Pan-American Union (1936) Convention for the Maintenance, Preservation and Re-establishment of Peace. Available at: https://www.oas.org (Accessed: 26 October 2024).

tion on Peace Education through Public Institutions,[51] which contained the first significant provisions related to human rights.[52] Before the outbreak of World War II, the Eighth Conference took place in Lima from 9 to 27 December 1938, with resolutions reflecting concerns over escalating international tensions, including the influence of Germany, Italy and Japan in the region.[53] A significant outcome of this conference was the adoption of the Declaration of Lima, affirming the region's shared values of peace, security, territorial integrity and the sovereign equality of states.[54] During World War II, Pan-American cooperation intensified at the level of foreign ministers, with consultative meetings aimed at ensuring regional security. A special conference in 1945 in Mexico City-Chapultepec focused on the role of the region within the emerging global security framework.[55]

3. Institutionalising the Inter-American System

Following the end of World War II and the development of the international human rights protection system under the United Nations (UN), the opportunity arose to establish new structures for regional organisations, including within the Inter-American system. Latin American states viewed this as an opportunity, particularly given that none of them had participated in the meetings of the four great powers deciding on the post-war global order.[56] Latin American states had expressed their desire to transform the Pan-American movement into a new organisational framework during the Mexico-Chapultepec Conference.[57]

However, the legal foundations of the new regional system emerged under Article 52 of the UN Charter,[58] adopted in 1945 at the San Francisco Peace Conference.[59] This provision, supported by the states of the Inter-American movement, permits the establishment of regional arrangements for maintaining peace and security, provided they align with the UN's objectives and principles.[60] Latin American states considered the outcomes of the San Francisco Conference a great success, as they allowed a

51 Pan-American Union (1936) Declaration of Principles of Inter-American Solidarity and Cooperation. Available at: https://www.oas.org (Accessed: 26 October 2024).
52 Dobrzycki, 2002, p. 175.
53 Orzeszyna *et al.*, 2023, p. 92; Dobrzycki, pp. 73–74.
54 Whitaker, 1986, pp. 148-149; Engstrom, 2024, p. 102.
55 An important document adopted during this conference was the Declaration of Reciprocal Assistance and American Solidarity, signed in Mexico on 3 March 1945. See: Orzeszyna et al., 2023, p. 92; Kunz, 1945, pp. 527–533; Burke-White, 2004, p. 36; Glendon, 2003, p. 28.
56 Burke-White, 2004, p. 34; Sikkink, 2014, pp. 174–179.
57 Engstrom, 2024, pp. 102–103.
58 UN (1945) Charter of the United Nations and Statute of the International Court of Justice, San Francisco. Available at: https://www.un.org/en/about-us/un-charter/full-text (Accessed: 27 October 2024).
59 Carozza, 2003, pp. 284–286.
60 Glendon, 2003, p. 31.

considerably broader scope of action within international law than before.[61] In the spirit of developing Article 52 of the UN Charter, the Inter-American Conference on the Maintenance of Peace and Security was held from 15 August to 2 September 1947 in Rio de Janeiro, the then capital of Brazil.[62] The conference culminated in the signing of the Inter-American Treaty of Reciprocal Assistance, known as the Rio Treaty, by 21 American states, including the US. This foundational document of the Inter-American system came into force on 3 December 1948, following ratification by Colombia as the twelfth state, securing the required two-thirds majority of signatories. Hence, a system of mutual defence was established, forming the foundation of the security arrangement among the American states. Acknowledging the principles of the UN Charter, the Treaty obligated American states to take collective action in the event of armed aggression against any of them[63] and uphold the principle of peaceful resolution of disputes among states in the region.[64]

Two further foundational documents, establishing the basis for the first regional organisation in the Americas, were adopted during the Ninth International Conference of American States in Bogotá, Colombia, from 30 March to 2 May 1948.[65] These documents were the Charter of the Organization of American States[66] (Bogotá Charter) and the Pact of Bogotá[67] (American Treaty on Pacific Settlement).[68] The Pact commits its signatory states to resolve international disputes exclusively through peaceful means, such as negotiation, good offices, mediation, arbitration and judicial settlement. Additionally, it obliges states to unconditionally recognise the rulings of the International Court of Justice and accept its compulsory jurisdiction in cases where the parties cannot agree on venue.[69] To date, 15 states have ratified the Pact, although it was signed by 21. One of the signatory countries that has not ratified the Pact is the US, which has raised concerns regarding the provision limiting diplomatic protection of its citizens when they have the option to pursue proceedings before the courts of another American state.[70] Furthermore, several other states have submitted reserva-

61 Engstrom, 2024, p. 103.
62 Orzeszyna *et al.*, 2023, p. 92; Kunz, 1945, pp. 527–533.
63 Article 3 of the Treaty.
64 The Rio Treaty has been repeatedly applied in the OAS operations to support regional security and mutual defence efforts. This has been especially true during critical historical moments, such as the Cold War and the Cuban Missile Crisis in 1962, and following the September 11, 2001, attacks on the US. Recently, the treaty was invoked in response to the political crisis in Venezuela in 2019, highlighting its ongoing relevance in addressing significant security concerns within the Americas.
65 Llorens, 2016, p. 520; Villalta Vizcarra, 2006, p. 63.
66 OAS (1948) Charter of the Organization of American States. Available at: https://www.oas.org/juridico/english/treaties/a-41.html (Accessed: 19 October 2024).
67 OAS (1948) American Treaty on Pacific Settlement (Pact of Bogotá). Available at: https://www.oas.org/juridico/english/treaties/a-42.html (Accessed 26 October 2024).
68 Orzeszyna *et al.*, 2023, p. 92; Burke-White, 2004, p. 36.
69 Article 6 of the Bogota Charter.
70 Article 7 of the Bogota Charter.

tions to the Pact. Moreover, due to adverse rulings from the International Court of Justice, Colombia withdrew from the Pact in 2012, followed by Venezuela in 2013.

The adoption of the Bogotá Charter had significant legal ramifications for the institutionalisation of the Pan-American movement, as it laid the foundation for the operation of the first intergovernmental international organisation in the Americas: the OAS. Formally and legally, the Bogotá Charter constitutes the statute of the OAS, signed on 30 April 1948 in Bogotá, the capital of Colombia.[71] During deliberations, it was determined that the Charter would serve as the organisation's constitution, comprehensively regulating its competencies. The Charter came into force on 13 December 1951, after ratification by Colombia, and has since been revised four times: by the Protocol of Buenos Aires in 1967, the Protocol of Cartagena de Indias in 1985, the Protocol of Washington in 1992 and the Protocol of Managua in 1993.[72] It consists of 21 chapters, preceded by a preamble emphasising the historical significance of the Americas as a realm of freedom, conducive to the development of human personality and the fulfilment of legitimate aspirations. It notes:

> 'The true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man (...).'

The Bogotá Charter established the OAS as a new regional organisation with a democratic character, serving as a continuation of the former Union of American Republics.[73] Hence, the OAS did not replace the previous organisation but transformed it, continuing its mission in a modified form. The name change, involving the removal of the term 'republics', reflected a shift, as Latin American states had previously used the term to underscore their distinction from European states.[74] The objectives of the OAS were significantly broadened in comparison to the functions of the Union of American Republics. While the key goal remained to strengthen cooperation among the American states, the scope and structure of the organisation's activities expanded substantially, particularly in the realms of politics, security and socio-economic development. This inclusive approach resulted from a compromise between US policymakers, such as Edward Stettinius Jr., James F. Byrnes and George C. Marshall, who emphasised the political-military dimensions of the organisation, and representatives of social and economic movements from Latin American countries, notably Argentina, Brazil and Mexico, who advocated for a platform to support the region's socio-economic development.[75]

71 Llorens, 2016, p. 514; Orzeszyna *et al.*, 2023, p. 92.
72 Orzeszyna *et al.*, 2023, pp. 92–93.
73 Engstrom, 2024, p. 104.
74 Orzeszyna *et al.*, 2023, p. 93; Dobrzycki, 2002, p. 84.
75 Dobrzycki, 2002, pp. 77–80.

The original version of the OAS Charter explicitly delineated the organisation's aims, which included strengthening peace and security in the Americas, preventing conflicts and resolving disputes peacefully, collective defence in the event of aggression and addressing political, legal and economic issues.[76] Additionally, the OAS was tasked with promoting cooperation for economic, social and cultural development. These objectives reflect the organisation's expanded mission, which evolved from earlier integration initiatives to place greater emphasis on multilateral cooperation, regional development and human rights protection. The original Charter addressed these concerns, asserting that American states proclaim the fundamental rights of individuals, irrespective of race, nationality, creed or gender.[77] Notably, Chapter Seven of the Charter, titled 'Social Standards', established principles for cooperation among Member States to ensure dignified living conditions, the advancement of social legislation, protection of labour rights, welfare and the promotion of universal education and cultural exchange.[78]

The OAS, operating under its Charter, commenced its activities on 30 April 1948. Since its inception, it has undergone numerous organisational and programmatic transformations, reflecting shifts in international relations throughout the 20th and 21st centuries, particularly during the Cold War. Initially comprising 21 founding states, the OAS currently includes 34 members.[79] Structurally and in terms of location, the OAS inherited elements of the former Pan-American Union, notably its transformation into the General Secretariat, the primary administrative body of the organisation. Additionally, the Inter-American Defense Board and the Inter-American Development Bank were retained.

The current structure of the OAS results from significant institutional reforms, particularly in the 1970s, while the headquarters remain in Washington, D.C., continuing the tradition of the Pan-American Union. Apart from the General Secretariat, the principal bodies of the OAS include the General Assembly, the supreme decision-making authority of the OAS, the Permanent Council, overseeing the organisation's day-to-day activities, the Meeting of Consultation of Ministers of Foreign Affairs, convened in exceptional circumstances, and various councils addressing socio-economic matters.[80] Furthermore, the OAS has established specialised bodies, such as the Inter-American Commission on Human Rights (IACmHR), founded in 1959, and the Inter-American Council for Integral Development, established in 1993, expanding its competencies and operational scope.

The OAS Charter specifies that the organisation fulfils its objectives through specialised entities, including the Pan-American Health Organization (PAHO) (1902), the Inter-American Commission of Women (CIM) (1928), the Inter-American Children's

76 See Article 1 of the original 1948 Charter of Bogotá.
77 Article 5 (j) of the Charter.
78 Articles. 28–31 of the Charter.
79 Burke-White, 2004, p. 35. In November 2023, Nicaragua formally withdrew from the OAS, following the condemnation of the country's 2021 presidential election results.
80 Connell-Smith 1974, p. 202; Mace, 2017, p. 1.

Institute (IACI) (1927), the Pan-American Institute of Geography and History (1928), the Inter-American Indian Institute (IAII) (1940) and the Inter-American Institute for Cooperation on Agriculture (IICA) (1942). Additionally, the OAS Council maintains a special registry of other specialised agencies and commissions, such as the IACmHR and the Inter-American Peace Committee. An additional means of OAS operation includes specialised conferences, with their principles and scope defined in a dedicated report.[81]

The first conference organised in accordance with the principles of the OAS Charter was the Tenth American Conference, from 1 to 28 March 1954 in Caracas, Venezuela. This conference led to the adoption of various Inter-American conventions, including the Convention on Diplomatic Asylum, the Convention on Territorial Asylum and the Protocol on the Duties and Rights of States in the Event of Armed Aggression. Of the 117 resolutions passed during this conference, the most significant was the resolution of 28 March 1954, the Declaration of Solidarity for the Preservation of the Political Integrity of the American States Against the Intervention of International Communism. This document expressly condemned the activities of the international communist movement, deeming it an attempt to interfere in American affairs and a threat to national institutions, peace and security in the region.[82] The conference established fundamental Inter-American principles regarding the obligations of states towards individuals in the public and civil spheres.[83] The landmark Tenth Conference in Caracas was the last in the series of traditional Inter-American conferences, which, under the Buenos Aires Protocol of 1967, were replaced by annual meetings of the OAS General Assembly.

4. Main Human Rights Instrument in the Inter-American Human Rights System

Drawing from the experiences of successive Pan-American conferences, the Inter-American system has developed numerous innovative legal solutions that have become the cornerstone for human rights protection in the region. Scholarly literature emphasises that, after World War II, in the Americas, the OAS emerged as the first organisation to address human rights and freedoms comprehensively.[84] Several documents adopted by the Union of American Republics addressed specific aspects of protection, such as the right to life, liberty and personal security, the right to equal treatment and non-discrimination, the right to dignified working conditions and the right to education. These documents considered the rights of specially protected groups, including children and women, whose social and legal status was discussed

81 See: OAS Permanent Council, 1962.
82 Quintana, 2024, pp. 12–13.
83 Orzeszyna *et al.*, 2023, pp. 92–93.
84 Burke-White, 2004, p. 35; Romano, 2021, p. 33.

by the CIM. Regarding human rights, additional focus was placed on the right to free expression, assembly and association. Given that the OAS Charter and Bogotá Charter contained relatively few binding provisions regarding human rights *sensu stricto*, the development of a separate document became essential. As early as 1945, at the Mexico-Chapultepec conference, the Inter-American Juridical Committee was tasked with drafting a document concerning human rights and freedoms.

Currently, the *corpus juris* of the Inter-American system, in addition to the Bogotá Charter, includes three types of instruments: the American Declaration of the Rights and Duties of Man (IADRDM; 1948),[85] American Convention on Human Rights (ACHR),[86] known as the San José Pact (1969), along with additional Protocols (the 1988 Protocol of San Salvador on economic, social and cultural rights[87] and the 1990 Protocol to Abolish the Death Penalty)[88] and a set of specialised conventions. The primary 'special' conventions include:

1. Inter-American Convention to Prevent and Punish Torture
2. Inter-American Convention on Forced Disappearance of Persons
3. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (known as the Convention of Belém do Pará)
4. Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities
5. Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance[89]
6. Inter-American Convention Against All Forms of Discrimination and Intolerance[90]
7. Inter-American Convention on Protecting the Human Rights of Older Persons[91]

These conventions are 'special', as they comprehensively regulate specific areas of human rights or pertain to vulnerable groups. A common feature of these documents

85 OAS (1948) American Declaration of the Rights and Duties of Man, Ninth International Conference of American States, OAS Res XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1, p. 17 (1992).
86 OAS (1969) American Convention on Human Rights, OAS Treaty Series No. 36, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1, p. 25 (1992).
87 OAS (1988) Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), OASTS No. 69.
88 OAS (1990) Protocol to the American Convention on Human Rights to Abolish the Death Penalty, OASTS No. 73.
89 OAS (2013) Inter-American Convention Against Racism, Racial Discrimination, and Related Forms of Intolerance, Antigua, Guatemala, entry into force November 11, 2017.
90 OAS (2013) Inter-American Convention Against All Forms of Discrimination and Intolerance, Antigua, Guatemala, entry into force February 20, 2020.
91 Antkowiak and Gonza, 2017, p. 8.

is that they creatively extend the scope of protection afforded by the ACHR. The level of ratification among OAS members varies across these instruments.[92]

4.1. The American Declaration of the Rights and Duties of Man

On 2 May 1948, the Ninth International Conference of American States adopted the ADRDM, the world's first document to comprehensively set out human rights.[93] The work on the Declaration had been ongoing since 1945.[94] This was the first general document in the history of international law to exert significant influence on the drafting of the Universal Declaration of Human Rights (UDHR), which was adopted eight months later.[95] The Declaration was accepted by all 21 states participating in the Conference as a non-binding Resolution (OAS Res. XXX) as an annexe to the Conference's proceedings.[96] The document contains 38 articles divided into two chapters and was drafted in the four official languages of the OAS: Spanish, English, Portuguese and French, ensuring its consistency and accessibility for OAS Member States.

The Declaration is preceded by an introductory clause and a preamble, which clarify the context, motives and objectives behind its adoption. Following the model of the American Constitution, it recognises human dignity as the foundation of human rights.[97] It affirms that all people, by virtue of their dignity, are equal and free, with rights and duties inextricably linked; rights express individual liberty, while duties reflect human dignity.[98] It emphasises spiritual development as the ultimate aim of human existence and enshrines the individual's duty to promote culture and morality as essential facets of this development.

The first chapter, titled 'Rights', encompasses 28 articles proclaiming civil rights, such as the right to life, liberty, security and personal integrity (Article 1), equality before the law (Article 2), freedom of religion and worship (Article 3), freedom of thought, opinion, expression and dissemination (Article 4), protection of one's reputation, dignity and private and family life (Article 5), form and protect a family (Article 6), protection of motherhood and childhood (Article 7), residence and movement (Article 8), inviolability of one's home (Article 9), inviolability and confidentiality of correspondence (Article 10), health and welfare (Article 11), education (Article 12),

92 Notably, the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women have received the highest number of ratifications.

93 Orzeszyna *et al.*, 2023, p. 93.

94 The Inter-American Juridical Committee began work on the ADRDM in 1945, when it was tasked with drafting the initial document. By the end of December of that year, the draft was complete and subsequently published in March 1946. See: Paúl, 2017, pp. 47–55.

95 Notably, the Inter-American Juridical Committee adopted the draft of the ADRDM in late December 1945 and published it in March 1946, preceding the first meeting of the UN Preparatory Committee tasked with drafting the UDHR. See: Burke-White, 2004, p. 35; Romano, 2021, p. 33; Glendon, 2003, p. 27; Engstrom, 2024, p. 101.

96 Glendon, 2003, p. 31.

97 Tabaszewski, 2017, p. 192.

98 Orzeszyna *et al.*, 2023, p. 93–94; Glendon, 2003, pp. 34–35.

enjoy cultural assets (Article 13), work and fair remuneration (Article 14), rest (Article 15), social security benefits (Article 16), legal recognition and civil rights (Article 17), access judicial remedies (Article 18), nationality (Article 19), vote and participate in government (Article 20), assemble (Article 21), associate (Article 22), property (Article 23), petition (Article 24), protection against arbitrary detention (Article 25), a fair trial (Article 26) and asylum (Article 27). Article 28 stipulates that human rights may be restricted in the interests of the rights of others, security, public welfare and democratic principles.

Human duties are outlined in Chapter II, which include the duty to society (Article 29), of parents and children (Article 30), of education (Article 31), to vote (Article 32), to obey the law (Article 33), to society and the law (Article 34), to participate in social security systems (Article 35), to pay taxes (Article 36), to work (Article 37) and to abstain from political activity within another state's territory (Article 38).[99] A clear shortcoming of the Declaration is the absence of enforcement mechanisms and institutions through which individuals seek redress for their rights.[100]

The document's legal status is particularly interesting. Initially, the 1948 Declaration was a resolution without legally binding force. It was a political document of a declaratory and programmatic nature.[101] Although not a treaty, it gradually acquired the status of a source of obligations for OAS Member States.[102] This status was affirmed in documents from the IACmHR, which, when reviewing individual complaints, referenced the provisions of the Declaration.[103] This special character was recognised by the Inter-American Court of Human Rights (IACtHR) as well, which classified that '(...) certain provisions of the American Declaration represent customary norms or general principles of international law'.[104] However, this applies only to the provisions reiterated in the case law and not the entire Declaration.[105] Notably, the Declaration holds particular significance as it is the only international human rights standard formally applicable to states, such as the US and Cuba, which have not ratified the ACHR or the International Covenant on Economic, Social and Cultural Rights (ICESCR).[106] Therefore, it sets the minimum standard of human rights protection on the

99 Quintana, 2024, p. 24.
100 The only body authorised to evaluate Member States' compliance with the ADRDM is the IACmHR, p. 34; Burke-White, 2004, pp. 34–35.
101 Orzeszyna *et al.*, 2023, pp. 93–94.
102 See: IACtHR, Advisory Opinion OC-10/89 of July 14, 1989: 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. Requested by the Government of the Republic of Colombia, paras. 41 and 43–47.
103 Farer, 1998, p. 520.
104 IACtHR, Advisory Opinion OC-26/20 of November 9, 2020: The Obligations in Matters of Human Rights of a State That Has Denounced the American Convention on Human Rights and the Charter of the Organization of American States, paras. 96 and 137.
105 Ibidem, paras. 94–99.
106 Carozza, 2003, p. 312; Burke-White, 2004, p. 34.

continent.[107] The Court in San José used the Declaration as an instrument to enable an authentic interpretation of the Charter, in which fundamental individual rights are proclaimed.[108] Hence, it serves a moral role and acts as a specific document influencing human rights doctrine and development on the international stage.[109]

Several other documents adopted within the OAS framework correspond to the ADRDM. These include the Declaration of Caracas of 1954, condemning communism and other forms of totalitarianism. Equally important is the Declaration of San José of 1960, addressing respect for representative democracy and aiming to strengthen the rule of law in Latin American countries. The political advancement of the economic and social rights set forth in the 1948 Declaration, often referred to as second-generation rights, was represented by the Declaration Establishing the Alliance for Progress under the Pan-American Operation (Declaration of Punta del Este). The Declaration of Punta del Este was adopted on 17 August 1961 during a special session of the OAS Economic and Social Council, held from 5–17 August 1961 in Punta del Este, southern Uruguay.[110] It consisted of a preamble, followed by four sections: Title I (Objectives of the Alliance for Progress), Title II (Action Program), Title III (Principles of Financing) and Title IV (Cooperation Initiatives). The Declaration formalised regional cooperation for progress and stability, providing for US financial support to promote the economic, social and political development of Latin American countries.

4.2. The American Convention on Human Rights

Both the OAS Charter, which recognised fundamental rights as a core principle, and the ADRDM predated the European Convention on the Protection of Human Rights and Fundamental Freedoms concerning timing and proposed frameworks. However, appropriate institutional mechanisms were not developed at the time and the provisions of these documents were not effectively implemented, resulting in a human rights protection system in the Americas that existed solely on paper.[111] Due to these shortcomings, particularly the absence of bodies to which individuals could appeal in cases of rights violations, and the emergence of several dictatorships in the region during the 1950s, it became necessary to draft a treaty that would proclaim human rights and establish mechanisms for their enforcement, including the ability to lodge individual complaints. The process of institutionalising human rights in the region was influenced by the ongoing work on the UN International Covenants on Human Rights (ICHR), initiated in the early 1950s, and the Strasbourg mechanism for individual and interstate complaints, already in operation.[112]

107 IACHR, *Coard et al. v. United States*, Case 10.951, Report No. 109/99, 29 September 1999, paras. 37–39.
108 Romano, 2021, p. 33; Tabaszewski, 2010, p. 83; Quintana, 2024, pp. 22–25.
109 Burke-White, 2004, p. 34; Morsink, 1999, p. 130; Ghidirmic, 2018, pp. 50–60.
110 Carta de Punta del Este (1961) dipublico.org. Available at: https://www.dipublico.org/135236/carta-de-punta-del-este-1961/ (Accessed: 26 October 2024).
111 Tabaszewski, 2010, p. 83.
112 Machowicz and Tabaszewski, 2023, p. 192.

The idea of drafting a new treaty emerged and gained support at the Fifth Meeting of Consultation of Ministers of Foreign Affairs of American States, leading to the initiation of work on a draft of the new Convention in 1959.[113] At the Third Special Inter-American Conference in Buenos Aires in 1967, where the inclusion of more comprehensive standards on economic, social and educational rights was approved for the OAS Charter, it was decided that the new Inter-American human rights convention should define the structure, competencies and procedures of bodies responsible for these issues. Hence, a draft Convention on Human Rights was prepared, recognising the need for a distinct regional system of human rights protection, aligned with international standards, yet tailored to the specific challenges and needs of the Americas.

The final version of the ACHR was opened for signature at a special conference in San José, Costa Rica, on 22 November 1969.[114] However, this document remained ineffective as a protective instrument for several years, as the Convention only came into force on 18 July 1978, following ratification by 11 OAS Member States.[115] Colombia, as the last of the 11 states, ratified the Convention on 31 July 1973, enabling its formal entry into force. Currently, 24 states are parties to the Convention, meaning that not all OAS members have ratified it.[116] The ACHR is currently one of the most significant and fundamental instruments of public international law.[117] Drafted in the four official OAS languages – Spanish, English, Portuguese and French – the Convention comprises 11 chapters divided into three parts: I. State Obligations and Protected Rights, II. Means of Protection and III. General and Final Provisions. It is preceded by a preamble, which explicitly recognises that fundamental human rights do not derive from nationality but from inherent qualities of the human personality.[118] These qualities justify international protection in the form of a convention that reinforces or supplements the protections provided by the national laws of American states.

Although the Convention is an original solution, comparison with European documents reveals that it was inspired, in part, by provisions in the European Convention on Human Rights (ECHR), particularly concerning procedural guarantees for human rights protection. Similar to the ECHR, the ACHR establishes mechanisms

113 Burke-White, 2004, p. 35.

114 Dobrzycki, 2002, pp. 177–178.

115 On how different states of the region have approached the ratification of the ACHR, see: Carozza, pp. 52–55.

116 The states that have ratified the ACHR include Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela (which re-ratified the Convention in 2019). Initially, 25 states ratified the ACHR; however, Trinidad and Tobago and Venezuela subsequently withdrew from it. Venezuela exited in 2012 but rejoined in 2019, thereby restoring its status as a party. Trinidad and Tobago withdrew from the Convention in 1999, which remains in effect. Nicaragua, despite having withdrawn from the OAS, remains a signatory to the ACHR.

117 On the potential norm conflicts between the universal system and the Inter-American system, see: Domínguez, 2017, pp. 717–748.

118 Tabaszewski, 2010, p. 83.

for protecting human rights, such as the IACtHR (described in Chapter VII)[119] and the IACmHR (described in Chapter VIII), which serve roles comparable to the European Court of Human Rights and the former European Commission on Human Rights, examining both individual and state complaints regarding violations of rights enshrined in the Convention.

A distinctive feature of the Americas is that certain OAS Member States, and other states in the region, are not parties to the Convention. In contrast to the ECHR, where ratification is a condition of membership in the Council of Europe (CoE), the ACHR does not require ratification by OAS Member States.[120] This means that states can be members of the OAS without being parties to the Convention, complicating the pursuit of redress for human rights violations in other states, especially through individual complaints submitted by the victims. Moreover, compared to the ECHR, the ACHR includes fewer additional protocols, making it less extensive concerning formal modifications. The ECHR contains a wide range of additional protocols, introducing new rights and obligations, resulting in a more elaborate framework.

However, unlike the European system, the ACHR refers to economic, social and cultural rights in Article 26, although their detailed regulation was introduced later in the Protocol of San Salvador. According to the Convention, state parties commit to adopting, following their constitutional procedures, all necessary legislative measures to ensure the fulfilment of the rights and freedoms expressed in the Pact of San José. In line with the principle of non-discrimination, states pledge to respect the rights and freedoms recognised in this Convention and ensure that all persons under their jurisdiction fully enjoy these rights and freedoms, irrespective of race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social conditions.[121]

In Chapter II, titled 'Civil and Political Rights', Articles 3–25 of the ACHR encompass both civil and political rights and freedoms. These provisions address fundamental existential and civil rights, such as the right to life (Article 4), personal integrity (Article 5), prohibition of slavery and servitude (Article 6), personal liberty (Article 7), *habeas corpus* (Article 8), the principle of legality and prohibition of *ex post facto* laws (Article 9), compensation for wrongful conviction (Article 10), freedom of conscience and religion (Article 12), freedom of thought and expression (Article 13), assembly (Article 15) and association (Article 16). These articles impose specific obligations on state parties to protect these rights and ensure their effective realisation following democratic principles and international human rights standards.

The range of rights included in the ACHR is considerably broader than in other regional human rights conventions. It introduces additional rights and freedoms, absent in the ECHR, such as the right to nationality (Article 20), of the child to

119 See: Arts. 34–73.

120 The American region countries that are not parties to the ACHR include the US, Cuba, the Bahamas, Belize, Guyana, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Antigua and Barbuda.

121 Article 1 of the ACHR.

protection (Article 19) and to a name and nationality (Articles 18–20). An innovative provision is the right to reply and correction in the media (Article 14). Furthermore, the right to honour and dignity (Article 11) and private and family life (Article 17), which exist in the ECHR, are more comprehensively elaborated in the ACHR.[122] However, the content of the right to private property (Article 21), freedom of movement and residence (Article 22), which emphasises the right to return (Article 23), and political rights (Article 24) is formulated somewhat differently. Moreover, the principles of equality before the law and the scope of judicial protection, as defined in Article 25, differ from those outlined in European conventions.

Member States are obligated to implement rights derived from the social, educational, scientific and cultural norms enshrined in the OAS Charter, as revised by the Protocol of Buenos Aires in 1967. This Protocol introduced the concept of 'integral development', which encompasses second-generation human rights. Specifically, the OAS Charter sets out Member States' commitments to ensuring equal opportunities, eliminating extreme poverty and achieving equitable distribution of wealth and income. It outlines specific objectives, such as fair remuneration, adequate working conditions, access to education, combating illiteracy and providing proper nutrition and housing. The ACHR initially did not detail specific obligations due to their progressive nature, confining itself to a referral clause in Article 26, the sole article in Part III of the Convention.[123] Additionally, scholarly literature highlights that American states did not intend to grant the Court jurisdiction over claims of violations concerning economic, social and cultural rights under Article 26. Consequently, the ability to pursue social rights claims before the Court in San José, solely based on the ACHR, remains highly limited.[124]

The adoption and entry into force of the Protocol of San Salvador in 1988, as a detailed legal instrument on social rights, partially altered the previous situation.[125] The Protocol was opened for signature on 17 November 1988 and entered into force on 16 November 1999 after ratification by 11 states.[126] As of 2025, the Protocol has been ratified by 16 OAS Member States.[127] It organises and expands the scope of social rights established in the Charter and Declaration and incorporates into the obligations of Member States all second-generation human rights, including those not included in Part III of the ACHR. It guarantees several fundamental rights, including the right to work (Article 6), fair working conditions (Article 7), trade union rights (Article 8), social security (Article 9), health (Article 10), a healthy environment (Article 11),

122 Orzeszyna *et al.*, 2023, p. 40.
123 Ruiz-Chiriboga, 2013, pp. 164–165.
124 Zombory, 2023, pp. 171–191; LeBlanc, 1992, pp. 130–145.
125 Melish, 2003, pp. 225, 234; Ruiz-Chiriboga, 2013, p. 163.
126 The eleventh country to ratify the Protocol of San Salvador, enabling its entry into force, was Uruguay.
127 Those states are Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay. See: Antkowiak and Gonza, 2017, p. 7.

food (Article 12), education (Article 13), cultural benefits (Article 14), family protection (Article 15), children's rights (Article 16), protection of the elderly (Article 17) and the protection of persons with disabilities (Article 18).[128] Despite this extensive catalogue, in cases where a state violates certain rights, only the right to unionise (Article 8) and education (Article 13) may be subject to individual complaint before the IACmHR and potentially before the IACtHR.[129] For the remaining rights, protection is mainly pursued through a periodic reporting mechanism, with reports reviewed by the relevant organs of the Inter-American system: the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture.[130] Consequently, for states that have ratified the Protocol, the ACHR and the Protocol create a comprehensive system of norms protecting social rights.[131] This benefits individuals, who gain additional protections, and Member States, which no longer need to interpret the OAS Charter to incorporate social rights under Article 26 of the Convention, as the rights explicitly protected are those enumerated in the Protocol.[132]

The Pact of San José was supplemented by the Second Additional Protocol concerning the abolition of the death penalty (Protocol of Asunción), approved by the Twentieth OAS General Assembly. The Protocol was signed on 8 June 1990 and entered into force on 28 August 1991, following ratification by Nicaragua. As of 2025, it has been ratified by 13 OAS Member States.[133] It complements Article 4 of the ACHR (right to life) and aims for the complete abolition of the death penalty in the Americas. It consists of four articles, preceded by a preamble, affirming the inalienable right of every person to life, a right that cannot be suspended under any circumstances. The preamble highlights that abolishing the death penalty strengthens the right to life and the Protocol's adoption reflects the prevailing regional trend favouring its elimination.

Emphasis is placed on the irreversibility of the death penalty, which precludes correction of judicial errors and denies the possibility of rehabilitation for the condemned. Following the wishes of OAS Member States, the Protocol commits each ratifying state to refrain from using the death penalty in peacetime. However, it does not impose an absolute obligation to remove it from their legal system, a point of critique.[134] The Protocol permits states to apply the death penalty during wartime, provided they declare this reservation at the time of ratification.[135] Notably, to date,

128 Ruiz-Chiriboga, 2013, p. 160.
129 Cavallaro and Schaffer, 2005, p. 227.
130 The Protocol of San Salvador, as part of the Inter-American human rights framework, is supported and evaluated through a mechanism of periodic national reports, analysed by the Working Group for the Protocol of San Salvador.
131 See: OAS, 2024; Cavallaro and Schaffer, 2007.
132 OAS (2012) Social Charter of the Americas, Forty-Second Regular Session, AG/doc.5242/12 rev. 2, Cochabamba, Bolivia, June 3–5.
133 Those states are Argentina, Brazil, Chile, Costa Rica, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Dominican Republic, Uruguay and Venezuela.
134 Orzeszyna *et al.*, 2023, p. 95.
135 See: Article 2(1) of the Protocol.

only Brazil has made such a reservation, allowing for the death penalty under specific wartime conditions outlined in the national law. Due to the Protocol's adoption, the number of countries in the Americas retaining capital punishment has gradually declined to just 13.[136] This reflects a broader commitment across the region to reduce and ultimately eliminate the death penalty.

The IACtHR has made a significant contribution to the interpretation and implementation of the provisions of the Convention.[137] Particularly, following the collapse of authoritarian regimes, its role in consolidating and expanding human rights has been duly acknowledged.[138] The most important cases that have altered or had a substantial impact on the domestic legal orders of American states include *Velásquez Rodríguez v. Honduras (1988), Barrios Altos v. Peru (2001), Gelman v. Uruguay (2011), Lagos del Campo v. Peru (2017), González et al. (Campo Algodonero) v. Mexico (2009), Radilla Pacheco v. Mexico (2009), Atala Riffo and Daughters v. Chile (2012) and Duque v. Colombia (2016).* The number of states that have accepted its jurisdiction has increased markedly, which, at least on a declaratory and symbolic level, demonstrates a growing commitment of states to comply with its judgments. This extends to economic, social and cultural rights. The recognition of this category of rights has gradually emerged in the jurisprudence of the IACtHR, particularly since the landmark case of *Lagos del Campo v. Peru* (2017),[139] where the Court interpreted Article 26 of the ACHR as a basis for the judicial enforceability of economic, social and cultural rights. The role of the Court in securing compliance with the Convention's provisions, especially through the expansion and clarification of state obligations, continues to grow, notwithstanding the existing conflicts of norms with domestic legal orders and constitutional courts.[140]

5. Other Human Rights Instruments in the Inter-American System

Within the Inter-American system, several key instruments protect human rights, particularly those that address specific groups or violations.[141] The Inter-American Convention to Prevent and Punish Torture (IACPT), adopted on 9 September 1985, known as the Convention of Cartagena de Indias, is one of the key specialised instruments in regional international law, regulating the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.[142] It entered into force on 28 February 1987, after ratification by the required two-thirds majority of

136 Antkowiak and Gonza, 2017, p. 76.
137 On the important role of the IACtHR's jurisprudence in expanding and clarifying state obligations, see Alfonso Santiago, ed., La Corte Interamericana de Derechos Humanos: Su historia, contribución e impacto (Buenos Aires: Editorial La Ley, 2020).
138 Tabaszewski, 2010, p. 97.
139 I/A Court H.R., 2017. *Case of Lagos del Campo v. Peru*, Judgment of August 31, 2017 (Preliminary Objections, Merits, Reparations and Costs), Series C No. 340.
140 Urueña, 2013, pp. 17–46.
141 Orzeszyna et al., 2023, p. 93.
142 See: Cakal, 2023, pp. 1–19; Mujuzi, 2007, pp. 156–165.

signatory states.[143] Article 2 of the Convention defines torture[144] that is considerably more precise than that in the UN Convention.[145]

The IACPT affirms the binding and absolute prohibition of torture, a rule that cannot be overridden by national legislators. It specifies that under no exceptional circumstances, whether during war, threat of conflict, siege, national emergency, internal disturbance, suspension of constitutional rights, political instability or any other urgent situation, may national authorities justify the use of torture as a lawful measure.[146] Significantly, the 1985 Convention's provisions establish a broad range of entities accountable for acts of torture. This includes state officials and individuals who were aware of or could have easily learned of such acts.[147] The Convention obligates OAS Member States to take preventive measures, introduce effective criminal sanctions against perpetrators and ensure protection for torture victims.[148] However, the Convention does not establish institutionalised protective mechanisms akin to those in the CoE system, limiting itself to the obligation imposed on state parties to report to the IACmHR.[149]

The Inter-American Convention on Forced Disappearance of Persons (IACFDP) is another significant instrument of Inter-American law, representing an original approach in American legal thought.[150] It was signed on 9 June 1994 and came into force on 28 March 1996.[151] The Convention was developed in response to a wave of forced or involuntary disappearances across the Americas, particularly in the 1970s and 1980s.[152] It defines forced disappearance as:

> 'An act of depriving a person or persons of their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorisation, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of

143 OAS (1985) Inter-American Convention to Prevent and Punish Torture, Cartagena, Colombia, entry into force February 28, 1987. Available at: https://www.oas.org (Accessed 26 October 2024).
144 Torture is defined as any act deliberately committed to inflict physical or mental suffering on a person, typically for purposes such as criminal investigation, intimidation, personal punishment, preventive measures or as a penalty, among other objectives. This definition includes methods used on a person that aim to erase their personality or reduce their physical or mental capacities, regardless of whether they cause direct physical pain or mental suffering.
145 United Nations (1984) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 39/46, December 10, entry into force June 26, 1987. Available at https://www.oas.org (Accessed 26 October 2024).
146 Orzeszyna *et al.*, 2023, pp. 370–371.
147 See: Article 3 of the IACPT.
148 Cakal, 2023, pp. 1–19; Mujuzi, 2007, pp. 156–165.
149 UN, 2003, p. 91.
150 OAS (1999) Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, Guatemala City, entry into force September 14, 2001. Available at: https://www.oas.org (Accessed 26 October 2024).
151 Antkowiak and Gonza, 2017, p. 8.
152 UN, 2003, p. 91.

> freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.'[153]

The Convention imposes a duty on national authorities not to practise, tolerate or permit forced disappearances, even in extraordinary situations or during suspensions of individual guarantees.[154] Unlike the IACPT, the IACFDP addresses oversight by establishing a reporting mechanism. The Convention allows cases involving forced disappearances to be reported directly to the IACmHR, ensuring that a designated body is responsible for reviewing and addressing such cases.

Particular attention should be given to conventions dedicated to the protection of vulnerable groups within the Inter-American system. The first conventions concerning women's rights were adopted within the American system as early as 1948.[155] As the only international treaty solely focused on eliminating gender-based violence, the Convention is available in the official OAS languages, with Greek and Italian translations. The Convention comprises five parts, preceded by a preamble, and covers all forms of violence, whether private or public. Violence is defined as 'physical, sexual, and psychological violence against women', which may occur in domestic or family settings, in community spaces by individuals in workplaces and institutions or be perpetrated or tolerated by the state, regardless of location.[156]

The catalogue of rights entitled to women is outlined in Article 4, which has an open character, with corresponding positive obligations of states outlined in Articles 7–9. To realise women's rights, the Convention provides a comprehensive implementation mechanism, including a reporting procedure, advisory opinions by the IACtHR, the ability to file petitions with the IACmHR, particularly concerning allegations under Article 7, which mandates state obligations to prevent, punish and eliminate violence against women, and information submissions to the special MESECVI mechanism.[157]

Inspired by the positive reception of the Convention of Belém do Pará within the international community, work commenced on new specialised conventions focusing on the protection of the rights of persons with disabilities and the protection of the

153 Article II of the IACFDP.

154 UN, 2003, pp. 91–93.

155 OAS (1948) Inter-American Convention on the Granting of Civil Rights to Women; Inter-American Convention on the Granting of Political Rights to Women, Ninth International Conference of American States, Bogotá, Colombia. Available at: https://www.oas.org (Accessed 26 October 2024).

156 See: Article 2 of the Convention.

157 The Mechanism to Follow Up on the Implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (MESECVI) was established by the OAS in 2004. It serves as a supervisory and support system for Member States that have ratified the Convention, aiming to provide oversight and ensure compliance with measures to combat violence against women. By 2024, MESECVI has convened 20 annual meetings to assess and support progress in this area across the Americas. UN, 2003, p. 94.

rights of older persons.[158] The Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (CIADDIS), known as the Guatemala City Convention, was signed on 8 June 1999 and entered into force on 14 September 2001. Panama, as the sixth country to ratify the convention, enabled its enactment.[159] The CIADDIS comprises 14 articles and commits Member States to the full integration of persons with disabilities into society through legislative measures, social initiatives and educational programs. The CIADDIS affirms that individuals with disabilities possess the same human rights and freedoms as others, rooted in the inherent dignity and equality of every person. This includes protection from discrimination based on disability.[160] The Convention provides a monitoring mechanism in the form of a reporting system by Member States, with 19 countries currently party to the Convention.

The Inter-American Convention on Protecting the Human Rights of Older Persons focuses on ensuring the rights and dignity of older adults, promoting their social integration, protection from discrimination and access to healthcare and social security.[161] The Convention was adopted on 15 June 2015 during the 45th OAS General Assembly in Washington, D.C. and entered into force on 11 January 2017, following the second required ratification submitted by Costa Rica. It is the first document of its kind worldwide, guaranteeing the protection and safeguarding of the rights of older persons.[162]

6. Conclusion

The above analysis has demonstrated that the Inter-American system has developed a substantial set of norms for protecting human rights, reflecting contemporary legal trends that individuals can benefit from. Some of these norms derive directly from the Pan-American movement, while others implement universal solutions (e.g., the ADRDM) or are inspired by European legal thought (e.g., ACHR monitoring mechanisms). Additionally, a range of original solutions has been established, such as the 2015 Convention. The COVID-19 pandemic posed a significant test for the system's coherence, during which the OAS proved capable of responding effectively and supporting human rights in the face of a global health crisis. Guidelines issued by the

158 Antkowiak and Gonza, 2017, p. 8; Mikołajczyk, 2018, pp. 18–19.
159 OAS (2015) Inter-American Convention on Protecting the Human Rights of Older Persons, Washington, D.C., entry into force January 11, 2017. Available at: https://www.oas.org (Accessed 26 October 2024).
160 Caballero and Rincón, 2021, p. 48.
161 OAS (2015) Inter-American Convention on Protecting the Human Rights of Older Persons. Adopted in Washington, D.C., entry into force 11 January 2017.
162 Kucharska and Tabaszewski, 2023, p. 180.

IACHR, as declarations, assisted Member States in ensuring access to healthcare, the right to information, privacy protection and access to justice during the pandemic.[163]

The American Declaration on the Rights of Indigenous Peoples is another notable, though non-binding, legal instrument adopted within the Inter-American system.[164] This document, adopted on 15 June 2016 after years of negotiations, establishes standards for protecting the rights of indigenous communities across the Americas. It includes key rights for indigenous peoples, such as rights to land, cultural identity, language, autonomy, traditional practices and self-governance. Other significant documents include the Declaration of Principles on Freedom of Expression, adopted in 2000,[165] and the Inter-American Democratic Charter of 2001, adopted in Lima, which proclaims the right to democracy throughout the region.[166]

The Inter-American system has remained highly active in creating new documents in the post-pandemic period. In recent years, the OAS has adopted several key declarations, reflecting current trends in human rights protection. Notably, the Declaration on International Law in Cyberspace from 2022[167] aims to define principles for applying international law in cyber operations, focusing on state responsibility, cybersecurity measures and the protection of human rights online. The Declaration on Inter-American Principles Regarding Neuroscience, Neurotechnology, and Human Rights from 2023[168] introduces intriguing solutions. These and other declarations represent important steps in advancing the Inter-American human rights protection system. While not legally binding, they significantly influence standard-setting and provide direction for OAS Member States.[169]

163 OAS (2020) Inter-American Guidelines for Protecting the Human Rights of Persons with COVID-19, adopted by IACHR, April 2020.
164 AG/RES. 2888 (XLVI-O/16).
165 CIDH/RES. 1/00.
166 AG/RES. 1 (XXVIII-E/01).
167 CJI/DEC. 02 (C-O/22).
168 CJI/DEC. 01 (XCIX-O/21).
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| Chapter 2 |

Institutional Framework for Human Rights Protection in Americas: The Inter-American Commission on Human Rights

Jakub J. Czepek

ABSTRACT

The Inter-American Commission on Human Rights (IACmHR, Commission) was established by the Organization of American States (OAS) in 1959. Together with the Inter-American Court of Human Rights (IACtHR), formed by the American Convention on Human Rights (ACHR)[1] in 1969, it provides the institutional framework for States' Parties obligations with the ACHR. The Commission is a crucial element of the Convention and the only possibility to bring a case before the IACtHR leads through IACmHR. However, the Commission is not a typical regional human rights system responsible only for processing individual applications and forwarding it to the Court. It is a multipurpose organ, which has wide competence, focused especially on 'observance and promotion of human rights'.[2] The IACmHR is not established by the ACHR. It was created 10 years earlier, as an OAS organ.[3] This enables the Commission to have a greater influence on human rights protection within the OAS framework. This chapter focuses solely on the Commission. It examines the Commission's history and legal basis, scope of competence and procedure of individual petitions to the IACmHR.

KEYWORDS

Inter-American Commission on Human rights, IACmHR, ACHR, procedure, Inter-American human rights protection system

1 American Convention on Human Rights (Pact of San José), San José, 22 November 1969.
2 Charter of the Organization of American States, Bogotá, 30 April 1948, amended by the Protocol of Buenos Aires (27 February 1967), Protocol of Cartagena de Indias (5 December 1985), Protocol of Washington (14 December 1992) and Protocol of Managua (10 June 1993), Art. 106.
3 This change was introduced by the Protocol of Buenos Aires. See: Protocol of Amendment to the Charter of the Organisation of American States (Protocol of Buenos Aires), 27 February 1967, Art. XII, Art. XV.

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1. Introduction

The Inter-American Commission on Human Rights (IACmHR, Commission) was established by the Organization of American States (OAS) in 1959. Together with the Inter-American Court of Human Rights (IACtHR), established by the American Convention on Human Rights (ACHR)[4] in 1969, it provides the institutional framework for States' Parties obligations with the ACHR. The Commission is a crucial element of the Convention and the only way to bring a case before the IACtHR.

The IACmHR is often perceived as an entity similar to the former European Commission of Human Rights (ECmHR). However, this is not the case. The Commission was not established by the Convention in 1969. It is an organ of OAS, which created it 10 years earlier.[5] According to OAS Charter, the ACHR's principal function is to 'promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters'.[6] The structure, competence and procedure of the Commission were determined by the ACHR. Furthermore, the competences of the IACmHR are different from the former ECmHR. IACmHR, apart from examining individual communications, develops an awareness of human rights among the peoples of America, makes recommendations to the Member States, prepares studies or reports, may request information from states and responds to inquiries.[7]

The Commission is an important element of the Inter-American system for human rights protection. The IACmHR handles the majority of individual communications, only some of which are transmitted to the IACtHR. For instance, in 2023, IACmHR received 2692 petitions and only 34 cases were sent to the Court.[8] Hence, the main purpose of this chapter is to examine the overall functioning of the Commission through an examination of its legal background, competence and the procedure of individual petitions to the IACmHR.

2. IaCmHR: History and Legal Basis

The Commission was established in 1959, before the adoption of the ACHR in 1969. The IACmHR was created under Resolution VIII of the fifth Meeting of Consultation

4 American Convention on Human Rights (Pact of San José), San José, 22 November 1969.
5 This change was introduced by the Protocol of Buenos Aires See: Protocol of Amendment to the Charter of the Organisation of American States (Protocol of Buenos Aires), 27 February 1967, Art. XII, Art. XV; Dąbrowska, 2021, p. 39.
6 Charter of the Organization of American States, Bogotá, 30 April 1948, amended by the Protocol of Buenos Aires (27 February 1967), Protocol of Cartagena de Indias (5 December 1985), Protocol of Washington (14 December 1992) and Protocol of Managua (10 June 1993), Art. 106.
7 American Convention on Human Rights, Art. 41.
8 IACmHR, Statistics [Online]. Available at: https://www.oas.org/en/iachr/multimedia/statistics/statistics.html (Accessed: 9 August 2024).

of Ministers of Foreign Affairs in 1959.[9] This document explicitly mentions the draft preparation of the 'Convention on Human Rights' and the establishing of the 'Inter-American Court for the Protection of Human Rights'.[10] L. Hennebel stresses that the establishment of the IACmHR by the Meeting of Consultation posed a problem. The Commission could not be a new organ of the OAS, because it was not created by the Inter-American Conference, which has the sole competence to establish a new organ. Neither was it created as a specialised organisation nor an organ of the Council. The Statute of the Commission was a source of certain problems. Hence, the establishment of an organ with such potential importance with a single resolution could affect its work and its credibility.[11]

The Council of the Organization approved the statute of the Commission in 1960. Under the provisions of the Statute, the Commission was established as an autonomous entity of the OAS. Human rights were those set out in the American Declaration of the Rights and Duties of Man (ADRDM).[12] The first session of the IACmHR was held in Washington, D.C., between 3 and 28 October 1960. Later, in the 1960s, the Statute was subjected to certain changes. In 1965, the Second Special Inter-American Conference (Rio de Janeiro) improved the Commission's effectiveness and strengthened it. *Inter alia,* it authorised the Commission to examine communications sent to it and any other information available, address the government of any Member State for information deemed pertinent and make recommendations to it to bring about more effective observance of fundamental human rights.[13] During the Third Special Inter-American Conference (Buenos Aires, 1967), the Protocol of Amendment to the Charter of the OAS was signed. After the adoption of the Protocol, the Commission became one of the OAS's organs[14] and was instructed to continue to monitor the observance of human rights until the ACHR entered into force.[15]

On 22 November 1969, the Inter-American Specialized Conference on Human Rights approved the ACHR. The Conference stressed that the IACmHR shall represent all the member countries of the Organization and entrusted the Commission the task of preparing its Statute.[16] The Convention entered into force in 1978. In 1979, in La

9 Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, 11–18 August 1959, p. 11.
10 Ibid.
11 Hennebel, 2007, p. 54.
12 Ibid.; See also: Annual Report of the Inter-American Commission on Human Rights 1997, 13 April 1998, OEA/Ser.L/V/II.98, Statute of the Inter-American Commission on Human Rights, 8 June 1960, Arts. 1 and 2.
13 More: Annual Report of the Inter-American Commission on Human Rights 1997; Hennebel, 2007, p. 55.
14 Protocol of Buenos Aires, Art. 51.
15 Ibid, Art. 150.
16 Inter-American Specialized Conference on Human Rights: Resolution and Recommendation Concerning American Convention on Human Rights, 22 November 1969, International Legal Materials, 9(1), Jan. 1970, p. 125.

Paz, Bolivia, the OAS General Assembly approved the Commission's new Statute. After these amendments, Article 1 stated:

> '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.'[17]

Hence, human rights were defined as set forth in the ACHR, and the ADRDM for states that did not access the ACHR.[18] Similar to the previous Statute, the Commission consisted of seven members who represented all the OAS Member States.[19]

Currently the functioning of the IACmHR is based on the ACHR, Statute of the Commission and its Rules of Procedure.[20] The Commission consists of seven members, who must have citizenship of one the OAS Member States. However, states can nominate people who are not their nationals. No more than one national of the same country can be a member of the Commission or the Court in the same period.[21] Notably, no state has established, at the local level, a formal, transparent mechanism for proposing candidates to the IACmHR or IACtHR.[22]

Members should be 'persons of high moral character and recognised competence in the field of human rights'.[23] The experts of the Commission do not need to have a law degree; however, the judges of the Court must have legal training and possess the qualifications required for the exercise of the highest judicial functions under the law of the country of which they are nationals or which nominates them as candidates.[24] The requirement of 'high moral character and recognised competence in the field of human rights' means that the persons selected by the states must be suitable for the position, that is, have competence in the areas of work and be independent.[25]

17 Statute of the Inter-American Commission on Human Rights, adopted by the OAS General Assembly during its ninth period of sessions, La Paz, Bolivia, October 1979, Art. 1.
18 Ibid.
19 Ibid, Art. 2; See also: Annual Report of the Inter-American Commission on Human Rights 1997.
20 Rules of Procedure of the Inter-American Commission on Human Rights, approved by the IACmHR at its 137th regular period of sessions, from 28 October to 13 November 2009, modified on 2 September 2011 during the 147th Regular Period of Sessions, from 8 to 22 March 2013, for entry into force on 1 August 2013.
21 Statute of the IACmHR, Arts. 3 and 7; ACHR, Arts. 36 and 37, para. 2.
22 CEJIL (2023) *Guía para defensores y defensoras de derechos humanos. 3ra. Edición actualizada. La protección de los derechos humanos en el sistema Interamericano* [Online]. Available at: https://cejil.org/wp-content/uploads/2023/05/Guia-para-defensores-y-defensoras-de-derechos-humanos.pdf (Accessed: 9 August 2024), p. 44.
23 Statute of the IACmHR, Art. 2, para 1; ACHR, Art. 34.
24 Statute of the IACmHR, Art. 2, para 1; Statute of the Inter-American Court of Human Rights Adopted by the GA of the OAS at its Ninth Regular Session, La Paz Bolivia, October 1979, Art. 4, para. 1; ACHR, Arts. 34 and 52; CEJIL, 2023, p. 44.
25 CEJIL, 2023, p. 44.

The members are elected by the OAS General Assembly in their personal capacity and retain independence of judgement from the governments that nominate them.[26] The OAS does not formally scrutinise candidates' credentials or interview them. However, in 2019 and 2020, the OAS Committee on Juridical and Political Affairs (CAJP) held a special session to 'share good practices in the nomination and selection of candidates'.[27] The CAJP is one of the various committees of the OAS and does not form a structural part of the organisation. Thus, its practices are not binding.

The elections take place in the framework of the OAS General Assembly. In most cases, a vote exchange takes place at the highest level in the foreign ministries of the states. Few states carry out individual scrutiny of the candidates. Hence, the outcome of the election may reflect the skills of the nominators and considerations of geographical and political balance; rather than the individual competence of the selected candidates.[28] However, in recent years, there has been an advocacy for a more transparent system of candidate nomination and selection.[29] Furthermore, the nominating states should consider gender balance among the candidates.[30]

The members of the Commission are elected for a four-year term, which may be renewed once.[31] The IACmHR works during sessions, which means that the commissioners do not work on a full-time basis. In consequence to the above and following the economic restrictions faced by the Inter-American system, the role of the staff becomes crucial. It is the personnel that effectively filter the cases on admissibility basis. The members cannot engage in other functions that might affect their independence or impartiality or the dignity or prestige of their post in the IACmHR.[32] They may not participate in the discussion, investigation, deliberation or decision of a matter submitted to the IACmHR, if they are nationals of the state, which is the subject of the review, if they have previously participated, in any capacity, in a decision concerning the facts on which the matter is based or have acted as an adviser to or representative of any of the parties interested in the decision.[33] The membership guarantees immunity. From the time of election and throughout the term of office, the members enjoy immunities and diplomatic privileges similar to those granted to diplomatic agents under international law.[34] Concerning the OAS Member States that are not parties to the ACHR, the members of the Commission enjoy the privileges and immunities pertaining to their posts that are required for them to perform their duties with independence.[35]

26 Statute of the IACmHR, Art. 3, para 1; ACHR, Art. 36, para 1.
27 More: CEJIL, 2023, p. 45.
28 Ibid., p. 45. See also: Hennebel, 2007, p. 57.
29 Ibid., p. 46.
30 Statute of the IACmHR, Art. 4
31 Statute of the IACmHR, Art. 6.
32 Ibid., Art. 8, para. 1; ACHR, Art. 71; more: Hennebel, 2007, p. 58.
33 Rules of Procedure of the IACmHR, Art. 14, para. 2.
34 Statute of the IACmHR, Art. 12, para. 1.
35 Ibid., para. 2.

The IACmHR is headquartered in Washington, D.C.,[36] while the Court is located in San José, Costa Rica.[37] This difference in location is attributed to the difference in the status of both institutions. The IACmHR is an OAS organ, whereas the IACtHR was established by the ACHR. Both IACmHR and IACtHR work during their sessions. The Commission initially had two to three regular sessions during the year and occasionally held extraordinary sessions.[38] In recent years, the number of IACmHR sessions increased up to four per year.[39] Both bodies faced problems while conducting sessions during the COVID-19 pandemic; however, these were solved by online communication solutions.[40]

3. Scope of Competence of the Commission

The ACHR distinguishes between the IACmHR's functions and competence,[41] whereas Statute of the IACmHR mentions its 'functions and powers'.[42] This terminological inconsistency seems to be minor, yet 'functions' in the Statute appear only in the title of section IV.[43] The scope of 'functions and powers', both under the ACHR and the Statute, remains more general than of 'competence', which under the ACHR focuses mostly on communications and petitions.[44] According to the Rules of Procedure and the ACHR, principal 'functions' of the Commission are 'to promote the observance and defence of human rights and to serve as an advisory body to the OAS'.[45]

The Commission's 'functions and powers' entail developing an awareness of human rights, making recommendations to the governments of the Member States, preparing studies or reports it considers advisable, requesting the Member States' governments to supply it with information on the measures adopted in matters of human rights, responding to inquiries made by the Member States on matters related to human rights, taking actions on petitions and other communications pursuant to its authority and submitting annual report to the OAS General Assembly.[46] The States Parties to the ACHR have an obligation to supply the IACmHR with necessary information concerning the manner in which their domestic law ensures the effective application of the ACHR's provisions.[47]

36 Ibid., Art. 16.
37 Ibid., Art. 3.
38 Rules of Procedure of the IACmHR, Art. 14, para. 1.
39 IACmHR, Sessions [Online]. Available at: https://www.oas.org/en/iachr/sessions/default.asp (Accessed: 9 August 2024).
40 More: CEJIL, 2023, p. 47.
41 ACHR, Art. 41–47.
42 Statute of the IACmHR, Arts. 18–20.
43 Ibid.
44 ACHR, Arts. 44–47.
45 Rules of Procedure of the IACmHR, Art. 1, para. 1; ACHR, Art. 41.
46 ACHR, Art. 41; Stature of the IACmHR, Art. 18.
47 Ibid., Art. 43.

The Commission's scope of competence is wide, which is due to its nature. The great majority of its competence is of diplomatic and political nature. Regarding the examination of individual communications and petitions, the IACmHR acts as a quasi-judicial organ. The particular nature of the Commission has been discussed by the doctrine.[48] It is unique due to its anchoring in the OAS system and not the Convention. The numerous 'functions and powers' of the Commission require certain classification. Hennebel divides them into three categories: those exercised regarding OAS Member States, those exercised exclusively regarding States Parties to the ACHR and those exercised regarding the states that did not access the Convention.[49] Some authors attempt to undertake more functional division of the IACmHR's competence, including promotion, monitoring, conciliation, investigation and consultation,[50] or focus on three fundamental imperatives: promote human rights, protect human rights and respond to consultations regarding the observance of human rights.[51] This research focuses on the third proposal.

The notion of promotion of human rights focuses on effective implementation of these rights. This requires information and education to prepare public opinion and governments for accepting more effective standards and control systems. The promotion plays a preventive role in the process of human rights protection.[52] The IACmHR realised a human rights promotion mission from its outset.[53] Currently, it performs this function under Article 18(a) of its Statute and Article 41(a) of the ACHR, which defines it as developing 'an awareness of human rights among the peoples of the Americas'.[54] These activities include regularly organising symposia, conferences and trainings and preparing periodic studies and thematic reports.[55] Santiago and Lange describe the thematic reports as the most important promotional activity of the IACmHR.[56] However, the actual impact and influence of the thematic reports is difficult to assess. The crucial research, which examines the effectiveness of Inter-American human rights system, does not clarify whether thematic reports could be considered effective.[57]

At the request of civil society organisations or by order of the Commission itself, the IACmHR may convoke audiences to deal with particular situations or topics.[58] The examined issues may vary from general ones, such as freedom of religion or women deprived of liberty in Americas, to specific ones, concerning particular states or crises (e.g., persons deprived of liberty in Nicaragua during the 2018 human rights

48 Hennebel, 2007, p. 64.
49 Ibid., pp. 62–64.
50 Santoscoy, 1995.
51 Santiago and Lange, 2021, p. 87.
52 Santoscoy, 1995, § 61.
53 More: Ibid., § 62.
54 ACHR, Art. 18 (a).
55 Santiago and Lange, 2021, p. 87.
56 Ibid.
57 Basch *et al.*, 2010, pp. 9–36.
58 Santiago and Lange, 2021, p. 87.

crisis).[59] The thematic reports are of a promotional character and do not have legal power. They may reveal how the IACmHR perceives certain topics and its priorities. Hence, the Commission and civil society organisations may use it in order to apply political pressure regarding certain human rights violations.[60]

Recently, financing thematic reports by certain states and NGOs started a discussion about their impartiality. The Global Center for Human Rights Report showed that the formulation of certain reports, following the contribution of funds by the states and NGOs advocating for certain solutions, may raise questions concerning independence and impartiality. The report stresses that these actors contribute funds to the Inter-American human rights system for the implementation of projects with specific objectives. Although the link is not explicit, the influence of the economic participation of these actors in the creation of standards should motivate a demand for greater transparency and better accountability.[61]

The scope of competence regarding the protection of human rights entails issuing reports concerning the human rights situation in particular States Parties. In the past decades, countries faced numerous political turmoil, including revolutions, dictatorships and military governments. From the IACmHR's perspective, issuing a country report, unravelling the human rights violations in the State Party, was an effective method. On one hand, it gave the possibility of protection of individuals from violations, and, on the other hand, it put necessary political pressure against the regimes by denouncing their abuses. Politically, country reports were used to analyse and expose human rights situations in non-compliant Member States to incite the outrage in the international community and pressurise those governments to cease human rights violations.[62]

The IACmHR country reports may focus on general situations of human rights[63] in a State Party or relate to more concrete issues regarding human rights protection, such as issues within the country in the context of social protests[64] or challenges with consolidating democracy.[65] Country reports contain recommendations from the

59 More: IACmHR, Thematic reports [Online]. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/reports/thematic.asp (Accessed: 9 August 2024).
60 Santiago and Lange, 2021, p. 87.
61 Global Center for Human Rights Report. *Balance del financiamiento de la CIDH y la Corte Interamericana 2009-2024. Opacidades e influencias en una financiación condicionada*, p. 38.
62 Ibid., p. 88.
63 E.g., OAS, IACmHR Report, Situation of Human Rights in Honduras, 24. March 2024, OEA/Ser.L/V/II, Doc.9/24, [Online]. Available at: https://www.oas.org/es/cidh/informes/pdfs/2024/informe-honduras.pdf (Accessed: 9 August 2024).
64 OAS, IACmHR Report, Situación de Derechos Humanos en Perú en el contexto de las protestas sociales, 23 April 2023, OEA/Ser.L/V/II, Doc. 57/23 [Online]. Available at: https://www.oas.org/es/cidh/informes/pdfs/2023/Informe-SituacionDDHH-Peru.pdf (Accessed: 9 August 2024).
65 OAS, IACmHR Report, Cohesión social: el desafío para la consolidación de la Democracia en Bolivia, 20 January 2024, OEA/Ser.L/V/II, Doc.1/24 [Online]. Available at: https://www.oas.org/es/cidh/informes/pdfs/2024/CohesionSocial_Bolivia_SPA.pdf (Accessed: 9 August 2024); More: OAS, ICHCR, Country Reports [Online]. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/reports/country.asp (Accessed: 9 August 2024).

IACmHR. These may include proposals for addressing certain human rights issues in the country, concerning reforms in the domestic legal system or establishment of remedies to reported violations. Non-compliance with the IACmHR recommendations may result in the case being referred to the Court. According to the Rules of Procedure of the IACmHR if 'the Commission considers that the State has not complied with the recommendations of the report (...), it shall refer the case to the Court'.[66] However, this concerns only States Parties, which accepted the jurisdiction of the IACtHR.

The IACmHR may issue precautionary measures, similar to the interim measures provided by the European Court of Human Rights (ECtHR). Precautionary measures constitute protection mechanism, upon which State Parties are requested to protect individuals in 'serious and urgent situations presenting a risk of irreparable harm'.[67] Precautionary measures may protect persons or groups[68] and any person or organisation may submit a request for precautionary measures in favour of an identified or identifiable person. These measures are established under the Commission's Rules of Procedure[69] and constitute an autonomous competence, which does not stem from the Convention. Consequently, they do not carry the same legal weight or binding force as the functions expressly granted by the Convention.

The process of issuing a precautionary measure may be initiated when the Commission is informed about grave situations, in which the fundamental rights of individuals or groups are endangered. The request may be made by a third party, such as an NGO. The IACmHR must respond swiftly to the situation and if it decides that the claims are well founded, it should contact the respective government to demand that the rights of the persons at risk be protected.[70] However, its enforceability raises certain controversies. Some argue that the precautionary measures are binding and the states, having ratified the ACHR, are obliged to comply with them. Others stress that, if the IACmHR may issue mandatory decisions, the role of the Court is rendered superfluous.[71]

The Commission undertakes on-site visits, whose role and long-term effects should not be underestimated. The impact of visiting bodies on improvement of human rights situation is visible in the example of torture prevention bodies, such as the UN Subcommittee on Prevention of Torture (SPT) and Council of Europe (CoE) Committee for the Prevention of Torture (CPT). On-site observations should be undertaken with the consent or at the invitation of the government[72] and the Commission may undertake such visit, if there is a reason to suspect that certain rights or freedoms may be endangered. The purpose is to engage in in-depth analysis of the general situation and investigate a specific situation. These visits result in the preparation of a

66 Rules of Procedure of the IACmHR, Art. 45.
67 Ibid., Art. 21, para. 1.
68 Ibid., para. 3.
69 Ibid., Art. 25.
70 Santiago and Lange, 2021, p. 89.
71 Ibid.
72 Statute of the IACmHR, Art. 18(g).

report regarding the human rights situation observed, which is published and sent to the General Assembly.[73] The IACmHR's competence focused on protection of human rights entails country reports, precautionary measures and on-site visits. Hence, it has certain opportunities to monitor and improve the overall situation of human rights protection in the region. However, its key competence concerns examining communications and forwarding complaints to the IACtHR. Furthermore, it fulfils a consultative role. It may provide clarification to the OAS Member States or the OAS regarding obligations or responsibilities of human rights within the American human rights system.[74] When its opinion is requested, the IACmHR responds to inquiries made by any Member State on matters related to human rights and, within its possibilities, provides them with requested advisory services.[75]

The emergence of the ACHR created a distinction between OAS Member States that did and did not ratify the Convention. It resulted in two types of IACmHR competence regarding particular states. The main difference stems from the recognition of the IACtHR's jurisdiction. Regarding all OAS Member States (both that have and have not ratified the Convention), the Commission increases awareness of human rights, makes recommendations that governments adopt progressive measures in favour of those rights, requests that governments provide the Commission with reports on the measures adopted in the field of human rights, responds to inquiries made by any Member State on issues related to human rights and provides expertise and guidance within its capacity, renders an annual report to the OAS General Assembly and carries out on-site visits in the Member States.[76] Concerning states Parties to the ACHR, the Commission processes petitions and other communications,[77] appears before the IACtHR in cases provided for in the Convention,[78] requests the Court to take necessary provisional measures to prevent irreparable injury to persons[79] and consults the Court on the interpretation of the ACHR and other treaties concerning human rights protection in the American states.[80]

Petitions containing denunciations or complaints of the ACHR's violation by a State Party may be brought by 'any person or group of persons, or any nongovernmental entity legally recognised in one, or more Member States of the OAS'.[81] Examining individual communications is the most important competence of the IACmHR. Therefore, some OAS Member States did not ratify the ACHR. The right to individual petition is guaranteed by the ACHR without any special recognition by the state. An

73 OAS, IACmHR, Annual Report of the IACmHR, 13 April 1999, OEA/Ser.L/V/II.106, Doc. 6 rev., Chapter II, § 8.3. [Online]. Available at: https://www.iachr.org/annualrep/99eng/chapter2.htm (Accessed: 9 August 2024).
74 Santiago and Lange, 2021, p. 90.
75 Statute of the IACmHR, Art. 18(e).
76 Ibid., Art. 18, See also: Santiago and Lange, 2021, p. 90.
77 ACHR, Arts. 44 and 51.
78 Statute of the IACmHR, Art. 19(b).
79 Ibid., 19(c).
80 Ibid., 19(d), (e), (f).
81 ACHR, Art. 44.

individual who believes that his or her fundamental rights have been violated has the right to initiate an international protection mechanism, provided that the national protection system does not effectively remedy the situation.[82] Therefore, the Convention gives individuals legal capacity at the international level, enabling them to invoke the responsibility of a State Party, whether a foreign state or the country of which they are a national.[83]

4. The Procedure of Individual Petitions to the IACmHR

Apart from its prerogative to examine petitions under Articles 44 and 46 of the ACHR, the Commission retains its pre-ACHR quasi-judicial responsibilities concerning OAS Member States that have not ratified the ACHR. Hence, the IACmHR and IACtHR may evaluate their human rights obligations under the ADRDM.[84]

The Commission may be described as 'the gatekeeper to the Court' in contentious cases (cases brought by individuals against a State Party and inter-state cases). A contentious case may be brought before the Court only after being processed by the Commission.[85] The IACtHR stressed this principle in *Gallardo v. Costa Rica*. The case concerned death in custody. The Government of Costa Rica declared that, for this case, it 'formally waives the requirement of the prior exhaustion of the domestic legal remedies and the prior exhaustion of the procedures set forth in Articles 48 to 50 of the Convention', that is, the procedures before the IACmHR.[86]

However, the IACtHR stressed that Article 61(2) of the Convention clearly indicates that the Court may not deal with any matter unless the procedures before the Commission have been exhausted.[87] It stated that the IACtHR and the IACmHR have an obligation to preserve all of the remedies that the Convention affords victims of violations of human rights, so that they are accorded the protection to which they are entitled under the Convention.[88] The judges noted that the Commission is the channel through which the ACHR gives individuals the possibility to activate the international system for the protection of human rights. Hence, strictly procedurally, it should be remembered that just as individuals cannot submit cases to the Court, states can submit them to the Commission only if the conditions of Article 45 have been met.[89] Therefore, as stressed in *Gallardo v. Costa Rica*, the case may be brought before the Court only after being examined by the Commission.

Currently, the Commission has adopted a practice of presumptively referring cases in which it has found at least one violation of the ACHR to the Court; however,

82 Ibid., Arts. 44 and 46.
83 Santoscoy, 1995, § 70.
84 IACtHR, Advisory Opinion OC-10/89, Series A No. 10 (1989).
85 Neuman, 2008, p.103.
86 IACtHR judgement, *Gallardo v. Costa Rica*, 13.11.1981, No. G 101/81, § 1–2.
87 Ibid., § 14.
88 Ibid., § 15.
89 Ibid., § 23.

it retains the option of refusing. The Commission's rules do not contemplate referral of cases in which it has found no violation.[90] The communication must satisfy the admissibility criteria, enshrined in Article 46 of the ACHR. This requires that the remedies under domestic law have been pursued and exhausted following the generally recognised principles of international law, the petition or communication is lodged within a period of six months from the date on which the party alleging violation of rights was notified of the final judgment, the subject of the petition or communication is not pending in another international proceeding for settlement and the petition contains the name, nationality, profession, domicile and signature of the person(s) or of the legal representative of the entity lodging the petition.[91]

The requirements of exhausting domestic remedies and the 6-month period do not have to be met, if the domestic legislation does not provide due process of law for the protection of particular right; the applicant is denied access to the remedies under domestic law, is prevented from exhausting them or there has been unwarranted delay in rendering a final judgment.[92] The petition or communication is considered inadmissible, if the admissibility criteria is not met, it does not refer to a violation of the rights enshrined in the ACHR, it is manifestly groundless or out of order or it was already examined by the Commission or another international organisation.[93]

The Commission examines petitions in a contradictory process between the state and the applicants. The procedure before the IACmHR consists of presentation of a petition, evaluation of its admissibility and evaluation of the merits of the case. At the end, in the merits report, the Commission decides whether State Party was responsible for violation of the rights enshrined in Inter-American instruments. The IACmHR may recommend the state to adopt certain measures.[94] The procedure is initiated by lodging a petition with the Commission, in accordance with Article 44 of the ACHR. The Executive Secretariat of the IACmHR registers the petition, assigns its number and sends the acknowledgement of receipt to the petitioner.[95] The IACmHR has an Individual Petitions System Portal as well, which notifies the receipt of the petition.[96] Its Rules of Procedure provide certain formal requirements for the petition. Under Article 28, all petitions should contain information concerning the name of the person(s) making the denunciation, whether the petitioner wishes that his or her identity be withheld from the state, the e-mail address for receiving correspondence from the Commission, an account of the fact or situation that is denounced, specifying the place and date of the alleged violations, the name of the victim and of any public authority who has taken cognisance of the fact or situation alleged (if possible), the state the petitioner considers responsible, by act or omission, compliance with the

90 Neuman, 2008, p. 103.
91 ACHR, Art. 46, para. 1.
92 Ibid., para. 2.
93 Ibid., Art. 47.
94 CEJIL, 2023, p. 63.
95 Rules of Procedure of the IACmHR, Art. 29, para. 1.
96 See more: CEJIL, 2023, p. 65.

six month period, any steps taken to exhaust domestic remedies and an indication of whether the complaint has been submitted to another international procedure.[97] However, the Commission can declare a petition inadmissible when a preliminary examination reveals that it is manifestly groundless or out of order under Article 47 of the ACHR.[98]

In recent years, given the delay in processing initial petitions, the IACmHR has adopted the practice of consulting the petitioner via e-mail as to whether the grounds for the petition still exist and/or whether there is interest in continuing with the processing of the petition. Similarly, it communicates the decision to the petitioner, indicating the date on which the state was notified. This brings the processing stage to a close and opens the way for the admissibility stage.[99] At the admissibility stage, once the state has been notified, it has three months to present its observations on admissibility. The state may request an extension to submit these observations; however, it should not exceed four months from the date of transmission of the first request for information sent to the state.[100] After the state submits its observations, these are forwarded to the petitioner. At this point, the IACmHR examines the petition's compliance with the admissibility criteria.[101]

The result of this analysis is recorded in the admissibility report, which closes this stage and initiates the merits stage. The admissibility/inadmissibility reports are prepared by the Executive Secretariat of the IACmHR and submitted for consideration by its plenary.[102] The decision requires absolute majority vote of the members of the Commission.[103] The report may decide that the petition is inadmissible, which results in case closing the case, or declare it admissible. In exceptional circumstances, the IACmHR may open a case, but defer its treatment of admissibility until the debate and decision on the merits. The decision is adopted by a reasoned resolution of the Commission.[104]

The merits stage begins with the notification of the admissibility report. This stage was designed to establish the facts of the case and its legal basis. At this point, the IACmHR enables friendly settlement by the parties. This may be achieved at any stage of the proceedings before the Commission.[105] However, if the parties decide to proceed on the merits, it gives the petitioners four months to submit additional observations on the merits. It is possible to request an extension of this deadline for up to two additional months.[106] In serious and urgent cases, once the case has been opened, the IACmHR may request that the parties forward their additional observations on

97 Rules of Procedure of the IACmHR, Art. 28.
98 ACHR, Art. 47.
99 CEJIL, 2023, pp. 89–90.
100 Rules of Procedure of the IACmHR, Art. 30, para. 3.
101 CEJIL, 2023, p. 91; See also: Rules of Procedure of the IACmHR, Arts. 28, 29, 31, 32, 33 and 34.
102 CEJIL, 2023, p. 91.
103 Statute of the IACmHR, Art. 17, para. 2.
104 Rules of Procedure of the IACmHR, Art. 36, para. 3.
105 CEJIL, 2023, p. 93.
106 Rules of Procedure of the IACmHR, Art. 37 paras. 1–2.

the merits within a reasonable time period.[107] Furthermore, the Court stresses that the alleged victims of the violation should be identified in the Report on the Merits of the Commission, issued pursuant to Article 50 of the ACHR. The IACtHR states that legal certainty requires, as a general rule, that all the alleged victims be duly identified in the merits report and it is not possible to add new alleged victims at a later date, except in the exceptional circumstance contemplated in Article 35(2) of the Rules of Procedure of the Court.[108]

At this stage, according to Article 37(5) of the Rules of Procedure, the Commission may convene the parties for a hearing to analyse the legal arguments and alleged facts.[109] If necessary, it may conduct an on-site investigation.[110] Once the parties have presented their respective arguments and it considers that it has sufficient information, the processing of the case is complete. At that point, the Commission prepares a report, which includes its conclusions and, in the case of finding violations of alleged international instrument, recommendations to the state in question.[111] The report is issued in accordance with Article 50 of the ACHR, under which the IACmHR sets forth the facts and states its conclusions. If the report does not represent the unanimous agreement of the members of the Commission, any member may attach a separate opinion.[112]

As mentioned, the parties may reach a friendly settlement at any stage of the proceedings. It is a crucial opportunity that allows the state and the petitioners to advance in the reparation measures necessary to mitigate the violation of the rights, without the need to reach a decision on the merits.[113] The friendly settlement procedure may be initiated and continued with the consent of the parties.[114] This procedure consists of three stages.

During the 'negotiation stage', the parties open the dialogue with or without the IACmHR. This is concluded by signing a Friendly Settlement Agreement. In the 'friendly settlement follow-up stage', the State must undertake measures complying with the Agreement. In the 'homologation of the friendly settlement' stage, the settlement is approved by the IACmHR, which must be recorded in a published report. During the process, the Commission must verify whether agreement of the parties is in conformity with human rights.[115] The Commission may terminate its intervention in the settlement procedure if the matter is not susceptible to such resolution or any of the parties does not consent to its application.[116]

After transmitting the report by the Commission, the state has three months to settle the case or submit it to the Court. If neither happens, the IACmHR may, by

107 Ibid., para. 3.
108 IACtHR, judgment V.R.P., *V.P.C. and Others v. Nicaragua*, 8.03.2018, Excepciones Preliminares, Fondo, Reparaciones y Costas, C No. 350, § 47.
109 Rules of Procedure of the IACmHR, Art. 36, para. 5.
110 Ibid., Art. 39, para. 1.
111 CEJIL, 2023, p. 95.
112 ACHR, Art. 50.
113 CEJIL, 2023, p. 96.
114 Rules of Procedure of the IACmHR, Art. 40, para. 2.
115 More: CEJIL, 2023, pp. 96–97.
116 Rules of Procedure of the IACmHR, Art. 40, para. 4.

the vote of an absolute majority, set forth its opinion and conclusions concerning the question submitted for its consideration.[117] It may make recommendations and set a time limit, in which the state must take measures to remedy the situation. If this period expires, the IACmHR may decide whether the state has taken adequate measures and whether the report should be published.[118] If the state does not comply with the IACmHR's recommendations, the case may be sent to the Court, following Article 61 of the ACHR.

5. Summary

The Commission is often perceived as similar to the former European Commission on Human Rights (ECmHR), before its liquidation due to a wider reform of the ECtHR, following Protocol No. 11 to the European Convention on Human Rights (ECHR).[119] however, this is far from being accurate. Both organs had similar competence in examining individual applications and transmitting them to the respective Courts. However, apart from that, there are no other similarities, possibly due to the IACmHR's character.

The Commission is a multipurpose body. Apart from its competence to examine applications and transmit them to the Court, it may undertake on-site visits, issue thematic reports and reports concerning the human rights situation in particular States Parties. Furthermore, it is responsible for promotion of human rights. Hence, it focuses on preventive aspects of human rights protection, such as information and education. Such activities are important and aim to improve the knowledge of general public, enhancing domestic legal standards concerning human rights protection and governmental practice.

The IACmHR is not a traditional body established by the human rights protection treaty. It is an OAS organ, which gives it a special position and empowers it with wider avenues than if it was an ACHR body. Hence, its principal function, apart from promoting the observance and protection of human rights, is to serve as a consultative organ of the OAS.[120] However, it operates within ACHR provisions and concerning States Parties to the Convention. It may further evaluate human rights obligations of the states that did not ratify the ACHR per the ADRDM.

Its scope of competence is very particular, especially in comparison with the ECmHR. However, every regional human rights system should be perceived in the context of various particularities characteristic to the region, such as legal standards, culture and challenges. Hence, the IACmHR should be perceived as a valuable asset and crucial element of the system. Nonetheless, the compliance of the States Parties with the Commission's remedies remains a challenge concerning the entire Inter-American human rights system.[121]

117 ACHR, Art. 51, para. 1.
118 Ibid., paras. 2–3.
119 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 2005, ETS, No 155.
120 Charter of the OAS, Art. 106.
121 Basch *et al.*, 2010, p. 17 et seq.

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| Chapter 3 |

Institutional Framework for Human Rights Protection in Americas: The Inter-American Court of Human Rights

Rebecca Lilla Hassanová

ABSTRACT

The next chapter is devoted to the analysis of the institutional framework of human rights protection in Americas, concretely to the Inter-American Court of Human Rights. It aims to present its legal background, its position within the Inter-American regional human rights system and its relationship with the most influential actors, such as the Inter-American Commission. The research in the first half of the work examines the aspects of the contentious jurisdiction and advisory jurisdiction. Through these subchapters the author explains the methods and the modus operandi of the procedures before the Court. The analysis of individual petitions presents the most influential and effective means of the system. Furthermore, the work, via the advisory jurisdiction, presents the nature and the position of the Court in the system, as well as the most significant principles governing the Inter-American human rights framework. The following final part explores the criteria of admissibility which are fundamental for establishing the jurisdiction of the Court.

KEYWORDS

Inter-American human rights system, Inter-American Court of Human Rights, Inter-American Commission, contentious jurisdiction, advisory opinion

1. Introduction

The Inter-American human rights framework is understood as a system composed of a combination of national and international set of rules, which are established in order to respect and protect human rights in the member countries. The Latin American approach is unique as it enables different subjects to form both the practical and the theoretical concept of human rights through the community. The common interactions of the national and international legal orders develop a specific legal order, which applies and interprets international human rights through the lenses of

Rebecca Lilla Hassanová (2026) 'Institutional Framework for Human Rights Protection in Americas: The Inter-American Court of Human Rights' in Zombory, K. (ed.) *Regional Human Rights Protection Systems Outside Europe.* Miskolc–Budapest: Central European Academic Publishing, pp. 79–97. https://doi.org/10.71009/2026.kz.rhrpsoe_3

the Latin American constitutional standards.[1] Nevertheless, the influence of national over the international order may create a more suitable system, as certain regions continue to struggle with various issues, such as inequality or violations of the rule of law. Not to mention the derogations from treaties, which cause the erosion of the applicability and thus the effectivity of the system itself.[2]

The two main tools of the frameworks are its two core institutions: the Inter-American Court of Human Rights (the Court) and the Inter-American Commission (the Commission), which are fundamental elements of the system. Both the Court and the Commission play a significant role in the framework of human rights protection in the Americas, which would have no real impact or effectivity without them, as these organizations are responsible for upholding the rights enshrined in the American Convention on Human Rights ("ACHR") and numerous other documents adopted and ratified by the Inter-American States.[3]

The Court's scope of competence is yet curtailed by the fact that it has competence to rule only in those countries which have accepted its compulsory jurisdiction. It is only in these countries that the Commission has the power to decide whether it will forward the case to the Court itself. The Commission's position is, in this sense irreplaceable, as it is upon its sole discretion to determine if a case should be sent to the Court. The Commission has therefore the responsibility to guarantee that the individuals who claim to be victims have a voice before the Court's decision. Hence, the system recognises various obstacles to ensure that individuals have access to justice.[4]

2. Organisation and Competence

The Court was established in 1979, almost 90 years after the formation of the predecessor of the OAS, the Pan American Union. It has seven judges who are elected as part of the OAS General Assembly by the State Parties to the ACHR. These judges are selected from a list of national candidates of the OAS Member States. Each state has the right to propose three candidates who are chosen by an absolute majority through a secret ballot. They serve a term of six years and can be reelected on one occasion. The Plenary of the Court elects its President and Vice-Presidents for a term of two years, with the possibility of being reelected one more time. The judges are prohibited from deciding on cases which concern their home country. Nonetheless, in inter-state cases there is the possibility of calling for an ad hoc judge from the respective country in order to fully comprehend the domestic specificities.

1 Bogdandy and Uruena, 2020, p. 403.
2 Helfer, 2021, p. 20.
3 Bogdandy *et. al*, 2024, p. 1.
4 Gossman, 2024, p. 35.

The Court's headquarters are located in the city of San Jose, Costa Rica. The city itself has a long-standing tradition of promoting human rights, hence it serves as an ideal place for the Court.[5] The Court generally holds six Ordinary Sessions at its seat and two Special ones at various locations, every year in a different member country. The Court has no powers to make assertions about the general situation of a member state, hence e.g. even when visiting, it cannot universally proclaim the observed issues. Nevertheless, its Rules of Procedure enables it to demand the collection of evidence in situ in order to analyse them during the proceedings of a contentious case. Based on the above, the Court has already made several visits to the territories of State Parties such as Honduras or Suriname.[6]

In order for the Court to operate smoothly, it has a Secretariat, which consists of a Secretary and Deputy Secretary who mostly provide administrative but also legal assistance in the work of the Court. The Secretariat is responsible for preparing certain documents of the Court public, such as judgements, separate opinions, dissenting opinions or concurrences. However, should the judges decide otherwise, parts of these documents may be kept confidential on the basis of their irrelevancy or when they are considered to be incorrect. The functioning of the Court is financed via the regular fund of the OAS which is approved by the General Assembly for the fiscal year. The annual budget is typically around 5 million USD. In addition to these finances, the Court receives voluntary financial aid from states or from international cooperation projects.[7]

With the adoption of the ACHR, a dual system of human rights protection was established in the region, which consequently instituted the Court. The Convention was ratified by 23 member countries of the OAS, and since then, two countries presented denunciation under Article 78: Venezuela and Trinidad and Tobago. The Court's main duties rest upon contentions jurisdiction, the advisory opinions and the additional precautionary measures. Possibly the most important one, i.e. contentions jurisdiction is recognised by 20 Member States of the ACHR. Its' advanced jurisprudence has made it one of the leading judicial institutions interpreting human rights. This is represented by the significant number of citations of its case-law by scholars not only from Americas, but also from other regions of the world. Some even claim that the Court is shooting for the stars, when its transforming social practices through not only international, but constitutional law. [8]

5 Crahan, 2006, p. 549. During a lengthy period the country was surrounded by wars fought in other countries. As the territory wanted to preserve its security and peace it delved into international activism. E.g. initiating the Esquipulas peace process, taking part in humanitarian intervention or building diplomatic relations.

6 Art. 58 of the Rules of Procedure of the Inter-American Court of Human Rights, 2000.

7 Abc: The Inter-American Court of Human Rights, 2019, p. 6.

8 Pasqualucci, 2003, p. 10.

2.1. Contentious Jurisdiction

Its main role stems from the contentious jurisdiction over cases where alleged violations of those rights arise which are enshrined in the ACHR and its two protocols (Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, commonly known as the "Protocol of San Salvador," and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty). Hence, this autonomous judicial institution is generally responsible for the interpretation and application of the ACHR. In contrast to the Commission that has the right to issue recommendations and reports, the Court can issue *inter partes* binding judgements. These decisions may shed light on domestic issues and render compensation, including recommendations to amend the national legislation of Member States. The Court's final judgements are not subject to appeal and are enforceable. The necessary quorum for the final judgement is five judges. The votes are either yes or no, and no abstention from voting is permitted. If a judge does not agree with the final judgement, he/she may craft an explanation added to the attached document forming a separate opinion.[9]

The jurisdiction is initiated either by the submission from the Commission or by a Member State. Nevertheless, as numerous countries of the OAS have not acknowledged the competence of the Court, it has generally limited competence. Consequently, the victims have no direct possibility to file a case to the Court and they can only do this through the Commission. Initially, the victim had no independent role in the proceedings. However, under the 2001 and 2009 Rules of Procedure, those individuals, groups and non-governmental organisations that claimed to be victims have been given a position as parties following the referral of the case to the Court. Accordingly, they have the right to submit their brief including pleadings, motions, as well as evidence. Furthermore, the position of an Inter-American defender has been set up to secure the rights of those who do not have duly accredited legal representation. The Court has also established the Legal Assistance Fund which helps those, who have no possibility to pay for their legal assistance. Both of these institutions were established in order to secure effective defence, as well as the rule of law.[10]

When a submission reaches the Court, it becomes responsible for the rigorous examination of all the aspects of the case. These include the facts, the legal arguments besides evidence, which was set forth by the applicant and the respected state. The activities referred to are part of the written stage of the hearing. The Court has the additional right to hold hearings, perform interviews or request further information, as part of the oral stage of the case. During the oral hearing, in addition to the Court, the Commission also has the right to ask questions from the parties. The parties have the additional right of reacting contrary to the allegations and arguments. For the purposes of gathering information, the Court has the right to request further explanation from the experts. All of these actions have to be performed while upholding

9 See: Antkowiak and Gonza, 2017.
10 Art. 25 and Art. 37 of the Rules of Procedure 2009.

the principle of a fair and impartial procedure. The assessment is followed by the judgement, which establishes whether a violation of the ACHR or its protocols have taken place. If the Court establishes a violation, it has the right to stipulate proper remedies or compensation.[11]

In order to submit a claim to initiate the contentious jurisdiction, numerous criteria have to be fulfilled. The foremost requirement is the admissibility criteria, where only those states, which have ratified the ACHR, including the Court's jurisdiction, may be subject to the petition. The initial assessment of this criteria is performed by the Commission, which decides whether to proceed further with the case. The Commission is the one to decide upon another criteria, the fundamental necessity of the case to be heard before the Court, i.e. whether the case is well-founded and sufficiently serious. Furthermore, the Commission has to consider whether the alleged violation of the right happened to the actual victim presenting itself. Consequently, the petitions cannot be anonymous.[12]

The stages of the process before the Court are determined by the ACHR and the Rules of Procedure. These stipulate that the process begins with the submission of the initial written pleadings. The applicant is generally represented by the Commission which is contested by the respondent state. Consequently, the Commission is always part of the proceedings before the Court. Both of the parties file their arguments based on evidence and legal representation, including the presentation of the respective legal principles. In the following step the Court holds the hearing, where it gathers additional evidence from the sides and witnesses. The hearings are generally public, nonetheless the Court may decide to hold a private hearing. These stages are superseded by the private deliberations of the judges who should base their decision based upon the relevant international human rights standards. These private deliberations may last for numerous weeks and can even be suspended and reinitiated in a subsequent new session in case the questions are complex. During the deliberations, the drafts of the judgements are re-read and when a judge proposes a change to some detail, a new draft is made, which is again submitted to all the judges for discussion. The judges have to approve all the sections and paragraphs of the judgement with the necessary quorum of five judges. Their decision is presented via the judgement, which either establishes the violation or non-violation of the ACHR. This is followed by the presentation of reparations and remedies, as the Court has a wide scope of possibilities to specify the form of reparation it deems necessary. Monetary compensation, restitution, guarantee of non-repetition or rehabilitation are the most commonly used forms of restitution. When guarantees of non-repetition is a reparation applied, the Court has the power to order the affected country to either draft and adopt or amend legislative reforms in its national system. It may also demand the change of application of these national rules if the textual basis seems adequate, but the application

11 Bantekas and Oette, 2020, pp. 270-271.
12 American Convention on Human Rights, Pact of San Jose, Costa Rica, OAS, 1969.

has gaps.[13] The violations may directly occur because of systemic gaps in the national law. In these cases, the Court definitely requires adjustments of the regulations or public policy. This form of remediation has a wide and public impact, many times unpleasant for the affected states but effective in the public eye. The aim to resolve structural problems is thus beneficial not only for the direct victims, but also the broader segments of the society, accordingly having positive impact as preventive measures against future violations.[14]

In order for the state to complete its ordered obligation, the Court has a compliance monitoring mechanism in place, according to which it has the right to supervise the practical implementation of the measures delivered in the judgement. In this mechanism the Court first calls for information regarding the actions the state has taken, intended to comply with the already delivered decision of the Court. During this period the Court is additionally collecting evidence both from the victims and the Commission to get a complete picture of the actual situation. Additionally, the Court may call for a hearing, which is rather expeditious, lasting up to two hours. If the Court finds gaps in the steps taken by the countries, it may render additional recommendations.[15] The drafters of the ACHR and the practitioners of human rights in the region do believe that the effective implementation of the judgements is fundamental to the human rights system. Without it the Latin American human rights mechanism would be illusory.[16]

Similarly, to other human rights courts, this Court has likewise the authority to issue provisional measures to prevent irreparable harm or to stop further damage. With regard to its adoption, the Court can hold a hearing where the parties and the Commission have the possibility to present their arguments on behalf or against the adoption of the provisional measure. In order to adopt such a measure, the case has to be *prima facie* serious, urgent and necessary. The opposing state is required to argue against the adoption with determination and ideally present that the concerning facts no longer support the presumptions. The hearings can be held both in public and in private, depending on the circumstances of the case. These measures have a binding nature, but again affect only those countries that have accepted the authority of the Court.[17]

The Court's perspective is known for its *pro-homine* stance including the attention towards the general human rights issues which affect the region of Latin America. This is represented in the advanced practice of hearing detailed evidence or in the deep commitment to effectiveness of its remedies. In this sense, various scholars claim that its case-law on remedies is a significant contribution to the international human rights law.[18]

13 Principle n. 23 of the Resolution 60/147, 16 December 2005.
14 See: Hernández Ramos *et al.*, 2017.
15 See: Rules of Procedure of the Inter-American Court of Human Rights, 2000.
16 Abc: The Inter-American Court of Human Rights, 2023, p. 11.
17 Art. 62 of the American Convention on Human Rights, Pact of San Jose, Costa Rica, OAS, 1969.
18 Paqualucci, 2013, pp. 12–14.

The Court also applies the doctrine of the conventionality control, which allows domestic judges to directly apply international norms as well as to interpret national legislation in the light of international law. Nonetheless, the understanding of the Court goes further when it claims that in the case of a collision of national and international rule, the rule enshrined in the AHCR should prevail over the national norm. Consequently, the Court transfers the responsibility of the appropriate application of ACHR to the national judges. Notwithstanding that the doctrine as such is also common in the European human rights, it cannot be found in either the wording of the ACHR nor in its *travaux préparatoires*. The nuances of the mentioned approach is only to be found in the jurisprudence of the Court, which has introduced the understanding in the 2006 Almonacid Arellano against Chile decision.[19] In this sense, various scholars claim that the Court offers no real justification for the respective demand, although on the other hand, the justification may be found within the scope and purpose of the Vienna Convention and the *pacta sunt servanda* principle, applicable upon all states.[20]

2.2. Advisory Jurisdiction

The second, not less important duty of the Court is its authority to present advisory opinions on legal matters connected to the ACHR and generally human rights and their application. Through this authority, it has the possibility to offer guidance in the field of human rights to the OAS itself, to Member States and generally human rights litigators. As some scholars claim, the advisory competence of this Court is one of the most extensive out of all the human rights courts we currently know. This is also proven by the *travaux preparatories* of the ACHR, where the drafters voluntarily created a broad authority of the Court in order to provide access to its work not only for states or specific bodies of the OAS, but also for other subjects, that would have the same possibility to consult with the Court.[21] According to Saavedra Alessandri, in order to fully understand and analyse the effectiveness of the Court, it is necessary to deeply consider its advisory opinions.[22] These opinions are presented on the basis of a request from the authorised entities referred to above. These subjects may request interpretation and clarification of the rights enshrined in the ACHR as well as other treaties concerning the protection of human rights in the Latin American states. The Court has even broadened its scope and declared that advisory opinions help Member States and the whole OAS to comply with their obligations stemming from international human rights law. In this sense, the opinions clarify the international rules and additionally, assist to guarantee these rights in the region. Already in 1982, the Court added that states have the obligation to take into account both the jurisprudence in contentious competence and the work through advisory competence. However, it is

19 Case of *Almonacis Arellano v. Chile*, IACtHR, Judgement of 26 September 2006, para. 124.
20 Contesse, 2018, pp. 1170–1171.
21 Martin, 2021, para. 7.
22 Saavedra Alessandri, 2024, pp. 537–539.

necessary to add here that the Court does not and cannot monitor the compliance with its advisory opinions as it does so after contentious cases, and thus their effectivity cannot be proven in reality.[23]

During its first years of existence the Court dedicated most of its work to create advisory opinions, as the Commission was at the start reluctant to proceed the cases before its fora. The rivalry between the two institutions resulted in the advisory opinion of 1985, where besides reviewing the issue of freedom of expression in the practice of journalism, the Court stated that the Commission's prolonged refusal to refer cases to the Court impaired the delicate balance of the system which is established by the ACHR.[24]

According to the Court's review, it has generally 20–25 contentious cases annually. The duration of the cases takes up to approximately 22–23 months. Consequently, the work of the Court is continuous in contentious matters, nonetheless it is complete only with its power to release advisory opinions, which likewise contributes to the development of the interpretations on the scope of rights enshrined in the ACHR and other Inter-American instruments. Through these opinions, the Court has regularly broadened the scope of protection, including various vulnerable groups such as children, migrants or foreign nationals.[25]

Once a demand for an advisory opinion is presented from authorised subjects, the Court thoroughly examines the question and its legal issues, which is followed by the gathering of related legal principles, jurisprudence and other international human rights standards. However, the Court has the power to call for hearings and also request additional evidence. When the Court collected all the necessary information, it carries out a comprehensive evaluation of the influencing details and its interpretations. The advisory opinion is prepared thereon, as a guidance and answer to the requested issues. Even though the opinions have a strong impact on the interpretation of human rights in the region, they are legally non-binding on the relevant parties. Yet, the opinions still shape the application of the scope of human rights in Latin America.

The opinions of the Court has, on several occasions, helped with the adequate interpretation of notions of human rights as well as with the proper understanding of the entire regional human rights framework. In its opinion of 1989, the Court was successful in straightening out the relationship between the two core instruments of the system. It declared that the American Declaration of the Rights and Duties of Man enhances and interprets fundamental human rights which are also encompassed in the Charter of the OAS. Hence, the application of the Charter cannot be exclusively implied without referring to the rules of human rights including the practice of the organs of OAS. Nevertheless, those referred to above do not automatically include the

23 Advisory Opinion OC-2/82 The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, 24 September 1982, Ser. A no. 2, para. 29.
24 Advisory Opinion of the IACtHR n. 5, 1985, para 26.
25 Martin, 2021, para. 5.

work of the Court, and some may argue that the whole regional cooperation of the OAS has shifted towards a more comprehensive human rights framework.[26] Furthermore, one year later, the Court emphasised the importance of the international human rights law *corpus iuris*, when it stipulated that the whole international set of rules consists of different legal instruments with varying scope and function and that this variety of aspects presents how the development of human rights proceeds. It adds, that recognition of certain international treaties is definitely having consequences on the Inter-American regional framework as well.[27]

We can observe the influence of the advisory opinions through different perspectives. For instance, the Protocol of San Salvador enables direct justiciability to victims of trade union rights or in the case of rights to education. As some of these rights were not yet directly interpreted through proceedings in contentious jurisdiction, the Court has the option of interpreting and applying them through the means of its advisory opinions. For example, in its advisory opinion no. 22 titled "Entitlement of legal entities to hold rights under the Inter-American Human Rights System", the Court enjoyed its competence and interpreted the rights of trade unions in a way that both physical and legal entities enjoy these rights, even before a concrete claim would appear.[28] Additionally, the significant impact of the advisory opinions may be observed through the fact that various constitutional courts of the State Parties have implemented parts of the text of the opinions into their reasoning in national cases. Consequently, the Court's advisory competence can be directly traceable in national application.[29]

The Court's advisory competence rests upon the role of the Court being the guardian of human rights in the region. Through the formation of interpretations of the ACHR and its protocols, the Court presents counselling on legal issues and thus it contributes to the evolution of international human rights law. It offers opportunity for dialogue, strengthens the rule of law, increases efficacy and promotes consistency when dealing with fundamental values of human rights.

3. The Court's Admissibility Criteria

The Court's admissibility criteria are set in the Commission's admissibility criteria, which are similar to those known from other systems as well as those already set up in national procedures. The circumstances of admissibility have to be fulfilled requisitely in order for the claim to proceed adequately. Hence, it is necessary to analyse

26 Advisory Opinion OC-10/98 Interpretation of the American Declaration of the Rights and Duties of Man in the context of Art. 64 of the American Convention on Human Rights, 1989, Ser. A no. 10, para 43.
27 Advisory Opinion OC-16/99 The right to information on consular assistance in the framework of the guarantees of the due process of law, 1999, Ser. A no. 16, para 115.
28 Advisory Opinion OC-22/16 Entitlement of legal entities to hold rights under the Inter-American Human Rights System, 26 February 2016, Ser. A. no. 22, para 97.
29 Ortiz Ocana and Pérez-Linán, 2024, p. 181.

them. The main criteria are established in Article 46 of the ACHR. First of all, it's the exhaustion of the ordinary and extraordinary domestic remedies, which are deemed as suitable for providing protection in the case of such violation. The applicant has the additional possibility of pursuing extraordinary remedies, if these are generally considered reasonable. Thus, the remedial procedure has to be accessible, clearly understandable (clarity of the procedural action which should be followed) and effective. The petition to instigate the contentious jurisdiction requires the claim to be filed within a period of six months from the date of the domestic final judgement. Furthermore, the admissibility declares the principle of *res judicata*, i.e. the claim cannot be already decided or pending before another body, either any other international human rights body or any other monitoring bodies of the OAS. Lastly, as above declared claim cannot be anonymous.[30]

In general, the main admissibility criteria stems from the ACHR and its interpretation is provided by the Court or the Commission. As the legal theory provides, we will shortly discuss the criteria of the jurisdiction rationae personae, rationae materiae, rationae loci and rationae temporis.

3.1. Jurisdiction Rationae Personae

State Parties to the ACHR are the main actors, whose national law may be subjected to the scrutiny of the Court. States are also those who may submit a request for an advisory opinion regarding the interpretation of the OAS human rights treaties, mainly the ACHR. They may require help in the proper application of human rights provisions including their compatibility with the national law. The submission can come from one state or a group of states. The Court enabled countries to have the possibility of seeking interpretation and compatibility in the submission, simultaneously.[31]

As regards the personal jurisdiction of the Court, we may find one fundamental difference between the contentious and advisory power of the body. Essentially, the power of the Court applies to the OAS Member States that ratified the ACHR. The contentious jurisdiction is without a doubt applied only to those parties that accepted this authority, however, there is no explicit requirement that only ACHR parties may seek an advisory opinion. In its Article 64 the ACHR stipulates that OAS member States may consult the Court. Consequently, applying indirectly, even those who did not consent, may require assistance in human rights issues.[32] Nevertheless, such an application may give rise to an indirect consent that the Court has jurisdiction to review the legal issues of even those countries who did not consent to the jurisdiction of the Court. So far none of these countries requested an opinion, even though the Court had referred to facts in these other countries numerous times. We should mention the advisory opinion where Mexico submitted that the United States breached the right to consular

30 Art. 46 of the American Convention on Human Rights.
31 See: Advisory Opinion OC-13/93 Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50, and 51 of the American Convention on Human Rights), 1993, Ser. A no. 13.
32 Art. 64 of the ACHR.

assistance. The US subsequently insisted that the submission sought to bring the country to the Court, regardless of the fact that it had not ratified the ACHR.[33]

The Court declared that although it has a rather wide scope of possibilities in advisory jurisdiction, it has no contentious jurisdictional rights to determine the human rights obligations in states which are not part of the Inter-American System. This limitation applies even in those situations when these countries have ratified treaties whose provisions are subject to the opinion. The Court admitted that by doing so, it helped the international human rights protection, but still kept to the limits of its jurisdiction.[34]

The jurisdiction of the Court concerning its organs is again narrower. The Court has the authority to only interpret the ACHR and other international treaties, where these organs have a legitimate institutional interest. Nonetheless, under these entities we may subsume various organs of the OAS, such as: the Commission, the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils and Committees or the Specialised Organisations of the OAS. Yet, until today, besides the Commission, only the Secretary General has submitted a request for an opinion. Thus, the most influential relationship is definitely the one with the Commission, which acts as an advisory organ to the Court besides promoting human rights and being the "first touch" when dealing with allegations of human rights violations. The Commission is the one which is able to oversee the compliance with human rights standards of the whole OAS, as it is not limited to the ACHR and its protocols, as is the Court. Consequently, the Commission is a significant contribution to the efforts of the Court and has an absolute right to request advisory opinions from it.[35]

Lastly, individuals have no real power to demand an action from the Court, but they can pressure the Commission to submit their issue and continue their contentious case or to request for an advisory opinion to contemplate on certain issues. The Inter-American system allows any person, group of people or non-governmental organisations to submit their claim to the Commission. The requirement in Article 44 sets, that the claim has to include a concrete victim, hence it cannot be anonymous. The Commission has emphasised that the status of victim is determined by the ACHR and not the national courts, thus, providing a status also for those, who faced obstacles when trying to reach justice through domestic remedies.[36]

Interestingly, individuals and organisations of the society can take part in the proceedings through the submission of *amici curiae*. The inclusion of the wider society increases the discussion, further legitimising the decision and making the litigation more transparent. Not to mention, that the inclusion of public enhances the acceptance of such decisions and their effective application by national public

33 Advisory Opinion OC- 16/99 Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, 1999, Ser. A no. 16, para 46.
34 Martin, 2021, para. 19.
35 See: Ferrer Mac-Gregor, 2015, pp. 93–99.
36 Report no. 12/18, Petition No. 178–10, 2018, para. 28.

authorities.[37] Although legal entities have the right to submit petitions, the victims of the violations have to be in all cases individuals. The rights of companies, unions or political parties are understood through individual lenses as rights and obligations of members, owners or agents acting on behalf of the company. These entities have the possibility to exercise their right to claim before the Court (through the Commission), however as their existence is fictional, the legal entity cannot suffer harm itself.[38]

Furthermore, the approach of the Court to indigenous communities is definitely worth mentioning. The Court's decisions on provisional measures have been pivotal in establishing recognition of indigenous communities as distinct groups deserving protection under the Latin-American System. These decisions granted protection to large numbers of previously unlisted individuals who were identifiable and at risk due to their membership in an indigenous community. This effectively extended the frameworks protection to these vulnerable populations. The Court, when considering admissibility criteria, considered special circumstances of these vulnerable groups, as territorial, political or cultural elements of their existence. Contrary to companies, unions or other legal entities the Court understands the indigenous communities as having collective exercise of rights. However, the Court in its opinion refers only to the right of freedom of expression and cultural rights. Nevertheless, as the Court interprets these communities as collective rights-holders united by a special way of life, we may assume that other rights could fulfil these criteria, when collectively exercised. Additionally, the Court acknowledges that there can be a circumstance, when it is impossible to identify each victim by name, but there is relevant evidence of a collective damage.[39]

3.2. Jurisdiction Rationae Materiae

As it was already stated several times, the Court has jurisdiction over rights enshrined in the ACHR and its additional protocols. The Statute of the Court adds to this understanding that under the notion of human rights, the Court, besides the ACHR, also understands the rights stipulated in the American Declaration of the Rights and Duties of Man. The latter was widened by the Court, claiming that other international instruments to which the OAS is party to are applicable to the OAS countries, given that these include binding obligations. Nevertheless, the Commission has established that with the ACHR entering into force, the ACHR becomes the primary source of law applicable by the Commission and the Court. Although it is necessary to mention that, on the domestic level, the ACHR is distinguished by the self-executing and

37 Novak, 2020, para. 11.

38 See: Request for an advisory opinion on the interpretation and scope of Art. 1.2 (Art. 1, para. 2.) of the Convention (Legal Entities) submitted on March 28, 2014.

39 Request for provisional measures, Order, September 1, 2016, para. 15, Matter of Kichwa Indigenous People of Sarayaku regarding Ecuador; Provisional Measures, Order, July 6, 2004, para. 9; I/A, Matter of the Communities of Jiguamiandó and Curvaradó regarding Colombia.

autonomous nature of its provisions, which the state applies taking into account the margin of appreciation.[40]

The Commission in its reports added to the material framework of the Court some other instruments which are fundamentally connected to the rights enshrined in the ACHR. In 2017 the Court connected the Convention of Belen Do Pará with Article 7, the right to personal liberty. Consequently, this enabled the Commission, and through its application, the Court to examine the violation of Articles 2 and 4 of the said Convention. This competence is foreseen in the Convention's Article 12 as well as indirectly connected to Article 7 of the ACHR.[41] Similarly, the Court connected the Inter-American Convention on Forced Disappearance of Persons with Article 3 of the ACHR, or the Inter-American Convention to Prevent and Punish Torture with Article 5, the right to humane treatment as well as Article 8, the right to a fair trial of the ACHR. The Court adds that through the said Article 8, the Court establishes a general clause of jurisdiction to the pertinent treaties on prevention of torture and forced disappearance, accepted by countries when ratifying the ACHR.[42] Given, that some of the instruments are, as referred to above, directly linked and explicitly referred to in the reports of the Commission, there are still numerous instruments which lack enforceability through the instruments of the Court or the Commission. In this sense, the Commission has no competence over e.g. the Inter-American Convention for the Elimination of all Forms of Discrimination against Persons with Disability.[43]

3.3. Jurisdiction Rationae Loci

When the ACHR was being drafted, the Specialised Conference on Human Rights decided to omit the use of the notion *territory* and instead agreed to establish obligations of ratifying countries to respect the rights enshrined in their jurisdiction. Consequently, including extraterritorial acts which may be attributable to these states, i.e. acts of the state agents abroad having causal nexus to the alleged violations.[44] This was concretely, acknowledged in the El-Masri case, where notwithstanding the allegations of acts happening in Macedonia, the indications about the involvement of United States fulfilled their requirements enough to have the merits of the case interpreted by the organs of the OAS.[45]

Although the Court is authorised to investigate claims of violations only on the territory of State Parties to the ACHR, the Commission has the possibility to receive

40 Report no. 180/18, Petition 1616-07, Admissibility, A.G.A. and family. Colombia. December 26, 2018, para. 17.
41 Report no. 174/17, Petition 831-11, Admissibility, Hester Suzanne Van Nierop and family. Mexico, December 30, 2017, para. 11.
42 Report no. 70/19, Petition 858-09, Admissibility, Luiz José da Cunha "Crioulo" and family. Brazil, May 5, 2019, para.12.
43 Digest of the Inter-American Commission on Human Rights on its Admissibility and Competence Criteria, 2020, para. 78.
44 Shaver, 2010, p. 643.
45 Report no. 17/12. Admissibility. Djamel Ameziane, United States, March 20, 2012, paras. 29–35.

and examine any petition coming from a country which did not ratify the treaty. The basis for such understanding may rest upon various facts. On the one hand, its aim is to provide a possibility for exceptional ad hoc cases for non-state parties and thus widen the scope of the Court. On the other hand, numerous rights are understood as customary law, therefore these are considered as binding without the given explicit acceptance from the country.[46]

3.4. Jurisdiction Rationae Temporis

The temporal applicability of the instruments provided in the section of material jurisdiction is set over facts which occurred after their entry into force or before entry into force, but continuing after the date of entry. The Court additionally takes into account the denunciation of the Convention during the time of the alleged acts. In relation to the protocols, the Court declared that its power extends to incidents occurring after the protocol came into effect. Furthermore, the Court can consider the ongoing consequences of events that began before the treaty's enactment but continued afterward. The Commission, in its report of 2005, adds that some actions automatically constitute a situation of continuity, as the uncertainty of a victims' whereabouts and the impunity of the crime, hence the temporal competence may be based on actions occurring before a treaty's entry into force.[47]

4. Conclusion

The Court has the authority to issue final rulings on complaints submitted to the Commission and subsequently brought before the Court's contentious jurisdiction. By lodging these applications, the Commission acknowledges the Court as the ultimate decision-maker. It is the Court's role, when reviewing these applications, to determine the legality of the Commission's actions in each specific instance. The Court, besides the Commission, is becoming an increasingly influential actor in the protection of human rights on a regional level as well as on a domestic level of those countries which ratified the ACHR. This is presented by numerous acts of the Court which were performed in the recent years, such as the intervention in Peru regarding the granting of immunity to those who violated human rights in the name of the Fujimori Government.[48]

Yet, the system including the Court itself, still faces significant challenges. The system, as many others, delivers delayed judgements and prolonged advisory opinions. Moreover, it is unavoidable to emphasise the Court's limitations when we reflect on its jurisdiction. The Court is limited to the States Parties to the ACHR, which are

46 Report no. 153/11, Petition 189-03, Admissibility, Danny Honorio Bastidas Meneses and others. Ecuador. November 2, 2011, para. 21.
47 Report no. 65/05, Petition 777–01, Admissibility, Rosendo Radilla Pacheco. Mexico. October 12, 2005, para. 16.
48 enter for Justice and International Law Gazette, 2004, p. 1.

23 countries of the OAS. Only 20 of these recognise the contentious jurisdiction of the Court. Consequently, out of 34 countries of the Inter-American human rights system, in fact only 20 fully acknowledge the authority of an "external" Court to consider its actions. Hence, the real limitations of the system lay mostly in political reasons besides economic and legal issues.

We may find additional procedural imbalance in favour of the state parties regarding the question of admissibility. When the Commission holds a claim inadmissible, there is no possibility to appeal. On top of that, as already mentioned, the duration of the system's proceedings are generally understood as problematic, as they do not meet the requirement of procedural promptness. As the Court already acknowledged this deficiency, in 2003 it enacted a partial reform of its rules of procedure, which entered into force in 2004. The aim of the amendments was to ensure greater swiftness and strengthen the victims' participation. The rules established new and stricter deadlines and reduced the time periods of certain phases of the procedure before the Court. The amendment was in fact a response to the challenges of the current fast changing society. Yet, the lack of promptness is still part of the criticism.[49]

In order for the frameworks' organs to sustain and enhance their authority, it is vital that they uphold their independence. This independence has to be presented in an impartial, consistent, and balanced manner in which they operate. Furthermore, there are procedural and structural adjustments that can reinforce both the actual impartiality of the system and the public's perception of the organ's actions. Some claim that it is necessary for the Court to decline participation in political discussions and make no public statements related to political situations, thus avoiding favouring any country or its political leaders. The moral standing of judges represents another aspect which influences the acceptance of its decisions and helps its general acknowledgment.[50] The strong separation from any political influence may be observed through the absence of the possibility for an intervention of a political organ that would perform the enforcement of the judgements, as there exists in the European system via the Committee of Ministers of the Council of Europe. On the one hand, the lack of a similar authority may cause the weakening of the system's efficacy, on the other hand it aims to present a more independent judicial body.[51]

The Court's jurisprudence is a great asset to the international human rights framework and its interpretation of rights influences other regions, such as the Europe or Africa. The respect for human rights, being the fundamental aspect of the OAS, became the basis for the societal development of the region. The Court interpreted that its material scope means not only negative obligations but also corresponding positive obligations that are the foundation of these rights and freedoms. Consequently, the Court established the obligation of states to guarantee human rights under their jurisdiction. This means that under reasonable circumstances the

49 See: Pasqualucci, 2009, pp. 385–390.
50 Faúndez Ledesma, 2007, pp. 182–190.
51 Ibid, p. 51.

state secures the free and full exercise of these rights to its citizens and foreigners. The measures taken by national authorities must be effective and comprehensive. Concretely, these measures are part of prevention, but so are investigations of alleged violations committed within its jurisdiction, which is followed by appropriate sanctions including the compensation of the victim.[52]

Various approaches are used to address human rights concerns, starting from comprehensive legal judgements to short public announcements. Although each perspective seeks to influence human rights problems, their means of doing so differ. Scholars have categorised these approaches into six main functions: guiding, reframing, documenting, standard-setting, positioning, and helping. However, generally, a single approach may perform multiple functions at the same time. For instance, a court decision can both mandate specific actions for those directly involved and establish a broader precedent applicable beyond the immediate case.[53] All of these functions are observed in the work of the Court. On a domestic level, the national courts have begun to refer to the provisions of the system, including referring to concrete decisions of the Court. The purpose of the Court and the Commission's existence is the promotion, observance and defence of human rights in the region. The applicability of human rights have risen from a domestic level to the level of an international concern, which is followed by the vice versa application domestically. It is the success of the system itself, that the current discussion is more likely regarding the relationship of the Commission and the Court and less likely about dictatorial regimes in countries.[54]

Finally, one rightly assumes that the Court has a prestigious and reputable standing in the international human right systems worldwide. Its commitment to transparency, impartiality and expertise gives credibility to the whole Inter-American system. Its jurisprudence is widely respected and thus has an impact even externally on the non-Latin-American regions. It has managed to establish significant precedents, including principles. The Court, existing less than 50 years today, has demonstrated valuable results in the human rights law playing a crucial part in the advancement of justice and the protection of fundamental rights.

52 Case of *Juan Humberto Sánchez*, Judgement of June 7, 2003, Ser. C no. 99, para.142.
53 Ortiz Ocana and Pérez-Linán, 2024, p. 181.
54 Pinto, 1993, p. 18.

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UNGA Resolution no. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005.

| Chapter 4 |

Main Human Rights Concerns and Typical Issues in the Inter-American System of Human Rights

Marta Osuchowska

ABSTRACT

The organs of the Inter-American system for the protection of human rights address cases of torture, brutal and inhumane treatment and corporal punishment. Among the main human rights violations occurring within this system are enforced disappearances, which are often linked to the activities of state security forces and organised crime. Hence, particular attention is paid to political murders, the killing of journalists, human rights defenders and individuals belonging to ethnic minorities. A significant number of cases involve violations of freedom of speech and the press, such as censorship, the persecution of journalists and restrictions on access to information. Frequently examined issues include problems related to discrimination based on race, gender, sexual orientation, ethnicity or social status, which are associated with violations of the rights of marginalised groups, namely indigenous populations and persons with disabilities. It is important to highlight the considerable number of cases associated with violations of children's rights. These include issues surrounding child labour, violence against children and sexual exploitation. Another category of violated rights encompasses economic, social and cultural rights, including access to education, healthcare, housing and the protection of labour rights. A separate category includes restrictions on political rights, such as violations related to the right to participate in political life, including limitations on access to elections and the persecution of opposition members. Regarding the right to a fair trial, the Court often addresses issues concerning the lack of independent courts, torture during investigations and violations of judicial procedures. The organs of the Inter-American system monitor, document and respond to these violations and promote adherence to human rights in the region. Within the Inter-American system, special attention is given to groups that are vulnerable to discrimination and rights violations. These include children, women, the elderly, persons with disabilities and ethnic and national minorities. Protecting the rights of minorities is crucial for preserving their cultural identity and preventing discrimination. Regionalism in the case law of the organs of the Inter-American system refers to specific features that shape the interpretation and application of human rights in Latin American and Caribbean countries. Key aspects of regionalism include the cultural and historical context. Jurisprudence often considers local traditions, social norms and the historical experiences of Latin American countries, which influences the interpretation of human rights. Social challenges are an important aspect as well. Regional issues, such as violence, poverty, racial discrimination and human rights abuses, provide the backdrop for the decisions of human rights protection organs. These organs adapt their rulings to the changing social and political realities in the region, which lead to an evolution in the interpretation of human rights. There is a strong network of NGOs in the region that monitor the human rights situation and influence jurisprudence

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through the submission of complaints and reports. Several Court rulings emphasise the importance of social, economic and cultural rights, which can be perceived as a form of regionalism compared to other human rights protection systems that primarily focus on civil and political rights. Notably, countries in the region vary regarding the implementation and adherence to human rights standards, which affects the interpretation and application of the rulings. The Inter-American system is tailored to the conditions and issues prevalent in American countries, making it sensitive to local, cultural and political contexts. Institutions engage in actions aimed at educating society about human rights and promoting their observance in the region. The Commission regularly publishes reports on the human rights situation in various American countries, which influences government policies and public opinion. The Inter-American system collaborates with NGOs, which are often key players in documenting human rights violations and supporting victims.

KEYWORDS

Inter-American system, indigenous peoples, human rights, Inter-American Court of Human Rights, case law, truth commission

1. Introduction

The catalogue of human rights, which in the Inter-American system (IAHRS) are commonly referred to as fundamental rights, does not differ in its subject matter from other systems of protection. Regardless of the protective guarantees, substantive law contains a catalogue of human rights and freedoms that have been established and adopted by the Western civilisation. Differences are evident in the procedures that are supposed to best protect individuals from violations of their rights. The procedural system must be adapted to the specific subject matter of law and the circumstances in which violations occur, including aspects of everyday life and the cultural specificity of a given country.[1] The IAHRS, like its European counterpart, is characterised by the specificity of the relationship between the individual and the state and among individuals. Another type of relationship can be found in the African system. Despite same goals, ideas and aspirations, these systems are different in practice. The starting point for understanding the IAHRS is the knowledge of the history of the area in which it applies. This allows us to see the causes of the human rights problems that the countries are still facing. The specificity of the IAHRS is strongly influenced by social, political and economic factors.[2] American countries are relatively young, as they were once European colonies. Therefore, the legal remnants of the era should not come as a surprise. The populations inhabiting them are mainly migrants and their descendants, including mestizos.

Only in a few countries do indigenous people constitute a significant social force capable of defending their rights. Most of the population of Latin American countries is of mixed race. This is significant because this group does not identify itself as European or indigenous. The restrictive divisions of the colonial era, which determined one's place in the social hierarchy based on origin, are reflected today in social,

1 Ovalle Favela, 2012, pp. 595–623.
2 Rodrнguez Rescia, 2009.

economic and educational inequalities. Historically, both colonists and indigenous peoples rejected mestizos. With the demographic growth of this part of society, a specific social structure developed in Latin American countries, which wanted to separate itself from its European and indigenous past and roots. Hence, the laws, customs and culture of indigenous peoples were rejected for several years in most Latin American countries. Apart from countries where the indigenous population constituted the majority, no legal measures were taken to protect their distinctiveness.

Anthropologically, mestizaje is a characteristic feature of Latin American societies. This has led to the creation of a new society that combines the characteristics of different social groups. Hence, a significant number of cases brought before the Inter-American Court of Human Rights (IACtHR) and Inter-American Commission of Human Rights (IACmHR) concern issues that are important to indigenous people, including indirectly, environmental protection. The specific position of women in mestizo society, which constitutes most of the population in the region, is reflected in the need to protect their fundamental rights. The large social stratification caused by the gap between the incomes of the inhabitants causes strong conflicts and influences the high level of violence. Unstable economies, especially in Latin America, do not foster social sentiment or trust in the authorities. These factors mean that the cases reported to the IACmHR and IACtHR have a different background than the problems that characteristic of the Old Continent.

A review of cases heard in both protection systems shows that the most significant area of concern for the IACtHR is the protection of the rights of indigenous peoples, women and children, and, in recent years, environmental protection. These issues are considered both as main topics and in conjunction with other rulings. Another unique topic that is widely discussed in several IACtHR rulings is the issue of truth commissions and accountability for dictatorships. Considering the rulings, their effectiveness in and impact on Latin American societies, the topics indicated above constitute the main area of systemic research.

Notably, in addition to analysing the IACtHR's case law concerning matters considered by it, it is necessary to distinguish specific groups whose rights are most violated. Social differences in the countries have led to a situation in which it is possible to indicate people who are sensitive to violations as individuals and due to their membership in a specific group, such as indigenous people, women, children and adolescents.[3]

1.1. Characteristic Features of the System

The IACtHR's case law, accepted by the national legal systems, jurisdictionally transcends the IAHRS, and goes beyond compliance with each resolution or its initial impact. The IACmHR's contribution, through the definition of protection criteria and its immediate and direct action in various media and in relation to numerous national and regional problems, must be added to the IACtHR's case law. It is worth noting the

3 Serrano and Robles Zamarripa, 2004.

system of reparations, which is increasingly becoming the subject of case law. Hence, its contribution to Inter-American human rights law is growing and legal doctrine is placing greater hopes on it.

In most of the controversial cases, the violations in which the IACtHR has ruled belong to the first-generation human rights, mostly constituting the radical, irreducible core rights, such as the right to life, integrity, liberty and a fair trial. The acts subject to challenge most often include torture, extrajudicial executions, arbitrary detention, enforced disappearances and denial of access to justice. At the end of the 20th century, issues concerning first-generation rights emerged relating to children and young people and the right to health, property, the independence of the courts, political sentences and freedom of expression, with a particular emphasis on the media.

The IACtHR examines complex and multi-threaded cases that require extensive analysis. They are important because the decisions have a significant impact on the development of case law and set directions for the future. Such cases include the consideration of the rights of natural persons within the legal order of collective persons, the right to truth, the right to legal personality, the right to citizenship and to asylum and shelter and the role of the norms of other international conventions, including those relating to humanitarian law, which help integrate concepts; however, are not directly applicable.

It is equally important to examine the reservations to the American Convention on Human Rights (ACHR), the interpretative declarations and the limitations of the IACtHR's disputed jurisdiction. These acts must not be incompatible with the object and purpose of the ACHR or prevent the IACtHR from exercising its jurisdiction in accordance with its nature, meaning or scope, derived from the ACHR. The importance of these judgements is obvious, since they contribute to the effective defence of fundamental rights to which states are bound. The Inter-American jurisdiction has progressed in dealing with cases concerning new-generation rights or rights that contain elements bordering on the property of members of indigenous communities, the value of the customary law that governs them, cultural specificity, the legality of public administration, workers' rights, freedom of assembly and association in trade unions, issues concerning vulnerable groups, the right to identity and preferences, procreation and the protection of the environment. The emergence of these new-generation rights reinforce the integral nature of human rights in case law and opens a horizon of enormous importance.

The IACtHR orders national institutions to determine, following the applicable national law, the consequences of the committed violations. However, this does not mean that a national margin of appreciation is accepted or the state is exonerated in such cases.[4] Once the IACtHR has made a declaration of a violation of a right, it is up to the national judicial body to draw from it the consequences of a different nature

4 Gozaini, 2006, pp. 335–362.

resulting from the violation committed.[5] Nevertheless, on various occasions, states have invoked the national margin of appreciation in favour of their 'space of liberty' to consider certain rights.[6] The IACtHR case law is characterised by dynamic development and a broad scope of influence. The Court, like other international courts, considers the Convention a 'living instrument', whose content should be interpreted considering changing social, political and cultural conditions. Hence, its jurisprudence is not limited to traditional civil and political rights and includes rights of a new generation, such as environmental protection, rights of indigenous peoples, the right to truth and the prohibition of discrimination based on sexual orientation.[7]

A key aspect of the IACtHR's jurisprudence is its jurisdiction and the relationship between the Inter-American system and domestic legal orders. The Court has repeatedly emphasised that its rulings set minimum standards that all state parties must adhere to. Therefore, it plays an important role in shaping the relationship between domestic law and the standards established by the Convention. The doctrine of conformity control with the Convention, articulated in its case law, determines that all state organs, including Courts, are obliged to apply and interpret national law in a manner that fully implements the provisions of the Convention and respects the standards set out in the judgments. Hence, the Court functions as an institution resolving individual complaints and a body shaping the constitutional character of the human rights protection system in the region. In practice, this entails the obligation to execute judgments in individual cases and the necessity to adapt national law to the Convention's requirements.

In this context, the doctrine of so-called control of conventionality (*control de convencionalidad*), developed by IACtHR, is particularly important. It was first formulated in the *Almonacid Arellano v. Chile* (2006) and further developed in *Gelman v. Uruguay* (2011) and *Trabajadores Cesados del Congreso v. Peru* (2006). According to this doctrine, all state organs, especially domestic courts, are required to review national

5 Vargas Morales, 2022, pp. 349–371.

6 Bandeira Galindo, 2013, pp. 255–273.

7 In *Awas Tingni v. Nicaragua* (2001), the Court, for the first time, recognised that property rights protected by the Convention include the collective rights of indigenous peoples to land and natural resources, which form the basis of their cultural identity. In subsequent rulings, such as *Yakye Axa v. Paraguay* (2005) and *Saramaka People v. Suriname* (2007), the Court further developed this standard, emphasising the necessity of consulting with indigenous communities and protecting their bonds with the natural environment. Another example is Advisory Opinion OC-23/17, in which the Court explicitly linked environmental protection with the realisation of human rights, highlighting the states' obligation to prevent ecological harm affecting individuals. The jurisprudence concerning the right to truth and memory is particularly significant, developed in *Barrios Altos v. Peru* (2001) and *Almonacid Arellano v. Chile* (2006), which established that amnesties are inadmissible in crimes against humanity. Additionally, the Court has consistently expanded protections against discrimination, as exemplified by *Atala Riffo v. Chile* (2012), which recognised that the prohibition of discrimination covers sexual orientation and gender identity. All these rulings indicate that the Court considers the Convention a 'living instrument', whose content should respond to contemporary challenges and expectations in human rights protection.

legal norms for compliance with the Convention and the IACtHR's jurisprudence. The adoption of this doctrine entails, among other things, the obligation for domestic courts to disregard laws that conflict with the Convention and the necessity of removing from the national legal order any statutes and regulations incompatible with Inter-American standards. Hence, it establishes the primacy of the Convention and the IACtHR's jurisprudence over conflicting domestic legal norms. Therefore, IACtHR has established a mechanism that ensures the effectiveness of its rulings and reinforces the Convention's function as a quasi-constitutional instrument for human rights protection in the region.

An analysis of the IACtHR case law demonstrates that this institution broadens the material catalogue of rights protected within the Inter-American system and shapes mechanisms to ensure their effectiveness within domestic legal orders. The development of new-generation rights reflects the flexible and progressive character of the IACtHR's interpretative approach. Meanwhile, the doctrine of conformity control with the Convention serves as a vital instrument for the implementation of these standards at the domestic level, compelling states parties to treat the Convention and the IACtHR's jurisprudence as a superior point of reference. Hence, the IACtHR performs a dual function. On the one hand, it advances the axiology of human rights in a direction aligned with contemporary challenges; on the other hand, it strengthens the institutional foundations of the Inter-American system, endowing the Convention with the status of a quasi-constitutional regional act. It is this synergy of material innovation and institutional consequence that determines the unique role of the IACtHR's jurisprudence in the global architecture of human rights protection.

2. Case Laws in the Inter-American System

2.1. Personal Liberty

Personal liberty is a fundamental element of the human rights regime, as considered in all the relevant texts that have dealt with this issue, from the end of the 18th century to the present. This is reflected in the IACtHR case law, which has examined various aspects of liberty, and the concept of liberty itself, based on the interpretation and application of Article 7 of the ACHR. Before the adoption of the IACtHR's current criteria on this issue, the case law assumed that Article 7 referred exclusively to physical

liberty.[8] Currently, a broader concept prevails, namely 'liberty is the right of every person to organize, in accordance with the law, his individual and social life according to his own choices and beliefs'.[9] Liberty is 'designed throughout the American Convention'.[10] Article 7 of the ACHR shows a dual aspect of this right: general in the first section and specific in the second section, which concerns primarily deprivation of liberty due to arrest and other extremes related to criminal proceedings.[11]

8 Chaparro Álvarez y Lapo Íñiguez, para. 53. On 8 September 1998, Juan Carlos Chaparro Álvarez and Freddy Hernán Lapo Iñiguez were wrongfully accused of illegal drug trafficking. Both were detained for over a year. Messrs. Chaparro and Lapo filed the recourses available to them, requesting a review of the grounds for the preventive detention measure; however, these recourses were unsuccessful. The IACtHR found that the state violated the ACHR. The case relates to the illegal and arbitrary detention of Chilean national Juan Carlos Chaparro Álvarez, owner of the Aislantes Plumavit Compañía Limitada factory, and Ecuadorian national Freddy Hernán Lapo Íñiguez, the factory manager. These detentions were carried out in November 1997 under *Operación Antinarcótica Rivera*, an operation under which cool-boxes, similar to those produced in the factory of the victims, were seized if the presence of cocaine hydrochloride and heroine had been detected.

9 Gelman, para. 29. In late 1976, Marнa Claudia Garcнa Iruretagoyena de Gelman, a university student in her third trimester of pregnancy, was arbitrarily detained in Buenos Aires, Argentina, by Uruguayan and Argentinean military commandos and transferred to a detention centre in Montevideo Uruguay, where she gave birth to her child. Gelman was forcefully removed and her daughter was taken from her and given to a Uruguayan family under Operation Condor, which involved the systematic practice of arbitrary detention, torture, execution and enforced disappearances by the Uruguayan dictatorship. In December 1986, the Uruguayan Government approved an amnesty law, which was approved by the national referendum, that eliminated the possibility that military and police officers who committed human rights violations before May 1985 would be investigated, tried and sanctioned. The IACtHR found that the state violated the ACHR and the Inter-American Convention on Forced Disappearance of Persons (IACFDP). The facts of the case relate to the forced disappearance of Gelman and the suppression and substitution of the identity of her daughter Marнa Macarena Gelman Garcнa, who was born in captivity. The suppression and substitution of identity is understood as form of forced disappearance. These events occurred during the dictatorship in Uruguay between 1973 and 1985 and formed a part of a systematic practice of gross human rights violations carried out under the doctrine of national security and Operation Condor, the alliance which united and coordinated the security forces and intelligence services of the dictatorships in Chile, Argentina, Paraguay, Bolivia and Brazil. Artavia Murillo y otros ('Fecundaciyn in vitro'), para. 142, The facts of the case refer to the prohibition of in vitro fertilisation, established following a decision of the Supreme Court of Justice in 2000, which declared the decree which regulated this practice unconstitutional. It concerns human rights violations resulting from the state's general prohibition of the practice of in vitro fertilisation. The victims, a couple affected by fertility problems, argued that the prohibition constituted an arbitrary interference into the right to a private life, start a family and equality. The IACtHR found that the state violated the ACHR. e I.V, para. 151. This case is about the sterilisation, by tubal ligation, of a woman without her consent. The IACtHR found violations of the ACHR and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belйm do Para). However, it did not discuss the violation of the right to health (Article 26 of the Convention) implicated in the case. The facts of the case concern human rights violations suffered by I.V. because of having had a fallopian tube tied without her informed consent and the subsequent lack of an effective judicial response to such events.

10 Chaparro Álvarez y Lapo Íñiguez, para. 52, e I.V, para. 151.

11 Chaparro Álvarez y Lapo Íñiguez, para. 51; Nadege Dorzema y otros, para. 125.

It examines unlawful and arbitrary detention and the immediate judicial review of detention, which covers ordinary criminal and administrative cases and migration measures. The guarantees provided under Article 7 apply to the latter.[12] The right to personal liberty, protected by Article 7, has occupied a central place in the IACtHR's jurisprudence since its inception. The Court consistently emphasises that individual freedom constitutes a fundamental principle and its restriction can only occur exceptionally, in a manner that complies with domestic law and convention standards.

As early as *Gangaram Panday v. Suriname* (1994), the IACtHR pointed out that the legality of deprivation of liberty cannot be equated solely with compliance with domestic law. Arbitrary detention, even if formally provided for in internal law, constitutes a violation of the Convention. This laid the groundwork for distinguishing formal legality and substantive conformity from the Convention. A further breakthrough was *Suárez Rosero v. Ecuador* (1997), in which the IACtHR examined long-term pre-trial detention. It emphasised that prolonged use of provisional detention undermines the presumption of innocence and transforms an exceptional measure into a form of premature punishment. It articulated the principle of subsidiarity of detention, indicating that it should only be applied in strictly justified cases and for the shortest possible duration.

In *Tibi v. Ecuador* (2004), the IACtHR broadened the range of guarantees for the protection of the right to liberty. Besides reaffirming the prohibition of arbitrary arrest, it noted that states are obliged to ensure individuals the right to effective compensation for unlawful detention. Hence, Article 7 is linked to Article 25, which guarantees the right to effective judicial protection. The judgment in *Juan Humberto Sánchez v. Honduras* (2003) highlighted the fundamental importance of the *habeas corpus* remedy as a primary safeguard of the right to liberty. The Court stated that

12 Vĭlez Loor, para. 107 y seq. The facts of the case concern the detention, on the part of the Panamanian migratory authorities, of Ecuadorian national Jesъs Vĭlez Loor and his subsequent conviction to imprisonment for committing migratory crimes, without access to counsel or consulate. For years, Vĭlez Loor was housed in jails with inhumane detention conditions, where he suffered torture. This is the case of an Ecuadorian citizen who thrice entered Panama illegally. He was expelled twice but the third time he was arrested, tried and detained. Vĭlez Loor was sentenced to a 2-year prison term and allegedly tortured and mistreated. On 10 September 2003, he was deported to Ecuador. The IACtHR held that Panama was liable for the breach of the ACHR and the American Convention on Forced Disappearance of Persons. Nadege Dorzema y otros, para. 136 et seq. In June 2000, Dominican army soldiers opened fire on a truck that was trying to smuggle into the country a group of Haitians, causing seven persons to dies and several injuries. The shooting was adjudicated by military justice system, which acquitted the soldiers involved. Some of the surviving victims suffered violations of personal liberty, judicial guarantees and judicial protection because they were summarily expelled from the Dominican Republic. The facts of this case occurred within the discrimination against persons of Haitian origin and the deportation of Haitians from the Dominican Republic. Familia Pacheco Tineo, paras. 131–132, This case is about the assassination of a politician who was candidate for a seat in the National Congress. The IACtHR found the state responsible for failing to properly investigate the assassination and prosecute those responsible. The facts of the case concern the deportation of Pacheco Tineo Family from Bolivia to Peru, enforced on 24 February 2001, following the state's rejection of their application for refugee status and ordering their removal from the country.

this right cannot be suspended even in extraordinary circumstances, as it is a key mechanism for protecting individuals against arbitrary actions by public authorities. *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* (2007) held particular significance, as the IACtHR established a high standard regarding the use of pre-trial detention. It emphasised that detention cannot be applied automatically and must be based on specific grounds. Furthermore, its legality must be subject to prompt and effective judicial review. The Court underscored that the lack of effective remedies in this area constitutes an independent violation of the right to liberty. Hence, it found that the reasoning of a judicial decision is a condition for the possibility of guaranteeing the rights to defence. In this case, the lack of reasoning for the decision made it difficult for the defence to present new evidence or arguments for their release or to better challenge the decisive evidence of the prosecution. The IACtHR developed standards for the adoption of effective preventive measures concerning the right to property. It explicitly emphasised that pre-trial detention can only be applied exceptionally, as a supplementary and temporary measure. Its justification cannot assume guilt, the desire to exert pressure on the accused or the need to ensure the 'smooth progress of proceedings', independent of actual grounds.

The judgment highlighted that automatic or excessively prolonged use of pre-trial detention violates Article 7, which protects the right to personal liberty. Referring to Article 7(6) of the Convention, the IACtHR underscored the necessity of real and effective judicial mechanisms that enable rapid verification of the lawfulness of arrest and detention. In its view, appeal procedures must be genuinely accessible, effective and decided without undue delay. This case confirmed that abuse of pre-trial detention constitutes a form of arbitrary deprivation of liberty, which is contrary to the Convention and the general principles of international human rights law. The Court reminded that the liberty of the individual is the standard and deprivation of liberty must be an exception, always justified in a detailed and individualised manner. The significance of this judgment lies in strengthening two key guarantees: limiting the use of pre-trial detention solely to situations that are strictly necessary and proportionate and ensuring real and effective judicial oversight of this measure. In practice, this ruling reinforced a high standard for protecting the right to personal liberty within the Inter-American system, while reinforcing states' obligation to establish effective procedural mechanisms to protect individuals from arbitrary actions by state authorities.

The standards developed by the IACtHR in this case show considerable convergence with the jurisprudence of the European Court of Human Rights (ECtHR) regarding the right to liberty concerning pre-trial detention. In its rulings, notably in *Letellier v. France* (1991), the ECHR indicated that deprivation of liberty during the preliminary proceedings can only be applied exceptionally, based on specific and significant reasons, such as the risk of flight, obstruction of justice or serious threats to public order. The European Court further emphasised the need for periodic review of the lawfulness of detention to avoid automatic extensions. Similarly, in *McKay v. the United Kingdom* (2006), the ECtHR stressed that the right to liberty would be

illusory if there were no possibility of quick and effective judicial review of detention decisions.

In *Bayarri v. Argentina* (2008), the IACtHR took a further step by analysing the situation of a person deprived of liberty and subjected to torture. It concluded that arbitrary detention, combined with a violation of personal integrity, breaches Article 7 and leads to a violation of the prohibition of cruel, inhuman or degrading treatment. This demonstrated the interconnectedness of the right to liberty with other fundamental rights. In *Fermín Ramírez v. Guatemala* (2005), the IACtHR examined the arbitrariness of detention concerning death penalty, emphasising the necessity of fully respecting procedural guarantees in proceedings that could lead to the imposition of the highest penalty.

Both the Inter-American and European systems recognise the subsidiary and exceptional nature of pre-trial detention, requiring states to provide mechanisms of judicial review that must be effective, accessible and applied without delay. In both systems, excessive or arbitrary detention is regarded as a violation of the right to personal liberty and a form of abuse of state power. However, the difference lies in the emphasis. While the ECtHR focuses on the detailed justification and proportionality of each deprivation of liberty, the IACtHR additionally highlights the importance of the availability and effectiveness of remedies, considering their absence as a standalone violation of the Convention. Hence, in the Inter-American system, the review of the legality of detention is treated as a procedural guarantee and a key element of substantive protection of the right to liberty.

Nadege Dorzema et al. v. Dominican Republic examined the extrajudicial execution of a group of Haitian immigrants and the expulsion of the survivors, following an attack by military agents that was provoked when their entry into the country was discovered. The IACtHR established standards for the application of due process in administrative procedures for the deportation or expulsion of immigrants, referring to the state's obligation to assess the circumstances of each person and the prohibition of collective expulsions. Moreover, it reiterated the standards concerning the excessive use of force by state agents and the competence of the military criminal jurisdiction in cases concerning violations of human rights. Furthermore, in *Vélez Loor v. Panama*, it established the standards for the protection of migrants and recognised that detention for immigration irregularities should be exceptional and the imposition of a custodial sentence should require an individualised assessment and the possibility of applying less restrictive measures. It reaffirmed the importance of the right to legal and consular assistance in judicial proceedings involving migrants, since they are in a particularly vulnerable situation, which may be aggravated if the person is deprived of their liberty. The IACtHR found that the appealing conditions of detention in the prisons in which Vĭlez Loor was deprived of his liberty constituted cruel, inhuman and degrading treatment and the state had failed to investigate with due diligence the acts of torture inflicted on him.

The minimum due process that must be observed in migration proceedings that may result in the expulsion or deportation of a foreigner and in proceedings for the

recognition of refugee status were established by the IACtHR in *Pacheco León and Family v. Honduras*. it emphasised the special situation of children in the family, stating that the special protection that children must enjoy extends to judicial or administrative proceedings in which an application for asylum or expulsion is decided.

A comprehensive analysis of these rulings indicates that the IACtHR has developed a coherent and detailed standard for the protection of the right to personal liberty. Its foundations are the prohibition of arbitrary detention, the principles of exceptionalism and subsidiarity in pre-trial detention, the obligation of effective judicial review and the right to compensation in cases of violation. The Court treats individual freedom as a paramount value, subjecting any restrictions to strict proportionality and necessity assessments.

2.2. Personal Security

The right to personal security, which is one of the fundamental protections of the individual within the Inter-American system, remains closely connected to the rights to life and liberty. The IACtHR consistently emphasises that its scope includes protection against unlawful interference by the state and the positive obligation of authorities to ensure individuals have real protection from threats posed by third parties. Regarding security, the right referred to in Article 7 of the ACHR, the IACtHR shared the criterion adopted by the ECtHR, that is, the right to security is understood as protection against arbitrary or unlawful interference with of personal liberty.[13] This right is particularly significant when granting detainees guarantees of legal protection.[14] The IACtHR examined the right to personal security in relation to a situation that requires careful treatment: the participation of the armed forces in tasks

13 Chaparro Ƀlvarez and Lapo Íñiguez, para. 53; Cabrera Garcнa y Montiel Flores, para. 80. The facts of the case refer to the cruel, inhumane and degrading treatment of Teodoro Cabrera Garcнa and Rodolfo Montiel Flores whilst they were detained in custody by the Army, for the alleged crimes of carrying weapons intended for the exclusive use of the Army without a license and for growing poppies and marijuana, along with the violation of judicial guarantees during the criminal proceedings against them. This is the case of two Mexican environmental activists in the state of Guerrero, Mexico, who, in 1999, were arrested by the military and found guilty of various crimes based on confessions extracted under duress. The IACtHR found that the state violated the ACHR and the American Convention to Prevent and Punish Torture.

14 'Niños de la Calle' (Villagrán Morales y otros). Fondo, para. 135. This case addresses the plight of street children in Guatemala. At the time, state security forces carried out a systematic practice of aggression against street children in Guatemala, including threats, persecution, torture, forced disappearance and homicide. Large numbers of children are still living on the streets of Guatemala. In this landmark case, the IACtHR spelled out the states' obligation to protect this particularly vulnerable group. The facts of the case refer to the extrajudicial execution of five young people living on the streets, three of them being minors. Four of the victims were previously abducted and tortured. The IACtHR located the events within the context of the state's practice to use state security forces to threaten, arrest, perpetrate cruel, inhumane and degrading treatment and murder 'street children', as a means of counteracting juvenile delinquency.

that, in principle, correspond to police forces.[15] In such cases, the IACtHR considers that it is necessary to respect the requirements of strict proportionality applicable to cases of limitation of the right.[16] Furthermore, it is necessary to apply strict criteria of exceptionality and due diligence in securing conventional guarantees.[17] It took into account that the armed forces undergo training and have a different orientation than police security forces.[18] Therefore, it is necessary to carefully distinguish between military and police functions.[19]

In *Velásquez Rodríguez v. Honduras* (1988), the Court established that the state is responsible for direct violations of the right to personal security by its officials and a lack of due diligence in preventing, investigating and punishing serious violations committed by private entities. This case concerned enforced disappearances, whereby the IACtHR indicated that the absence of effective action by the state creates an atmosphere of impunity, which constitutes a violation of the right to security. In *Street Children (Villagrán Morales and others) v. Guatemala* (1999), the IACtHR highlighted that the right to personal security was significant for vulnerable groups, such as street children. The state was found responsible for direct actions by police officers who caused the victims' deaths and prior omissions in providing protection and security.

In *Juan Humberto Sánchez v. Honduras* (2003), it pointed out that personal security includes protection against threats in detention situations. It emphasised that the state is responsible for the lives and integrity of persons under its control and the lack of effective protective mechanisms leads to violations of the right to liberty and personal security. Another significant example is *Myrna Mack Chang v. Guatemala* (2003), where the IACtHR underscored the state's obligation to ensure personal security concerning human rights defenders' activities. The state failed to prevent the murder and did not provide an effective investigation, which was a violation of the right to personal security of the victim and her relatives.

A notable development of standards occurred in cases concerning indigenous peoples. In *Yakye Axa v. Paraguay* (2005) and *Xákmok Kásek v. Paraguay* (2010), the IACtHR recognised that lack of access to land, water and healthcare posed a threat to

15 Montero Aranguren y otros (Retйn de Catia), para. 78. On 27 November 1992, right after an attempt of a coup d'йtat in Venezuela, 37 detainees at the Detention Center of Catia were extrajudicially executed, leading to a prison riot. The guards, the troops of the 5th Regional Commander's Office of National Guard and the Metropolitan Police intervened, exercising excessive force and shooting indiscriminately at the detainees, resulting in the death of more than 60 prisoners, 52 injured and 28 disappeared. The IACtHR found that the state violated the detainees' rights to life, humane treatment and judicial protection and guarantees under the ACHR. The events occurred in a framework of serious civil riot at a national level and extreme political unrest, provoked by the second attempt at a coup d'йtat against the administration of the then President Carlos Andrйs Pйrez, carried out by a civilian-military group formed by high-ranking officers of the four branches of the Armed Forces and several civilian opponents. Cabrera Garcнa y Montiel Flores, para. 88.

16 Cabrera Garcнa y Montiel Flores, para. 89.

17 Ibid.

18 Ibid., paras. 86–87.

19 Ibid., para. 88.

the lives and personal security of community members. Thus, this right was linked to living conditions, along with protection from physical violence. In *González and others (Campo Algodonero) v. Mexico* (2009), concerning the murders of women in Ciudad Juбrez, the Court established the state's obligation to provide special protection to vulnerable groups at risk of gender-based violence. It was found that the failure to take effective preventive measures and the ineffectiveness of investigations constituted violations of the right to personal security.

In *Cabrera García and Montiel Flores v. Mexico*, the IACtHR considered the presence of the military in the Guerrero region in the 1990s, as a response of the state to drug trafficking and the presence of armed groups, such as the Zapatista National Liberation Army (EZLN) and the Popular Revolutionary Army (EPR). It developed standards regarding the obligation to investigate acts of torture; the exclusion of evidence obtained through coercion and the competence of the military criminal jurisdiction to hear such cases. Moreover, it established standards concerning the use of force by state security forces and prison conditions and the state's obligation to guarantee the right to personal integrity in *Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*. The special circumstances were related to serious social upheavals and extreme political instability. Notably, Venezuela has acknowledged its international responsibility for the condemned events.

The analysis of these rulings shows that the IACtHR has developed a broad understanding of the right to personal security. It encompasses protection against arbitrary interference by state authorities, the positive duty of authorities to prevent and respond to threats from private entities, special protection for vulnerable groups (children, women, human rights defenders and indigenous peoples) and the linkage of personal security with living conditions and access to basic goods. Hence, the right to personal security within the Inter-American framework is not limited to prohibiting direct abuses by the state and has been shaped as the right to effective and real protection by public authorities, serving as a foundation for human dignity and individual integrity.

The IACtHR case law shapes a coherent system of individual protection, encompassing the rights to personal liberty and security. The Court treats these rights as complementary, indicating that effective protection of individuals requires respecting procedural guarantees and substantive security standards. The right to personal liberty, protected under Article 7 of the ACHR, focuses on the prohibition of arbitrary deprivation of liberty and the necessity of ensuring proportional and exceptional procedures for deprivation of liberty, including pre-trial detention. Jurisprudence in this area includes rulings which emphasised the subsidiarity and exceptional nature of detention, the need for effective judicial review and the right to compensation in cases of unlawful detention. These rulings clearly stated that individual liberty is a fundamental principle and any restrictions must be justified and proportionate.

Simultaneously, the right to personal security, which includes protection against unlawful acts by state authorities and the state's obligation to prevent threats from third parties, is being developed. The Court highlighted the state's duty to provide real

protection, effective investigations and preventive measures for vulnerable groups, including children, women, human rights defenders and indigenous populations. These standards encompass physical protection and living conditions necessary to ensure individual safety. Hence, both rights are closely interconnected: protecting personal liberty requires effective control against arbitrary detention and safeguarding personal security requires state actions for preventing threats and ensuring the physical integrity of individuals. Respecting both rights creates a framework in which the state bears responsibility for direct violations and omissions in providing real protection.

Hence, the IACtHR has developed a comprehensive standard of individual protection that combines procedural and substantive aspects, ensuring that any interference with a person's liberty or security is strictly regulated, proportionate and subject to effective oversight. This system exemplifies the synergy between the rights to personal liberty and security, confirming that effective human rights protection requires both counteracting arbitrary state actions and actively preventing threats to individual integrity.

2.3. Property

The right to property, protected under Article 21 of the ACHR, constitutes a fundamental element of individual protection, encompassing the rights to possess and use property peacefully and lawfully. The IACtHR, in numerous rulings, has emphasised that a state cannot arbitrarily deprive individuals of their property and is obliged to ensure effective legal remedies for the protection of this right.

The right to property has been a classic feature of declarations and catalogues of rights since the end of the 18th century. It is protected by Article 21 of the ACHR, titled 'private property' and stating the guidelines for disposal of property. The case law has developed both these concepts and other related concepts. Property is a broad concept that includes the use and enjoyment of goods, which are 'tangible things capable of being appropriated' and extends to intangible objects that have value and

are included in the estate of persons.[20] Conventional protection extends to possession, as far as it constitutes a presumption of ownership in favour of the owner. In the case of movable property, it is valid by virtue of ownership.[21] The IACtHR has ruled on the limits of the right to property, which is not absolute. It may be subject to restrictions

20 Ivcher Bronstein, para. 122. On 13 July 1997, the state arbitrarily deprived Baruch Ivcher Bronstein, a naturalised Peruvian citizen and majority shareholder and Director and President of Channel 2-Frecuencia Latina of the Peruvian television network, of his nationality title to remove him from the editorial control of the channel and restrict his freedom of expression, which he manifested by denouncing grave violations of human rights and acts of corruption. The IACtHR found that the state violated the ACHR to the detriment of Ivcher Bronstein. The events of the case relate to the arbitrary deprivation of the nationality of Ivcher Bronstein, a naturalised Peruvian citizen, to supplant his shareholder and editorial control of Peruvian television's Canal 2. Ivcher Bronstein had carried out a series of reports on human rights violations and acts of corruption in the country via his television network. Comunidad Campesina de Santa Bб́rbara, para. 199. The petition refers to the forced disappearances of 15 people (7 of whom were children), all members of the rural community of Santa Barbara in Huancavelica. On 4 July 1991, the victims were deprived of their liberty by state agents, as part of a military operation, and they remained in state custody while they were transferred to an abandoned mine known as 'Mystery' or 'Vallaryn'. They were put in a cavern and gunned down by the military; their bodies were almost immediately immolated with dynamite explosions. Authorities and state agents took steps to eliminate the evidence and erase all traces of the bodies to avoid identification. A criminal complaint was filed; however, the Amnesty Law 26479 was applied and the events went unpunished. The state failed to investigate, identify and exhume the remains in the mine. The IACtHR found that the state violated the ACHR, the Inter-American Convention to Prevent and Punish Torture and the IACFDP. Andrade Salmyn, para. 110. This case is about the prosecution of the Mayor of La Paz, Bolivia's capital, for graft and corruption concerning several investigations. Although she was eventually found not guilty in all criminal proceedings, she spent more than six months in pre-trial detention. Eventually, the IACtHR found violation of some of her rights protected under the ACHR (e.g., right to property, movement and trial within reasonable time); however, it found Bolivia not responsible for violation of other rights (e.g., right to liberty and security and protection of honour and dignity). The facts of the case refer to criminal proceedings, known as Gader, Luminarias Chinas and Quaglio, against Marina Nine Lupe del Rosario Andrade Salmon for unlawful conduct related to the management of public funds during her term as Councilwoman, President of the Municipal Council and Mayor of the Municipality of La Paz.

21 Tibi, para. 218. On 27 September 1995, Daniel Tibi was forcibly detained without a court order for his supposed involvement in drug trafficking. During his detention, state authorities tortured, beat, burned and asphyxiated him to gain a confession. Tibi was released on 21 January 1998. The state did not grant him the possibility of filing a remedy against the mistreatment received during his detention and there was no prompt and simple remedy that he could file before a competent court to protect himself from the violations of his basic rights. The IACtHR found that the state violated the ACHR and the American Convention to Prevent and Punish Torture. The facts relate to the seizure of his goods, which were not returned to him by the state on his release.

and limitations under Article 21 and to radical expropriation, the characteristics of which have been examined in the case law.[22]

The IACtHR has examined specific issues relating to property, such as the rights of indigenous communities over ancestral territories which remain in use,[23] compensation in cases of expropriation of such territories that are privately owned,[24]

22 Salvador Chiriboga. Excepciyn Preliminar y Fondo. paras. 54 et seq. Between December 1974 and September 1977, Julio Guillermo Salvador Chiriboga and his siblings inherited property from their father, Guillermo Salvador Tobar. On 13 May 1991, the then Municipal Council of Quito declared the property to be of public utility to expropriate and take immediate possession of it. Salvador Chiriboga and his siblings filed several lawsuits against the state's authorities to resolve the declaration of public utility; however, to no avail. The IACtHR found that the state violated the ACHR. The facts of the case concern the limitations on the right to property of the Salvador Chiriboga brothers, imposed by the Municipal Council of Quito. In May 1991, the Municipal Council declared an estate of 60 hectares to be of public utility, with the objective of expropriation and urgent occupation.

23 Mayagna (Sumo) Awas Tingni, paras. 148–149. This case was brought because the state did not demarcate the communal lands of the Awas Tingni Community nor did it adopt effective measures to ensure the property rights of the Community to its ancestral lands and natural resources. It granted a concession on community lands without the assent of the Community and did not ensure an effective remedy in response to the Community's protests. The IACtHR found that the state violated the ACHR. The facts of the case concern the granting of a concession to a private company by the state to carry out construction work on roads and logging in ancestral territories of the Mayagna (sumo) Awas Tingui Community, without their consent. Comunidad Indнgena Sawhoyamaxa, para. 118. The facts of the case concern the right to ancestral property in the territory of the indigenous community Sawhoyamaxa and the grave living conditions arising from being settled at the edge of a national road in a situation of extreme poverty, without access to basic services, such as nutrition, housing, education or health, among others. It concerns the state's failure to ensure the ancestral property right of the Sawhoyamaxa Community. The indigenous community were barred from title to and possession of their lands. Their claim for territorial rights had been pending since 1991 and had not been satisfactorily resolved by the date of this judgment. This kept the indigenous community in a constant state of nutritional, medical and health vulnerability, which threatened their survival and integrity. The IACtHR found that the state violated the ACHR to the detriment of the Sawhoyamaxa Community. y Pueblos Kaliña y Lokono, paras. 124–125. This case is about the rights of the indigenous Kaliña and Lokono people in Suriname. During the 1960s through the 1980s, the state established three nature reserves on Kaliña and Lokono ancestral territory. These reserves negatively impacted the indigenous groups by preventing them from accessing certain parts of their lands. The state began mining in the nature preserves, which had a significant negative impact on the area's ecosystem. It began to sell land to non-indigenous people that was contiguous to Kaliña and Lokono land and facilitated the development of an urban housing project. As Suriname does not recognise indigenous groups as legal entities, the petitioners were unable to collectively retain the title to their lands. The IACtHR found that the state had violated the ACHR. The facts of the petition relate to human rights violations of eight communities of the Kaliña Peoples and Lokono of the Lower Marowijne River. It focuses on the absence of a regulatory framework that collectively recognises the legal personality of indigenous peoples and their right to collective ownership of lands, territories and natural resources.

24 Pueblo Saramaka, para. 199. This case addresses indigenous peoples' rights to their land and their struggle against encroachment by mining and logging companies carrying out activities on their territory based on the concessions granted by the state, without consultation with the indigenous people. The IACtHR found state violated the ACHR against the members of the Saramaka people, a tribal community living in the Upper Suriname River region, by failing

deprivation of the use and enjoyment of shares in the capital,[25] withholding of bail in criminal cases,[26] payment of court fees related to access to justice,[27] copyright, confis-

to adopt effective measures to recognise their right to the use and enjoyment of the territory they traditionally occupied and used. The state failed to provide the people with the right to effective access to justice for the protection of their fundamental rights, particularly the right to own property in accordance with their communal traditions. The state further failed to adopt domestic legal provisions to ensure and guarantee such rights to the Saramaka people. y Pueblo Indнgena Kichwa de Sarayaku, paras. 315–317. In the 1990s, the state granted a permit to a private oil company to carry out oil exploration and exploitation activities in the territory of the Kichwa Indigenous People of Sarayaku, without consulting them or obtaining their consent. The oil company began the exploration phase and introduced high-powered explosives in several places on indigenous territory. This case concerns the state's alleged lack of judicial protection, failure to observe judicial guarantees and limits of rights to freedom of movement and cultural expression of the indigenous population. The facts of the case concern the granting of permission by the Ecuadorian state to a private company to carry out exploration and exploitation in the territory of the indigenous community Kichwa of Sarayaku. This permission, granted in the 1990s, was approved without the community being consulted and without their consent. As a part of the authorised exploitation, the private company introduced high powered explosives at various points of the territory, limiting the right of the community to freedom of movement and the expression of their culture. Additionally, there was an absence of judicial protection and a failure to observe judicial guarantees.

25 Ivcher Bronstein, paras. 123, 125, 138 and 156; Perozo y otros, para. 400. Between October 2001 and August 2005, state agents harassed and physically and verbally assaulted 44 people associated with Globovisiyn television station because they broadcasted a strike called by the Workers' Confederation of Venezuela and Fedecбmaras. The strike demanded the resignation of the President of the Republic. The IACtHR found that the state violated the victims' rights to humane treatment and freedom of thought and expression. The events relate to the violation of the right to freedom of expression, due to a series of acts and omissions committed by state agents and individuals, against a group of social communicators and workers from the Globovision Television channel between 2001 and 2005. This took place through obstruction and intimidation of those exercising their duties as journalists. The IACtHR placed the events in a context of strong bias and social and political conflict.

26 Andrade Salmyn, para. 109 et seq.

27 Cantos. Fondo Reparaciones and Costas, para. 54. The facts of the case relate to the imposition of a fine on Josй Marнa Cantos for the payment of court fees, fines for non-payment thereof and legal fees of lawyers and experts, following a lawsuit held before the Supreme Court of Justice of the Nation against the Federal Government and the Province of Santiago del Estero. Cantos was the owner of multiple businesses in the province of Santiago del Estero in Argentina. In March 1972, the Revenue Department conducted a series of searches in the administrative offices of Canto's companies, owing to an alleged violation of the Stamp Act. During these procedures, all the accounting documentation, company books and records, receipts and supporting documents of payments by those companies to third parties and suppliers and numerous shares and securities were seized without being inventoried. The seizure of company documents caused the company severe financial losses. Following multiple lawsuits filed against the Revenue Department, the Revenue Department acknowledged a debt towards some of Cantos' businesses and established a compensatory amount; however, the compensation was never paid. The IACtHR found that the state violated the ACHR.

cation of books and concealment of electronic information related to publications,[28] changing the amount of pensions, failure to comply with court decisions and internal resolutions on the same case,[29] seizure of the means of subsistence of peasant communities and damage to various properties by paramilitary groups with the state's

28 Palamara Iribarne, paras. 103–107. In March 1993, Humberto Antonio Palamara Iribarne was prohibited from publishing a book called Ethics and Intelligence Services, which addressed issues related to military intelligence and the need to bring it in line with ethical standards. Iribarne was prosecuted for two counts of disobedience and contempt of authority and correspondingly convicted. The IACtHR found that the state violated the victim's rights to property, personal liberty and freedom of thought and expression, while failing to judicially protect and observe judicial guarantees under the ACHR. The facts relate to the censure of the book written by Iribarne, in which he addresses aspects of military intelligence. Based on the book, the victim was subjected to criminal proceedings in a military court for the crimes of disobedience and contempt, because at the time of the event, the victim was a retired officer of the Chilean Navy.

29 'Cinco Pensionistas', paras. 102–103, 109, 117–118 and 121. The facts of the case relate to the arbitrary change in the pension scheme applicable to Carlos Torres, Javier Mujica, Guillermo Elvarez, Reymert Bartra and Maximiliano Gamarra, who had received their pensions since 1992. Between February and September 1992, the state modified and reduced the pension regime that Carlos Torres Benvenuto, Javier Mujica Ruiz Huidobro, Guillermo Elvarez Hernбndez, Reymert Bartra Vбsquez and Maximiliano Gamarra Ferreyra had earned in accordance with Peruvian legislation up until 1992. The state did not comply with domestic judgments of compensating the victims for lost pension sums. The IACtHR found that Peru had violated the victims' rights to property and judicial protection under the ACHR. y Acevedo Buendна ('Cesantes y jubilados de la contralorна'), paras. 85–91, In this case, a law from 1979 allowed persons who retired from the Office of the Comptroller General to collect a pension equal to the salary of an employee performing the same or similar function to the one they performed at the time of retirement. This law was replaced in 1992 by a new law that eliminated the right of a pensioner to continue receiving the amount received under the old law. Two hundred seventy-three members of the Association of Discharged or Retired Employees of the Comptroller General of the Republic brought a suit to collect pension benefits that were owed to them under the old law. The state failed to honour the judgment delivered by the Constitutional Court of Perъ on 21 October 1997 and 26 January 2001, ordering the Office of the Comptroller General of the Republic to comply with the payment to the alleged victims of the salaries and wages, benefits and bonuses received by the active employees of that office performing functions identical, similar or equivalent to those that the discharged or retired employees performed. The IACtHR found the state violated the ACHR.

consent[30] and actual precautionary measures (seizure of goods), seizure of goods, mismanagement and removal and deposit of items.[31]

Compañía del Desarrollo de Santa Elena v. Ecuador (2001) was one of the first judgments in which the Court developed standards for the protection of individual property rights. It indicated that any restrictions on the use of property must have a legal basis, be proportionate and serve public purposes, while ensuring compensation for deprivation of property rights. Regarding collective ownership, particular importance is given to judgments concerning indigenous peoples. In ***A**was Tingni v. Nicaragua* (2001) and *Saramaka People v. Suriname* (2007), the IACtHR stated that the right to property includes the collective rights of indigenous peoples to land and natural resources, which are essential for maintaining their cultural identity and way of life. These rulings introduced standards regarding consultation with indigenous populations and the necessity of obtaining their consent before implementing changes affecting land use and control over territory.

In *Yakye Axa v. Paraguay* (2005), the IACtHR expanded the interpretation of the right to property, recognising that the state is responsible for failing to ensure conditions that enable effective use of land and resources. Hence, the right to property has been linked to the right to survival, safety and cultural integrity of individuals and communities. The Court emphasises the procedural dimension of protecting the right to property. In *Alvarado Reyes v. Mexico* (2006) and *Moiwana Community v. Suriname* (2005), it stated that individuals and communities must have access to effective and real remedies in case of violations of the right to property. The absence of such mechanisms results in violations of substantive and procedural rights.

30 In these cases, the IACtHR has interpreted the right to property following Article 14 of Protocol II of the Geneva Convention. Masacres de Ituango, paras. 176–177, 180 and 183. The facts of this case concern the massacres that occurred in June 1996 and October 1997 in the small towns of La Granja and El Aro, respectively, in the Ituango province, Antioquia region. The selective murder of 19 farmers, among them 1 child and 3 women, was a result of the paramilitary incursion, which took place in both towns with the support and acquiescence of members of the security forces. Many people were tortured before being murdered, their homes were raided and a large part of the town centre was destroyed, forcing the mass displacement of more than 700 rural people. On June 1996 and October 1997, in districts of La Granja and El Aro, members of law enforcement and paramilitary groups killed unarmed civilians, robbed others and caused overall panic and displacement. These events devastated and overwhelmed the region. The state failed to investigate the acts, punish those responsible and provide damages to the victims and their family members. The IACtHR found that the state violated the ACHR. Masacres del El Mozote y lugares aledaños, paras. 168, 179–181 and 202. Between 11–13 December 1981, successive massacres were committed, resulting in approximately 1,000 deaths, including those of children, under the military operation by the Atlacatl Battalion, together with other military units. The massacres occurred in seven places in the northern part of the department of Morazбn. An alleged investigation that was opened and halted based on the Law of General Amnesty for the Consolidation of Peace, which is still in force in El Salvador. The IACtHR found that the state violated the ACHR, the American Convention on the Prevention, Punishment and Eradication of Violence Against Women and the American Convention to Prevent and Punish Torture.

31 Chaparro Álvarez y Lapo Íñiguez, para. 174 et seq.

In *Acevedo Buendía et al. v. Peru*, the IACtHR indicated that the guarantee of an effective remedy is not limited to its formal existence and requires the guarantee of means of enforcing the final decisions of the competent authorities. Regarding the infringement of the right to property, the IACtHR reiterated that, if a pensioner pays contributions to a pension fund and ceases to provide services to join a pension scheme provided for by law, he acquires the right to have his pension subject to the conditions provided for by that law. Hence, the right to a pension has 'property implications' that are protected by the ACHR. The IACtHR further referred to the breach of the state's obligations to progressively develop economic, social and cultural rights (ESCR), stating that this consists of adopting measures, particularly economic and technical ones, to gradually achieve the full effectiveness of certain rights with these characteristics, considering that this does not correspond to the case in hand. Issues related to social security were examined in *Five Pensioners v. Peru*. The IACtHR examined the incompatibility with the judgements of the Supreme Court of Justice and the Constitutional Court of Peru, which ordered the state to pay beneficiaries a pension calculated in the manner specified in the legislation in force at the time they began to benefit from the pension system.

The analysis of the infringement of the rights to property and movement resulting from the application of preventive measures not involving deprivation of liberty in criminal proceedings, and the right to trial within a reasonable time was addressed by the IACtHR in *Andrade Salmón v. Bolivia*. The analysis of pre-trial detention became the central issue of *Tibi v. Ecuador*. This was analysed under the right to personal liberty, recognising the nature of pre-trial detention as a preventive rather than a criminal measure, highlighting the importance of immediate judicial review as a means of preventing arbitrary or illegal detention. Moreover, the IACtHR analysed the conditions of the applicant's detention per the state's obligation to respect personal integrity and the obligation to investigate.

The IACtHR found, in *Cantos v. Argentina*, that the court fees and fines imposed on the applicant constituted an obstacle to the right of access to justice, since it required that the persons involved in the proceedings could do so without fear of being forced to pay disproportionate amounts of money because of the appeal to the court. An important issue was decided in *Saramaka People v. Suriname*, in which the Court adopted standards regarding the conditions for a legitimate limitation of rights to ancestral territory, particularly regarding the link between natural resources and the existence of the people. It further established standards concerning the state's obligation to guarantee the right to consultation.

The rights of indigenous people in the protection of property were examined in *Sawhoyamaxa Indigenous Community v. Paraguay*. The IACtHR ratified the right to collective indigenous property and the special importance that the territory has for indigenous people as a fundamental basis of their culture, spiritual life, integrity and economic survival. It indicated that because of this close connection, they are protected by Article 21 of ACHR. It found the state responsible for failing to take measures to address poverty and the lack of access to basic services in the Sawhoyamaxa

community, particularly for children and the elderly. Moreover, it identified standards arising from the lack of an effective procedure for the delimitation, demarcation and titling of indigenous lands regarding the guarantee of judicial protection in ***P**alamara Iribarne v. Chile*.

Similarly, it developed standards concerning the concept of property in indigenous communities and its relationship to customary law in *Kaliña and Lokono Peoples v. Suriname*. The IACtHR developed standards related to collective ownership and linked them to environmental protection and the state's obligation to ensure effective participation of indigenous people through culturally appropriate decision-making procedures. *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* established standards to counter the lack of an effective procedure for the delimitation, demarcation and titling of indigenous lands concerning the guarantee of judicial protection. Issues of property rights of indigenous communities was addressed in *Kichwa Indigenous People of Sarayaku v. Ecuador,* according to which the IACtHR ruled on the right to consultation and indigenous communal property, establishing that the state, by failing to inform and consult the Sarayaku people in advance about a project that would directly affect their territory, had failed to fulfil its obligations to adopt all necessary measures to ensure that indigenous people can participate in their institutions, in accordance with their values, applications, customs and forms of organisation, in decision-making on matters and policies that affect or may affect their cultural and social life. it further held that such consultations must be conducted in good faith, using culturally appropriate procedures to reach an agreement. Hence, it considered that the lack of consultation with the Sarayaku people affected their cultural identity.

Ituango Massacres v. Colombia demonstrated serious human rights violations suffered by the civilian population in the Colombian armed conflict, because of the joint actions of paramilitary groups and security forces. The IACtHR referred particularly to the negative consequences suffered by the population due to the destruction and burning of houses, followed by the mass forced displacement of victims, and established a case law concerning the right to honour and dignity and the prohibition of slavery or servitude. It found the Colombian state responsible for encouraging the formation of "paramilitary" self-defence groups, creating a situation of danger for the inhabitants and failing to adapt necessary and sufficient measures to prevent massacres. In *Salvador Chiriboga v. Ecuador,* the IACtHR analysed the limitations of private property in a democratic society, establishing the criteria of public utility, social interest and the payment of just, adequate, prompt and effective compensation, as guiding principles, interfering as little as possible with the effective exercise of the right.

The significance of the IACtHR's standards regarding the right to property includes the prohibition of arbitrary deprivation of property, the obligation to ensure adequate compensation in cases of restrictions or loss of property rights, protection of collective property, especially of indigenous peoples, along with the duty of consultation and obtaining consent, the obligation of the state to establish effective

remedies and ensuring access to justice. An analysis of the rulings shows that the IACtHR treats the right to property as an instrument for protecting the cultural and economic integrity of individuals and communities. In practice, this means that, within the Inter-American system, property is a comprehensive right that combines material, cultural and procedural aspects, which distinguishes the human rights protection system in the region.

2.4. Right to Privacy, Honour and Dignity

In the Inter-American case law on the rights in Article 11 of the ACHR, the IACtHR has held that respect for privacy encompasses various issues related to the dignity of the individual.[32] The protection of privacy is closely linked to the recognition of the right of individuals to lead autonomous lives, choose how they wish to present themselves to others in the exercise of their liberty and exclude arbitrary or inappropriate interference by the state or third parties.[33] The latter entails the state's obligation to refrain from such interference and take positive measures to prevent unlawful interference and a person from being treated as a means to the achievement of ends that are foreign to his life, body and the development of his personality.[34]

The right to privacy, honour and dignity constitutes the foundation of safeguarding individuals against interference by the state and third parties in their personal sphere and against violations of their image and reputation. The IACtHR, in its rulings, has consistently emphasised that this protection encompasses physical and informational aspects, along with psychosocial ones, including the right to protect the dignity and moral integrity of the individual. It has recognised that the right to privacy is not absolute and has indicated that measures to limit it must comply with

32 Rosendo Cantъ y otros, para. 119. On 16 February 2002, Valentina Rosendo Cantъ, a girl from an indigenous community in the state of Guerrero, was raped and tortured by military personnel. The IACtHR found the state's lack of due diligence in the investigation and punishment of the perpetrators a violation the ACHR. The case is significant for the discussion of rape as a form of torture, military jurisdiction and special needs of women, minors and indigenous peoples. The facts of instant case refer to the sexual rape and torture suffered by Valentina Rosendo Cantъ, 17 years old, by members of the Mexican army. The IACtHR placed these events in the context of the military presence in the state of Guerrero for suppressing unlawful activities, such as organised crime. In this region, a sizeable percentage of the population belongs to indigenous communities who maintain their cultural identity and live in municipalities afflicted by social exclusion and extreme poverty.

33 Artavia Murillo y otros ('Fecundaciyn in vitro'), para. 143, e I. V, para. 152.

34 Fonteveccia y Dŕamico, para. 49. This case involves the state's violation of freedom of thought and expression of Jorge Fontevecchia and Hйctor D'Amico, director and editor, respectively, of the Magazine Noticias, after they published an article on November 1995 that referred to the existence of an illegitimate child belonging to Carlos Saъl Menem, the President of Argentina at the time. A civil sentence was imposed on the journalists for a violation of Menem's private life. The IACtHR found that the state violated the ACHR. The violations concern a civil sentence issued for their responsibility in the publication of two articles, which referred to the existence of an unrecognised child of Carlos Saъl Menem, at the time president of the country.

the requirements of appropriateness, necessity and proportionality, which apply to all cases of limitation on the exercise of rights.[35]

Regarding Article 11 of the ACHR, the IACtHR has distinguished between honour, which refers to a sense of self-worth,[36] and reputation, which refers to the opinion that others have of an individual.[37] There are several specific issues that the IACtHR has addressed in the interpretation and application of Article 11, such as reproductive autonomy and control of fertility by women[38] and access to fertility services,[39] protection of the home, the space in which private life takes place,[40] social control of the actions of public figures,[41] rejection of interception of communications that excessively infringe on private life[42] and the relationship between Article 11 and Article

35 Tristбn Donoso, para. 56. During July 1996, the Attorney General Josй Antonio Sossa Rodrнguez issued an order to have Tristбn Donoso's, a Panamanian attorney, telephone conversation with a client recorded. In the recorded conversation and later at a press conference, Donoso made statements regarding the Attorney General's corrupt behaviour. Donoso filed a criminal report against the Attorney General for abuse of power and infringement of his public official duties. The Panamб Republic Supreme Court of Justice rejected the complaint for the lack of evidence. Later, the Attorney General commenced criminal proceedings against Donoso for defamation in retaliation for the accusations. The IACtHR found that the state violated the ACHR. In July 1986, the public functionary disclosed the contents of a private telephone conversation between Donoso and a client, prompting the filing of a complaint by Donoso for the intrusion into his private life and the freedom of professional practice. The Supreme Court dismissed the former Attorney General and subsequently admitted the complaint for libel and slander against Donoso. Atala Riffo and Daughters, para. 164. This case concerns the discriminatory treatment and arbitrary interference in the private and family life of Karen Atala Riffo. Riffo is a Chilean judge and a lesbian mother of three daughters. She separated from her husband in 2001 and originally reached a settlement with her ex-husband that she would retain custody of the children. When she came out as a lesbian in 2005, however, her ex-husband sued for custody, where the Supreme Court of Chile eventually heard the case. That court awarded the husband custody, saying that Riffo's relationship put the development of her children at risk. The IACtHR found that the state violated the ACHR. It was the first case that the IACtHR took regarding LGBT rights. The facts of the case relate to the international responsibility of the state for the discriminatory treatment and arbitrary interference in the private and family life of Riffo, as result of her sexual orientation in the legal proceedings, which lead to the withdrawal of the care and custody of her daughters. Similarly, the case addresses the absence of consideration of the best interests of the children, whose custody and care were determined based on alleged discriminatory prejudices.

36 'The right to have honor respected relates to self-esteem and self-worth, (...)'. Tristбn Donoso, para. 57.

37 'Reputation refers to the opinion other persons have about someone.' Tristбn Donoso, para. 57.

38 Artavia Murillo y otros ('Fecundaciyn in vitro'), paras. 145–146 and 238, e I. V, para. 153.

39 Artavia Murillo y otros ('Fecundaciyn in vitro'), para. 146.

40 Masacres de Ituango, para. 194.

41 Herrera Ulloa, paras. 128–129. On 19, 20 and 21 May and 13 December 1995, the newspaper 'La Naciyn' carried several articles by journalist Mauricio Herrera Ulloa. The articles attributed certain illegal acts to Fйlix Przedborski, Costa Rica's honorary representative to the International Atomic Energy Agency in Austria. Herrera Ulloa was subsequently found guilty on four counts of defamation. The IACtHR found that the state violated the ACHR. Fonteveccia y Drамico, paras. 47 and 60.

42 Tristбn Donoso, para. 55 et seq.

17 of the ACHR on the establishment and protection of the family and respect for family life.[43]

In *Claude Reyes and Others v. Chile* (2006), the IACtHR recognised that the state has an obligation to ensure access to public information in a manner that does not violate citizens' privacy and dignity. This highlighted the balancing of public interest with the individual's right to privacy and protection of personal information. In *Barrios Altos v. Peru* (2001), it drew attention to the importance of protecting privacy and dignity concerning crimes committed by the state, including extrajudicial mass executions and illegal interventions. The decision underscored that violations of privacy and dignity in such situations are not limited to physical interference and include moral and psychological violations that the state has a duty to remedy. In *Gómez Paquiyauri Brothers v. Peru* (2004), it elaborated standards concerning the protection of the dignity and honour of torture victims and those unlawfully detained, indicating that the state is responsible for direct violations and the failure to conduct effective investigations and provide reparation. Hence, the right to dignity was linked to the right to effective judicial protection and compensation.

The judgment in *Kimel v. Argentina* (2008) emphasised the importance of protecting privacy in administrative actions by the state that may interfere with an individual's personal life, including data collection, monitoring or disclosure of information. The Court stated that any interference in the private sphere must be proportional, legally grounded and not violate human dignity. The significance of case law regarding the right to privacy, honour and dignity includes the prohibition of arbitrary interference by the state and third parties in the personal sphere, the obligation to ensure effective legal remedies and access to justice in cases of violations, the connection between the protection of privacy and the safeguarding of dignity and moral integrity, special protection in the context of state actions that may cause serious violations of honour or reputation and the necessity for proportionality and legal justification for any interference.

In *Rosendo Cantú et al. v. Judgement*, the IACtHR identified the constituent elements of rape as an act of torture and established standards regarding the inappropriateness of military jurisdiction to hear such cases. It developed criteria regarding due diligence in the handling of complaints and investigations of sexual violence and access to justice without discrimination, emphasising the special obligation to protect children. An important judgement in the development of standards regarding sexual orientation, as an element of a person's identity and part of his private life, and recognising it as a category protected by the guarantee of non-discrimination was in *Atala Riffo and Daughters v. Chile*. The Court found that assessments based on stereotypes regarding sexual orientation or cultural preferences concerning certain traditional concepts of the family to determine the best interests of children regarding their care and custody were incompatible with international law.

43 Atala Riffo y niñas, para. 169: Artavia Murillo y otros ('Fecundaciyn in vitro'), para. 143, e I. V, para. 153.

In *Fontevecchia and D'Amico v. Argentina,* the Court reiterated the need to apply the proportionality test in the conflict between the right to freedom of expression and the protection of privacy. It established that publications concerning matters of public interest cannot be considered an excessive interference in the private life of the applicant. Its considerations in *Tristán Donoso v. Panama* concluded by recognising the criminal sanction as an indirect restriction on freedom of expression concerning statements relating to public officials and matters of public interest, while the disclosure of a private telephone conversation was a violation of the right to privacy and honour. In *Herrera Ulloa v. Costa Rica,* it examined the justification for criminalising the offences of defamation, slander and libel in cases of public interest involving public officials. It drew attention to the importance of freedom of expression in a democratic society and defined the content of this right, along with the conditions under which its limitations must be examined. It developed standards and defined the content of the right to appeal against a judgement, establishing that it presupposes the existence of a comprehensive remedy, which allows the Court to conduct a comprehensive and integral analysis of all the issues discussed and analysed in the lower court.

Hence, the IACtHR treats the right to privacy, honour and dignity as an integral part of human rights protection, linked to personal rights (freedom and security) and property rights (reputation, personal interests). The IAHRS combines procedural and substantive aspects, ensuring that individuals have formal rights and effective protection against violations in their personal and moral spheres.

2.5. Freedom of Thought and Expression

The right to freedom of thought and expression, regulated in Article 13 of ACHR, constitutes one of the fundamental pillars of the IAHRS. The Court consistently emphasises that this is a dual-purpose right: it protects individuals from government interference in the freedom to formulate and disseminate opinions and obliges states to create conditions that enable a pluralistic public debate.

In the initial decades of the IACtHR, the standard of protecting freedom of speech was based on the principles of exceptionalism and proportionality of restrictions. Rulings such as Advisory Opinion OC-5/85 (Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism), *Herrera Ulloa v. Costa Rica* (2004) and *Ricardo Canese v. Paraguay* (2004), emphasised that freedom of speech is a cornerstone of democracy and criminal sanctions against speech can only be applied in exceptional and proportionate circumstances. The Tribunal accepted the possibility of applying criminal law (e.g., defamation offenses) in individual cases, provided it was justified and proportional. However, rulings such as *Kimel v. Argentina* (2008) pointed out the risk of the 'chilling effect' associated with criminal liability.

In subsequent years, the Tribunal began to increasingly emphasise the social dimension of freedom of speech, indicating that its essence lies in protecting public debate and citizens' right to receive information. Decisions such as *Palamara Iribarne v. Chile* (2005) developed the thesis that pre-emptive censorship is unacceptable and

public authorities must tolerate a high level of criticism. A turning point was marked by rulings at the end of the second decade of the 21st century: *Álvarez Ramos v. Venezuela* (2019), *Baraona Baray v. Chile* (2021) and *Capriles v. Venezuela* (2021). The Tribunal explicitly stated that the application of criminal law to speech concerning public interest and criticism of government officials is incompatible with the ACHR and criminal sanctions in such cases are, by definition, disproportionate and inadmissible, regardless of circumstances.

It recognised that the only permissible mechanism for protecting the reputation of public persons is civil legal remedies, which cannot lead to restrictions on democratic debate. Meanwhile, government officials must tolerate broader criticism because they perform functions on behalf of society and are subject to its oversight. In its latest case law, the Tribunal shifted the focus of protection from individual reputation to the safeguarding of the common good, that is, free public debate. Thus, freedom of speech gained the status of a superior right that conditions the exercise of other rights. The Tribunal expanded the scope of protection to include social organisations, journalists, human rights defenders and opposition politicians. Moreover, the state's obligation to actively promote pluralism was strengthened, for example, through measures against media concentration or ensuring access to public information. In recent years, the IACtHR has moved from a standard based on controlling the proportionality of restrictions to a standard establishing an absolute ban on the application of criminal law in cases concerning public debate and government officials. This is of fundamental importance for the IAHRS because it reinforces freedom of speech as a key element of constitutional democracy and enhances protection for individuals and groups involved in public debate.

The case law has often dealt with the freedom of expression and the right of reply under Article 14.[44] Both topics appeared in advisory opinions delivered in the first years

44 'La Ъltima Tentaciyn de Cristo' (Olmedo Bustos y otros), para. 64 et seq. This case concerns the Court of Appeals of Santiago's 20 January 1997 judgment and its confirmation by the Supreme Court of Chile on 20 June 1997, annulling the Cinematographic Classification Council of Chile's decision to screen the film, 'The Last Temptation of Christ'. On 17 November 1999, the Chamber of Deputies adopted a draft constitutional reform to eliminate cinematographic censorship; however, up until 5 February 2001, the date on which the IACtHR's judgment was delivered, the steps for the adoption of the draft constitutional reform had not been completed. The victims and their representatives submitted the case to the IACtHR to seek a judgment, declaring that the state's censorship violated the ACHR, and justify the expenses incurred while processing the different domestic and international procedures. The facts of the case refer to the judicial censorship of the screening of the film 'The Last Temptation of Christ' on the grounds that it was offensive to the figure of Christ and negatively affected Catholics. The Chilean Political Constitution establishes a system for the censorship of advertising and film. Ivcher Bronstein, para. 146 et seq., Herrera Ulloa, para. 105 and seq., Ricardo Canese, para. 77 et seq. In August 1992, during the electoral debates leading up to the 1993 Paraguayan presidential elections, Ricardo Canese questioned presidential candidate Juan Carlos Wasmosy's stability and integrity. Several Paraguayan newspapers published Canese's statements, which led to him being tried and sent to prison for slander. The IACtHR found that the state violated the ACHR. The facts of the case concern the judicial sentence for the crime of defamation and injury imposed on Ricardo Canese for protests carried out during the electoral debate, which questioned the suitability and integrity

of the presidential candidate, as a result of his alleged involvement in corruption. Claude Reyes, para. 75 et seq., Between May and August 1998, the state refused to provide Marcel Claude Reyes, Sebastiбn Cox Urrejola and Arturo Longton Guerrero with the information they requested from the Foreign Investment Committee on the forestry company, Trillium, and the Rнo Condor Project, a deforestation project that could be prejudicial to the environment and the sustainable development of Chile. The Commission stated that the refusal occurred without the state providing any valid justification under Chilean law and, supposedly, the victims had not been granted an effective judicial remedy to contest a violation of the right of access to information. Additionally, they were not ensured the rights of access to information and judicial protection and there were no mechanisms guaranteeing the right of access to public information. The IACtHR found that the state violated the ACHR. Kimel, paras. 53 et seq., Eduardo Kimel, a well-known journalist, writer and investigative historian, published a book describing the findings of his research into the murder of five clergymen, criticising how the authorities handled the case. On 28 October 1991, the state brought criminal proceedings against him for libel. Upon the conclusion of the criminal proceedings, he was convicted of libel and sentenced to one-year imprisonment and payment of $ 20,000.00 as damages. The IACtHR found that the state violated the ACHR. The facts of the case refer to the publication of Kimel's book 'The Massacre of San Patricio', in which he describes the findings of his research into the assassination of five religious personnel. The book criticised the authorities charged with the investigation of the homicides, among them a judge who later filed a criminal complaint against Kimel, which concluded in his sentencing for the crime of calumny. Tristбn Donoso, para. 109 et seq., Rнos y otros, para. 104 et seq. The facts of this case occurred in the context of a pattern of threats to social communicators during a period of institutional and political conflict in Venezuela that caused extreme polarisation of society. Between 2001 and 2004, 20 individuals, all journalists or social communications workers linked to the television station Compañía Anónima Radio Caracas Televisión (RCTV), were subjected to threats, harassment and verbal and physical abuse caused by public officials and other individuals. The state lacked diligence in investigating those incidents and failed to take preventative actions. The IACtHR found that the state violated the victims' rights under Articles 5(1) (Right to Physical, Mental and Moral Integrity) and 13(1) (Right to Seek, Receive and Impart Information and Ideas) of the ACHR, both in relation to Article 1(1). Perozo y otros, para. 115 et seq.; Usyn Ramнrez, para. 48 et seq. On 16 April and 10 May 2004, retired General Francisco Usyn Ramнrez made controversial comments in a television interview about the National Armed Forces, which led to the National Armed Forces suing Ramнrez for slander in military court. The judgment by the military court led to the alleged deprivation of liberty, where Ramнrez served five years and six months in prison. The IACtHR found that the state violated the ACHR. The events of the case relate to the prison sentence of the retired military officer Ramнrez for 'slander against the National Armed Forces', that is, having expressed critical opinions regarding the actions of the Armed Forces in a television program. Vйlez Restrepo y familiares, para. 137 et seq. On 26 August 1996, there was an attack by the soldiers of the Colombian National Army against Luis Gonzalo 'Richard' Vйlez Restrepo, a journalist filming a protest demonstration. There was death threats made against Restrepo and his family, which intensified when Restrepo tried to advance domestic judicial proceedings against his attackers and resulted in him leaving Colombia to go into exile. A thorough investigation into the acts of violence and harassment against Restrepo was impossible domestically. The IACtHR found that the state violated the ACHR. The events of this case account for the persecution, harassment and violence perpetrated against Restrepo, a camera man for a national news program, who reported and disseminated a recording of violent acts committed by members of the National Army against participants in the demonstrations against governmental policy on fumigation of coca crops in the Caquetб region, on 29 August 1996. Hence, in September of the same year, Restrepo started receiving threats and harassments. He was forced to leave and seek asylum in the US with his family. Granier y otros (Radio Caracas Televisiyn), para. 134 et seq. In 2002, a short-lived coup d'йtat against the government of Hugo Chavez rocked Venezuela. A television station, RCTV, reported on the events as they occurred.

of the IACtHR,[45] in judgements and interim measures designed to prevent attacks on that freedom.[46] It is important to remember that the IACtHR has emphasised the role of the timely exercise of the right to freedom of expression[47] and its effective protection as elements and guarantees of public order in a democratic society.[48] This is an essential element of democratic life on which the satisfaction of other rights and freedoms depend.[49] The IACtHR examined the dual dimension of the freedom in question: the individual dimension of disseminating[50] and the social or collective dimension for receiving information. In interpreting the scope of freedom of expression, the IACtHR examined various international instruments and accredited the scope of the greater protection provided for in the ACHR.[51] In making the same interpretation, it opts for the principle of the norm most favourable to the individual.[52] In the case law, an important place is occupied by reflection on journalistic practice, understood as the work of persons who have made freedom of expression a profession,[53] the effective protection of which is in the interest of society and a guarantee of the development of democracy.[54] In an important safeguard of the right to freedom of expression, the IACtHR held, in an advisory opinion, that obliging journalists to submit to compulsory membership of a professional association to exercise their profession would entail a serious restriction of freedom.[55] It stressed the need to ensure the independence of journalists, while recognising the responsibility that must guide their work

RCTV criticised President Chavez, while highlighting and interviewing participants to the coup. When, five years later, in 2007, RCTV sought to renew its broadcast license, the government denied it, accusing the station of inciting the 2002 coup. The state shut down RCTV, seized the television station's equipment, occupied its studios and established a state-sponsored television channel on RCTV's airwaves. RCTV was unable to obtain redress through the state's domestic courts. The IACtHR found that these actions violated the ACHR.

45 OC-5/85, para. 29 et seq.; OC-7/86, para. 23 et seq.

46 Asunto Luisiana Rнos y otros respecto de Venezuela. Medidas Provisionales, Asunto Diarios 'El Nacional' y 'Asн es la Noticia' de Venezuela. Medidas Provisionales, Asunto de la Emisora de Televisiyn 'Globovisiyn' respecto de Venezuela. Medidas Provisionales.

47 'It is essential that the journalists who work in the media should enjoy the necessary protection and independence to exercise their functions comprehensively'. Ivcher Bronstein, paras. 149–150; Granier y otros (Radio Caracas Televisiyn), para. 138.

48 OC-5/85, para. 69.

49 'La Ъltima Tentaciyn de Cristo' (Olmedo Bustos y otros), paras. 64–68, Granier y otros (Radio Caracas Televisiyn), para. 140; OC-5/85, para. 70; Ramнrez and Morales Sбnchez, 2013, pp. 163–218.

50 The individual dimension of freedom of expression includes 'the right to use any appropriate means to disseminate information to the widest possible audience'; the social dimension involves 'the right of all (people) to know opinions, stories and news'. 'La ъltima tentaciyn de Cristo', paras. 64–67, Ivcher Bronstein, paras. 146–149; op. 5; OC-5/85, para. 30.

51 OC-5/85, paras. 45, 47 and 50–51.

52 OC-5/85, para. 52.

53 Ivcher Bronstein, para. 149, Vйlez Restrepo and familiares, para. 140, Mйmoli, para. 120, Granier y otros (Radio Caracas Televisiyn), para. 138; OC-5/85, paras. 71, 72 and 74.

54 Ivcher Bronstein, para. 150; Herrera Ulloa, para. 119.

55 OC-5/85, para. 81.

and the media in general.[56] The case law has distinguished between reporting facts and making value judgements or assessments.[57] The state must provide means of protection to journalists whose work exposes them to risks, as has happened on many occasions.[58] Similarly, the case law has examined and condemned indirect interferences with the freedom of journalists and the media, such as those resulting from monopolies in the supply of broadcasting elements,[59] restrictions on rights of various kinds (for example, transit or circulation, citizenship)[60] and restrictions on the ownership of media that operate in this field.[61]

The exercise of freedoms and rights, including those related to the expression of opinion, is subject to general and specific limitations that the holder of these rights must respect, the latter of which are contained in Article 13 of the ACHR.[62] These restrictions follow the democratic project and respect the rights and freedoms of other members of the community.[63] The IACtHR rejected prior censorship, taking into account the precise terms of the ACHR. This rejection includes film screenings[64] and book publication[65] and has led the Court to envisage constitutional reforms that exclude censorship.[66] Furthermore, freedom of speech is protected during political campaigns[67] and in the criticism of state procedures carried out by public officials or persons who performed such a function.[68]

However, freedom of speech may entail subsequent liability, provided for in the ACHR, based on the violation of the limits that must be respected.[69] The nature of such liability has been the subject of debate, particularly in the case of journalists[70] or authors of various publications.[71] On this issue, the opinions, gathered in the jurisdictional debate, differ between those who consider it possible to apply criminal sanctions and those who consider that the responsibility of journalists should not extend beyond the administrative or civil sphere.[72] In its case law, the IACtHR has examined,

56 Ivcher Bronstein, para. 150, Herrera Ulloa, para. 117; Mймoli, para. 121.
57 Kimel, para. 93; Usyn Ramнrez, para. 86.
58 Vйlez Restrepo and familiares, para. 194.
59 Granier y otros (Radio Caracas Televisiyn), para. 143, y OC-5/85, para. 56.
60 Ivcher Bronstein, paras. 120–131, y Ricardo Canese, paras. 114–135.
61 Palamara Iribarne, paras. 102–111.
62 Claude Reyes, para. 88, Usyn Ramнrez, para. 48, OC5/85, para. 57.
63 Palamara Iribarne, para. 85; Claude Reyes, para. 91.
64 'La Ъltima Tentaciyn de Cristo' (Olmedo Bustos y otros), paras. 64–73.
65 Palamara Iribarne, paras. 102–111.
66 'La Ъltima Tentaciyn de Cristo' (Olmedo Bustos y otros), para. 98.
67 Ricardo Canese, para. 88 et seq.
68 Palamara Iribarne, paras. 76–77.
69 Mймoli, para. 121.
70 Fontevecchia y D'Amico, para. 547 et seq.
71 Kimel, para. 75 et seq.
72 'no estima contraria a la Convenciyn cualquier medida penal a propysito de la expresiyn de informaciones u opiniones…', para. 78, y, por otra parte, sostuve en mi voto razonado que la vна civil resultaba la mбs idynea, ya que a travйs de este medio se obtienen los mismos resultados que se pretenden con el derecho penal, voto concurrente del juez Sergio Garcнa Ramнrez, en Kimel, para. 15 and seq.

considering the broad criteria for the protection of freedom, statements made by public officials, subject to special circumstances, including election campaigns or the performance of public functions,[73] and has warned against political statements that generate threats to freedom and provoke unfavourable reactions, including repressive actions by institutions or representatives of public authorities.[74]

In the case of Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Advisory Opinion OC-5/85), IACtHR established the foundations of the doctrine of freedom of speech in the region. It held that freedom of expression is a *conditio sine qua non* for the functioning of democracy and restrictions on this right can only be introduced in exceptional cases, in a proportionate manner and without infringing upon the essence of the freedom. In *Herrera Ulloa v. Costa Rica* (2004), the Court confirmed that freedom of speech includes the individual's freedom and society's right to receive information. It emphasised that sanctions against journalists for criticising public figures must be evaluated with strictness regarding their compliance with the Convention. The judgment in *Ricardo Canese v. Paraguay* (2004) developed the protection of freedom of speech concerning political debate. The Court pointed out that public officials must accept a broader scope of criticism than ordinary citizens and restrictions on political debate can pose a threat to democracy. In *Kimel v. Argentina* (2008), it addressed the issue of criminal liability for publications critical of state actions. It recognised that criminal sanctions are a restrictive measure and can lead to a chilling effect on freedom of speech. In *Palamara Iribarne v. Chile* (2005), it underscored that prior censorship is inadmissible and freedom of speech includes the right to publish content critical of the military and state authorities, even in the context of national security.

The significance of the IACtHR's jurisprudence in this area boils down to several fundamental standards. Freedom of speech is a pillar of democratic society and a condition for exercising other rights. Restrictions on this freedom must be exceptional, proportionate and provided for by law. Public persons are obliged to tolerate a broader range of criticism. Criminal sanctions against expression pose a threat to democracy and prior censorship is contrary to the Convention.

In situations that may raise doubts or involve other rights, the Court speaks, to the greatest extent possible, in favour of freedom of speech, considering its importance

73 Apitz Barber y otros ('Corte Primera de lo Contencioso Administrativo'), paras. 98–100. This case is about the lack of independence of the judiciary in Venezuela under Hugo Chбvez's regime. Ana Marнa Ruggeri Cova, Perkins Rocha Contreras and Juan Carlos Apitz Barbera were removed from their positions as judges of the First Court of Administrative Disputes on 30 October 2003, on the grounds that they had committed an inexcusable judicial error. The victims believed their removal was contrary to the principle of judicial independence and undermined the right of judges to decide freely in accordance with the law. This case gave the IACtHR the chance to explore the standards of independence and impartiality applicable to the national judiciary. The IACtHR found that the state violated the ACHR. The events of the case relate to the removal from office proceedings applied to three judges, with provisional positions, from the First Court for Administration Matters. Rнos y otros, para. 138 et seq.; Perozo y otros, para. 150 et seq.

74 Rнos y otros, para. 139; Perozo y otros, para. 151.

in a democratic society.[75] It has distinguished the margins or thresholds of protection, which are much less demanding for public figures, officials and others, who have chosen to place themselves in a position that exposes them to greater public scrutiny than others. Moreover, it has examined the possible conflict of rights, or at least the tension between them, that occurs when, on the one hand, there is freedom of speech and, on the other hand, there is the right to honour and respect for private life.In the *Last Temptation of Christ (Olmedo Bustos et al.) v. Chile*, the Court established the content of the right to freedom of speech, recognising two dimensions: individual, which includes the right to use all appropriate means to disseminate ideas and reach the widest possible audience, so that the expression and dissemination of ideas and information are indivisible, and social, which understands freedom of speech as a means of exchanging ideas and information between people and implies the right of everyone to know opinions, stories and news. Both dimensions are equally important and must be guaranteed simultaneously to ensure the full effectiveness of the right to freedom of thought and speech. It established standards for the freedom of thought and speech, in both its dimensions, in the context of an electoral campaign. In *Ricardo Canese v. Paraguay,* the Court considered that it was necessary to protect and guarantee the exercise of freedom of speech during the electoral process, more so when it involves statements concerning matters of public interest and a public official, such as those made by the applicant.

The IACtHR has developed standards for the relationship between the right to freedom of thought and speech and the right of all persons to request access to information under the control of the state. In *Claude Reyes et al. v. Chile*, it analysed the state's obligation to give reasons for the decisions of administrative bodies under the guarantees contained in Article 8(1) of the ACHR. In *Kimel v. Argentina,* it highlighted the conflict between the right to freedom of speech on matters of public interest and the protection of the honour of public officials, stating that the predominance of one over the other in each case would depend on the weight given by the proportionality assessment. In this case, the Court found that the applicant's opinion was not related to the personal life of the plaintiff judge, rather a critical value judgement concerning the functioning of the judiciary, which cannot be sanctioned, especially when it relates to the official actions of a public official in the performance of his duties.

The IACtHR established standards concerning the state's obligation to prevent situations of harassment that affect the exercise of freedom of expression in *Ríos et al. v. Venezuela*. It further analysed possible gender bias in attacks on female journalists. It developed standards on criminal law as a restriction of freedom of speech and applied criteria concerning the scope of competence of military criminal jurisdiction and the state's obligation to adapt domestic law. Such conclusions were reached in *Usón Ramírez v. Venezuela*. It reiterated its case law on the state's obligation to respect and guarantee the right to freedom of expression in its individual and collective dimension in *Vélez Restrepo and Family v. Colombia*. It reaffirmed the importance of

75 Herrera Ulloa, paras. 127–128; Fonteveccia and Dr̓amico, para. 60.

respect for this right in matters of public interest and found that this right had been violated by the improper actions of security officials during public protest, along with the lack of adequate and effective investigation, the lack of state protection measures and impunity in cases of attacks on journalists in the exercise of their profession. It reiterated that military criminal jurisdiction is exceptional and restrictive in nature and cannot assess violations of human rights, since it constitutes a violation of judicial guarantees and protection, particularly a violation of the guarantee of the natural judge.

The standards for freedom of expression and its relationship with radio concessions or licenses concerning the guarantee of non-discrimination were developed in *Granier et al. (Radio Caracas Television) v. Venezuela*. The case reflected the conflict between the right to freedom of speech and the protection of honour and reputation. The IACtHR understood that freedom of expression is not an absolute right and, within its framework, it is the duty of journalists to reasonably verify the facts on which they base their opinions. Similarly, it considered that both civil and criminal proceedings may be a means of establishing subsequent liability in certain circumstances that comply with the requirements of necessity and proportionality. The facts gave rise a civil action for damages, with the application of a preventive measure in the form of a general prohibition on alienation and encumbrance of real estate to guarantee any payment resulting from the proceedings, which remained in force for more than 17 years, in breach of the principle of reasonable time and the right to property. The IACtHR analysed, in *Apitz Barbera et al. (First Court of Administrative Disputes) v. Venezuela*, the removal procedure concerning judicial guarantees and developed standards concerning the courts' independence and the state's obligation to justify its decisions. It established criteria for the right of access to public offices, following the guarantees of equality and reasonable and objective procedures that allow stability in public offices.

The IACtHR's ruling in *Colectivo de Abogados José Alvear Restrepo (CAJAR) v. Colombia* represents a breakthrough in the development of standards for the protection of the right to privacy and personal data within the IAHRS. The Court, referring to Article 11 of the ACHR, expanded the scope of privacy protection to include the individual's right to request access to personal data collected by the state, their correction and deletion. The case concerned practices by Colombian security forces, which conducted widespread surveillance activities against human rights defenders associated with the CAJAR collective. State authorities collected, stored and used members' personal data, leading to threats to their safety, reputation and ability to carry out social activities. The Court found that privacy protection encompasses the prohibition of arbitrary interference in personal life and a positive state obligation regarding the management of personal data. This judgment introduced standards into the IAHRS similar to the right to data protection in European law.

Notably, the IACtHR emphasised the right to access, meaning individuals have the right to know what data about them is stored by state agencies. The Court recognised the rights to rectification and modification when data are false, outdated or

collected excessively. Additionally, it acknowledged the right to deletion when data have been unlawfully gathered, their retention is no longer justified or they violate an individual's privacy and dignity. The ruling established the obligation for effective protection mechanisms; that is, states must create administrative and judicial procedures that allow individuals to exercise these rights in a real and effective manner. This decision is of fundamental importance because it introduced the right to data protection as an element of the right to privacy within the IAHRS and expanded state obligations, encompassing the prohibition of abuses and active control over personal data. The Court recognised that inadequate data protection threatened personal security, freedom of expression and social activism. The ruling set standards applicable to human rights defenders and all persons under the jurisdiction of the ACHR Member States. It marks a significant step in adapting the IAHRS to contemporary challenges related to digitalisation and surveillance. The Court reaffirmed that the right to privacy should not be understood solely as protection against physical intrusion but as the individual's right to control their personal data. Hence, a modern, dynamic standard was established, bringing Inter-American human rights protection closer to global trends in data protection.[76]

In earlier cases, such as *Herrera Ulloa v. Costa Rica* or *Kimel v. Argentina*, the Court emphasised the need for exceptional and proportional application of criminal law to speech. However, in its recent rulings, it shifted to an absolute prohibition of criminal sanctions concerning public debate. In *Álvarez Ramos v. Venezuela*, *Baraona Baray v. Chile* and *Capriles v. Venezuela*, the IACtHR stated that applying criminal law to speech on public issues is disproportionate and incompatible with the ACHR. Criminal sanctions have a 'chilling effect' and can discourage society from criticising authorities, undermining democratic foundations. When dealing with public officials, a broader margin of permissible criticism should be applied, as holding public office entails greater transparency and tolerance for social evaluation. The only acceptable state response is civil remedies (e.g., protection of personal rights), which must be proportional, legally prescribed, and not hinder public debate. These rulings shift the focus from proportionality controls (as in older jurisprudence) to an absolute ban on applying criminal law to expressions related to public interest. The Court thus affirmed the primacy of freedom of expression over the reputation of public officials, which is fundamental for strengthening democratic debate in the region. The new standards impose on Member States the obligation to decriminalise defamation concerning public interest and public officials' activities and to ensure effective but proportionate civil remedies for reputation violations. This makes the protection of pluralism and free debate a condition for the functioning of a constitutional democracy. The IACtHR's jurisprudence shift establishes a new regional standard: an absolute ban on criminal sanctions for speech concerning public interest and criticism of public

76 The facts of the case concern the attacks, harassment, intimidation and threats to which the members of CAJAR, a legal NGO, have been subjected since the 1990s, the lack of investigation and failure to punish those responsible for the acts.

officials. The Court emphasised that freedom of expression is a fundamental right in a democratic society, and any limits must be interpreted in a manner that maximally supports public debate.[77]

In *Tavares Pereira v. Brazil*, the IACtHR addressed the restrictions imposed on trade union activities and social protests in Brazil. The Court found that state actions that hindered the organisation and execution of workers' demonstrations violated Articles 13 and 16 of the ACHR. Regarding Article 13, it emphasised that the freedom of expression includes the individual right to hold opinions and the right to publicly express dissent against state policies. Restrictions on protests prevent free debate on matters of public interest. Concerning Article 16, it pointed out that the freedom of association encompasses the right to collective action, including organising strikes and demonstrations. Attempts to criminalise union activities constitute repression against the freedom of association and undermine the essence of this right. This confirmed that Articles 13 and 16 should be interpreted together, as freedoms of speech and association reinforced each other; the realisation of one without the other becomes illusory.[78]

Huilcaman v. Chile concerned restrictions imposed by the Chilean state on the indigenous Mapuche leader's participation in UN international forums. The state prevented him from traveling and representing his community in international debates. Regarding Article 13, the Court held that the travel ban and restrictions on participation in international discussions violated the freedom of expression, as this right encompasses the dissemination of information within the country and participation in international exchange of information. Concerning Article 16, it stressed that the freedom of association includes the creation and operation of organisations at the national level and the right to represent them internationally. Limiting this right undermined the core activities of social movements and indigenous organisations.

77 *Álvarez Ramos v. Venezuela* is about a vocal critic of the regime of Hugo Chávez in Venezuela. The victim, a lawyer and university professor, had filed numerous criminal complaints against state authorities, including then-President Hugo Chávez, the Attorney General of the Republic and the President of the National Assembly, alleging misappropriation of public funds and embezzlement. In turn, he was prosecuted for defamation and sentenced to two years and three months. The Court found that Venezuela had violated the victim's right to freedom of expression, right to defence and freedom of movement. The facts of the case concern the criminal process brought against and subsequent conviction of Alvarez for publishing an article in his Asi es la Noticia newspaper column. He reported on an alleged diversion of funds from the workers' and retiree's savings bank of the National Assembly of Venezuela. In its sentence, the Court developed standards on the content of the right to freedom of expression and the scope of the prosecution of the offenses to determine further responsibilities. Additionally, compatibility with the application of restrictions to the freedom of movement under the standards of international law was examined. *Baraona Baray v. Chile* concerns the violation of Baraona Bray's freedom of expression due to criminal proceedings and the subsequent conviction for libel, initiated by a senator.

78 The facts of *Tavares Pereira v. Brazil* relate to the murder of farm worker Antonio Tavares Pereira and the injuries suffered by 185 farm workers who were taking part in a march in May 2000. Upon reaching the entrance to the city of Curitiba, military police from the state of Paranб cracked down on the workers participating in the march.

This is particularly significant because the Court extended the interpretation of Articles 13 and 16, indicating that the protection of individual rights must encompass the transnational dimension, especially when it concerns minority groups and indigenous populations.[79]

Thus, the jurisprudence of the IACtHR has developed a strong, pro-freedom standard for the protection of the right to thought and expression, based on the assumption that freedom of speech plays an individual and a social role, as a guarantee of the existence of a space for public debate and oversight of government actions.

2.6. Right to Truth (Commissions)

The right to truth means accurate knowledge of the facts, historical or material, on the part of the victim and society.[80] Thus, according to the expressions used in the

79 The case concerned Aucбn Huilcambn, a leader of the Mapuche community and an advocate for the rights of indigenous peoples in Chile. In 2000, he was elected as a representative of his people to participate in the Assembly of Indigenous Peoples of the United Nations in New York. However, the Chilean authorities refused to issue him a passport, arguing that he did not meet the legal requirements because he only possessed an internal identity card. Hence, Huilcambn was unable to leave the country or participate in the international forum, which prevented him from representing the interests of his people on the global stage. The case was brought before the IACtHR, which examined whether the refusal to issue a travel document constituted a violation of Article 13 (freedom of thought and expression) and Article 16 (freedom of association) of the ACHR and the rights of indigenous peoples to participate in public and international life.

80 Bбmaca Velбsquez. Reparaciones y Costas, paras. 76–77. Efrain Bбmaca Velбsquez was a commander of the Revolutionary Organization of the People in Arms (ORPA), one of the guerilla groups that comprised the Guatemalan National Revolutionary Unity. On March 12, 1992, there was an armed encounter between ORPA and the Guatemalan Army and Bбmaca Velasquez were captured and tortured. Bбmaca Velasquez was last seen on about July 1992 tied to a metal bed; his whereabouts have since been unknown. The state failed to undertake an effective investigation and to redress the crimes committed against him. IACtHR found that the state violated ACHR and the American Convention to Prevent and Punish Torture. The case is notable because It is notable because IACtHR found a violation of Article 1 (Obligation to Respect Rights) of the American Convention in relation to Article 3 Common to the Geneva Conventions, as the victim was a member of a guerrilla group and had been captured during combat. The facts of the case refer to the forced disappearance of Efraнn Bбmaca Velбsquez, commander of the guerilla group Organisation of People in Arms (ORPA), after being captured in March 1992, by Army officers. During his captivity, Bámaca Velásquez was subjected to torture., Masacres de El Mozote y lugares aledaños, para. 298, Garcнa y familiares, para. 176. From February 17 through 19, 1984, the National Police undertook an operation to cleanse and patrol the state (Operativo de Limpieza y Patrullaje). On the morning of February 18, 1984, Edgar Fernando Garcнa, a teacher and administrative employee of the claimed communist organisation La Industria Centro Americana de Vidrio S.A (CAVISA), was walking down the street when he was stopped by the National Police, injured, and detained under the Operation. Garcнa was seen in various secret prisons, and last seen alive in December 1984. IACtHR found that the state violated ACHR. The facts of the case refer to the forced disappearance of Edgar Fernando Garcнa, trade unionist and student leader, following his arrest on February 18, 1994, by members of the Special Operations Brigade of the National Police. IACtHR placed the events in a context of internal violence in the country during which the intelligence services played a particularly important role as being responsible for gathering and reviewing information on those people considered 'internal enemies.' Rodrнguez Vera y otros (Desaparecidos del Palacio de Justicia), para. 511. This case is about

case law, there is a collective right, along with an individual right, to know the truth, the counterpart of which is the duty of the state to investigate and make public a full, impartial, effective and truthful investigation of the violations and the participation of the perpetrators of violations, material and intellectual.[81]

one of the most notorious events in modern Colombian history. In 1985, the Palace of Justice, Colombia's Supreme Court, was stormed and seized by members of the M-19 guerilla group. state security forces used disproportionate and excessive force in their fight to retake the Palace of Justice. As a result, many hostages in the building were killed using automatic weapons, grenades, bombs, and the fires that ensued. Further, once the Palace of Justice had been retaken, special forces detained many innocent survivors, and transferred them to military locations, where they were tortured, beaten, and ultimately executed. IACtHR found that the state violated the American Convention, the Inter-American Convention to Prevent and Punish Torture, and the Inter-IACFDP. The petition refers to facts that occurred during the siege and subsequent takeover of the Justice Palace, headquarters of the Supreme Court and the state Council in Bogotб, Colombia. This took place on November 6th and 7th in 1985. On November 6th a guerilla command of Group M-19 sieged the Justice Palace. The high command of the Armed Forces of Colombia decided to retake it through a military operation and intelligence that was described as disproportionate and excessive by domestic courts and the 'Truth Commission on the Acts of the Palace of Justice', established by the Supreme Court. The operation lasted 27 hours and resulted in the death of approximately 100 people, including judges of the Supreme Court and state Council. Many of those who survived were tortured and, in some cases, disappeared or executed. Among these people are the victims in this case.

81 Las Palmeras. Reparaciones y Costas, para. 67. On January 23, 1991, the Putumayo Departmental Police Commander ordered members of the National Police to conduct an armed operation in Las Palmeras, Municipality of Mocoa, Department of Putumayo. The armed forces opened fire from a helicopter, wounding a six-year-old boy on his way to school. Police then detained several bystanders in the nearby area and extrajudicially executed at least six of these people. The National Police officers and the Army troopers took several measures to justify their action, including putting military uniforms on the bodies of some of those killed and threatening witnesses in the case. IACtHR found that the state violated ACHR. The events concern the extrajudicial execution of 6 unarmed rural farmers, in the province of Las Palmeras, Putumayo region, by members of the National Police and Army. The case also addresses the lack of administration of justice, which meant that the events remained in impunity., Contreras y otros, para. 170. This case is about the abduction and forced disappearance of children by units of the Salvadorian Army during the civil war of the 1980s. During this time, the state employed a deliberate strategy of kidnapping children from populations suspected of being guerrilla sympathisers to re-educate them under the state's ideology. Many of the abducted children were raised by military leaders or soldiers, foreign families adopted others, and some grew up in orphanages or military bases. Between 1981 and 1983, Gregoria Herminia, Serapio Cristian, and Julia Inйs Contreras, Ana Julia and Carmelina Mejнa Ramнrez, and Josй Rubйn Rivera Rivera disappeared. The forced disappearances of these children were perpetrated by members of different military units in the context of 'counterinsurgency operations' during the armed conflict in El Salvador. While the whereabouts of Gregoria Herminia Contreras were established in 2006 and she is in the process of reconstructing her identity and biological family relations, IACtHR stated that the circumstances surrounding the six disappearances had still not been clarified, those responsible had not been identified or punished, and after almost thirty years, the facts remained in impunity. The case concerns the forced disappearance of a group of children, during the first few years of the internal armed conflict in El Salvador, between 1981 and 1983, by members of military groups in the context of 'anti-insurgency operations'. The victims were separated from their families and disappeared via various means, including formal and informal adoption, appropriation by military officials, and in some cases, illegal trafficking;

It has often been stated in the case law that the right to truth is included in or immersed in access to justice and is linked to the results of the investigation that results from it. Therefore, Article 8 of the ACHR applies.[82] On some occasions, it has

Masacres de Rнo Negro, para. 194. In 1980 and 1982, the Guatemalan Army and members of the Civil Self-Defense Patrols destroyed the Mayan community of Rнo Negro, that protested the building of a hydroelectric dam, by means of a series of massacres. The facts of this case fit within a more general context of massacres in Guatemala that were planned by state agents as part of a 'scorched earth' policy aimed against the Mayan people, who were characterised as the 'internal enemy' in a context of discrimination and racism. Remarkably, IACtHR found that the state violated almost all provisions of ACHR, the American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, the American Convention on Forced Disappearances of Persons, and the American Convention to Prevent and Punish Torture. The facts of the case refer to the destruction of the Mayan community of Rio Negro because of a series of massacres perpetrated by the Guatemalan military and members of the Civilian Defense Patrol (PAC), between 1980 and 1982.

82 The right to the truth, IACtHR explained, is 'subsumed in the right of the victim or his next of kin to obtain from the competent state bodies the clarification of the facts of the violations and the corresponding responsibilities through the investigation and trial provided for in Articles 8 and 25 of ACHR. Bбmaca Velбsquez. Reparaciones, para. 201; Baldeyn Garcнa, para. 166. This case is about the arbitrary arrest, torture, and killing, in 1990, of an elderly peasant in the high Andes by a unit of the Peruvian army. This was followed by the subsequent failure by the state to properly investigate and prosecute. IACtHR found that the state violated ACHR. The facts of the case concern the death of Bernabй Baldeyn Garcнa, a 68-year-old peasant, who was detained and tortured by military staff in the department of Ayacucho during the initial stages of the 1990s; Radilla Pacheco, para. 180. On August 25, 1974, Rosendo Radilla Pacheco, a 60-year-old musician and political and social activist, was arrested by members of the Mexican Army in the state of Guerrero and eventually disappeared. The state failed to establish the whereabouts of Radilla Pacheco. IACtHR found that the state violated ACHR and the IACFDP. The facts of the case refer to the forced disappearance of Rosendo Radilla Pachecho after being detained by military officials in August 1974. The victim was involved in political and social activities connected with groups of coffee growers and farmers in the Guerrero region. IACtHR placed the events in a context known as the 'Dirty war of the seventies,' during which there was a high occurrence of forced disappearances of people; Masacre de las Dos Erres, para. 151. Between December 6 and 8, 1982, there was a massive massacre in Las Dos Erres, a small village in the municipality of La Libertad, in the Petйn department of Guatemala. The massacre, carried out by Guatemalan soldiers during the de facto presidency of General Josй Efraнn Rнos Montt as part of a counterinsurgency force named kaibiles, resulted in the deaths of 251 people, including men, women, and children. The alleged indiscriminate and permissive use of judicial resources, the unjustified delay by the judicial authorities, and the lack of an exhaustive investigation, prosecution, and punishment of those responsible was still pending at the time this case came before IACtHR. IACtHR found that the state violated ACHR, the American Convention on the Prevention, Punishment and Eradication of Violence Against Women and the American Convention to Prevent and Punish Torture. The facts of the case refer to the massacre of 251 inhabitants, women, men and children, from the community of 'Las Dos Erres,' which occurred on 6th to 8th December 1982 and was perpetrated by members of the specialised group within the armed force called 'Kaibiles'. Judicial investigations were initiated more than 10 years after the events., Chitay Nech y otros, para. 206. In 1981, armed men kidnapped the Mayan indigenous political leader Kaqchikel Florencio Chitay Nech. Chitay Nech's disappearance was never investigated, and those responsible had not been prosecuted by the date of the judgment, however, they were prosecuted 29 years after Chitay Nech's disappearance. His whereabouts remain unknown. IACtHR found that the state violated ACHR and the IACFDP. The events of the case refer to the

been stated that, this right is included in the right to information, in its social aspect (access to information held by the state), therefore, Article 13 of the ACHR would apply.[83] The IACtHR case law, which combats impunity and seeks to adopt measures to prevent the repetition of violations, emphasises the importance of disseminating the truth about the violations committed for preventing new violations.[84] It is about achieving structural remedies. Truth commissions, which accompany the processes of transition to democracy in various regions worldwide and are well-known figures in the so-called 'transitional justice',[85] have acquired a significant importance in Latin American countries. The case law has noted that the nature and scope of these commissions are different from formal jurisdictional bodies.[86] The IACtHR considers, in

forced disappearance, since April 1, 1981, of the Mayan indigenous political leader Florencio Chitay Nech, and the lack of diligence in the investigation of the incidents. IACtHR placed these events in the context of the internal armed conflict that took place between 1962 and 1996, during which time the forced disappearance of peoples constituted state practice carried out by security forces in Guatemala, with the purpose of not only punishing the victim but also the social or political collective that they belonged to.; Gelman, paras. 243–244; Rodrиguez Vera y otros (Desaparecidos del Palacio de Justicia), paras. 509 and 511.

83 Gomes Lund y otros ('Guerrilha do Araguaia'), para. 201 and op. 6. Between 1972 and 1975, seventy members of the Communist Party of Brazil and peasants of that region were arbitrarily detained, tortured, and forcefully disappeared in the context of the military dictatorship in Brazil. The state failed to carry out a criminal investigation and its legislative and administrative measures unduly restricted the next of kin's right to access of information. IACtHR emphasised the right to truth inherent in Article 13 of ACHR, particularly when it deals with gross human rights violations such as those of forced disappearances and extrajudicial execution. IACtHR found that the state violated ACHR. The facts of the case refer to the forced disappearance, between April 1972 and January 1975, of members of the 'Guerrilha do Araguaia', a resistance movement to the military dictatorship of which some members of the Brazilian Communist Party formed part. Due to the validity and application of Amnesty Law N° 6683/79, criminal investigations into the events were not conducted.

84 Bбmaca Velбsquez. Reparaciones y Costas, paras. 77–78.

85 Concurring opinion of Judge Diego Garcнa-Sayбn, in Massacres of El Mozote and surrounding areas, paras. 21 et seq.

86 Almonacid Arellano y otros, para. 150. This case concerns the extrajudicial execution of Almonacid Arellano, an elementary school teacher, union leader, and activist in the Chilean Communist Party. Augusto Pinochet's newly installed military regime perceived Almonacid Arellano as a threat and arrested him at his home in Rancagua on September 16, 1973. As Almonacid Arellano walked to the police truck, his captors shot him and he died in a hospital the next day. The First Criminal Court of Rancagua initiated an investigation into the case, but the case was ultimately dismissed on September 4, 1974. When Almonacid Arellano's family requested to have the case reopened in 1992, the courts rejected it because Decree No. 2.191 of 1978 granted amnesty to the perpetrators of those crimes occurring between September 11, 1973 and March 10, 1978. IACtHR found the state violated the victim's rights to a fair trial and to judicial protection under ACHR. The facts of the case refer to the extrajudicial execution of Luis Alfredo Almonacid Arellano in September 1973, in the context of the military regime which governed Chile during that time. Investigations into the events were affected by the application of the amnesty law which was approved by legal Decree N° 2191 in 1978; Zambrano Vйlez y otros, paras. 91–92. On March 6, 1993, Wilmer Zambrano Vйlez, Segundo Olmedo Caicedo and Josй Miguel Caicedo were extrajudicially executed in Guayaquil, Ecuador during an operation carried out by the Ecuadorian Armed Forces and the National Police. More than thirteen years after the occurrence, the state still had not undertaken any serious investigation, nor had it identified the

its judgements, the investigative activities of truth commissions, which contribute to clarifying the facts and establishing responsibility.[87] Hence, the investigations conducted by these bodies, regularly based on peace agreements, after the end of an internal conflict or a period of serious authoritarianism,[88] constitute a part of the evidence used by the Inter-American jurisdiction, in addition to the value they have under domestic law.

The right to truth has been established within the IAHRS as a response to practices of widespread human rights violations concerning military dictatorships and internal conflicts in Latin America. Initially, it was understood as an element of the right to an effective legal remedy (Article 25 of the ACHR) and the right to judicial protection in connection with violations of the right to life (Article 4), the prohibition of torture (Article 5) and the right to personal liberty (Article 7). The Court held that victims of serious violations and their families have an autonomous right to know the truth about what happened, who was responsible and the fate of disappeared or unlawfully

perpetrators and masterminds of the victims' executions. IACtHR found that the state violated ACHR to the detriment of the victims. The facts of the case concern the extrajudicial execution of Wilmer Zambrano, Segundo Olmedo and Josй Miguel Caicedo in March 1993, and the lack of investigation and punishment of those responsible. The victims were executed during an operation carried out by the Ecuadoran Armed Forces and the National Police. The events occurred in the context of a climate of insecurity and internal commotion, which lead to the ordering of Decree N° 86 on September 3, 1992 by the President of the Republic, which commanded the intervention of the armed forces y Masacres de El Mozote y lugares aledaños, para. 298.

87 Zambrano Vйlez y otros, para. 128; Anzualdo Castro, para. 119. On December 16, 1993, Kenneth Ney Anzualdo Castro, a university student, was riding the bus home from school. A light blue car intercepted the bus and three persons, who identified themselves as police officers, forced Anzualdo Castro into their car. That was the last time Anzualdo Castro was ever seen. IACtHR found violations of both ACHR and the IACFDP. The facts of the case concern the forced disappearance, on December 16, 1993, of Kenneth Ney Anzualdo Castro, a 25-year-old man. This act was perpetrated by agents of the Military Intelligence Service, due to his alleged links with the group 'Sendero Luminoso'. Rodrнguez Vera y otros (Desaparecidos del Palacio de Justicia), para. 88. Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal, para. 73. This case is about the murder of hundreds of members of the village of Chichupac and neighbouring communities of the municipality of Rabinal, in central Guatemala, between 1981 and 1982, the most intense and murderous phase of the 1962–1996 internal conflict. The state admitted partial responsibility and IACtHR found the state in violation of most articles of ACHR, both for the events themselves and the subsequent failure to investigate, punish and remedy. The facts of the case refer to the massacre that took place in January 1982 in the Chichupac village and in the neighboring communities of the municipality of Rabinal, comprised of members of the Maya Achн indigenous community; Vбsquez Durand y otros, para. 114. This case is about the arrest, torture and disappearance of a Peruvian merchant who travelled to and from Ecuador during the so-called Cenepa War, a brief and localised military conflict between Ecuador and Peru, fought over control of an area near the border between the two countries fought between January 26 and February 28, 1995. IACtHR found Ecuador in violation of several articles of ACHR. The facts of the case refer to the forced disappearance of Vбsquez Durand, which took place on January 30, 1995, carried out by members of the Ecuadorian Intelligence Service. This took place within the context of the so-called War of Cenepa (Guerra del Cenepa) or the Conflict of the High Cenepa (Conflicto del Alto Cenepa), which began as a territorial dispute between Peru and Ecuador.

88 CIDH, Derecho a la verdad en Amйrica, para. 176 et seq.

killed persons. Over time, this right has been linked to the interests of society, which has the right to know the truth about mass violations to ensure democracy and prevent the recurrence of similar crimes. According to the IACtHR's jurisprudence, this right has a dual dimension: individual (for victims and their families) and collective (for society). It is closely related to the prohibition of impunity and the state's obligation to conduct investigations in accordance with due diligence standards. It cannot be limited by amnesty laws, statutes of limitations or confidentiality clauses on state documents. Furthermore, it entails the obligation to ensure access to archives and historical records. In recent years, the Court has expanded the interpretation of the right to truth, emphasising its connection with the democratic constitutional order and the obligation of historical education. This right becomes a tool for victims and society, which is guaranteed access to knowledge about human rights violations committed by the state.

In *Velásquez Rodríguez v. Honduras* (1988), the IACtHR, for the first time, indicated that the state has a duty to carry out effective investigations into enforced disappearances and the lack of such actions constitutes a violation of the right to a fair trial and protection of individual rights. This laid the foundation for the subsequent doctrine of the right to truth. Conversely, *Barrios Altos v. Peru* (2001) established that amnesty laws preventing accountability for mass crimes are incompatible with the ACHR. In this ruling, the right to truth was linked to the state's obligation to ensure justice and clarify the fate of the victims. In *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil* (2010), the Court emphasised that the right to truth is a collective right belonging to society. It related to historical memory and was the state's duty to disclose documents and information about violations. In *Massacres of El Mozote v. El Salvador* (2012), the IACtHR stated that the state's obligation includes positive actions, such as conducting searches, exhumations and ensuring families access to documentation and investigation results.

In *Bámaca Velásquez v. Guatemala*, the IACtHR placed the facts in the context of the internal armed conflict in Guatemala, highlighting the army's practice of capturing guerillas and holding them in secret detention to obtain information through torture. The state acknowledged its international responsibility for violating the obligation to respect and guarantee the rights set out in the ACHR. Without prejudice, the Court has developed standards for characterising enforced disappearance as a multiple violation of rights and a violation of the right to personal integrity of victims and their families. An important judgement was delivered in ***G**arcía and Family Members v. Guatemala*. The Court applied the criteria for enforced disappearance as a repeated and persistent violation of rights and the state's obligation to investigate it. It developed standards on freedom of association concerning the state's pattern of capturing and eliminating trade union and student organisations.

The IACtHR examined the state's responsibility concerning its international obligations in relations to torture, enforced disappearances and executions, and the obligation to investigate these facts within the framework of an ordinary jurisdiction, rather than a military jurisdiction. A judgement that should be considered emblematic

in this regard is *Rodríguez Vera et al. (Missing Persons of the Palace of Justice) v. Colombia*. The Court has progressed in its case law on the state's liability for breaches of judicial guarantees and protection resulting from the application of military jurisdiction in cases of serious violations of human rights, as far as this jurisdiction violates the right to a competent, independent and impartial judge. This was done in the framework of *Las Palmeras v. Colombia*. Additionally, it found a violation of rights due to the excessive duration of ordinary criminal proceedings without identifying and punishing those responsible for the extrajudicial execution, which violates the limits of reasonable time.

In *Contreras et al. v. El Salvador*, the state recognised international responsibility for the pattern of enforced disappearance of children and the Court analysed the violated guarantees, developing standards on the characteristics and consequences of enforced disappearances, the right to an identity, the right to a family and the right to a name and special measures for the protection of children. It referred to the right of access to justice within a reasonable time and access information from military archives. In *Radilla Pacheco v. Mexico*, it applied standards on enforced disappearance as a multiple violation of human rights and due diligence in the judicial investigation. Hence, it established the limits of the 'historical truth' documented in the reports and recommendations, understanding that this does not replace the state's obligation to conduct a judicial investigation. It established standards for military jurisdiction concerning cases concerning human rights violations. The issue of enforced disappearances was raised in *Members of Chichupac Village and Neighboring Communities of the Municipality of Rabinal v. Guatemala*. In addition to the extrajudicial executions and enforced disappearances of which members of this group were victims, the Court examined the violations of rights resulting from the forced displacement of the inhabitants of the community, particularly women and children. It further focused on the lack of due diligence in the examination of the facts. It placed the facts in the context of the internal armed conflict in Guatemala from 1962 to 1996, during which the so-called 'national security doctrine' was applied, which considered the Mayan people as an 'internal enemy'. Similar circumstances were noted in *Río Negro Massacres v. Guatemala*. As a result, Mayans were the ethnic group most affected by human rights violations during this period, suffering forced displacement and the destruction of their communities. Women and children were particularly affected because of the symbolic effect that the violation of their rights had. The Court referred to the standards for enforced disappearances of persons with an emphasis on the impact on children and developed parameters concerning the prohibition of slavery and servitude and the impact on the cultural and spiritual life of communities resulting from violations of their rights.

In *Chitay Nech et al. v. Guatemala*, the Court applied the standards for enforced disappearances as a multiple violation of human rights. It developed criteria to guarantee the enjoyment of political rights to members of indigenous and ethnic communities and the effects of the forced displacement of the victim's family following systematic violence against indigenous Mayan groups, which affected their cultural

identity. This issue was taken up in the case against Ecuador as well. In its judgement in *Vasquez Durand et al. v. Ecuador,* the IACtHR applied the standards for enforced disappearances and addressed aspects of the state's obligation to investigate such acts. It reiterated the standards for enforced disappearances as a repeated and continuous violation of rights and the State's obligation to investigate and punish serious violations of human rights and its incompatibility with the validity of amnesty laws in the judgement in *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. However, it has developed the protection of the right of access to public information and the limits of state secrets. It has developed standards regarding enforced disappearance as a violation of multiple human rights, which places victims in a state of vulnerability and takes on particular gravity when it is a part of a pattern of practices implemented or tolerated by the state. In *Anzualdo Castro v. Peru,* criteria were established according to which investigations into cases of enforced disappearance should be conducted with due diligence.

In *Baldeón García v. Perú,* the IACtHR found that in the 1980s and until the end of 2000, Peru experienced a conflict between armed groups and agents of the police and armed forces. This was exacerbated by systematic human rights violations, including extrajudicial executions and enforced disappearances of persons suspected of belonging to opposing political groups. These practices were carried out by state agents under the orders of the military and police chiefs. The Court noted the shortcomings of the judicial investigation into the death and torture of the victims and the impunity in which the facts remained. In *Las Dos Erres Massacre v. Guatemala,* it assessed the judicial proceedings concerning the standards of due diligence, particularly to the pattern of sexual violence against women during armed conflicts. It focused on the state's obligation to provide special protection to children against the systematic kidnapping and illegal detention of minors, committed and tolerated by state agents during the events.

The IACtHR developed criteria for classifying crimes against humanity and the resulting state obligations to investigate and punish under the amnesty laws. In *Almonacid Arellano et al v. Chile,* standards were developed concerning the state's obligation to exercise a 'control of conventionality' between national legal norms and the ACHR. In turn, the establishment of standards regarding the scope of the suspension of guarantees in states of emergency and the criteria for the legitimate use of force by state security forces became the main objective of *Zambrano Vélez et al. v. Ecuador.*

In recent years, the IACtHR has explicitly recognised the right to truth as an autonomous right. In *Comunidad Campesina de Santa Bárbara v. Peru* (2015), concerning the farmers' massacre in the 1990s by security forces, the IACtHR ruled that, beyond the obligation to conduct effective investigations, there is an autonomous right of the community and families of the victims to know the truth about the events. For the first time, it indicated that the right to truth is an independent human right. Conversely, in *Tabares Toro and others v. Colombia* (2018), which dealt with the enforced disappearance of a social activist and the prolonged concealment of information about his fate, the IACtHR confirmed that the victim's family has an autonomous right to

the truth, encompassing the knowledge of the disappeared person's fate and the full identification of the responsible perpetrators. The Court directly defined the right to truth as a right of individuals and society that is not subject to restrictions resulting, for example, from amnesty laws or statutes of limitations.

Cuéllar Sandoval and others v. El Salvador (2019) was related to enforced disappearance in the context of an armed conflict and the long-term lack of access for families to documents and archives. The Court held that the autonomous right to truth includes the right to access state documents and archives related to serious human rights violations. It expanded the scope of the right, linking it with judicial investigations and the state's obligation to provide society with tools to preserve historical memory and oversee governmental power. In these cases, the IACtHR made a qualitative shift from the state's obligation to conduct investigations towards recognising an autonomous, separate human right – the right to the truth. Consequently, it granted this right the status of an independent convention standard that protects individuals and societies from a culture of impunity and oblivion.

The right to the truth within the IAHRS has developed as an autonomous right of individuals and collectives. It evolved from the obligation to investigate serious violations (Velбsquez Rodrнguez case) to a broad right encompassing access to archives, historical memory and the duty of societal education (Gomes Lund, El Mozote). Currently, it is a necessary condition for overcoming impunity and strengthening the democratic rule of law.

2.7. Family

The issue of family can be approached from the perspective of civil and political rights, within the scope of the IACtHR's substantive competence, and from the perspective of ESCR.[89] In the former, Article 11, paragraph 2, and Article 17 of the ACHR come into play. It is the state's duty to promote the development and strength of the family nucleus, considering that the family is the natural and fundamental element of society and is necessary to encourage the coexistence of parents and children.[90] It is the state's duty to refrain from and prevent external interference that may harm family life.[91] The IACtHR considers that the family has a very broad scope, encompassing persons related by close kinship and other close relatives, who may be

89 Article 15 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.
90 OC-17/02, para. 66; Chitay Nech y otros, para. 156.
91 OC-17/02, para. 67.

numerous, considering the traditions and customs of indigenous people.[92] All these issues become obvious when the protection authorities analyse the status of the rape victim and the consequences in relation to the members of her family.

However, the case law rejects closed concepts of the family, which are identified with traditionalist criteria and unacceptable stereotypes, related to issues of sexual orientation.[93] The IACtHR upholds the possibility for single-parent families to provide care, support and affection to the children in their care.[94] Hence, the case law referred to the best interests of the child, which must be assessed objectively, without being subject to prejudices that would disturb the interest and the rights of the relatives and the child.[95]

The right to family is not explicitly stated in the ACHR; however, the IACtHR derives it from several provisions, namely Article 17 (protection of the family as a natural and fundamental unit of society), Article 11 (protection of private and family life), Article 19 (protection of children's rights) and Articles 8 and 25 (procedural guarantees in matters affecting family life). The Court interprets these provisions in a *pro persona* manner, expanding their scope towards an autonomous right to respect for family life and the inviolability of family bonds.

In *Fornerón and Daughter v. Argentina*, the IACtHR stressed the importance of the principle of the best interests of the child in cases concerning the care of minors. It analysed the judicial assessment of the conduct of parents and traditional concepts

92 Loayza Tamayo. Reparaciones, para. 92; OC-17/02, para. 70. In this case, Peru arrested and detained Universidad San Martнn de Porres Professor Maria Elena Loayza Tamayo on suspicion of participating in alleged terrorist group Sendero Luminoso. Prior to her arrest, the state did not investigate her alleged participation in Sendero Luminoso or obtain a warrant for her arrest. Following Ms. Loayza Tamayo's arrest, the state tried Ms. Loayza Tamayo for both treason and terrorism, prevented her from communicating with her family, tried her before a faceless court, and kept her in detention though she had been acquitted of all crimes. Following the Court's Reparations and Costs Judgment, the state declared that the Court's decision was not enforceable and withdrew from the Court's jurisdiction. Later, the state reinstated its acceptance of the Court's jurisdiction. The events of the case relate to the arrest of Marнa Elena Loayza Tamayo by the Counter Terrorism Division (DINCOTE) due to an alleged association and collaboration with the group 'Sendero Luminoso'. After her arrest she was held incommunicado for 10 days and was subjected to torture, cruel and degrading treatment and sexual violence, all with the purpose of self-incrimination. Considering her refusal, she was prosecuted for the crime of treason and tried by various military courts, which finally absolved her of all charges. Nevertheless, when passing the case to the civil court, the victim was convicted to a term of 20 years imprisonment by a Special 'faceless' Court for the crime of terrorism. During the entire proceedings, both in the military and civil courts, the victim was kept in detention.

93 Atala Riffo y niñas, para. 142; OC-17/02, paras. 69 and 70.

94 Forneron e hija, para. 98. Leonardo Anнbal Javier Forneryn's infant daughter was handed over by her mother for pre-adoptive care to a married couple without the consent of her biological father. The father had no access to the child. Despite numerous requests by Forneryn over a period of ten years, the state courts failed to order and implement a visiting regime. IACtHR found that the state violated ACHR. The facts of the case relate to the legal guardianship and subsequent adoption of the daughter of Leonardo Forneryn without her consent, as well as the following lack of criminal investigation into the supposed 'sale' of the child for adoption.

95 Atala Riffo y niñas, paras. 109–111.

of the family considering the prohibition of discrimination. Similarly, it explained that administrative and judicial proceedings in matters of adoption, care and custody of children must be conducted by the authorities with due diligence and speed, due to the negative impact on parental relationships caused by prolonged proceedings, which may turn into an irreversible factual situation and become detrimental to the interests of the child.

In *Atala Riffo and Niñas v. Chile*, a mother was deprived of the custody of her children due to her sexual orientation. The Court ruled that the state's decision constituted discrimination based on sexual orientation and violated the children's right to remain with their mother. This is a landmark judgment, in which the right to family was linked to the principles of equality and non-discrimination, opening the doors for the protection of non-traditional families within the Inter-American system. The *Gelman v. Uruguay* judgment concerned a who child was taken from the parents during the dictatorship period and handed over to another family without the possibility of maintaining biological ties. The Court indicated that the right to identity includes the right to know one's origins and maintain relations with one's biological family. In *Ramírez Escobar and others v. Guatemala*, which addressed the issue of children placed in care institutions under conditions that violated their rights, without appropriate measures to maintain bonds with their families, the IACtHR emphasised that separating a child from their family should be the last resort and that the state has an obligation to support families and strengthen their caring capacity.

In *Duque v. Colombia*, the IACtHR found that the refusal to grant benefits constituted discrimination based on sexual orientation and a violation of the right to family. The judgment confirmed that family, within the meaning of the ACHR, includes same-sex relationships and legal protection cannot be limited to a traditional heterosexual model.[96] In *María v. Argentina*, it pointed to the violation of Article 19 (rights of the child) in conjunction with Article 17, emphasising that the state has an obligation to ensure the integrity of the child's family life, protect the child from secondary victimisation and support the family in the education process. The Court linked the right to family with the obligation to protect children from violence and with the concept of the child's best interests, strengthening standards for institutional family support.[97] In *Brítez Arce v. Peru*, the IACtHR held that the state violated the right to family and the child's right to social integration by not taking positive measures that would allow the family to provide proper care for the child. The judgment expands the state's duty to actively support families in difficult situations (poverty, disability) and indicated

96 The case concerned a man who, after the death of his same-sex partner, was deprived of social benefits because Colombian law did not provide for such benefits for homosexual relationships.
97 The case involved a girl who was a victim of sexual violence, and the state committed numerous neglects in prosecuting the perpetrators and protecting the child. The consequences included destabilisation of family life and a lack of institutional support.

that separating a child from their family is a last resort that is incompatible with the ACHR in the analysed case.[98]

In advisory opinion OC-24/17, issued at the request of Costa Rica, the IACtHR interpreted Articles 11, 17 and 24 of the ACHR concerning the protection of LGBTI individuals. It held that states have an obligation to recognise the legal gender identity of transgender persons, ensuring that they have documents consistent with their actual identity. They are obliged to recognise and legally protect same-sex relationships, including by granting them a status equivalent to marriage or another institution that provides full legal protection. This opinion expanded the interpretation of Article 17, defining family as an inclusive category that encompasses all stable relationships based on affection, regardless of gender.

The right to family in the IAHRS has developed as an autonomous right, combining elements of privacy, identity and child protection. The Court has repeatedly emphasised that protecting family bonds is a fundamental element of a democratic society and states have an obligation to refrain from interference and actively support families.[99]

98 The case concerned a child with a disability who was placed in a care institution without adequate support for his biological family.

99 The jurisprudence of the Inter-American Court of Human Rights regarding the right to family shows a clear evolution from a traditional understanding of biological ties toward an inclusive approach that considers diverse forms of family life and prohibits discrimination. In rulings such as *Forneron e Hija v. Argentina* (2012) and Gelman v. Uruguay (2011), the Court primarily focused on protecting biological relationships and parental rights, as well as ensuring the integrity of the child's family life. During this period, emphasis was also placed on the best interests of the child and the state's obligation to prevent arbitrary restrictions on parental rights. In subsequent cases, such as *Duque v. Colombia* (2016), the Court broadened its scope of protection to include same-sex relationships and LGBT+ partnerships, highlighting that the lack of legal recognition of such unions constitutes discrimination and violates the right to family life. In the same vein, Advisory Opinion OC-24/17 (2017) established new standards in the region: the Court stated that states have the obligation to recognise individuals' legal gender identity and to provide legal protection for stable same-sex partnerships, including in matters of inheritance, social benefits, and parental rights. Furthermore, the Court explicitly indicated that children raised in LGBT+ families have the right to family life on equal terms with children in heterosexual relationships, without being subjected to discrimination or stigmatisation. A comparative analysis of earlier rulings and OC-24/17 reveals a clear paradigm shift: from the protection of traditional biological bonds toward an inclusive right to family that encompasses diverse forms of relationships and emphasises equality and non-discrimination. The new jurisprudential line imposes on states not only the obligation to refrain from interfering in family life but also the active duty to support families in crisis and to ensure legal protection for all their members, regardless of sexual orientation or gender identity. Therefore, Advisory Opinion OC-24/17 and the accompanying rulings represent a milestone in the development of standards governing the right to family within the Inter-American system, laying the foundation for an inclusive and equality-based protection of family life in accordance with the principles of a democratic rule of law.

2.8. Sexual and Reproductive Rights

Sexual and reproductive rights are recognised by the IACtHR as an integral part of human rights, linked to the rights to life, health, liberty, non-discrimination and privacy and family life. The Court's jurisprudence shapes protection standards concerning access to reproductive health services, the right to make decisions about one's body and protection against forced medical procedures. It considers issues related to the sexual and reproductive rights of women[100] who are unjustly subjected to unauthorised operations that deprive them of their reproductive capacities. The violation of autonomy in this area violates various rights, including physical and psychological integrity, access to information, private and family life, exclusion of violence and non-discrimination.[101]

Manuela et al. v. El Salvador is one of the most important cases of women's and reproductive rights in Latin American countries. The IACtHR applied its standards on pre-trial detention, finding that Manuela's detention was arbitrary and contrary to the principle of the presumption of innocence. It found that the criminal investigation and grounds for Manuela's conviction were the result of gender stereotyping and the application of a disproportionate sentence. The IACtHR considered the specific implications of the right to sexual and reproductive health for persons with childbearing capacity, highlighting that Manuela's treatment violated her personal integrity and the right to health. It has developed the standards for the scope of medical confidentiality and the protection of personal data.[102]

In *Artavia Murillo and others v. Costa Rica*, the IACtHR found that the ban violated the right to private life (Article 11 of the ACHR), liberty and the right to equal treatment (Article 24 of the ACHR). The ruling emphasised the autonomy of individuals in family planning, the use of available infertility treatments and the necessity to respect reproductive freedom, regardless of the religious beliefs of the state. A significant ruling was issued in *I.V. v. Argentina*. The Court found violations of the right to physical integrity (Article 5) and private life (Article 11), indicating that forced reproductive procedures constitute serious violations of human rights, especially concerning women and vulnerable individuals. The judgment established that any procedure related to the reproductive body must be conducted with voluntary, informed consent.

The access to abortion was addressed by the IACtHR in *K.L. v. Peru*. The case concerned insufficient access to legal abortion in situations where the woman's life or

100 Artavia Murillo y otros ('Fecundaciyn in vitro'), paras. 294–300, y Asunto B. respecto de El Salvador. Resoluciyn de la Corte Interamericana de Derechos Humanos del 29 de mayo de 2013, para. 14, op. 1.

101 Part I.V, op. 3.

102 This case is about a woman who miscarried and was criminally prosecuted for that. Moreover, although seriously ill, the state failed to provide her with adequate medical care, resulting in her death. IACtHR found the state in violation of several articles of ACHR, including Article 26. The facts of the case concern the conviction of Manuela for aggravated homicide for having suffered a miscarriage. Manuela died due to lack of adequate medical attention while being deprived of her liberty.

health was at risk, including lack of information and medical care. The Court held that the state violated the rights to life and health (Articles 4 and 5), privacy (Article 11) and the obligation to ensure effective legal remedies (Article 25). The ruling underscored the state's duty to guarantee access to safe reproductive health services, including abortion, when legally permitted, and provide comprehensive medical information.

One of the most important issues in reproductive health is obstetric violence, which includes all forms of violation of women's rights during pregnancy, childbirth or postpartum, such as lack of consent for medical procedures, unjustified interventions, medical neglect, ignoring patients' complaints and discrimination based on social status, age, sexual orientation or origin. The IACtHR has repeatedly emphasised that obstetric violence is a form of human rights violation, particularly of the rights to physical and psychological integrity (Article 5), life (Article 4), health and privacy and family life (Article 11). In *Brítez Arce v. Peru*, the IACtHR found that the state violated the mother's right to family life and the child's physical integrity, noting that obstetric violence is physical and institutional, resulting from a lack of consultation, ignoring parents' opinions and limiting autonomy in decision-making processes concerning the child's health. The judgment highlighted the state's obligation to actively support families in caring for children with disabilities, ensure the patient's or guardian's consent for medical procedures and respect their autonomy. The Court found violations of Articles 4, 5, 7 and 19, indicating that obstetric violence in the form of medical neglect and ignoring patient consent constitutes a violation of reproductive rights in the case of *Pacheco y otra v. Venezuela*. The ruling confirmed that the state bears responsibility for improper practices in the reproductive health system, including the lack of proper procedures to monitor and protect women during pregnancy and childbirth.

A separate opinion was issued in *Beatriz v. El Salvador*. The decision declared violations of the rights to life, physical and psychological integrity and the rights to health and private life. The Court emphasised that obstetric violence in the form of denial of access to legal medical procedures is a violation of human rights. In a separate opinion, Judge Sierra Porto pointed out that the state should ensure access to medical procedures, respecting women's decisions and the obligation to protect life and health, regardless of statutory bans. She further highlighted that complete bans on abortion can lead to severe violations of women's rights and constitute a form of reproductive violence. The jurisprudence of Brнtez Arce, Pacheco y otra, and Beatriz shows that the IACtHR considers obstetric violence a violation of fundamental human rights, encompassing women's physical and psychological integrity, along with the right to life, health and family life. Separate opinions, such as that of Judge Sierra Porto, emphasise the necessity of respecting patient autonomy and ensuring real access to medical services, which becomes a standard for protecting reproductive rights in the region.

The IACtHR's jurisprudence regarding sexual and reproductive rights sets a high standard for protecting individual autonomy and family life, linking the right to decide about one's body with the state's duty to ensure access to appropriate medical

services and education. Its rulings and opinions demonstrate that these rights are fundamental to human rights and their violation constitutes a breach of the rights to life, health, privacy and non-discrimination.

2.9. Political Rights

The case law analysed the rights to political participation, participate in the evaluation and adoption of measures of general application and the exercise of public functions, as provided in the ACHR. These rights are contained in the 'hard core' tenets in Article 27, in connection with Article 23, of the ACHR, in cases variously described as suspension of rights or guarantees or suspension of state obligations. Hence, the case law preserves the right to participate in political processes, which may involve the application of the customary order of indigenous communities,[103] consultations on the use of land and natural resources, conducted in a manner consistent with the customary order,[104] decisions subject to domestic law, provided they are in accordance with the principles and rules of a democratic society,[105] access to public offices in conditions of equality and non-discrimination[106] and the existence and effectiveness of remedies against decisions that violate political rights.[107] The case law regarding political rights demonstrates an evolution from the protection of the fundamental right to vote to a broad conception of the right to active participation in political life. This includes the possibility of candidacy, association and expression of political opinions.

103 Yatama, para. 215. This case involves the exclusion of candidates for mayors, deputy mayors and councillors who were part of the indigenous regional political party, Yapti Tasba Masraka Nanih Asla Takanka (YATAMA) from participating in the municipal elections held on November 5, 2000 in the North Atlantic and the South Atlantic Autonomous Regions. The individuals affected filed several recourses against this decision, however, the Supreme Court of Justice of Nicaragua declared that their claims were inadmissible. IACtHR found that the state violated ACHR. The facts of the case concern the exclusion from participation in the municipal elections of a group of candidates pertaining to a regional indigenous political party, as a result of a resolution emitted by the Supreme Electoral Council.

104 Pueblo Saramaka y Comunidad Indıgena Xбkmok Kбsek, para. 157. This case relates to the state's international responsibility for failing to ensure the ancestral property rights of the Xбkmok Kбsek Indigenous Community and its members. The actions concerning the territorial claims of the Community had been processing since 1990 and had not been decided satisfactorily at the time of this judgment. Not only was it impossible for the Community to access the property and take possession of their territory, but the Community was left in a vulnerable situation regarding food, medicine, and sanitation that continuously threatened the Community's integrity and the survival of its members. IACtHR found that the state violated ACHR Rights. The facts of the case concern the right to ancestral property of the indigenous Community Xбkmok Kбsek, which for more than 20 years have held a claim request without obtaining a response.

105 Yatama, para. 207; Castañeda Gutman, para. 149. This case was brought by the former Mexican minister of foreign affairs, who tried to participate in the Presidential elections of 2006 as a citizens' candidate, without being affiliated with a political party. It explores the Mexican electoral process. IACtHR found that the state violated ACHR. The facts of the case refer to the violation of Jorge Castañeda Gutman's political rights, owing to an electoral law that imposed the requirement that Presidential candidates had to be postulated by a political party.

106 Castañeda Gutman, paras. 148–150.

107 Ibid., para. 92.

The IACtHR developed standards on political rights, particularly the right to participate in political life, concerning the unjustified restrictions imposed on victims due to the regulation, which was found discriminatory in *YATAMA v. Nicaragua*. In turn, the development of standards of judicial protection concerning the availability and effectiveness of remedies and the analysis of the scope and content of political rights and the conditions and criteria for their regulation were made by the IACtHR in *Castañeda Gutman v. Mexico*.

In the early period, represented by *Baena Ricardo et al. v. Panama* (2001), the IACtHR mainly focused on protecting the right to vote and prohibiting arbitrary exclusion of citizens from elections. The judgment emphasised the need for legal and proportional grounds for restrictions on political rights and the principle of non-discrimination. Subsequently, in *Gómez Paquiyauri Brothers v. Peru* (2004) and *Barreto Leiva et al. v. Venezuela* (2009), it expanded its interpretation to include political rights encompassing the ability to run for office and active participation in political life. It was highlighted that the state cannot repress citizens involved in public life or restrict the freedom to express political opinions, and administrative obstacles or arbitrary exclusions constitute violations of ACHR. More recent judgments, such as *Chávez y otros v. Ecuador* (2010), introduced an additional procedural and institutional dimension. The Court pointed out that effective protection of political rights requires adherence to democratic procedures, transparency in electoral processes and respect for mandates of democratically elected representatives. Hence, the standard of protection gained a substantive dimension, concerning the possibility of participating in governance, and a procedural dimension, relating to the rule of law and transparency of state actions. As a result, the Court's case law evolved from protecting passive voting rights to a comprehensive standard ensuring full citizen participation in political life, including active participation in elections, candidacy, formation of political associations, expression of opinions and protection against repression and discrimination. This evolution reflects the increasing importance of political rights as a foundation of democratic rule of law in Latin America.

The analysis of key cases indicates several fundamental elements of protection for political rights within the IAHRS. First, the right to participate in governance encompasses the right to vote and the possibility of candidacy and active engagement in political life. The Court explicitly mentions that the state cannot impose arbitrary restrictions in this regard or exclude citizens based on political views, origin or social status. Second, restrictions on political rights must have a clear legal basis, be proportional and serve a genuine public interest. The Court has repeatedly emphasised that the state has an obligation to ensure equality and non-discrimination in electoral processes and protect citizens from repression resulting from participation in political life. Third, political rights are inherently linked to the rule of law and transparency of democratic procedures. The Court indicates that procedural violations, such as arbitrary annulment of mandates of democratically elected representatives or inability to participate in elections for administrative or political reasons, constitute breaches of the right to political life. Fourth, the IACtHR's jurisprudence underscores

that political rights include the freedom to express political opinions and participate in public debate. Protection of these rights is negative, requiring the state to refrain from interference, and positive, necessitating active measures to ensure conditions for genuine and equal citizen participation in democratic processes.

The concept of electoral integrity constitutes a key element of the protection of political rights within the IAHRS. The IACtHR, in its rulings, emphasises that free and fair elections are an essential condition for the realisation of citizens' right to participate in governance and active involvement in democratic processes, following Articles 23 and 25 of the ACHR. In *Capriles v. Venezuela*, the IACtHR pointed out that the state is obliged to ensure fair, equal and transparent electoral procedures that guarantee every citizen a real opportunity to cast their vote and run as a candidate. The judgment highlighted that manipulations, inequalities in media access or instrumental use of state institutions in election campaigns constitute violations of the right to free elections and, consequently, the right to participate in governance. Similar standards were articulated in *Gadea Mantilla v. Nicaragua*, where the IACtHR held that any administrative or legislative actions that restrict candidacy or discriminate against participants in political life threaten the integrity of the electoral process. It was indicated that the state cannot impose arbitrary obstacles or apply measures resulting in unequal treatment of candidates and voters. The jurisprudence in *Oroya v. Peru* extends this analysis to the context of citizen participation by indigenous populations in public life. The Court emphasised that the state has an obligation to ensure equal opportunities for participation in electoral and decision-making processes for all social groups, regardless of ethnic origin. Restrictions stemming from structural discrimination that exclude certain groups from participating in public life constitute a violation of the right to free elections and participate in governance.

In summary, the IACtHR's jurisprudence in the cases of Capriles, Gadea Mantilla and Oroya establishes standards for electoral fairness as an integral part of political rights, highlighting the substantive and procedural dimensions of this right. Fair elections are essential for citizens' full participation in public life and their absence represents a serious violation of democratic standards for the protection of human rights in the Latin American region. The Court's jurisprudence on political rights establishes a comprehensive protection standard, combining the individual's right to participate in public life with the state's obligations regarding legality, equality and transparency. Political rights in the IAHRS are guarantees of passive participation through voting and the foundation for active involvement in governance and free political debate, which are essential for the functioning of a democratic rule of law.

2.10. Economic, Social and Cultural Rights

The reference to ESCR, which some authors call 'second-generation rights', is found in Article 26 of the ACHR. The origins of this instrument lie in the attempt to incorporate

the ESCR into the ACHR, which failed.[108] Decisions on the redress system bridge civil and political rights and ESCR, as they respond to the needs of individuals or groups that concern the meaning or content of the said rights, for example, general or specific development measures,[109] care for cultural patterns,[110] actions related to education

108 Inter-American Specialised Conference on Human Rights (San Josй, Costa Rica, 7–22 November 1969). Proceedings and Documents. Articles 1 to 33 of the Inter-American Convention on Human Rights studied by Commission I, pp. 115–116 and 303.

109 Comunidad Indнgena Sawhoyamaxa, paras. 229–232; Fernбndez Ortega y otros, paras. 267 and 270. On March 22, 2002, Ms. Inйs Fernбndez Ortega, a woman from an indigenous community in Guerrero, Mexico, was raped and tortured by military personnel. The state failed to undertake proper due diligence on the investigation and punishment of the perpetrators of these crimes. This case also dealt with the use of the military justice system to investigate and prosecute human rights violations, and the difficulties encountered by indigenous people, indigenous women in particular, to obtain access to justice. IACtHR found that the state violated ACHR, the American Convention on the Prevention, Punishment and Eradication of Violence Against Women and the American Convention to Prevent and Punish Torture. The facts of the case refer to the sexual violation and torture perpetrated on Inйs Fernбndez Ortega by members of the Mexican military. IACtHR placed the events in a context of significant military presence in the state of Guerrero, aimed at suppressing unlawful activities such as organised crime. In this region a sizeable percentage of the population belongs to indigenous communities who maintain their cultural identity and live in municipalities afflicted by social exclusion and extreme poverty.

110 Gonzбlez y otros ('Campo Algodonero'), paras. 541–543. On November 6, 2001, three bodies were found in a cotton field in Ciudad Juбrez. This case is about the state's international responsibility for the disappearances and subsequent deaths of Ms. Claudia Ivette Gonzбlez, and minor children, Esmeralda Herrera Monreal and Laura Berenice Ramos Monбrrez. The state failed to protect the victims despite full awareness of the existence of a pattern of gender-related violence that had resulted in the murders of hundreds of women and girls. The facts of instant case refer to the disappearance and death of 3 young women, 2 of them minors, whose bodies were found in a cotton field in Ciudad de Juбrez in 2001. The victims were subjected to significant torture of a sexual nature.

and health[111] and protection of culture.[112] The IACtHR applied, within its substantive jurisdiction, the San Salvador Protocol concerning the right to education. It adopted the criterion of the Committee on Economic, Social and Cultural Rights, according to which the right to education must meet, at all levels, certain 'fundamental and interrelated characteristics' – accessibility, availability, acceptability and adaptability.[113]

In the initial period of case law, the protection ESCR had an indirect character, focusing on the connection between fundamental rights and the individual's living conditions. An example is the *González et al. (Cotton Field) v. Mexico* (2009), in which the IACtHR analysed the state's neglect in protecting the lives and integrity of women, while emphasising its obligation to ensure conditions conducive to the realisation of social rights, such as safety and access to education. Subsequently, jurisprudence evolved toward the direct recognition of state obligations regarding ESCR. Cases such as *Tibi v. Ecuador* (2004) and *Kawas Fernández v. El Salvador* (2009) demonstrated that the state must refrain from actions violating individual rights and actively ensure access to health, educational and social services, especially for vulnerable or marginalised groups. Thus, it introduced the concept of positive obligations, whereby the state is required to create public policies enabling the effective realisation of ESCR.

A significant stage in the development of standards for ESCR protection is associated with the recognition of their interdependence and indivisibility with civil and political rights. Judgments such as *López Álvarez v. Honduras* (2006) and *García Cruz et*

111 Albɒn Cornejo y otros, para. 164. On December 13, 1987 Laura Susana Albɒn Cornejo was admitted to the Metropolitan Hospital, a private health institution located in Quito, Ecuador, due to a set of symptoms of bacterial meningitis, and was prescribed a dose of morphine for pain. On December 18, 2007, while she was under medical treatment, Miss Albɒn Cornejo died, allegedly due to the medication she was administered. After her death, Miss Albɒn Cornejo's parents appeared before the Eighth Civil Court from Pichincha, the Honor Tribunal of the Pichincha Medical Association, and filed a criminal complaint to investigate the causes of their daughter's death. Two physicians were accused of negligent medical practice. The case against one of them was dismissed and the second was still pending at the time this case was brought. IACtHR found that the state violated ACHR. The facts of the case concern the death of Laura Susana Albɒn Cornejo because of the medical assistance she received for bacterial meningitis following her admission to the private health facility the Hospital Metropolitano. Gonzales Lluy y otros, paras. 373 and 386. In 1998, three-year-old Talʜa Gonzales Lluy was diagnosed with a blood disorder that requires multiple blood transfusions to be treated. However, the donated blood was transfused into her body before it was tested for infectious diseases. Shortly thereafter, Talʜa tested positive for HIV. When she began attending primary school, she faced severe discrimination from school officials and teachers, and was barred from attending her classes. Further, the Gonzales Lluy family was evicted and forced to move multiple times when landlords discovered Talʜa's condition. After failing to obtain recourse in the domestic courts, the family sought redress from the IACtHR. IACtHR found that the state violated ACHR. The facts of the petition refer to the child Talia Gabriela Gonzales Lluy, who at the age of 3 became infected with HIV during a blood transfusion from a Red Cross blood bank at a private clinic. The criminal proceedings initiated to assign responsibility prescribed and the lack of firm criminal decision impeded a civil action from being admitted. As a result of her diagnosis, the girl was forbidden from staying in school.

112 Pueblo Indʜgena Kichwa de Sarayaku, para. 323.

113 Gonzales Lluy y otros, para. 233 and seq.

al. v. Guatemala (2010) show that violations of the right to health, education or work can lead to violations of the right to life, physical integrity or equality, highlighting the need for a holistic approach by the state in human rights protection. In recent years, the Court has consistently advanced standards concerning real access to ESCR for vulnerable groups, including the poor, children, persons with disabilities, indigenous peoples and women. These rulings emphasise that the state must counteract structural discrimination, implement inclusive policies and monitor the effectiveness of public actions to ensure practical access to rights. This demonstrates that the IACtHR is steadily developing ESCR protection standards, transforming them from an indirect concept into full-fledged human rights, forming the foundation of sustainable democratic development within the rule of law in Latin America.

In *Fernández Ortega et al. v. Mexico*, the IACtHR identified the constituent elements of rape as an act of torture and established standards regarding the inappropriateness of military jurisdiction to hear such cases. It developed criteria for due diligence in handling complaints and investigations of sexual violence and access to justice without discrimination. In *González et al. (Cotton Field) v. Mexico*, it placed the facts of the case in the context of the increase in the number of murders of women since 1993 in Ciudad Juбrez, which had the characteristics of sexual violence and remained largely unpunished. It has developed standards concerning the obligation to respect, guarantee and prevent gender-based violence and the state's duty of due diligence in response to such incidents. Furthermore, it established criteria for conducting autopsies and the identification of gender stereotypes in state practices.

Albán Cornejo et al. v. Ecuador led the IACtHR to analyse the response of the criminal justice system to the investigation and clarification of the facts and establish standards for access to medical records and the obligations of medical professional supervisory bodies. Furthermore, it considered that it was for the state to decide whether to include the specific offence of medical malpractice in its domestic legislation, since it could be considered a part of crimes such as murder or bodily harm. The IACtHR analysed the facts of *Gonzales Lluy et al. v. Ecuador* concerning the state's obligation to regulate and supervise the provision of health services and the accessibility and quality of health care. It established standards regarding the scope of the right to education and the violation of the right to remain in the education system in connection with the obligation of non-discrimination.

Lagos del Campo v. Peru (2017) marks a turning point in the IACtHR's jurisprudence concerning ESCR. Referring to Article 26 of the ACHR, it offered an interpretation aligned with its object and purpose, applying *pro persona* criteria and an evolutionary approach. Article 26, which guarantees equality before the law and prohibits discrimination, was considered in this context as a framework allowing the full protection of ESCR contained in the Charters of the Organization of American States (OAS), such as the OAS Social Charter. The Court indicated that the failure to realise or violations of these rights could be treated as autonomous violations, independent of violations of traditionally protected civil and political rights. Hence, it established that each of these rights could be subject to autonomous investigation, with the state

being responsible for actions and omissions leading to their violation. This approach strengthens the position of ESCR as fully protected human rights within the Inter-American system, with state obligations extending beyond passive non-interference to active provision of access to services, means and conditions necessary for the enjoyment of these rights. The *pro persona* and evolutionary approach applied by the IACtHR allows for treating ESCR standards as dynamic and adaptable to contemporary social challenges, enabling the protection of ESCR in situations not foreseen in the original legal text of the Convention.

2.11. Environment

Within the IAHRS, the right to a healthy environment is expressly recognised in Article 11 of the Protocol of San Salvador (1988), in OC-23/17, and, tacitly, in Article 26 of the ACHR. The IACtHR considers it to be included among ESCR, given that states are obliged to promote and encourage its progressive development. The scope of application of the right to a healthy environment obliges states to guarantee it within or outside their territory, which means that they are responsible for what happens within their territory and what happens extraterritorially, to the extent that the state exercises jurisdiction or control in that geographical space. Therefore, states can be guilty of causing transboundary damage.

The right to a healthy environment is a human right, without prejudice that it extends to all nature, including all forms of life. It is autonomous because it does not depend on other rights to be enforceable and effective. It has a dual scope: collective, because it protects present and future generations, and individual, because it has an individual interest and its violation has direct consequences for individuals. It has a special relationship with other fundamental human rights. In this sense, two groups can be distinguished: substantive rights, that is, the right to life, personal integrity, health, housing, water, food, property, non-forcible eviction and participate in cultural life, and procedural rights, that is, freedom of expression, association, access to information, an effective remedy and participate in decision-making.

In dealing with civil and political rights, the IACtHR has identified criteria that entail the protection of ESCR. This is the case of environmental protection, an issue that the IACtHR has examined on several occasions concerning the protection of the environment as a living space for individuals or communities, the preservation of the rights of indigenous groups[114] and the protection of environmental defender

114 Pueblos Kaliña y Lokono, para. 163 et seq.

who experience threats or aggression in the development of this activity.[115] It is necessary to consider the biological dimension of protected areas and their socio-cultural dimension. The rights of indigenous people and environmental protection norms are not mutually exclusive; instead, they are complementary.[116] These rights, directed towards the use of natural resources, reduce or eliminate the risks that such use may entail for the survival of human groups.[117] Broadly, there is an undeniable link between environmental protection and the implementation of various human rights.[118]

The IACtHR stressed the obligation to protect the environment from threats and aggression and obliged states to consult interested groups on development projects[119] that they intend to approve or implement, provide information on this subject to those who request it and conduct environmental impact studies in connection with such projects.[120] Moreover, it considered that environmental protection may constitute a ground for expropriation in public interest[121] and pointed out that the defence of human rights includes civil and political rights and ESCR.[122]

The most decisive and conclusive statement on the relationship between human rights and the environment in the IAHRS is found in advisory opinion OC-23/17 on the

115 Kawas Fernбndez, paras. 143–155. On February 6, 1995, Ms. Blanca Jeannette Kawas Fernбndez, president of the Foundation for the Protection of Lancetilla, Punta Sal, Punta Izopo and Texiguat was murdered. The organisation was created to improve the quality of life for people who live within the watersheds of the Baнa de Tela region. Ms. Kawas Fernбndez denounced attempts by private individuals and entities to illegally appropriate Punta Sal, as well as the contamination of the lakes and the depredation of the forests in the region. IACtHR found that the state was directly responsible for Ms. Kawas Fernбndez's death and the subsequent lack of investigation that took place, violating ACHR. The facts of the case refer to the death of Blanca Jeanette Kawas Fernбndez, human rights defender with significant experience in environmental issues. She was killed by gun shots on February 6, 1995, while she was at home. Kawas was president of the foundation PROLANSATE and her leadership was crucial to the identification of the area Punta Sal in the department of Atlбntida as a National Park, and for publicly denouncing illegal logging. The assassination of Kawas remained in impunity for more than 14 years. Luna Lypez, paras. 121–139. On May 18, 1998, Carlos Antonio Luna Lypez, a human rights advocate and member of the city council of Catacamas, Olancho Province, Honduras, was murdered as he left a meeting at the Mayor's Office. The state failed to take immediate steps to protect the crime scene or conduct an autopsy, and later failed to properly investigate evidence that indicated state official involvement. The facts of the case refer to the death of Carlos Antonio Luna Lypez, in May 1998, as he left a meeting in the Town Hall of Catacamas. Luna Lypez was a human rights defender who supported the struggles for land of local peasant groups. IACtHR placed the events in a situation of conflict and risk for those who worked in the protection of the environment in Honduras.

116 Pueblos Kaliña y Lokono, para. 173.

117 Ibid., para. 214.

118 Kawas Fernбndez, para. 148; Luna Lypez, para. 123.

119 Pueblo Saramaka, para. 133; Pueblo indнgena Kichwa de Sarayaku, para. 177.

120 Pueblo Saramaka, para. 129; Pueblos Kaliña and Lokono, para. 214.

121 Salvador Chiriboga, para. 76.

122 Kawas Fernбndez, para. 147; Luna Lypez, para. 123.

states' obligations regarding respect to life and personal integrity.[123] Guaranteeing a healthy ecological environment for the population is an elementary prerequisite for the development and enjoyment of other human rights, since all human rights are susceptible to environmental degradation, as the full enjoyment of all human rights depends on a favourable environment. Therefore, it is up to the state to ensure the necessary conditions to avoid environmental damage. The advisory opinion establishes the environmental obligations that states must comply with and defines their scope.

The integration of environmental protection into the IACtHR case law is achieved through the interpretation of the rights deriving from the ACHR, particularly in cases concerning the rights of indigenous people, as they are exposed to environmental damage due to the increasing pressure on their lands and resources and the cultural and religious ties they maintain with their ancestral territories. Since 2001, there has been a development of case law on the relationship between human resources and the environment, in cases related to the rights of indigenous people and other individual cases and advisory opinions. The evolution of the relationship between human rights and the environment through human rights courts is different in Europe than in the Americas. Although both cases represent progress, the former focuses on individual rights to environmental protection, usually related to environmental pollution caused by noise, while the latter focuses on the collective rights of indigenous people against violations of their lands and natural resources related to their use and exploitation, mainly through state concessions to large companies.

The first judgement to note the link between human resources and the environment is the case of Mayagna (Sumo) Awas Tigni Community. Another judgement that deserves to be highlighted is *Claude Reyes et al. v. Chile*. In this judgement, the IACtHR, for the first time, condemned a state for failing to comply with the environmental obligation to guarantee access to information. In *Kaliña and Lokono v. Suriname,* the dispute concerned the lack of a normative framework recognising the legal personality of indigenous people and the lack of state regulation regarding the right to collective ownership of the lands, natural resources and territories of the Kaliña and Lokono communities in Suriname. The IACtHR developed standards related to collective ownership and linked them to environmental protection and the state's obligation to ensure the effective participation of indigenous people through culturally appropriate decision-making procedures.

The IACtHR developed standards on due diligence in investigations into violent deaths and the right to association for those working to promote and defend human rights in *Kawas Fernández v. Honduras*. In turn, in *Luna López v. Honduras*, it applied

123 On 15 November 2017 IACtHR, in accordance with the request made by the Republic of Colombia, issued Advisory Opinion OC-23/17 on the environment and human rights, in which it ruled for the first time on the right to enjoy a healthy environment, considering it as a right in itself; in addition to acknowledging the inseparable link that exists between the legal protection of the environment and the effective realisation of human rights. In this sense, IACtHR defined in the consultation document the indivisible and interdependent nature that governs the relationship between the environment, sustainable development and human rights.

standards on the state's obligations in situations of real and immediate danger to people's lives. It assessed the investigation into what happened based on the due diligence framework. In *Lhaka Honhat (Indigenous Communities) v. Argentina* (2020), it emphasised that the state has an obligation to ensure the protection of the natural environment in a manner that allows indigenous communities to fully enjoy their traditional way of life. All decisions regarding the exploitation of natural resources should be preceded by consultations and consider the opinions of local communities. This highlights the obligation of the state to undertake proactive measures to protect the environment, rather than refraining from interference.

Similarly, in *Caso Comunitario de Pueblos Indígenas Xákmok Kásek v. Paraguay* (2010), the IACtHR found that environmental degradation, threatening the health or livelihoods of communities, constitutes a violation of human rights, including the rights to life and physical integrity. The judgment underlined that the state has a duty to provide access to information, participation in decision-making processes and legal remedies when economic or investment activities threaten the environment and the rights of residents. It further indicated that the right to a healthy environment is intrinsically linked to other rights, such as the right to health, food, water and housing. In *Furlan y familiares v. Argentina* (2012), it was ruled that inadequate control of industrial activities and emissions of harmful substances violate individuals' physical integrity and their right to live in safe conditions, constituting a breach of the state's obligations under the Convention.

Initially, the IACtHR in cases such as *Gómez-Paquiyauri Brothers v. Peru* (2004) or *Case of the Xákmok Kásek Indigenous Community v. Paraguay* (2010), primarily protected the environment indirectly, noting that environmental degradation can lead to violations of the rights to life, physical integrity or health. The state was mainly responsible for actions or omissions that directly threatened the health or lives of citizens. Subsequently, including *Lhaka Honhat (Indigenous Communities) v. Argentina* (2020), the IACtHR emphasised that the state has positive obligations regarding environmental protection. This includes active management of natural resources, implementing regulations to prevent environmental degradation and ensuring that environmental use does not threaten the health and lives of citizens. A standard of consultation with local and indigenous communities in decisions about resource exploitation was established.

Recent jurisprudence demonstraes a trend toward treating the right to a healthy environment as an autonomous human right, linked with rights to health, housing, food, water and culture. These rulings, including *Furlan y familiares v. Argentina* (2012), stress that environmental degradation and the lack of government action to protect it can constitute independent violations of ESCR. Contemporary case law emphasises a *pro persona* and evolutionary interpretation, recognising that environmental protection standards should be dynamic and adaptable to new ecological, climatic and social challenges. Thus, the right to a healthy environment has become an integral part of the human rights protection system in the region, encompassing physical

environmental protection and community participation, access to information and effective legal remedies.

La Oroya v. Peru mrked a turning point in the IACtHR's jurisprudence regarding the right to a healthy environment. In this case, the IACtHR recognised, for the first time, in a comprehensive manner that environmental degradation can constitute an autonomous violation of human rights, independent of traditionally protected civil and political rights, such as the right to life or physical integrity. The Court stated that the state bears responsibility for direct violations of human rights and omissions leading to environmental degradation that threatens the health and life of residents. The ruling emphasised that the state has positive obligations, including monitoring industrial activities, limiting emissions of harmful substances, ensuring access to information and social consultation and providing effective legal remedies. It indicated that the right to a healthy environment is inextricably linked to rights to health, housing, water, food and participation in cultural life, which confirms the complex nature of this right. Moreover, the decision applied a *pro persona* interpretation, recognising that environmental protection standards must account for contemporary challenges, such as industrial pollution and climate change, allowing the protection of human rights to adapt to the actual living conditions of communities. This case established the foundations of the modern understanding of the right to a healthy environment within the Inter-American system. It set standards encompassing autonomous violations of human rights, resulting from environmental degradation, and the application of a *pro persona* and evolutionary interpretation, enabling the adaptation of protection standards to changing ecological and social conditions. Consequently, this case became a fundamental precedent, shaping the Court's current stance on protecting the right to a healthy environment, emphasising its autonomous character and broad connections to other human rights and state obligations in the Latin American region.[124]

The IACtHR's jurisprudence concerning the right to a healthy environment sets high standards for state responsibility, including physical and ecological protection, ensuring community participation in decision-making processes, access to information and effective legal safeguards. These standards reflect a growing awareness of the importance of environmental protection for the full realisation of human rights in Latin America. The evolution of case law in this area ranges from indirect protection of fundamental rights, through recognition of positive state obligations, to the treatment of the right to a healthy environment as an autonomous human right interconnected with the right to health, housing, food and water, along with constitutional and international rights. These standards emphasise the responsibility of states for

124 The case concerned the community of La Oroya in Peru, exposed to years of emission of toxic substances by the metallurgical industry. The consequences of industrial activity included serious health threats to residents, pollution of air, soil, and water, and a negative impact on the living conditions of the local community.

environmental degradation and the necessity of involving communities in decisions regarding natural resources and protecting against the effects of harmful actions.

2.12. Due Process

In the scope of the issues dealt with by the IACtHR, similar to its European counterpart, issues related to a fair trial are of considerable importance and linked to various grounds of the ACHR, including Articles 8 and 25, along with 4(6) (death penalty), 7(5) and 7(6) (right to persona liberty) and 27(2) (suspension of guarantees). These issues appear constantly in advisory opinions, judgements in contentious cases, interim measures and rulings on compliance with the IACtHR's findings.[125]

a. Concept

The IACtHR has established in its case law the specific content of a fair trial, specifying several elements that this complex concept must include, following the ACHR and its corresponding case law.[126] However, to date, there is no independent treaty that incorporates the case law criteria concerning a fair trial, as is the case for other issues, including torture, enforced disappearances, the protection of women and non-discrimination in the case of disability.

b. Scope

The IACtHR has included in fair trial certain rights that were not expressly considered previously, which extends the scope of protection of legitimate claims, for instance, in the case of foreign prisoners.[127] Hence, the meaning and protective function of a fair trial have been expanded.[128]

125 Salmón and Blanco, 2012.

126 Masacre de la Rochela, paras. 193–198; OC-21/14, para. 109. On January 18, 1989, a paramilitary group with the cooperation of state agents killed judicial officials while they were carrying out their duty to investigate the responsibility of civilians and army personnel in the massacre of the 19 tradesmen and other violent acts perpetrated in the Magdalena Medio region. These deaths underwent no criminal investigation, and no one was ever implicated for the crime or punished. IACtHR found that the state violated ACHR. The facts of this case relate to the massacre of a group of 15 judicial officials who were members of a Judicial Commission (Unidad Myvil de Investigaciyn) who were performing their duties by carrying out an investigation into the massacre of 19 traders and other occurrences of violence in the region of Magdalena Medio. Of the 15 victims, 12 were executed and 3 survived.

127 Vйlez Loor, para. 151 et seq.; Nadege Dorzem y otros, para. 124 and seq.; OC-16/99, paras. 84 and 124; OC-18/03, para. 119 et seq.

128 Voto concurrente del juez Sergio Garcнa Ramнrez, en OC-16/99, pp. 2–3.

c. Jurisdictional body

The IACtHR placed the judge at the foundation of a fair trial, indicating the need for him to be independent, impartial and competent.[129] According to its case law, the judge is the point of reference and the basis, and not only an element of a fair trial;[130] hence, any 'trial' conducted in the absence of a judge is invalid. The same statement led to other declarations of the IACtHR, including, and particularly importantly, the rejection of the intervention of military jurisdictions in the investigation and prosecution of human rights violations that should be dealt with by ordinary courts.[131] The same rejection applies to the intervention of the so-called 'faceless judges'.[132]

129 Durand y Ugarte. Fondo, para. 130. On February 14, 1986, Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were detained under the suspicion of their participation in terrorist acts. The victims were incarcerated in the El Frontyn Island prison off the Peruvian coast, and were killed during the quelling of a prison riot by use of disproportional force by Peruvian armed forces. IACtHR found that the state violated ACHR. The remains of one of the two victims were found eighteen years later, after IACtHR issued its judgment, and those of the second victim are still missing. The facts of the case refer to the illegal arrest, by members of the Counter-Terrorism Office (DIRCOTE), and the disappearance of Norberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, under the suspicion of having participated in terrorist acts, without a warrant or having being found guilty of any felony. Whilst the victims were being detained, there was a riot in the 'El Frontyn' prison, which was declared as a 'restricted military zone,' in this way preventing the entry of judicial and civil authorities. During the operation to recover control of the prison, security forces demolished the Blue Pavilion causing injury and death amongst the prisoners. Durand and Ugarte were not on the list of survivors nor were their corpses identified.
130 Barreto Leiva, para. 75. This is an unusual case for IACtHR as it deals with the prosecution and trial of a high level state official, who had been accused, together with the President of Venezuela, of embezzlement. In the judgment on the merits IACtHR discussed at length the scope of due process rights. It eventually found violation of some rights protected by ACHR, but all those the Commission claimed to have been violated. The events of the case relate to the violation of Oscar Enrique Barreto Leiva's judicial guarantees, who whilst serving as Director General of the Administration and Services Department of the Ministry Secretariat of the Presidency, was sentenced in 1989 for being an accomplice to the crime of aggravated generic misappropriation.
131 Durand and Ugarte. Fondo, para. 117. Radilla Pacheco, para. 275, Rosendo Cantъ y otra, para. 160; Quispialaya Vilcapoma, para. 144. In 2001, Valdemir Quisiplaya Vilcapoma, a soldier of the state army, was engaging in target practice when he was repeatedly beaten on the face and head with a rifle by one of his superiors for his lack of precision in shooting. This beating caused Quispialaya Vilcapoma to experience persistent headaches and fever, and caused him to lose vision in one of his eyes. The officer who beat him threatened further violence should he report the incident. When Vilcapoma finally reported the incident, he was unable to obtain redress in the military and civilian courts of the state. IACtHR found that the state violated ACHR and the Inter-American Convention to Prevent and Punish Torture. The proceedings conducted before the military jurisdiction determined that the injuries resulted from the victim's service. Likewise, the criminal justice also failed to establish liability.
132 Castillo Petruzzi y otros, para. 133. On October 15, 1993, four Chilean citizens were arrested in Peru for terrorism. All four were members of the Tupac Amaru terrorist organisation and were linked to several kidnappings. They were tried by a military tribunal while blindfolded and bound to chairs. None were allowed to examine the evidence against them or cross examine witnesses. They were all sentenced to life in prison. IACtHR found that the state violated ACHR. The facts of the case relate to the prosecution and sentence to life imprisonment of 4 Chilean citizens for the crime of treason considered in Peruvian legislation as a form of aggravated terrorism. IACtHR understood that during the 1980s and towards the end of 2000, Peru

The IACtHR has emphasised the judge's mission as the guarantor of human rights in different directions.[133] On the one hand, the judge must respect the truth about the facts that are the subject of the judgement, acting more dynamically in the search for

experienced a conflict between armed groups and military and police officers. This conflict was exacerbated by a systematic practice of human rights violations, among them extrajudicial executions and forced disappearances of people suspected of belonging to opposition political groups, which were carried out by state agents following orders of police and military leaders, Cantoral Benavides. Fondo, para. 127. On February 6, 1993, Luis Alberto Cantoral Benavides was detained without an arrest warrant issued by a competent authority, and accused of committing treason. He was physically and mentally tortured. Cantoral Benavides was acquitted of treason in a military tribunal, but retried for the same alleged crime in a civilian court, where he was convicted. Cantoral Benavides was not released after his acquittal in the military jurisdiction, as the state released his twin brother, who was also wrongfully accused of treason, instead. Cantoral Benavides was continually tortured for four years in various prisons, until he was released by an ad hoc committee, after his case had reached IACtHR. IACtHR found that the state violated ACHR and the American Convention to Prevent and Punish Torture. The facts of the case concern the illegal deprivation of liberty of Luis Alberto Cantoral Benavides, following his arbitrary imprisonment, torture, the violation of his judicial guarantees and the double jeopardy imposed because of the mentioned events. The victim was detained by agents of the Counter Terrorism Division (DINCOTE) in February 1993, during which time a state of constitutional emergency was in place involving the suspension of a series of guarantees. During his detention, he was subjected to acts of violence whose objective was to obtain self-incrimination. These events occurred in the context of the armed conflict experienced in Peru between armed groups and military and police agents during the 1980s and until the end of 2000. This conflict was exacerbated by the systematic practice of human rights violations, among them extrajudicial executions and forced disappearances of people suspected of belonging to opposition political groups, which were carried out by state agents following orders of police and military leaders. Garcha Asto and Ramhrez Rojas, para. 149. In 1995 and 1991, two Peruvian university students suspected of being affiliated with Sendero Luminoso were arrested, tried by a faceless tribunal, and detained in inhuman, cruel, and degrading conditions. They were sentenced to twenty- and twenty-five-years imprisonment as alleged perpetrators of the crime of terrorism. IACtHR found that the state had violated ACHR. The facts of the case concern the arbitrary detention of Wilson Garcha Asto and Urcesino Ramhrez Rojas, in 1995 and 1991 respectively, by the Peruvian National Police. The case also concerns their being maintained incommunicado and the later investigation, trial and sentencing carried out by 'faceless' judges and prosecutors, in accordance with the established and active anti-terrorist legislation. The state carried out partial recognition of responsibility regarding the events which occurred before September 2000, as this was the moment in which democratic order was restored in the nation.

133 Bayarri, para. 67. On November 18, 1991, Juan Carlos Bayarri was detained as a suspected kidnapper in Buenos Aires. Bayarri was then detained for almost thirteen years based on a confession obtained during torture. Even though the Federal National Criminal and Correctional Appeals Chamber of Argentina recognised that Bayarri had been subjected to torture, Argentina failed to punish those responsible for his unlawful detention and did not provide any reparation for the violations he suffered. IACtHR found that the state violated ACHR and the Inter-American Convention to Prevent and Punish Torture. The fact of the case relates to the illegal and arbitrary detention of Juan Carlos Bayarri, which was followed by acts of torture and a lengthy pre-trial detention. These violations occurred in the context of criminal proceedings carried out against him for the alleged repeated commissioning of extortive kidnappings. The victim was deprived of liberty for 13 years based on a confession extracted under torture. 16 years later, the events remained in total impunity before national justice systems.

the truth.[134] On the other hand, they must take care of the protection of the persons involved in the procedure.[135] The national judge is obliged to exercise the 'control of conventionality', a transcendental point in the Inter-American jurisprudence.

d. Evidence and defence

The case law establishes that the presumption of innocence constitutes the foundation of the guarantees encompassed by a fair trial[136] and upholds the principles, rules or figures relevant in this area when interpreting and applying the ACHR's provisions. Particular emphasis is placed on the principle of adversarial proceedings,[137] the broad exclusion of excessive restrictions, including physical or mental torture and other cruel, inhuman or degrading treatment, in respect of which the Court has interpreted

134 Voto razonado del juez Sergio Garcна Ramнrez, en Dacosta Cadogan, paras. 15–18. On May 18, 2005, the Supreme Court of Barbados found Tyrone DaCosta Cadogan guilty of murder and sentenced him to death by hanging; a sentence that is in accordance with Barbados's Offences Against the Persons Act of 1994. Barbados imposed this mandatory death penalty sentence without considering the specific circumstances of the crime or the mitigating factors. Due to a savings clause in the Constitution of Barbados, the domestic courts could not declare the mandatory death sentence to be invalid even though it violated fundamental rights protected under Barbados's Constitution and ACHR. The facts of the case refer to the mandatory death penalty applied to Tyrone Dacosta Cadogan after being found guilty of the crime of homicide.

135 Mejна Idrovo, para. 77. On March 12, 2002, the Constitutional Tribunal ruled that the Executive Decrees ordering that Josй Alfredo Mejна Idrovo could be suspended and discharged from the army were unconstitutional and provided reparations for the harm. The state failed to comply with this decision. IACtHR found that the state violated ACHR. The facts of the case refer to the non-compliance with a decision ordered by the Constitutional Court which declared unconstitutional two executive decrees through which it was determined that Coronel Josй Alfredo Mejна Idrovo should be brought to justice and discharged from the army.

136 Suбrez Rosero. Fondo, para. 77. On June 23, 1992, Rafael Ivбn Suбrez Rosero was arrested without a warrant by officers of the National Police of Ecuador. He was later charged with illegal drug trafficking. At no time before or during his detention was Suбrez Rosero summoned to appear before a competent judicial authority to be informed of the charges brought against him. IACtHR found that the state violated ACHR. The facts of the case concern the illegal and arbitrary detention, in June 1992, of Rafael Suбrez Rosero on the part of Ecuadorian National Police agents. This occurred in the context of the police operation 'Ciclyn', whose objective was to break up one of the biggest international drug trafficking organisations. The victim was detained without a warrant having been emitted by a competent authority and without having committed delicto flagrante. Following several days kept in isolation, he was remanded in custody by a judge. In Lypez Mendoza, para. 128, Leopoldo Lypez Mendoza was prevented by the state from participating in the regional elections in 2008. The state also failed to provide him with the relevant judicial guarantees and judicial protection or the appropriate reparation. IACtHR found that the state violated ACHR. The events of instant case refer to the 2 sanctions of disqualification for the holding of public office that the Comptroller General of the Republic applied to Leopoldo Lypez Mendoza in the framework of the processing of administrative proceedings. As a result of these sanctions Lypez Mendoza was prevented from registering his candidacy for an elective office in the electoral process of 2008.

137 Barreto Leiva, para. 54; OC-17/02, para. 132.

and applied the ACHR and the Torture Convention,[138] the public,[139] the defence[140] and the receipt and evaluation of evidence[141] and the reasoning and grounds of the judgement.[142] Article 8, paragraph 1, of the ACHR sets out the main elements of a fair trial through judicial guarantees in all proceedings concerning the determination of a person's rights or obligations. Article 8, paragraph 2, refers to guarantees corresponding to criminal proceedings. The IACtHR's definition, which represents a convenient extension of the fair trial regime, is unusual as the guarantees of Article 8, paragraph 2, apply equally, within the relevant limits, to all procedures listed in paragraph 1 of the same provision.[143]

e. Reasonable time

The central point of the process and of the entire procedure preceding it, whether administrative or judicial, is the reasonable time within which a decision recognising rights or defining obligations and responsibilities must be taken. The IACtHR adopted the criteria of the European Court and added the necessary consideration of the

138 Manuel Cepeda Vargas, para. 150. On August 9, 1994, Senator Manuel Cepeda Vargas was murdered in Bogotб. His murder was followed with a lack of due diligence in the investigation and punishment of all those responsible. IACtHR found that the state violated ACHR. The events of the case concern the extrajudicial execution of the senator Manuel Cepeda Vargas, which occurred on August 9, 1994 in the city of Bogota, and the lack of investigation and punishment for those responsible for the crime. The senator was furthermore a political leader and member of the Patriotic Union (UP) party and the Communist Party, and his extrajudicial execution is explained by his political activism, and can be placed in the context of systematic violence against UP members. Cabrera Garcнa y Montiel Flores, para. 165.

139 Palamara Iribarne, paras. 167–169, para. 217.

140 Barreto Leiva, para. 29; Velйz Loor, para. 145.

141 Barreto Leiva, para. 61.

142 Chaparro Blvarez and Lapo Íñiguez, para. 107; Apitz Barbera y otros ('Corte Primera de lo Contencioso Administrativo'), para. 77; Lypez Mendoza, para. 141.

143 Baena Ricardo, This case concerns the arbitrary dismissal of 270 government employees that participated in a demonstration for labor rights and were subsequently accused of complicity for perpetrating a military coup. In this case, IACtHR had the opportunity to rule on violations of certain articles of ACHR that are seldom invoked, such as Article 10 (Right to Compensation), Article 15 (Right of Assembly) and Article 16 (Freedom of Association), as well as matters of litispendence and the IACtH's power to monitor compliance with its own judgments. IACtHR found that the state violated ACHR. Fondo, Reparaciones y Costas, para. 125. Yatama, para. 147; Personas dominicanas y haitianas expulsadas, para. 349. The facts of the petition relate to arbitrary detention and summary expulsion of people of Haitian descent, including children, from the Dominican Republic.

greater or lesser impact that the passage of time may have on the rights or freedoms in question.[144]

An early case law of the IACtHR established a set of criteria that enables the assessment of the reasonableness of the duration of judicial and administrative proceedings, a key element of the right to a fair trial (Article 8). These criteria were formulated, among others, in cases such as *Genie Lacayo v. Nicaragua* and *Gonzales Lluy and otros v. Ecuador*, and form the basis for analysing potential violations of the right to have a case heard within a reasonable time. The Court identified four main criteria for evaluating the reasonableness of the duration of proceedings:

1. Complexity of the case: This considers the nature and difficulty of the case, the number of participants involved and the degree of legal complexity. The more complex the case, the longer the duration may be deemed justified, provided that the state demonstrates active efforts to conduct the process efficiently.

144 Valle Jaramillo y otros, para. 155. On February 27, 1998, two armed men entered Jesъs Marнa Valle Jaramillo's, a human rights defender, office in Medellнn and took him hostage and killed him. It was speculated that the crimes were perpetrated by members of paramilitary forces with members of the Army to silence Marнa Valle Jaramillo from speaking out about the human rights abuses that took place in Ituango. After nine years, three civilians had been convicted in absentia, and there are no judicial investigations underway to determine whether state agents bore any responsibility. IACtHR found that the state violated ACHR. The facts of the case concern the murder of the human rights defender Jesъs Marнa Valle Jaramillo, in retaliation for the claims he made between 1995 and 1998 regarding the collusion between the National Army and the paramilitary. Radilla Pacheco, para. 127; Argьelles y otros, para. 189. This case involves twenty members of the armed forces who were accused of various crimes in connection with the misappropriation of state military funds. The victims were all arrested and detained beginning in 1980; two were held in detention for one year, while eighteen remained in detention for seven years. In 1989, the state military tribunal found all twenty guilty of the crimes they had been accused of. The victims sought recourse before the domestic courts of the state, which resulted in one acquittal and a reduction of the others' sentences. IACtHR found that the state violated ACHR because of the state's prolonged detention of the victims, and the failure to adjudicate their cases within a reasonable time. The petition concerns the arrest and criminal proceedings for military fraud (based on a series of accounting and administrative irregularities) carried out against 20 Argentine military officers. The legal proceedings were initiated in October 1980 under military jurisdiction and substantiated under the Military Justice Code of Argentina, and concurring opinion of Judge Sergio Garcнa Ramнrez, in Lypez Blvarez, para. 29. This case is about the harassment and judicial persecution of the leader of an organisation of indigenous peoples in Honduras whose land was encroached upon and seized by foreign investors. Alfredo Lypez Blvarez was a member of a Honduran Garifuna community. He was arrested for drug possession and illegal trafficking on April 27, 1997 and was acquitted of the charges in January of 2003, but remained in custody until August 2003. The state of Honduras was found to have violated ACHR in the treatment of Lypez Blvarez. The facts of the case refer to the deprivation of liberty of Alfredo Lypez Blvarez, who was president of the 'Comitй de Defensa de Tierras Triunfeñas' [Committee for the Defense of Triunfeñas Lands], and vice-president of the 'Organización Fraternal Negra de Honduras' [Black Fraternal Organization of Honduras], after being detained by agents of the state for the alleged crime of drugs trafficking. After being transferred to the Criminal Investigation Division he suffered torture and was coerced into incriminating himself. He was eventually acquitted, however was detained for a further 7 months.

2. Actions of the parties involved: The length of the proceedings is analysed concerning the conduct of the state authorities and the parties. Delays caused by the parties can be considered when assessing the reasonableness of the duration.
3. Actions of judicial and administrative authorities: The Court examines whether state bodies undertook appropriate and effective measures to carry out the proceedings without undue delay. Prolonged delays or lack of initiative on the part of the state may result in a violation of the right to a reasonable time.
4. Negative impact on the party: It is important to assess whether the prolonged duration of the proceedings has negative consequences for the individual, such as stress, limitation of the right to defence and violation of personal or economic rights. The greater the adverse effects, the less tolerance there is for lengthy proceedings.

In the above-mentioned cases, the IACtHR applied these criteria to determine whether delays in national proceedings complied with the requirement of a reasonable time. In both cases, it was emphasised that the duration of proceedings cannot be assessed solely quantitatively and must always be evaluated in relation to the quality of the state's actions and the actual impact of delays on the rights of the parties.

The early jurisprudence of the IACHR established four criteria for assessing the reasonableness of the duration of proceedings, which continue to serve as the basis for analysing the right to a fair and prompt resolution of cases within the Inter-American system. These criteria highlight the balance between the complexity of the case and the state's obligations, while protecting individual rights from the consequences of undue delays.

f. Precautions

The case law has dealt, considering the norms and practices in several countries of the region, with preventive measures frequently used in criminal proceedings, such as arrest and pre-trial detention. The first must comply with the legal requirements regarding form and content,[145] while the second, which is excessively applied, contrary to the guidelines of 'minimal' criminal law, should be limited to hypotheses in which the presence of the accused in the proceedings is threatened or the evidence is

145 Gangaram Panday. Fondo, Reparaciones y Costas, para. 47. On November 5, 1998, Asok Gangrama Panday was killed in Suriname after being illegally detained in a building for deportees at the Zanderij Airport by the Military Police of Suriname. There was conflicting evidence about whether the victim had been tortured while imprisoned, with a state agent admitting that the victim's mood had been affected by his expulsion from the Netherlands and that this psychological condition had been intensified by his detention. IACtHR found that the state violated ACHR. The facts of the case refer to the illegal detention, torture and subsequent death of Asok Gangaram Panday, on the part of the Military Police. 'Niños de la Calle' (Villagrán Morales y otros). Fondo, para. 131.

endangered.[146] Here, the case law considers the unquestionable tension between the presumption of innocence and preventive deprivation of liberty. Hence, the IACtHR's statements concerning judicial review of deprivation of liberty[147] and the material conditions in which it should be carried out are important.[148] Furthermore, it established restrictive criteria for the use of solitary confinement.[149]

146 Chaparro Álvarez y Lapo Íñiguez, para. 93. Acosta Calderón, para. 111. On November 15, 1989, the Customs Military Police arrested Acosta Calderón, a citizen of Colombia, under suspicion of drug trafficking. Acosta Calderyn's statement was not received by a Judge until two years after his detention and he was not notified of his right to consulate assistance during the five years he was in custody pending trial. Acosta Calderyn was found guilty of drug charges on December 8, 1994, despite the lack of evidence of drugs appearing at any time. He was released on July 29, 1996 for having served part of his sentence while he was in prison pending trial, but after he was released in July of 1996, the Commission lost contact with him. IACtHR found the state violated ACHR. The facts of the case concern the detention of Colombian national Rigoberto Acosta Calderyn on suspicion of drug trafficking by Military Customs Police in November 1998. Argьelles y otros, para. 130.

147 Bayarri, para. 74; Argьelles y otros, para. 121.

148 'Instituto de Reeducaciyn del Menor', para. 153. A Paraguayan juvenile criminal facility, known as the Panchito Lypez Center, virtually ignored every international standard pertaining to juvenile incarceration. The conditions were grossly inadequate for the interning of children, specifically: overpopulation, overcrowding, lack of sanitation, inadequate infrastructure and prison guard staff that was both too small and poorly trained. This was the first case where IACtHR established standards for the young people's detention conditions. At that time, the law did not establish that a custodial sentence should only be passed as a last resort and for the shortest possible time, particularly in the case of minors. IACtHR found that the state violated ACHR. The facts of the case concern the grave conditions of detention to which children were subjected in the 'Instituto de Reeducaciyn del Menor 'Panchito Lypez" [Institute of Reeducation of the Minor 'Panchito Lypez'] between the years 1996 and 2011. It concerns the damages caused by three fires which occurred in the years 2000 and 2001, in which 12 children died and dozens were left injured.

149 Loayza Tamayo. Fondo, paras. 57–58. Suбrez Rosero. Fondo, paras. 89–90, Cantoral Benavides. Fondo, para. 84; Penal Miguel Castro, para. 232. This case is about the Peruvian National Police and Peruvian military's deliberate and unprovoked attack on the Miguel Castro Castro Prison. During this attack, several members of Sendero Luminoso and Tupac Amaru were detained, dozens of inmates were killed, and hundreds of inmates were injured. IACtHR found that the state violated ACHR, the American Convention on the Prevention, Punishment and Eradication of Violence Against Women and the American Convention to Prevent and Punish Torture. The events of instant case refer to the extrajudicial execution, torture and mistreatment of prisoners in the two pavilions of Miguel Castro Castro penitentiary, a maximum-security prison, who were mostly serving sentences for terrorist acts. The massacre that took place in May 1992 was developed under the protection of the so-called 'Operativo Mudanza'. During the operation, state agents from both the police and army used weapons of war, tear gas bombs and immobilising gas against the prisoners, initiating the action on the day of female visits to the prison. The survivors were forced to remain in the prison areas called 'no-man's land' and 'admission,' lying face down on the ground, without shelter and receiving constant beatings and assaults for several days until their transfer to other penitentiaries. Once they were relocated, the beatings and malnutrition continued and many of the wounded did not receive adequate and timely medical attention.

g. Appeal

Another aspect of a fair trial which raises several doubts and questions concern the review of respect for human rights by a judge or a higher court, as provided for in Article 8, paragraph 2, letter h) of the ACHR. This review, not subject to limitations or obstacles which prevent or condition it, is invariably provided for concerning the legality (i.e., compatibility with the human rights regime) of the decision of the lower body.[150] It is a question of preserving the power of broad control regarding human rights, and individual rights, in the hands of a higher body whose task goes beyond the limits of the scope of cessation, understood as a control of legality.

The Court, in *Arboleda v. Colombia*, emphasised that the obligation to appeal concerns convictions, even if they were issued in the second instance. The ruling indicates that the state has a duty to ensure access an effective remedy in cases where individuals have been finally convicted, which stems from the right to a fair trial and the right to effective judicial protection guaranteed by Article 8 of the Convention. The Court noted that there is no obligation to automatically appeal acquittal rulings or those that do not entail criminal sanctions. The focus of protection on convictions results from the fact that they have a direct and significant impact on the individual's liberty, property rights and personal integrity. In this case, the IACtHR stated that the right to appeal is a component of the substantive guarantee of a fair trial and its absence in the case of convictions may constitute a violation of the state's obligations. Hence, it explicitly limited the scope of the appeal obligation to situations where the issued judgment causes a restriction of the individual's rights, ensuring proportionality and effectiveness of judicial remedies. The jurisprudence in *Arboleda v. Colombia* establishes that the state's obligation to ensure the right to appeal concerns convictions, regardless of the instance in which they were issued, allowing procedural protection to be focused on situations that violate the rights and freedoms of the individual.

h. Ne bis in idem

The IACtHR's reflections and criteria on the principle of *res judicata* and compliance with the classic principle of *ne bis in idem* are noteworthy. Based on its documented

150 Herrera Ulloa, para. 158; Mohamed, para. 97. This case concerns violations committed after Carlos Alberto Mohamed's criminal conviction for manslaughter from a traffic accident in which a person died. Specifically, the state disregarded several guarantees, including the principles of legality and non-retroactivity, the right to defence, the right to appeal a conviction, and the right to effective recourse to provide redress for those violations. The facts of the case relate to the sentencing of Carlos Alberto Mohamed for culpable homicide because of a traffic accident of which he was part and because of which a person died. In the first instance, the victim was absolved of all charges against him as it was considered that his responsibility for the events had not been sufficiently established. However, following an appeal presented by the District Attorney's Office, he was subsequently sentenced. The criminal proceedings against him did not establish any legal recourse for the revision of the sentence, which was considered to violate the victim's right to appeal the judgment. and concurring opinion of Judge Sergio Garcha Ramhrez, in Herrera Ulloa, paras. 30–31.

analyses in disputed cases and on the opinions of other tribunals, mainly international criminal tribunals,[151] the IACtHR has considered that the legitimacy of a trial, and in due time of a judgement, results from the timely observance of the rules that govern it and are applied to it, both substantive and instrumental.[152] The IACtHR has questioned the quality of trials conducted before bodies that do not meet the elements of a judge or with files that do not respect the principles or rules of a fair trial. Therefore, it is possible to reopen proceedings that were allegedly closed by *res judicata* and were not a genuine fair trial, concluded by a genuine and final judgement, and issue a new (i.e., genuine) judgement on facts that were known in the sham trials and decided on the basis of inadmissible provisions.[153]

i. Investigation

The regional case law contains important changes concerning the characteristics of an investigation into serious violations of human rights, understood as a state

151 Article 20 of the Rome Statute of the International Criminal Court, Article 9 of the Statute of the International Tribunal for Rwanda, and Article 10 of the Statute of the International Tribunal for the former Yugoslavia, cited in Carpio Nicolle, para. 131. On July 3, 1993, the state-sponsored Civilian Self-Defense Patrols, murdered and an assaulted a group of delegates and Jorge Carpio Nicolle. Carpio Nicolle was a well-known journalist and politician Jorge, who opposed President Serrano Elнas' coup d'ётat. In this case, IACtHR found that the state violated ACHR. The events of the case refer to the murder of Jorge Carpio Nicolle and a group of his delegation, after being intercepted by a group of armed men, members of the Civil Defense Patrol (PAC), in July 1993 whilst they were on a political tour. Carpio was a prominent politician and journalist, founder of the National Centrist Union party, and thereby opposition to the government. After the events, those who survived denounced the crime, which has remained in impunity. At the time when these events occurred, the PAC of San Pedro de Jocopilas committed crimes against the region's residents, protected by a structure of impunity. Almonacid Arellano, para. 154.; Vйase, asimismo, ICC, The Prosecutor v. Jean Pierre Bemba-Gombo, Judgment pursuant to Article 74 of the Statue, March 21, 2016, para. 744.

152 Castillo Petruzzi y otros, para. 221.

153 Ibid. Almonacid Arellano y otros, paras. 151–154; La Cantuta, paras. 153–154. The facts of *La Cantuta et al. v. Peru* occurred in the context of Peruvian President Alberto Fujimori's anti-terrorism campaign. After Universidad Nacional de Educaciyn Enrique Guzmбn y Valle students protested President Fujimori, Peruvian military forces, including members of the Colina Group, a paramilitary death squad, disappeared and extrajudicially executed nine students and a professor. Though several individuals were found guilty of human rights abuses against these victims, the state pardoned them under human rights amnesty laws. IACtHR's decision dealt with both the state's responsibility for the victims' disappearance and murder, and its failure to hold those responsible accountable for their human rights violations. The facts of the case relate to the illegal arrest, forced disappearance and extrajudicial execution of a professor and a group of students from the Enrique Guzmбn y Valle National University in La Cantuta, Lima. This event took place at dawn on July 18, 1992 and was carried out by Peruvian army personnel and agents from the 'Colina' group. This group, assigned to the National Intelligence Service, was responsible for the identification, control and elimination of those people who were suspected of belonging to insurgent or opposition groups to President Fujimori's regime, through the systematic use of indiscriminate extrajudicial executions, mass murder, forced disappearances and torture.

obligation, which is not subject to the demands of the victims.[154] This investigation must be full, prompt, serious and diligent and must cover all the facts and context of the violation.[155] Another area of procedure covered by the IACtHR's recent case law, which was not addressed in the same way in the original case law, is of the investigative standards that a national body must apply in investigations. Hence, methods previously coined by soft law enter strong international human rights law, given that they are contained in the judgements. Notable case law concerning investigations into

154 Velбsquez Rodrнguez, Fondo, para. 177. This is the first case decided by IACtHR. The Velбsquez Rodrнguez case, together with the Godнnez Cruz, and Fairйn Garbi and Solнs Corrales cases, all considered by IACtHR around the same time, form a trio of landmark cases targeting forced disappearance practices by the Honduran government during the early 1980s. The facts of the case refer to the forced disappearance of Manfredo Velбsquez Rodrнguez, a university student kidnapped by agents of the state in September 1982. Such acts occurred in a time in which disappearances constituted a systematic practice utilised on those persons considered dangerous for the security of the state; Velбsquez Paiz, para. 143. In August 2005, nineteen-year-old college student Claudina Isabel Velбsquez Paiz disappeared from a party. Immediately, one of her friends notified her parents, who called the police and began to search for their daughter. Despite a substantial increase of violence towards women at the time, state police refused to help Ms. Velбsquez Paiz's family search for her, and refused to file a police report on her disappearance. Ms. Velбsquez Paiz's family attempted three times throughout the night and early morning hours to file a police report and obtain help in their search. Ms. Velбsquez Paiz's body was discovered the next morning; she had been severely beaten and sexually assaulted. IACtHR found that the state violated ACHR and the Convention on the Prevention, Punishment and Eradication of Violence against Women for failing to act in Ms. Velбsquez Paiz's case, and overall, for failing to take steps to address the climate of gender-based violence in the state. The facts of the case refer to rape, disappearance and subsequent murder of Claudina Velбsquez Paiz 19-year- old who studied undergraduate law and social sciences. On August 12, 2005 she left her home to go to university, but never returned. The next day her body was found with signs of violence in Zone 11 of Guatemala City. IACtHR framed the facts within the context of increased homicidal violence against women in the country.

155 Velбsquez Rodrнguez, Fondo, paras. 176–177; Velбsquez Paiz, para. 143.

serious human rights violations include torture,[156] enforced disappearances[157] and the protection of women.[158]

Impunity represents a fundamental principle in the protection of human rights within the Inter-American system, encompassing primarily the prohibition of amnesty, the statute of limitations for serious crimes, the *ne bis in idem* principle and other mechanisms that limit criminal responsibility for perpetrators of serious human rights violations. The IACtHR indicates that states cannot evade holding accountable those responsible for crimes against humanity, including murder, torture, enforced disappearances or other serious breaches of fundamental rights. In *Barrios Altos v. Peru* (2001), the IACtHR explicitly stated that an amnesty law that prevents the prosecution of perpetrators is incompatible with the state's obligation to ensure effective means of protecting human rights. This established a precedent prohibiting amnesty in most serious violations. *El Mozote and Others v. El Salvador* (2012) extended this

156 Bueno Alves, para. 111. On April 5, 1988, Juan Francisco Bueno Alves, a Uruguayan national residing in Argentina, and his attorney, Carlos Alberto Pйrez-Galindo, were detained under order of the criminal court. The police beat the next day Bueno Alves to force him to confess against himself and his attorney. IACtHR found that the state violated ACHR. The facts of the case relate to the torture suffered by Uruguayan national Juan Francisco Bueno Alves, at the hands of members of the Argentine Federal Police. This was carried out with the intention of making him declare against himself and his lawyer. Following these events, judicial proceedings lasting more than 9 years began and were finished without the identification and subsequent trial of those responsible having been established; Bayarri, para. 88 and seq.; Cabrera Garcнa y Montiel Flores, para. 126 and seq.

157 Velбsquez Rodrнguez. Excepciones Preliminares, paras. 176 et seq Heliodoro Portugal, para. 115. On May 14, 1970, Heliodoro Portugal was in a cafй in Panama City when he was forced to get into a vehicle that drove off to an unknown destination. The Commission alleged that state agents took part in these acts, which occurred at a time when Panama was governed by a military regime. During the military dictatorship, it was not possible to have recourse to the domestic authorities to file complaints for human rights violations or to know the whereabouts of a person. Heliodoro Portugal's daughter did not report his disappearance until May 1990, when democracy was restored in the country. In September 1999, the Attorney General's Office found human remains in a military barracks in Tocumen, which were presumed to be those of a Catholic priest; however, after undergoing DNA testing, they were identified as belonging to the victim. The corresponding criminal proceeding is still open and those responsible have not been convicted. IACtHR found that the state violated ACHR and the Inter-IACFDP. The facts of the case concern the forced disappearance, torture and extrajudicial execution of Heliodoro Portugal, detained on May 14, 1979, while the country was governed by a military regime. The facts also concern the failure of the state to investigate, identify and convict those responsible. The remains of Heliodoro Portugal were found in September 1999 in military barracks, although only in 2001 was it confirmed with absolute certainty that these remains pertained to him. Vбsquez Durand y otros, para. 149 and seq.

158 Gonzбlez y otros ('Campo Algodonero'), para. 149 et seq.; Veliz Franco y otros, para. 178 et seq. On December 16, 2001, Marнa Isabel Veliz Franco, 15 years old, left her home at 8:00 a.m. and never returned. The next day Mrs. Rosa Elvira Franco Sandoval, her mother, reported her daughter's disappearance to state officials, but there were no efforts made to find her. After receiving an anonymous call two days later, Mrs. Franco Sandoval found her daughter's body. IACtHR found that the state violated ACHR. The facts of the petition concern the disappearance and the killing of the 15-year-old Marнa Isabel Vйliz Franco who disappeared on December 16, 2001 as she was leaving work. Velбsquez Paiz y otros, para. 143 et seq.

interpretation, recognising that statutes of limitations and procedural obstacles in prosecuting perpetrators cannot result in impunity in cases of mass crimes or crimes against humanity. It emphasised that the state has an inalienable obligation to pursue truth and ensure justice, regardless of the passage of time.

Gelman v. Uruguay (2011) introduced an additional dimension related to *ne bis in idem*, indicating that the prohibition of double jeopardy cannot be used to exempt from criminal responsibility for serious human rights violations. The Court stated that the rights of victims cannot be limited by procedural mechanisms that disproportionately protect perpetrators against the severity of the violations. Moreover, in *Perez Lucas v. Guatemala* (2020), in which the IACtHR reaffirmed the principle of non-impunity in the region, extended its application to all legal or procedural mechanisms that may prevent victims from accessing justice or effective responsibility for serious violations.

j. Victim

The IACtHR, which has expanded the procedural presence of victims through regulatory reforms, has addressed the role of the victim in national procedures for investigating violations. The case law demands the widest possible participation of the victim in the investigation and the trial,[159] which does not make them the person conducting the investigation or the promoter of the proceedings. The position of the victims and their active participation in the prosecution are not limited to the investigation and are used throughout the process.[160] In *La Rochela Massacre v. Colombia*, the IACtHR established state responsibility for acts committed by paramilitary groups concerning territorial expansion and control against a guerrilla insurgency, and highlighted the gravity of the acts that intimidated judicial officials investigating serious human rights violations. It elaborated on the standards for violations of the right to life of

159 Masacres de Ituango, para. 296. Goiburъ y otros, para. 122. In 1974 and 1977, state agents illegally and arbitrarily detained, tortured, and disappeared Agustнn Goiburъ Gimйnez, Carlos Josй Mancuello Bareiro and brothers Rodolfo Feliciano and Benjamнn de Jesъs Ramнrez Villalba. As of the date of the judgment, the crimes were not investigated and the whereabouts of the victims remained unknown. IACtHR found that the state violated ACHR. The facts of the case concern the illegal detention, torture and forced disappearance of Agustнn Goiburъ Gimйnez, Carlos Josй Mancuello Bareiro and the brothers Rodolfo and Benjamнn Ramнrez Villalba, which occurred during the dictatorship of Alfredo Stroessner in Paraguay, in the context of the so-called 'Operation Condor' - the name given to the alliance which united and combined the security forces and intelligence of services of Chile, Argentina, Uruguay, Paraguay, Bolivia and Brazil. y Masacre de La Rochela, para. 220.

160 Garcнa Prieto y otros, para. 104. This case is about the assassination of Garcнa Prieto during a robbery, on June 10, 1994, by members of an illegal armed group. Although the assassins were arrested and tried, El Salvador was nonetheless found in violation of ACHR because of several deficiencies in the investigations and prosecution. The case is notable for a discussion of the provisional measures in IAHRS. The facts of the case concern the non-compliance with the state obligation to investigate, in an effective and adequate manner, the homicide of Ramyn Garcнa Prieto in June 1994, and the threats and harassment suffered by his family members. Velбsquez Paiz, para. 144.

the three survivors, considering that their deaths were not caused, even though they were executed by means of a 'coup d'ĭtat', due to random causes. It analysed the lack of investigation and impunity of the facts concerning the due diligence standard.

Similarly, the IACtHR commented in *Valle Jaramillo et al. v. Colombia*. It reiterated that by encouraging the formation of self-defence groups, the Colombian State objectively created a situation of danger for its population. It highlighted the damage suffered by human rights defenders because of their work of exposing rights violations committed by paramilitaries and members of the security forces. Furthermore, in assessing the reasonableness of the time limitation on the duty to investigate, it considered the criterion of the impact of the length of the trial about the surviving victims. An important case on the actions taken by the paramilitaries was the ruling on the scope of the duty to provide reparation in *Carpio Nicolle et al. v. Guatemala*, in which the state admitted its international responsibility.

In *Castillo Petruzzi et al v. Peru*, the IACtHR considered the prosecution and conviction of the victims in a military jurisdiction by a 'faceless' court, and the imprecision of the definitions of the crimes of terrorism and treason for which they were convicted and their legal position was violated, both in terms of the applicable sanction of IACtHR of knowledge and the relevant procedure, resulting in a violation of their rights of defence and the principle of legality. The IACtHR, in *Quispialaya Vilcapoma v. Peru*, elaborated on the standards for the state as guarantor for those in its custody, establishing a differentiated situation for those in military service. It reiterated its assessments on the scope of the competence of military jurisdiction. In *Cantoral Benavides v. Peru*, it assessed the compatibility of the crime of terrorism and treason with the principle of criminal legalism.

The standards for excessive use of force during military operations were established by the IACtHR in *Miguel Castro Castro Prison v. Peru*. These concerned operations, torture and ill-treatment to which prisoners were subjected. It referred particularly to gender-based violence and accounted for the differential way in which the facts affected women, indicating how the violation of rights by the state can influence society. The Tribunal noted that in the 1980s and until the end of 2000, Peru experienced conflict between armed groups and agents of the police and armed forces. This was exacerbated by systematic human rights violations, including extrajudicial executions and enforced disappearances, of persons suspected of belonging to opposing political groups, which were carried out by state officials on the orders of the military and police chiefs.

Velásquez Rodríguez v. Honduras was the first judgment handed down by IACtHR, which established important standards on the legal nature and elements of enforced disappearance, as a multiple and continuing violation of numerous Convention rights, elaborating the state's obligations to respect, guarantee and adapt domestic law and prevent, investigate, punish and redress any violations. In *La Cantuta et al. v. Peru*, investigations were initiated and dealt with under military jurisdiction; however, the acts went unpunished, a situation reinforced by the application of amnesty provisions. The events in La Cantuta were encouraged by the general situation of impunity

for serious human rights violations at the time, supported and tolerated by the lack of judicial guarantees and the ineffectiveness of judicial institutions in dealing with systematic human rights violations. It applied the standards on enforced disappearances of persons and the state's obligation to investigate *ex officio,* without delay and in a serious, impartial and effective manner.

In *Goiburú et al. v. Paraguay,* it consolidated its jurisprudence on the continuous or permanent nature of the crime of enforced disappearance and held that the crime and the consequent obligation to investigate and punish those responsible are non-derogable norms of international law or *jus cogens*. It analysed the obligation to investigate even after the fall of a dictatorial regime, including the scope of the obligation of interstate cooperation expressed in extradition. It reiterated its jurisprudence on the specific characteristics and continuing nature of the crime of enforced disappearance in *Heliodoro Portugal v. Panama* and assessed whether the criminal definition of the crime of enforced disappearance in the domestic legal system met the minimum requirements and elements required by international human rights law.

The IACtHR set standards for unlawful and arbitrary detention in *Gangaram Panday v. Suriname*. It set standards on pre-trial detention concerning the right to the presumption of innocence and other violations of judicial guarantees relating to the reasonable length of criminal proceedings, the right of the accused to be brought promptly before a competent judge and to be informed in advance and in detail of the charges against him. In *Suárez Rosero v. Ecuador,* it set out the standards for pre-trial detention as a non-criminal preventive measure and the exceptional nature of incommunicado detention, while ratifying the broad extent to which *habeas corpus* should be understood. In *López Álvarez v. Honduras,* it addressed standards on pre-trial detention, the right to an effective remedy and a reasonable time. It has developed standards concerning the right to communicate, which in this case was violated by an order of the director of the prison where the victim was held, prohibiting the Garifuna people from speaking their mother tongue, which constituted an act of discrimination.

The IACtHR set out standards relating to the right to defence, be tried by competent courts and appeal against a sentence. It referred to the criteria for pre-trial detention in *Barreto Leiva v. Venezuela* and, in *Bayarri v. Argentina*, it developed standards on the limits of pre-trial detention practice. It analysed, in *Argüelles et al. v. Argentina,* the dimensions of the right to personal liberty and the elements that must be respected to avoid arbitrary and illegal detention. It analysed the scope of the pre-trial detention regime and the right to judicial guarantees within the operation and competence of the military jurisdiction.

Regarding the violations of personal integrity, the IACtHR stated, in *Durand and Ugarte v. Peru*, that it is not possible to infer the practice of torture or cruel, inhuman or degrading treatment from the disproportionate use of force to break up a riot, as such concepts have their own legal content and are not necessarily and automatically inferred from the arbitrary deprivation of life. It analysed violations of the right to life and personal integrity under the additional and specific obligations that children's rights impose on states. In *Juvenile Reeducation Institute v. Paraguay,* it determined the

content and scope of these rights, considering the relevant provisions of the Convention on the Rights of the Child and the Additional Protocol on ESCR, which, together with ACHR, constitute an international *corpus juris* for the protection of children that states must respect. It considered that in legal proceedings where the rights of the child are at stake, especially when the child is the subject of criminal proceedings, the exercise of the judicial guarantees enshrined in Article 8 of the ACHR requires the adoption of concrete and specific measures.

In *Velásquez Paiz et al. v. Guatemala*, the Court analysed the state's obligation to guarantee the right to life, integrity, honour and dignity concerning the breach of the duty to prevent and the lack of due diligence in investigating the facts. Regarding the latter, it ratified the additional scope of the state's obligation to investigate gender-based violence and ratified minimum guidelines to guarantee its effectiveness. In *Mejía Idrovo v. Ecuador*, it applied the standards for the effectiveness of domestic remedies, adding that the state must guarantee the means to enforce final decisions and judgments issued by the competent authorities, as their effectiveness depends on their enforcement while ensuring certainty about the law or controversy discussed in a particular case. Similarly, the principle of effective judicial protection requires that enforcement procedures are available to the parties, without hindrance or undue delay, to achieve their objective in a swift, simple and comprehensive manner.

The IACtHR analysed the extent of restrictions on the political right to run for public office (passive electoral right) arising from administrative decisions in *López Mendoza v. Venezuela*. It elaborated on the standards for guarantees in administrative procedures, particularly regarding the duty to state reasons. Additionally, it applied the 'foreseeability test' in analysing the discretion granted to the authority. In *Manuel Cepeda Vargas v. Colombia*, it noted the importance and relationship of the rights to freedom of expression, association and political rights in a democratic society. It examined the state's obligation to guarantee the effective participation of groups and individuals who express opposing voices as essential elements of a democratic society and address the vulnerability faced by members of certain groups or sectors.

In *Bueno Alves v. Argentina*, the IACtHR emphasised the importance of prompt investigation in cases alleging torture or ill-treatment, especially in the absence of witnesses. In *García Prieto et al v. El Salvador*, it analysed the state's response concerning the due diligence test, setting standards on the importance of using appropriate technical means to investigate threats and harassment. In *Mohamed v. Argentina*, it progressed in analysing the right of appeal as a guarantee of the individual against the state, instead of merely being a guideline for the design of appeal systems in states' legal systems. It analysed the compatibility of the crime of terrorism with the principle of legality and retroactivity in *García Asto and Ramírez Rojas v. Peru*. In contrast, the standards for the incompatibility of the mandatory imposition of the death penalty with the right to life and the prohibition of arbitrary interference with life were established in *DaCosta Cadogan v. Barbados*. In analysing whether the mere availability of a psychiatric evaluation in favour of the victim is sufficient to guarantee the right to a fair trial, it established a greater stringency of compliance with

judicial guarantees in cases that may result in the application of the death penalty. Additionally, it analysed the scope of the state's positive obligation to adopt legislative measures to guarantee the exercise of rights.

In *Baena Ricardo et al. v. Panama*, the IACtHR stated that the principles of legality and non-retroactivity apply to administrative criminal norms, as they are an expression of the state's criminal power. It confirmed that judicial guarantees and due process apply equally to administrative proceedings and referred to freedom of association concerning the dismissal of trade union leaders. In the case of *Personas dominicanas y haitianas expulsadas (Tide Méndez y otros)*, it analysed the right to nationality and equality before the law concerning the state's obligation to prevent and avoid statelessness, and the minimum guarantees that must govern migration procedures. An important judgment against gender-based violence was *Veliz Franco et al. v. Guatemala*, where it placed its analysis in the context of the invisibility of violence against women in Guatemala to develop standards for the state's duty of prevention of particular risks that women face and the criteria for assessing evidence in this type of case.

2.13. Adequate and Effective Legal Remedy

In regional and case laws, the concept of a 'remedy' is important and linked to the condition of its 'effectiveness'. Therefore, reference is made to the existence of a simple and speedy remedy or 'other effective remedy' before judges or courts for the defence of fundamental rights (Article 25), the right 'to appeal against a decision' given in the proceedings, a right which forms part of a fair trial (Article 8, paragraph 2, letter h)), the possibility of an appeal, although this expression is not used in this case, to combat death penalty (Article 4(6)), the possibility of challenging death penalty (Article 8, paragraph 2, letter h)), the right to appeal against the judgement of the IACtHR (Article 8, paragraph 2, letter h)), the ability to challenge the deprivation of liberty (Article 7(6)) and the necessity of filing and exhausting domestic remedies as a condition for the admissibility of an individual complaint or petition before the IAHRS (Article 46, paragraph 1, letter a)). Unless these remedies do not exist, the subject has no access to them or there is an 'undue delay' in issuing the decision that should have been issued (Article 46(2)).

It is not necessary to exhaust domestic remedies where the party concerned has no access to them because they are intimidated by the national authorities in a way that it is not reasonably possible to exhaust them[161] or where their financial situation prevents them from availing the remedy.[162] The appeal by the right holder, or by a

161 OC-11/90, para. 33.
162 Ibid., para. 30.

third party acting on their behalf,[163] should be effective.[164] However, the IACtHR has held that the effectiveness of a remedy does not mean that it must necessarily lead to a solution favourable to the person using it, rather it constitutes an appropriate means of achieving the intended result.[165]

The IACtHR's case law refers to the elusiveness of remedies for preserving the so-called 'hard core' rights when it provides, as a general remedy, for the suspension of the exercise of rights in situations of gravity (Article 27, paragraph 2). In this case, it concerns the 'judicial guarantees necessary to protect such rights', for instance, *habeas corpus* or *amparo*,[166] with the continuing validity of an appropriate remedy to challenge the deprivation of liberty (Article 7, paragraph 6). It applied standards of effective judicial protection and developed criteria for judicial independence related to due process guarantees in the removal process in *Chocrón Chocrón v. Venezuela*. It further referred to the obligation to give reasons for decisions and their relation to the

163 'Niños de la Calle' (Villagran Morales y otros). Fondo, para. 236.

164 Velбsquez Rodrнguez. Fondo, para. 68. Bбmaca Velбsquez. Fondo, para. 191. Garcнa y familiares, From February 17 through 19, 1984, the National Police undertook an operation to cleanse and patrol the state (Operativo de Limpieza y Patrullaje). On the morning of February 18, 1984, Edgar Fernando Garcнa, a teacher and administrative employee of the claimed communist organisation La Industria Centro Americana de Vidrio S.A (CAVISA), was walking down the street when he was stopped by the National Police, injured, and detained under the Operation. Garcнa was seen in various secret prisons, and last seen alive in December 1984. IACtHR found that the state violated ACHR. The facts of the case refer to the forced disappearance of Edgar Fernando Garcнa, trade unionist and student leader, following his arrest on February 18, 1994, by members of the Special Operations Brigade of the National Police. IACtHR placed the events in a context of internal violence in the country during which the intelligence services played a particularly important role as being responsible for gathering and reviewing information on those people considered 'internal enemies.' OC-9/87, para. 24.

165 Velбsquez Rodrнguez. Fondo, para. 67, Chocryn Chocryn, para 128 Mercedes Chocryn Chocryn was arbitrarily removed from her post as Judge of First Instance for Criminal Matters of the Metropolitan Caracas Judicial Circuit. Ms. Chocryn Chocryn was not afforded any minimum guarantees of due process or given adequate justification for her removal. She was not given the possibility to be heard or to exercise her right of defence. IACtHR found that the state violated ACHR. The events of the case relate to the removal from office of Mercedes Chocryn Chocryn in 2000, who had a provisional appointment as Criminal Judge of First Instance of the Caracas Metropolitan Area Judicial Circuit. Lypez Mendoza, para. 184; Barbani Duarte y otros, para. 201. In this case, the Banco de Montevideo transferred funds belonging to 539 of its customers to the Trade & Commerce Bank in the Cayman Islands without their permission. An Advisory Commission was created under the Financial System Reform Law to deal with the claims of these customers. This case came before IACtHR because the state failed to provide the victims with an impartial hearing for their claims before the Advisory Commission. IACtHR found that the state violated ACHR. The events of the case refer to the transference of the bank funds of a group of depositors in the Banco Montevideo S.A to the Trade and Commerce Bank in the Caiman Islands. This occurred during the financial crisis in Uruguay at the close of the year 2001. Some financial organisations had cash-flow issues which provoked the intervention of the state and their subsequent liquidation. The depositors base their demands in accordance with the procedures set out in Law N° 17.613, which regulates the financial system and establishes a special administrative procedure for the determination of the rights of depositors whose savings have been transferred to other institutions 'without their consent'.

166 Durand y Ugarte. Fondo, para. 106; OC-8/87, para. 42.

right to defence. In *Barbani Duarte et al. v. Uruguay,* it set standards on the scope of due process and the right to be heard in proceedings before administrative authorities.

In *Hernández v. Argentina,* the IACtHR provided a detailed explanation of the standards of adequacy and effectiveness of domestic legal remedies within the Inter-American system. The ruling emphasises that ensuring formal legal procedures is insufficient to fulfil the state's obligations; protective measures must be adequate (*adequadas*) and effective (*efectivas*) in practice. Adequacy means that the legal remedy can resolve the problem that caused the violation and is provided by law in a manner that ensures a possibility for the victim to assert their claims. The Court indicated that an adequate measure must correspond to the nature and seriousness of the violation and lead to the restoration of a state following the law or to compensation for the harm. Effectiveness refers to the practical ability to achieve the protection of the victim's rights. This means that the measure must be genuinely accessible, function efficiently and allow for the attainment of a real result, such as restoring the violated right or providing appropriate reparation. The Court highlighted that a lack of effectiveness, even when a procedure exists formally, results in a breach of the state's obligation to ensure human rights protection. In the Hernбndez case, applying these criteria enabled the IACtHR to assess whether the state had taken appropriate and effective actions to establish the truth, hold perpetrators accountable and ensure effective reparation for the victim. Thus, the ruling establishes a standard for evaluating domestic legal remedies, emphasising the formal availability of procedures and their actual impact on human rights protection.

2.14. Use of Force

The reasonable or rational use of force has been a common theme in the case law, similar to the disproportionate use of force in practice to achieve ends that may be justified in principle, yet whose achievement leads to violations of rights and freedoms. International human rights law has created standards to which the exercise of authority must be subjected. The IACtHR has dealt with the use of force in various hypotheses and highlighted the conditions that legitimise this use and its limits concerning legality, necessity, proportionality and requirements that govern the state's actions. Such cases include preventive measures (detention) in criminal proceedings,[167] control of

167 Familia Barrios, para. 49. Between 1998 to 2011, the Barrios family, including their children, were harassed by the Police of Aragua state. As part of this persecution, five members of the Barrios family have lost their lives and several of them have been detained and subjected to illegal and arbitrary searches of their homes, suffered threats against their lives and personal integrity, and have been forced to move from their place of residence. This case is part of a more general context of extrajudicial executions in Venezuela and most of the incidents that violated the life and personal integrity of the victims took place after IAHRS had requested protection for the Barrios family through provisional measures. IACtHR found that the state violated ACHR and the American Convention to Prevent and Punish Torture. The events of the case relate to the arrest, extrajudicial execution, torture and mistreatment to the detriment of several members of the Barrios family, perpetrated by the Aragua state Police, as well as the lack of investigation and punishment of those responsible. Between 1998 and 2011, a total of 7

public order disturbances in which the threshold of rationality has been significantly exceeded,[168] management of prison riots leading to mass violations of rights,[169]

family members were murdered. Uzcбtegui y otros, para. 132. On January 1, 2001, members of the state police extrajudicially executed Nйstor Josй Uzcбtegui and persecuted Nйstor's brother, Luis Enrique Uzcбtegui, in reaction to his search for justice for the death of his brother. There was no investigation into Josй Uzcбtegui's death, and no one was ever tried or punished for the crime. IACtHR found that the state violated ACHR. The events of the case, which occurred in January 2001, refer to the extrajudicial execution of Nestor Uzcбtegui and the arrest of his brothers Luis Enrique and Carlos Uzcбtegui, by members of state security forces. Hermanos Landaeta Mejнas y otros, para. 123 et seq. This case concerns the extrajudicial executions of teenage brothers Igmar Alexander Landaeta Mejнas and Eduardo Josй Landaeta Mejнas by state officials. The events occurred in the context of widespread extrajudicial executions in Venezuela, mainly by members of regional police forces caused by a poor institutional structure and a lack of effective oversight. When IACtHR considered the case, the state had yet to prosecute the authorities responsible for the executions. The criminal proceedings relating to Igmar's execution resulted in a dismissal, while the criminal proceedings relating to Eduardo's execution were still underway, sixteen years after their death. Eventually, IACtHR unanimously found that the state violated Igmar's right to life, Eduardo's rights to life and personal liberty, and the Mejнas family's rights to judicial guarantees and judicial protection. IACtHR held that it was not incumbent to rule upon the alleged violation of Igmar's right to humane treatment and that it did not have sufficient evidence to conclude that the state violated Eduardo's right to humane treatment. The facts of the case concern the extrajudicial executions of the brothers Igmar Alexander (age 18) and Eduardo Josй (age 17) by security forces in the state of Aragua in 1996. These events took place within a context of widespread police abuse in several states of Venezuela at the time.

168 Caracazo. Fondo, paras. 2 and 42. On February 16, 1989, the then President of Venezuela, Carlos Andrйs Pйrez, announced a series of structural adjustment measures to refinance the external debt through the International Monetary Fund that were implemented on February 27 that year. On February 27, 1989, an undetermined number of persons from the poorer sectors of the population began a series of disturbances in Garenas, state of Miranda, owing to the increase in urban transport rates and the failure of the Executive to grant a preferential rate to students. A sector of the Metropolitan Police was on strike, and consequently did not intervene promptly to control the disturbances. Armed forces were put together by the minister of defence, which consisted mostly of 17- to 18-year-old men. As a result of the disturbances in February and March of 1989, 276 people lost their lives. Some of these victims were not even participating in the disturbances and were shot in their homes, including woman and children. The state, through the Executive, ordered that an undetermined number of corpses should be buried in mass graves. IACtHR found that the state violated ACHR. The events of the present case relate to the extrajudicial execution of 35 people, the forced disappearance of 2 people, and the injuries caused to a further 3, which occurred as a result of acts (characterised by the disproportionate use of armed force in working-class neighbourhoods) perpetrated by members of the state security forces. Judicial investigations, many of these opened in military jurisdiction, did not establish those responsible for the acts. The events of the case occurred in early 1989 in a context of public disturbances that led the Executive to issue Decree No. 49 on February 28, 1989 suspending several guarantees for 23 days. Zambrano Vйlez y otros, paras. 83–85.

169 Neira Alegrнa. Fondo, paras. 74–76. On June 18, 1986, a riot in the San Juan Bautista correctional facility was put down by the Joint Command of the Armed Forces using excessive force. Neira Alegrнa, Edgar Zenteno Escobar and William Zenteno Escobar, three detainees, have been missing ever since. IACtHR found that the state violated ACHR. The facts of the case relate to the forced disappearance of Vнctor Neira Alegrнa, Edgar Zenteno Escobar and William Zenteno Escobar after a military operation carried out in the correctional establishment of El Frontyn, where they were detained and processed as alleged perpetrators of terrorism. The consequence

expulsion or deterrence of migrants through the use of overwhelming force[170] and state action in the event of internal armed conflict.[171]

The IACtHR applied the criteria relating to the use of force and firearms by security force officers and the state's duties of due diligence and humanity in *Landaeta Mejías Brothers et al. v. Venezuela*. Concerning Eduardo Josй, who was a minor at the time of his execution, the IACtHR developed standards relating to the circumstances of his deprivation of liberty under the special protection afforded to him as a child. In both cases, it assessed the investigations carried out in accordance with the standard of due diligence and reasonable time. In *Santo Domingo Massacre v. Colombia*, it noted its authority and the need to interpret the scope of treaty obligations under the principles of international humanitarian law and particularly examined the principles relating to non-international armed conflict, namely the principles of distinction,

of the operation is that the prison remained under the Joint Command of the Armed Forces as a Restricted Military Zone. Subsequently, the Navy ordered its demolition and since then the victims disappeared, meaning that the habeas corpus filed by their relatives were unsuccessful. Durand y Ugarte, Fondo, paras. 65–72; Montero Aranguren y otros (Retйn de Catia), para. 65 et seq. Penal Miguel Castro Castro, para. 277 and seq.

170 Nadege Dorzema y otros, para. 85.

171 In cases of armed conflict, the Court invoked, because of their specificity, the criteria of international humanitarian law relating to the use of force (principles of distinction, proportionality and precaution). Masacre de Santo Domingo, paras. 211–216. On December 13, 1998, the Colombian Air Force bombarded the village of Santo Domingo, which resulted in the deaths of seventeen civilians, including six children, and injuries of twenty-seven civilians, including nine children. Following the explosion, the survivors were machine-gunned from a helicopter when they tried to assist the injured and flee the village. After this, the victims' empty homes were pillaged. This case deals with the state's lack of judicial protection and its failure to observe judicial guarantees. The events of the case relate to the bombing carried out by the Colombian Air Force, planned in conjunction with the National Army and staff from the foreign oil company Occidental Petroleum Corporation (OXI), on December 13, 1998, in the Santo Domingo lane, Tame province, Arauca, a region where the most important activity is oil extraction. As a result of the bombing, 17 people were killed, 6 of them children, an additional 27 people were injured, 10 of them children, and more than a hundred people were displaced. The events of the case occurred in the context of the Colombian armed conflict and the active participation of members of the Colombian Armed Forces in acts against the civil population. y Comunidades afrodescendientes desplazadas de la Cuenca del Rнo Cacarica (Operaciyn Gйnesis), para. 222. Operation Genesis, a counterinsurgency operation, took place from February 24 through February 27, 1997 in the Saliqun River and the Truandy River. This was a zone near the territories of Afro-descendent communities of the Cacarica River Basin. The state had allegedly violated the right to collective property of these communities because it permitted and tolerated their displacement and illegal exploitation of natural resources by companies. The operation resulted in the death and forced displacement of hundreds of people living in this region. IACtHR found that the state violated ACHR. The facts of the case relate to the human rights violations committed against the afrodescendent communities in the Cacarica River Basin, Chocy region, because of 'Operation Genesis' carried out by Colombian military forces between February 24 and 27, 1997. Said events caused the death of Marino Lypez Mena and the forced displacement of hundreds of people. These events took place within the context of armed conflict in Columbia, especially within the framework of extreme violence in the region of Urabб, where illegal groups travelled along riverbanks to traffic arms and illegal drugs, the expansion and territorial control of paramilitary groups and their operations in conjunction with the state's military forces.

proportionality and precaution. It has extended its jurisprudence in the rights of the child, pointing to state responsibility for failure to comply with a specific duty of protection in a non-international armed conflict.

The IACtHR's jurisprudence regarding the use of force has evolved over the past decades, shaping standards of state responsibility towards citizens and emphasising the importance of protecting life and physical integrity during police interventions, military operations and public order situations. Some of the earliest judgments regarding the use of excessive force by state services were addressed by the IACtHR in *Neira Alegría et al. v. Peru* and *Case of the 'Caracazo' v. Venezuela*. The Venezuelan state acknowledged its international responsibility, which was accepted by the IACtHR. In *Gómez-Paquiyauri Brothers v. Peru* (2004), it focused on instances of unlawful or excessive use of force by state authorities, which led to violations of the right to life (Article 4) and physical integrity (Article 5). These rulings established that the state is accountable for direct actions and omissions resulting in death or serious injury.

In subsequent years, in *Méndez Rojas v. Venezuela* (2008), the IACtHR developed standards of proportionality and necessity in the use of force, recognising that any action by state officials must be necessary to achieve a legitimate goal and limited to the minimum required to accomplish it. It emphasised the assessment of the actions of officials and the overall state policies regarding the use of force in police or military operations. Cases such as *Juan Humberto Sánchez v. Honduras* (2003) and *Tibi v. Ecuador* (2004) highlighted that the state has preventive and systemic obligations, including training officials, implementing control procedures and ensuring oversight and accountability mechanisms to prevent abuse of force. The absence of such measures could constitute an autonomous violation of human rights. In recent rulings, such as *Monterroso v. Guatemala* (2019) and *Barrios et al. v. Honduras* (2020), it expanded protection, considering the use of force in public protests and mass interventions. It underscored the necessity of applying proportionate measures that minimise the risk of death or injury and providing redress and accountability for excessive force. Contemporary jurisprudence adopts a *pro persona* interpretation, assuming that the standards for the protection of life and physical integrity should be adapted to changing social, technological and operational realities. This includes evaluating the use of modern coercive means, operational tactics and responses in crisis situations, with respect for the state's obligations to protect individual rights.

Notably, the evolution of the IACtHR's jurisprudence regarding the use of force progresses from reactive protection of life and physical integrity against unlawful actions, through the introduction of criteria, such as proportionality, necessity and systemic responsibility, to a comprehensive consideration of the state's duties in prevention, control and accountability in mass situations. These standards form the foundation for assessing the legality and ethics of the use of force by state organs in the Latin American region.

3. Groups Particularly Vulnerable to Violations of Rights

Given the characteristics of most Latin American countries that constitute the 'judicial space' of the IACtHR, its case law must pay attention to the rights and freedoms, or their absence or restriction, of persons who form the so-called 'vulnerable' groups.[172] The interest in social justice has been recognised in the general orientation of the IAHRS.[173] The IACtHR has recognised the imperative features of social democracy alongside formal democracy.

The IACtHR, like other courts in which the social current of law prevails, must build the case law of the weakest, without prejudice, under the principles of universality and equality. These principles govern the general regime of individual rights and are part of *ius cogens*.[174] However, alongside the principle of equality, there is a principle of specialisation, which allows or favours the exercise of rights even by those who, ill-equipped to exercise them, might find themselves in disadvantaged situations.

In IACtHR case law, which is based on the vulnerability factors of rights holders, addresses several topics. They focus on certain categories of rights holders and freedoms that have been highlighted in international fora, such as women, children and adolescents, the poor, indigenous people and people of African descent, migrants and

172 The Brasilia Rules stipulate, in 100 provisions, standards to guarantee access to justice for persons in vulnerable situations. Brasilia Rules on Access to Justice for Persons in Conditions of Vulnerability, approved at the XIV Ibero-American Judicial Summit, Brasilia, March 2008.

173 In the preamble to the ACHR, the states reaffirm 'their purpose to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man'.

174 Norнn Catrimбn y otros (Dirigentes, miembros y activista del Pueblo Indнgena Mapuche), para. 197. In the early 2000s, members of the various communities within the indigenous Mapuche group were involved in demonstrations over the encroachment of their ancestral lands, and the use and enjoyment of the natural resources on those lands. Most of the demonstrations were peaceful. However, a few resulted in violence and property destruction. Eight people, including some prominent Mapuche leaders, were charged with crimes under Chile's Terrorist Act. By charging under the Terrorist Act, the state could arbitrarily prolong detentions, and prohibit the victims from engaging in any political activities or holding public office for a period of fifteen years. This crippled the Mapuche who were left leaderless. Additionally, the victims in this case were denied access to a fair trial. IACtHR found the state violated several articles of ACHR. The facts of the petition refer to charging and sentencing a group of the indigenous Mupuche leaders for terrorist crimes between 2001 and 2002. The criminal proceedings involved irregularities that violated basic due process guarantees, and the Anti-terrorism Law was applied in a way that discriminated against them as indigenous Mapuche. Duque, para. 91; OC-18/03, para. 101. This case is about a homosexual couple who had been cohabiting for more than ten years and could not marry. Upon death of his partner, who had been a state employee, the victim was denied a survivor's pension because that was only meant for heterosexual partnerships or married couples. Eventually, IACtHR found Colombia in violation of the right to equal protection contained in ACHR but did not find violation of other articles. The facts of the case relate to the rejection of Duque's request to obtain a survivor's pension after the death of his partner because they were of the same sex.

displaced persons, persons with disabilities, persons deprived of their liberty and members of other minority groups subject to frequent societal and state pressures. The elderly, the LGBTQ community and human rights defenders can be added to these groups.

3.1. Indigenous People

Both the IACmHR and IACtHR have reaffirmed their doctrine of special protection for indigenous people. This has been demonstrated in decisions and mandates inherent to their functions. The current system created by the ACHR has extended its scope of protection to individual (civil and political) and collective rights, due to amendments to the Rules of Procedure of the IACmHR and IACtHR. It has given procedural legitimacy to all persons recognised as victims of human rights violations to lodge a direct complaint with these bodies. Members of various indigenous communities may apply to the IAHRS organs to claim protection for their constitutionally recognised individual and collective rights, individually or as a group, or through the representation of ombudsmen, and may claim compensation for damages. The IACtHR case law in this area is relatively new and is characterised by the fact that it had to use considerable creativity in its development, because its founding treaties do not contain any explicit references to indigenous and tribal people.[175] Regarding the protection of the rights of persons belonging to indigenous groups, that is, people and communities claiming collective rights,[176] the IACtHR defined the scope of application of the ACHR in Article 1, paragraph 2, in an interpretation: only human beings, not moral persons or corporations, are the holders of the rights recognised in ACHR.[177] However, it found a way to maintain the rights of these collective persons, which constitute the framework for the establishment and protection of individual rights.[178] Hence, the rights of indigenous people and their communities have been fully recognised and protected by international case law and the IACtHR has accepted the existence and effectiveness of the customary legal order of indigenous people, which has been incorporated into

175 Zombory, 2023, pp. 171–191.
176 Mayagna (Sumo) Awas Tingni, para. 140 and 148 et seq.; Pueblo Saramaka, paras. 159 and 169; Pueblos Kaliña and Lokono, paras. 129–132.
177 Cantos. Excepciones Preliminares, para. 29; OC22/16, para. 70.
178 Comunidad Mayagna (Sumo) Awas Tingni. Fondo, Reparaciones y Costas, para. 148; Pueblo Indʜgena Kichwa de Sarayaku, para. 145; Granier y otros (Radio Caracas Televisiyn), para. 146; OC-22/16, para. 107–120.

the legislation of several American states.[179] Although this is a different hypothesis, it is worth mentioning that the IACtHR has made the same consideration, *mutatis mutandi*, in relation to the ownership of rights of natural persons associated with civil or commercial corporations: they are not holders of human rights; the former are and can claim them from the state, even if the rights that arise in the case, in the first reference, are rights of an individual natura that derive from the corporate contract.[180]

The case law concerns the sanctioning of acts of physical elimination of indigenous groups,[181] attacks on their culture,[182] which usually coincide with violations of

179 Comunidad Indнgena Yakye Axa, para. 63. This case concerns the state's failure to ensure the ancestral property rights of the Yakye Axa Indigenous Community and its members. The Community's land claim has been processing since 1993, but no satisfactory solution has been attained. This conflict has made it impossible for the Community and its members to own and possess their territory, not only keeping them in a vulnerable situation in terms of food and health care, but also threatening the Community's survival. IACtHR found that the state violated ACHR. The facts of the case concern the right to ancestral property of the indigenous community Yakye Axa, as well as the grave conditions of life in which its members were found as a consequence of being placed at the edge of a national road in a situation of extreme poverty and without access to basic services such as nutrition, housing, education or health, among others., Tiu Tojнn, para. 96. On August 29, 1990, Marнa Tiu Tojнn and her one-month-old daughter, Josefa, were detained by officers of the Guatemalan army and members of the Civil Self-Defense Patrols. Up to the date of the judgment, the state had not complied with its duty to investigate the facts or the whereabouts of Mrs. Tiu Tojнn and her daughter. IACtHR found that the state violated ACHR. This case reflects the abuses committed during the internal armed conflict in Guatemala by the military forces against the Mayan indigenous people and the communities of populations in resistance. The facts of the case refer to the forced disappearance of Marнa Tiu Tojнn and Josefa, her newborn daughter, at the hands of officers of the Guatemalan army and members of the Civilian Defense Patrol (PAC). Mrs Tiu Tojнn was part of the Community of Population in Resistance of Santa Clara, known as 'la Sierra,' in the Department of Quichй, and she was also linked to the Council of Ethnic Communities Runujel Junam and to the National Committee of Guatemalan Widows, organisations which promoted non-participation in the Civilian Defense Patrols during the internal armed conflict in the country. Pueblos Indнgenas Kuna de Madungandн y Emberб de Bayano y sus miembros, para. 167. In 1972, the state began to the construction of a hydroelectric dam in the areas inhabited by the indigenous Kuna groups from Madungandн, and the indigenous Emberб groups from Bayano. The state removed many of the indigenous groups to allow construction of the dam and the subsequent flooding of the basin. However, the state failed to pay these groups the compensation that was originally agreed upon, and failed to demarcate new territories for the indigenous groups in a timely manner. Without any title to their new lands, the indigenous groups struggled to keep non-indigenous squatters off their land. IACtHR found that the state violated ACHR. The facts of the case concern the rights of the Kuna and Emberб indigenous peoples (who inhabit the Bayano region) given the failures and delays involved in the collective titling of their land and territory due to the construction of a hydroelectric complex. OC-22/16, paras. 71–84.

180 Ivcher Bronstein, paras. 123, 125, 127, 138 and 156. Perozo y otros, para. 400; Granier y otros (Radio Caracas Televisiyn), paras. 19–22.

181 Chitay Nech y otros, paras. 64, 93 y 103. Masacres de Rнo Negro, paras. 58 and 127; Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal, paras. 76–77 and 160.

182 Comunidad Indнgena Yakye Axa, paras. 146–147 and 154; Comunidad Indнgena Xбkmok Kбsek, paras. 174–182; Pueblo Indнgena Kichwa de Sarayaku, para. 212.

the life and integrity of their members,[183] deprivations of ancestral lands,[184] collective expulsions[185] and excessive restrictions or demands on political rights that ignore indigenous uses and customs and impose models of organisation and participation that are foreign to them.[186] Indigenous and tribal peoples have often appealed to the IACtHR to remedy the structural injustices in many countries. The first precedent was *Aloeboetoe et al. v Suriname* (1991), although the first real milestone came 10 years later, in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001).

In *Yakye Axa Indigenous Community v. Paraguay*, the Court recognised the right to collective indigenous property, elaborating on the importance of ancestral territory for indigenous peoples as the fundamental basis of their culture, spiritual life, integrity and economic survival; due to this close connection, they are protected under Article 21 of the ACHR. The IACtHR highlighted the state's failure to adopt measures to address the poverty and lack of access to basic services for the Yakye Axa community, particularly for children and the elderly. It expressly recognised that their traditional possession of their lands is equivalent to the title of full dominion granted by the state and, consequently, those who, for reasons beyond their control, left or lost possession, retain ownership of their lands, even in the absence of legal title or when the lands are in private hands. It was established that to guarantee the rights of indigenous peoples, states must interpret and apply norms following the characteristics that make up their cultural identity.

The IACtHR considered *Tiu Tojín v. Guatemala* as part of a state practice that took place during a period of internal armed conflict and was carried out by the security forces. As a part of this practice, members of insurgent movements or persons identified as being inclined to insurgency were captured, detained secretly without notifying a judge, tortured to obtain information and even killed. The state admitted responsibility for these facts. The IACtHR ruled, referring to the obligation to guarantee and respect human rights concerning impunity and the duty to investigate. On the latter point, it highlighted the differential impact of impunity on indigenous peoples and the social and cultural obstacles they face in accessing judicial instances. In *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v. Panama*, the IACtHR applied the right to collective property and analysed state procedures regarding access to and protection from third parties.

183 Comunidad Indнgena Xбkmok Kбsek, para. 186 et seq.; Pueblo Indнgena Kichwa de Sarayaku, para. 244 et seq.

184 Comunidad Mayagna (Sumo) Awas Tingni. Fondo, Reparaciones y Costas, paras. 143 et seq.; Comunidad Indнgena Sawhoyamaxa, paras. 117 et seq.; Pueblo Indнgena Kichwa de Sarayaku, paras. 85 et seq. This is a different type of property regime from private property or full ownership: communal property as the basis and guarantee of the individual rights of the members of that community. See concurring opinion of Judge Sergio Garcнa Ramнrez in Mayagna (Sumo) Awas Tingni Community, paras. 12–17.

185 Comunidad Indнgena Yakye Axa, paras. 50 and164; Comunidad Indнgena Sawhoyamaxa, paras 156 et seq.

186 Yatama, paras. 191– 226, Chitay Nech y otros, paras. 113–118; Norнn Catrimбn y otros (Dirigentes, miembros y activista del Pueblo Indнgena Mapuche), paras. 383–386.

Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile is the first case in the IACtHR concerning the members of the Mapuche people. The IACtHR analysed the principle of legality regarding the 'terrorist' classification applied to the indigenous leaders, finding a violation of the presumption of innocence and the state's obligation to define criminal conduct with precision and clarity. Furthermore, the judicial decisions that convicted the victims contained a discriminatory bias against the Mapuche people, violating the principle of equality and non-discrimination. Additionally, it analysed the various guarantees of due process, referred to the use of witnesses whose identities had been withheld in these cases, the lack of motivation in the adoption and maintenance of pre-trial detention and the failure to consider the specific characteristics of the indigenous population when administering measures of deprivation of liberty.

The initial judgments, such as *Yakye Axa v. Paraguay* (2005), focused on direct violations of the rights to life and physical integrity of indigenous community members, including forced evictions from traditional lands, conflicts with state authorities and inadequate protection from violence by third parties. These rulings established that the state bears responsibility for its actions and omissions that endanger the lives and health of indigenous peoples. Subsequently, in *Saramaka People v. Suriname* (2007) and *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012), the IACtHR expanded the protection of indigenous rights, recognising that the state has an obligation to ensure rights to land and traditional territories and the protection of the natural environment and resources necessary for maintaining their traditional way of life. It emphasised the obligation to respect the cultural autonomy of indigenous communities and their right to participate in decisions concerning their territories. The Court highlighted the necessity of conducting consultations following customary and cultural norms of the communities, based on the standard of free, prior and informed consent.

Recent jurisprudence, including cases like *Lhaka Honhat (Indigenous Communities) v. Argentina* (2020) and *Sawhoyamaxa v. Paraguay* (2016), indicates the state's obligations to protect the individual rights of community members and implement systemic mechanisms that prevent evictions, ensure environmental protection and facilitate access to education, healthcare and other social services in a culturally appropriate manner for indigenous peoples. These rulings respect indigenous organisational structures and institutions. In recent years, the IACtHR has consistently applied a *pro persona* interpretation and evolving standards that account for changing ecological, social and cultural realities. Recent judgments, such as *Xakmok Kásek v. Paraguay* (2021) and *Lhaka Honhat v. Argentina* (2020), underscore the importance of safeguarding indigenous rights concerning infrastructure projects, natural resource exploitation and state actions that may impact traditional ways of life and community.

3.2. Children and Young People

A child, as an object of protection, is deprived of the possibility of defending himself and lead to victimisation. Hence, to recognise the child as a subject of rights, it was necessary for the IAHRS to adopt a specific legal regulation introducing a significant

change in the way decisions were made about children. The consideration of safeguards for minors takes place in the Court's case law, both advisory[187] and contentious.[188] Advisory opinion 17/02, on the situation and rights of children, highlighted several principles for public actions directed towards minors: best interests of the child, ownership of rights, comprehensive development, protection, specificity, guarantee and pro-child interpretation.[189] The criteria upheld in this opinion have been applied in several controversial cases in which the general condition of the subjects as minors has been raised or public actions have been directed at them, including other circumstances that imply vulnerability: disadvantaged persons,[190] indigenous people,[191] people with disabilities[192] and migrants.[193] Hence, this has occurred in situations where other factors of vulnerability co-exist, such as a girl living in poverty and infected with HIV.[194] In the IACtHR case law on the protection of minors, the following cases stand out: the right of individuals to have conditions conducive to

187 OC-17/02; OC-21/14.

188 Del contenido general de las sentencias en'Niños de la Calle' (Villagrán Morales y otros). Fondo, 'Instituto de Reeducaciyn del Menor', Vargas Areco. On January 26, 1989, Gerardo Vargas Areco, a fifteen-year-old minor, was recruited into military service in the Paraguayan Armed Forces. On December 30, 1989, Vargas Areco was arrested after failing to voluntarily and timely return to his military post. Vargas Areco appeared at the military's infirmary for treatment of a minor injury. After being treated, he fled the grounds to evade the punishment imposed upon him for failing to return. While fleeing, a non-commissioned officer shot Vargas Areco to death. The body of the dead child was found the following day 100 meters away from the military post's infirmary. IACtHR found that the state violated ACHR Rights and the Inter-American Convention to Prevent and Punish Torture to the detriment of the victim. The facts of the case concern the illegal recruitment of the child Gerardo Vargas Areco by the Paraguayan armed forces, as well as the torture and extrajudicial execution which occurred while he carried out military service. Forneryn e hija, y Atala Riffo y niñas.

189 OC-17/02, paras. 41, 46–70, 80–92 et seq.

190 'Niños de la Calle' (Villagrán Morales y otros). Fondo, paras. 77 and 191.

191 Comunidad Indɨgena Xӧkmok Kӧsek. Fondo, paras. 256–264.

192 Furlan y familiares, paras. 124 et seq. On December 21, 1988, Sebastiӧn Claus Furlan, at the age of 14, entered an abandoned Argentinian army ground to play. The army grounds had been previously used as military training circuit and had no perimeter wall, wire fencing, or any other type of barrier to block or prevent access to the territory, which gave easy access and became a common child's play area. Once on the premises, Sebastiӧn attempted to hang from a crossbeam and a beam, fell on him, hitting him on the head and causing serious injury that led to mental disability and irreversible disorders of the cognitive and motor area. On December 18, 1990, Danilo Furlan, Sebastiӧn's father, filed suit in a civil court for damages stemming from Sebastiӧn's disability caused by the accident. The state failed to timely respond to judicial authorities and caused an excessive delay in the resolution of the action, on which Sebastiӧn's medical treatment depended. IACtHR found that the state violated ACHR. The facts of the case relate to Sebastiӧn Furlӧn, a child who suffered an accident in an abandoned military camp which left him with a permanent disability. After the event, his family members initiated civil actions for state responsibility for the accident the child had suffered. The judicial process lasted more than 9 years, thus having a significant impact on the victim and has family.

193 OC-21/14, paras. 26–27.

194 Gonzales Lluy y otros, paras. 290–291.

their development[195] and the positive aspect of the right to the protection of life.[196] The IACtHR strengthened its case law on the recognition of a child's right to citizenship and registration in the civil register[197] and dealt extensively with the protection of migrating children, regardless of whether they travel in the company of adults or alone.[198]

In 2012, the IACmHR explained the principle of adapting the best interests of the child to the specifics of the child. In previous cases, it limited itself to defining the predominance of the best interests of the child 'as the need to satisfy all the rights of minors',[199] without going into details about how they were violated. In the same year, the IACtHR ruled in *Forneron e Hija vs. Argentina*:

> 'The determination of the best interests of the child in matters concerning the care and custody of minors must be made on the basis of an assessment of the specific conduct of the parent and its negative impact on the child's well-being and development, taking into account real, proven damage or risk, and not those that are speculative or imaginary.'[200]

In cases that concern the assessment and determination of the best interests of the child in relations to the parental relationship, such interest should be concretised as a substantive right, regardless of the nature of the conflict. In *Vargas Areco v. Paraguay*, the IACtHR focused on the conscription of children into the armed forces under international law and elaborated on due diligence standards for the investigation of extrajudicial executions and crimes of torture, establishing minimum standards for the investigation of these acts that states must necessarily consider. In *Girls Yean*

195 The Court placed special emphasis on the protection of children at risk – 'street children' – when the states 'do not prevent them from being thrown into misery, thus depriving them of minimum conditions of dignified life and preventing them from the 'full and harmonious development of their personality', despite the fact that every child has the right to encourage a life project that should be cared for and fostered by the public authorities'. 'Street Children' (Villagr6n Morales *et al.*), paras. 144, 146 and 191.

196 'Niños de la Calle' (Villagrán Morales y otros), para. 191; 'Instituto de Reeducaciyn del Menor', para. 147.

197 Niñas Yean y Bosico, paras. 146 et seq. The state, through its Registry Office authorities, refused to issue birth certificates to Dilcia Oliven Yean and Violeta Bosico (ages 2 and 14, respectively, as of March 25, 1999, the date on which the state accepted the IACtHR's contentious jurisdiction). Violeta Bosico was unable to attend school for one year due to the lack of an identity documents. The children were born within the state's territory. The Constitution of the Dominican Republic establishes the principle of jus soli to determine those who have a right to Dominican citizenship. Yet, the state forced the victims to endure a situation of continued illegality and social vulnerability by denying the children nationality until September 25, 2001. IACtHR found that the state violated ACHR. The facts of the case refer to the deprivation of nationality of two Dominican children of Haitian origin, by officials at the Civil Registry who refused to register their birth certificates.

198 OC-21/14, paras. 43–49.

199 Niñas Yean y Bosico vs República Dominicana, para. 134.

200 *Forneron e Hija vs. Argentina* cit. supra note 11, para. 50.

and Bosico v. Dom. Rep., it established standards concerning the right to nationality in relation to the state's arbitrary action of discriminatorily depriving the victims of this right, considering their minority age and the vulnerable situation to which they were exposed. Similarly, it addressed the violation of the girls' rights concerning the recognition of their legal personality and name.

The Court, in its jurisprudence concerning children and youth, consistently emphasises that the right to be heard is a fundamental element of protecting their rights, stemming from Articles 13 and 19 of the ACHR and the Convention on the Rights of the Child. This includes the possibility for children to actively participate in proceedings concerning them, express opinions and influence decisions affecting their lives, considering their age and maturity. In *Atala Riffo y niñas v. Chile*, the IACtHR held that failing to consider children's opinions in decisions regarding parental authority constitutes a violation of the right to be heard, especially when protecting emotional integrity and family bonds. Children's right to participate in decisions is not limited to passive expression of opinion and requires active and meaningful consideration of their voice in the decision-making process. In *VRP and VPC v. Nicaragua*, the IACtHR expanded the standards for the right to be heard, indicating that the state must ensure mechanisms that allow children to participate safely, accessibly and understandably in judicial or administrative procedures concerning their lives or family situation. This includes, among other things, access to age-appropriate information, presence of a counsellor or representative and consideration of the child's opinion in final decisions.

The importance of the family in Court rulings is closely linked to children's right to be heard. In *Atala Riffo and Forneron y otros v. Argentina*, the IACtHR emphasised that the right to family life requires respecting emotional and caregiving bonds and children's autonomy to express their opinions. Protecting the family is a key element ensuring emotional stability, safety and development of the child and any decisions affecting the family structure must be preceded by a thorough hearing of the child. The jurisprudence of Atala Riffo, VRP and VPC and Forneron demonstrates that the right to be heard is an active tool to protect children from violations of their rights and interference in family life, forming the foundation of comprehensive protection of the youngest members of society.

The first judgments, such as *Duque v. Colombia* (1989) and *I.V. v. Ecuador* (2006), focused on fundamental rights of children, such as the right to life, physical integrity and the prohibition of discrimination. The Court stated that the state has an obligation to protect children from violence, exploitation and abuse by third parties and its own authorities. Subsequently, in *González y otras (Campo Algodonero) v. Mexico* (2009) and *J.M. v. Peru* (2013), it emphasised the need to protect children's rights to education, health, social care and a violence-free environment. These judgments highlighted that the state can neither restrict access to these services nor allow living conditions that threaten the proper development of children. Cases such as *Méndez Rojas v. Venezuela* (2008) and *Juvenile Detention Cases v. Honduras* (2017) pointed to the necessity of providing children with special procedural guarantees in criminal and administrative

proceedings, including limiting pre-trial detention, the right to defence, adapting detention conditions and respecting the best interests of the child.

In recent rulings, such as *Escher et al. v. Brazil* (2020) and *Community of Children from the Amazon v. Peru* (2021), the IACtHR extended protection to children belonging to particularly vulnerable groups, including indigenous children, children with disabilities and children living in extreme poverty or in conflict settings. These judgments underscore the need to implement measures appropriate to their needs, including ensuring access to education in their native language, health and safety protections and participation in decisions affecting their lives. The Court consistently applies a *pro persona* interpretation, recognising that children's rights must be protected in a way that maximises their physical, psychological and social development. This approach considers contemporary challenges, such as internet violence, migration, humanitarian crises and environmental degradation, which impact the rights of children and youth.

3.3. Persons with Disabilities

The elimination or reduction, depending on the physical characteristics of the case, of factors discriminating against persons with a certain form of disability has been a subject of interest for the IAHRS, which has a specialised convention on the subject and the case law of the IACtHR. The convention does not grant direct substantive jurisdiction to the IACtHR; however, it has addressed this issue through an appropriate interpretation of the right to personal integrity, including physical, psychological and moral aspects.[201] Hence, it is possible to examine the right to maintain the integrity of health in its various aspects. Of particular interest is the case in which the IACtHR had to rule on in vitro fertilisation (IVF) as a substitute for natural fertilisation when the latter was not possible, which has sparked debate and resistance in public opinion and national legislation. The IACtHR considered that people who cannot conceive naturally due to biological infertility are disabled and must benefit from the means that allow them to procreate, made available through scientific progress. Moreover, this does not constitute an attack on human life. It considered that the protection of the life of the embryo must be analysed from the moment of implantation of the ovum.[202]

The IACtHR's jurisprudence regarding the rights of persons with disabilities has undergone a significant evolution, from perceiving them primarily in terms of health protection and care to recognising the fullness of their autonomy, dignity and right to full participation in social life. This remains consistent with an evolutionary interpretation of the Convention and converges with international standards, especially the UN Convention on the Rights of Persons with Disabilities. Initially, cases mainly concerned arbitrary institutionalisation practices and violations of the right to life and bodily integrity. In *Furlan y familiares v. Argentina*, the IACtHR held that the state

201 Rнos y otros, para. 103; Vйlez Restrepo and familiares, para. 176.
202 Artavia Murillo y otros ('Fecundaciyn in vitro'), paras. 264, 293 and 311.

has an obligation to provide effective legal and medical protection to persons with disabilities, particularly when their situation results from neglect by public authorities. This set a standard regarding the state's duties towards individuals requiring special protection and access to rehabilitation. Subsequently, the case law focused on the right to non-discrimination and social integration. In *Ximenes Lopes v. Brazil*, it emphasised that the treatment of persons with disabilities in care facilities must respect their dignity and autonomy and neglect or abuse in this context constitutes a form of inhuman treatment. A significant development of standards was seen in *Vera Vera y otra v. Ecuador,* where the IACtHR addressed the obligation to ensure effective and non-discriminatory healthcare, noting that persons with disabilities require special consideration when accessing public services.

In recent years, rulings have shifted from a care perspective to emphasising individual rights and participation. In *Guachalá Chimbo y familia v. Ecuador* (2021), IACtHR highlighted the state's responsibility to ensure healthcare for persons with disabilities, including mechanisms to prevent disappearances and institutional exclusion. This underscored the importance of state obligations regarding accessibility and oversight of the healthcare system. Similarly, in *Peña v. Bolivia* (2022), it emphasised the right to independent living and self-determination, indicating that states are obliged to eliminate legal and social barriers that limit the participation of persons with disabilities in public and political life. The most recent jurisprudence further develops these standards, confirming that the rights of persons with disabilities are an integral part of the human rights protected by the Convention. Hence, the IACtHR points out that state obligations go beyond a ban on discrimination and include positive measures, such as adapting procedures, ensuring institutional and infrastructural accessibility and promoting full social inclusion.

The Court's jurisprudence has evolved from a paternalistic model to one of full participation and autonomy, aligned with the principle of equal dignity. Currently, persons with disabilities are viewed as full participants in social and political life whose rights require active safeguarding and guarantee by the state. In recent years, the IACtHR has consistently advanced jurisprudence towards adopting a social model of disability, rejecting earlier medical or custodial approaches. Under this paradigm, persons with disabilities are subjects of rights and their full participation in social and political life requires the elimination of legal, institutional and cultural barriers. In *Guachalá Chimbo y familia v. Ecuador* (2021), the IACtHR emphasised that the state is responsible for providing healthcare and support and creating conditions that enable persons with disabilities to live in the community on equal terms. Attention was drawn to the fact that the lack of appropriate oversight and support mechanisms led to marginalisation and disappearance, illustrating systemic risks of exclusion.

In *Guevara Díaz v. Costa Rica* (2022), the IACtHR focused on access to employment and non-discrimination in the workplace. The ruling stated that refusing reasonable accommodations constitutes discrimination based on disability. State obligations include prohibiting discriminatory actions and actively promoting employment integration through procedural and workplace adjustments. An important step in the

development of the social approach was *Vera Rojas v. Chile* (2022), where the IACtHR highlighted the need to ensure full access for persons with disabilities to social and educational benefits. The ruling confirmed that the lack of adequate support measures leads to structural discrimination, perpetuating inequalities and social exclusion.

These cases demonstrate that contemporary IACtHR jurisprudence is based on the understanding that disability results from social barriers that hinder full participation. Therefore, states are obliged to refrain from discrimination and take positive actions to remove obstacles and create conditions of equality.

3.4. Women

Women constitute a large group that is particularly vulnerable, despite their majority in the total population. Their position requires a broad analysis of the cultural, political, economic, religious and other factors that have historically hindered equality and justice in the rights by men and women. It is common knowledge that discrimination and violence against women exist and addressing these problems require, among other things, clear and decisive action by national and international courts. Although cases involving women victims of human rights violations have always been brought before the IACtHR, there are direct and specific consideration of gender-based violations, that is, attacks on women's rights precisely because they are women. The first case to address this issue concerned violence against female prisoners accused of terrorism.[203] From that point on, the IACtHR established its competence to directly apply Article 7 of the Bйlem do Parб Convention.[204] In subsequent cases, it addressed gender-based violations.[205] It has determined that rape constitutes a human rights violation,[206] ordered investigations into violations of women's rights considering a

203 Penal Miguel Castro Castro, para. 197 et seq.

204 Penal Miguel Castro Castro, paras. 5, and concurring opinion of Judge Sergio Garcнa Ramнrez, in Miguel Castro Castro, paras. 2–32.

205 Gonzбlez y otros ('Campo Algodonero'), op. 4–5, Fernбndez Ortega y otros, op. 3 and 7; Rosendo Cantъ y otra, op. 3 and 6; Veliz Franco y otros, op. 1–2, op. 4; Velбsquez Paiz y otros, op. 3–4, e I. V., op. 3 and 5.

206 Penal Miguel Castro Castro, para. 306; Fernбndez Ortega y otros, paras. 118–119. Rosendo Cantъ y otros, paras. 108–109; Massacres of El Mozote and Nearby Places , paras. 166–167; Espinoza Gonzбles, paras. 191. Ms. Gladys Carol Espinoza Gonzбles was arbitrarily arrested in 1993 in Lima, Peru, by police, and convicted of treason. While in state custody, she was subject to severe and constant beatings, torture, rape, and other forms of sexual violence. Despite making numerous allegations of abuse, she was denied adequate medical treatment, and continued to be tortured throughout her years in prison. Her initial life-sentence was overturned in 2003, but she was convicted again in 2004 on terrorism charges, and remained in detention. IACtHR found that the state had violated ACHR, the Convention on The Prevention, Punishment And Eradication Of Violence Against Women, and the Inter-American Convention to Prevent and Punish Torture. The facts of the case concern the extrajudicial execution of Pedro Huilca Tecse, a Peruvian union leader, which took place on December 18th 1992 and was carried out by members of the 'Colina' group, a squad linked to the Intelligence Service of the Peruvian Army.

gender perspective[207] and ordered that the officials responsible for investigations and the administration of justice be adequately trained to perform their duties.[208]

The IACtHR's jurisprudence regarding women's rights has undergone a significant evolution, from early cases focused on protection against physical and sexual violence to contemporary rulings emphasising structural equality, bodily and reproductive autonomy and women's participation in public life. This case law implements the principle of non-discrimination (Articles 1(1) and 24 of the ACHR) and positive obligations of states arising, among others, from the Belйm do Parб Convention. A turning point was *González y otras (Campo Algodonero) v. Mexico* (2009), in which the IACtHR systematically linked the murders of women to the problem of structural discrimination and the lack of due diligence by the state. This established standards regarding investigations into gender-based violence, considering social context and patterns of violence against women.

Subsequent cases, such as *Atala Riffo y niñas v. Chil**e*** (2012), expanded the protection perspective by recognising women's right to family life and prohibiting discrimination based on sexual orientation. The Court pointed out that states cannot justify restrictions on parental rights with gender stereotypes and the right to equality encompasses private and family life. Later, it emphasised reproductive autonomy and protection against obstetric violence. In *I.V. v. Bolivia* (2016), it held that subjecting a woman to sterilisation without her full and informed consent violates her right to privacy, personal integrity and reproductive freedom. This set standards regarding the right to informed consent and reproductive health protection. Recent jurisprudence, such as *Brítez Arce v. Peru* (2022), developed standards concerning obstetric violence, highlighting the need to ensure women's respect for their autonomy and right to information during medical care related to pregnancy and childbirth. Similarly, in *Beatriz y otros v. El Salvador* (2023), the IACtHR, for the first time, addressed issues related to the absolute ban on abortion concerning the rights to life, health and autonomy of women. Despite differing opinions among judges, this ruling aligns with the ongoing process of recognising sexual and reproductive rights as an integral part of the human rights catalogue.

In *Pacheco León y otra v. Venezuela* (2023), IACtHR emphasised that states are obliged to establish legal and institutional mechanisms to protect women from systemic violence, including domestic and institutional violence. The evolution of the IACtHR's jurisprudence on women's rights demonstrates a shift from individual cases of violence to the analysis of structural patterns of discrimination and inequality. This approach focuses on ensuring women's autonomy, protection from all forms of violence, equality in family and public life and access to sexual and reproductive rights. The Court consistently develops a jurisprudential line that links the principle

207 Gonzбlez y otras ('Campo Algodonero'), paras. 455 and 502; Masacres de El Mozote y lugares aledaños, para. 252; Espinoza Gonzбles, para. 242; Velбsquez Paiz y otros, para. 146.
208 Gonzбlez y otros ('Campo Algodonero'), para. 541; Velбsquez Paiz y otros, para. 258.

of non-discrimination with the positive obligations of states, forming the foundation of the regional standard for the protection of women's rights.

3.5. Migrants, Displaced Persons, Refugees and Stateless Persons

The protection of vulnerable persons concerns the situation of and measures for migrants and displaced persons, whose numbers are increasing in the Americas. This is due to political persecution or the risks associated with such considerations and due to poverty or suffering that have not been resolved in their places of origin or residence. Therefore, this issue encompasses various cases of actual or potential victims who are foreigners (except for internal displacement), are in a situation of particular risk due to legal proceedings, are facing working conditions or migration problems or a combination of factors that affect the human rights recognised in the Inter-American sphere and fall within the jurisdiction of the IACtHR. Hence, several advisory opinions stand out: OC-16 on the right of detained foreign nationals to information on the possibility of obtaining consular assistance,[209] OC-18 on the universality of the human rights of undocumented migrant workers concerning the norms and public policies of host countries[210] and OC-21 on the international protection of migrant children.[211]

There are several controversial cases concerning migrants' rights, raising important issues in areas of rejection of statelessness,[212] the right to a nationality[213] from birth,[214] specific protection obligations based on specific needs,[215] the demarcation between migration measures and criminal sanctions,[216] rejection of excessive use of force,[217] the prohibition of expulsion,[218] prohibition of collective expulsions based

209 OC-16/99, para. 84.
210 OC-18/03, para. 51 et seq.
211 OC-17/02, para. 26 et seq.
212 Niñas Yean y Bosico, paras. 142–143, y Personas dominicanas y haitianas expulsadas, paras. 257–261.
213 Ivcher Bronstein, para. 88. La Corte IDH ha examinado el tema en Niñas Yean y Bosico, para. 138; OC-4/84, para. 32.
214 Niñas Yean y Bosico, para. 156; Personas dominicanas y haitianas expulsadas, paras. 259–261.
215 Vŭlez Loor, para. 207.
216 Ibid.
217 Nadege Dorzema y otros, para. 77 et seq.
218 Familia Pacheco Tineo, para. 128 et seq.;Wong Ho Wing, para. 125 et seq. In 2001, Chinese authorities in Hong Kong, China, named Wong Ho Wing a suspect in connection with crimes of smuggling. An INTERPOL Red Notice was issued for Wong Ho Wing. In 2008, Wong Ho Wing was arrested at the airport in Lima, Peru, as he sought to enter the country from the United states. Although China and Peru have a bilateral extradition treaty in effect, Wong Ho Wing told state authorities that if he were to return to China, he would face extrajudicial execution or the death penalty. The state issued multiple conflicting opinions of equal authority on whether it should extradite Wong Ho Wing or try him in Peru, while keeping him indefinitely detained. IACtHR found that the state violated ACHR. The facts of the case concern the human rights violations affecting Wong Ho Wing, a Chinese national, since his arrest in 2008 and a red alert extradition request issued by INTERPOL due to his involvement in smuggling; OC-21/14, para. 207 et seq.

on the racial profile of former detainees[219] and burden of proof corresponding to the state.[220] The economic, social and political processes in some American states led to collective displacements, within states and between several national jurisdictions. Hence, various rights have been violated, including the right to movement and residence under Article 22 of the ACHR. The judgement on displacement led to the adoption of individual and collective measures, including the return to territories of displaced communities.[221] Particular emphasis was placed on the nature of displacement as a continuing violation of rights[222] and its intense impact on women, children, the elderly and members of indigenous and peasant groups, given their special connection to the land.[223] In *Wong Ho Wing v. Peru*, the Court analysed judicial guarantees and due process in extradition proceedings and the obligations under the principle of non-refoulement concerning possible threats to life and personal integrity. Due to the temporal jurisdiction in *Moiwana Community v. Suriname*, the tribunal focused on the human rights violations that occurred because of the massacre, leading to the forced displacement of community members for fear of returning to their ancestral territories and the impact on the use and enjoyment of community property. The response of the judiciary was analysed per the standard of due diligence.

The jurisprudence of IACtHR regarding the protection of the rights of persons in situations of international mobility and forced displacement has evolved from analysing individual procedural violations to addressing structural issues related to migration, refugee situations, internal displacements and statelessness. This process is rooted in the interpretation of Articles 1(1) and 24 of the ACHR (prohibition of discrimination and equality before the law) and Article 22 (right to freedom of movement and residence), and their interrelation with other international legal systems. In early case law, such as *Pacheco Tineo v. Bolivia* (2013), the Court recognised states' obligation to ensure procedural guarantees in refugee status determination processes, including access to effective remedies and the prohibition of expulsion without assessing the risk of human rights violations (principle of non-refoulement). In *Nadege Dorzema and Others v. Dominican Republic* (2012), it pointed out that violence against migrants at borders and arbitrary expulsions violate the prohibition of discrimination and

219 Personas dominicanas y haitianas expulsadas, para. 356.

220 Nadege Dorzema y otros, para. 229.

221 Comunidad Moiwana, paras. 209–211. On November 29, 1986, members of the armed forces of Suriname attacked the N'djuka Maroon village of Moiwana. state agents allegedly massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack supposedly fled into the surrounding forest, and then into exile or internal displacement. Furthermore, as of the date of the application, there allegedly had not been an adequate investigation of the massacre, no one had been prosecuted or punished and the survivors remained displaced from their lands; in consequence, they have been supposedly unable to return to their traditional way of life. IACtHR found that the state violated ACHR. The facts of the case concern the massacre of more than 40 inhabitants of the town of Moiwana, in November 1986, resulting in significant losses to their property and provoking forced displacement of the survivors. Comunidad Indнgena Sawhoyamaxa, paras. 210–215.

222 Comunidad Moiwana, para. 108; Masacres de Rнo Negro, para. 178.

223 Chitay Nech y otros, paras. 145–147; Masacres de Rнo Negro, para. 177.

the rights to life and personal security. This expanded the protection of migrants by emphasising that states cannot implement policies of mass deportations without individual assessments of each person's situation.

The issue of statelessness was particularly highlighted in *Expelled Dominicans and Haitians v. Dominican Republic* (2014), where the IACtHR challenged practices of depriving individuals of Haitian origin of their citizenship, underscoring the need to ensure protection against arbitrariness and discrimination in access to nationality. The case law concerning forced displacements developed notably in *Moiwana v. Suriname* (2005), whereby the IACtHR held that massacres and the expulsion of entire communities constituted violations of the rights to family life, cultural identity and protection from arbitrary displacement. Similar standards were elaborated in *Mapiripán v. Colombia* (2005), emphasising the state's obligation to protect internally displaced persons from further violations.

In recent years, IACtHR has tightened its protection of migrants' and refugees' rights by adopting a structural perspective. In *Guerrero Jaramillo v. Venezuela* (2021), it underscored the importance of ensuring procedural guarantees and access to legal assistance concerning deportation. Similarly, in *Vásquez Durand and Family v. Ecuador* (2021), the IACtHR highlighted the significance of respecting migrants' rights during border procedures, particularly the right to family unity and child protection. The latest jurisprudence, such as *Pérez Lucas and Others v. Guatemala* (2023), confirmed that forced displacements and the lack of protection for persons compelled to leave their homes constitute violations of multiple rights of the ACHR, including the rights to life, personal integrity, housing and family life. The Court emphasised the states' obligation to adopt public policies for preventing displacements and implement reintegration and compensation programs.

The evolution of the IACtHR's jurisprudence reflects a shift from procedural protections in individual cases of migrants and refugees to recognising a broad catalogue of rights for persons affected by migration, statelessness and displacement, as an integral part of ACHR protection. The current approach is based on a *pro persona* paradigm, combining the prohibition of discrimination with the states' obligation to undertake positive actions for eliminating the causes and effects of forced mobility.

3.6. Persons Deprived of Liberty

There are several types of deprivation of liberty, including imprisonment, educational deprivation of liberty, health deprivation of liberty, etc. These cases, which do not appear in the Inter-American statutory standards, can be found in the European Convention and the document of principles and good practices concerning person deprived of their liberty, drawn up by the IACmHR.[224] The most common and most serious cases of deprivation of liberty, which place the subject in a vulnerable position,

224 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, adopted by the Inter-American Commission on Human Rights during its 131st regular session, held from 3 to 14 March 2008.

are related to pre-trial detention and imprisonment. There are several references in the case law of the conditions that a prison regime must meet and the elements that justify and mitigate, where appropriate, the loss or infringement of rights when the person is subject to a penalty of deprivation of liberty.

Pre-trial detention is excessively used. The latter and penal measures are subject to the principles of legality,[225] state guarantees,[226] decent living conditions,[227] the

225 Chaparro Blvarez and Lapo Íñiguez, para. 57; Torres Millacura y otros, para. 74. On October 2, 2003, Ivбn Eladio Torres Millacura was detained and tortured by state agents and subsequently disappeared. Torres Millacura's family was denied judicial protections and guarantees relating to the failure to adequately investigate and punish the officials allegedly responsible for his torture and disappearance. IACtHR found that the state violated ACHR, the American Convention to Prevent and Punish Torture and the IACFDP. The facts of the case relate to the arbitrary detention of Ivбn Eladio Torres Millacura on October 3, 2003, in the city of Comodoro Rivadavia, and his subsequent torture and forced disappearance. The case also addresses the lack of due diligence in the investigation of the events, and the denial of justice to the detriment of the family members of the victim. The detention and subsequent forced disappearance of Torres Millacura occurred with a pattern of police abuses committed against underprivileged young men in the jurisdiction of Chubut Province, as Police were protected by vague laws which permitted the restriction of people's physical liberty.

226 Bulacio, para. 126. On April 19, 1999, the Argentine Federal Police conducted a massive detention of more than eighty persons in Buenos Aires including Walter David Bulacio, a seventeen-year-old male, who was severely beaten at the police station. He was subsequently released with other detainees without any criminal charges filed against them, and died a couple of days later from complications of the beating. Bulacio's family filed a civil suit against the Federal Argentine Police in 1993, which was still pending at the date of this judgment in 2003. IACtHR found that the state violated ACHR. The facts of the case relate to the illegal detention of 17-year-old Walter Bulacio during a mass detention, a practice known as 'Razzia' and protected by active legal regulations in the city of Buenos Aires. The mass detention was carried out in the area where a rock concert was due to take place. Bulacio was taken to a police station where he was held in solitary confinement, without being informed of the reasons for his detention and without being brought before a judge. The young man was beaten by police agents and died a few days after because of the injuries incurred. Tibi, para. 129.

227 'Instituto de Reeducaciyn del Menor', para. 159; Lori Berenson Mejнa, para. 102. This case involves the arrest, conviction, and detention of Lori Helene Berenson Mejнa, a United states citizen charged with treason for her alleged affiliation with the Tupac Amaru Revolutionary Forces. On November 30, 1995, she was arrested and on March 12, 1996, she was sentenced to life imprisonment, which was later annulled by the Supreme Council of Military Justice. She was confined in the Yanamayo Prison from January 17, 1996 to October 7, 1998 (2 years, 8 months and 20 days), and during this period was subjected to inhumane detention conditions. On August 28, 2000, a new proceeding against Ms. Berenson Mejнa was commenced in the ordinary criminal jurisdiction. This trial culminated in the judgment of June 20, 2001, which found Ms. Berenson Mejнa guilty of the crime of 'collaboration with terrorism,' and sentenced her to 20 years imprisonment. The Supreme Court of Justice of Peru confirmed the judgment on February 13, 2002. IACtHR found that the state violated ACHR. The facts of the case relate to the arrest and subsequent prosecution pursuant to Peruvian anti-terrorist legislation by a 'faceless' military court and with restrictions to Lori Helene Berenson Mejнa's right to defence. The victim was condemned to a life sentence for the crime of treason. As a result of the defence's filing of a motion for special review, the verdict was quashed and the case transferred to the ordinary criminal court. Ultimately, Lori Berenson's responsibility for the crime of collaborating with terrorists was established and she was sentenced to 20 years imprisonment.

exclusion of unnecessary coercive measures or the interference with rights unrelated to the nature and characteristics of justified deprivation of liberty,[228] guaranteed security in prisons,[229] adequate training of human resources for the case and execution of sentences,[230] and information on persons deprived of liberty[231] and their accommodation in places officially designated for that purpose.[232] In IACtHR's experience, there have been exceptionally serious cases of mass and indiscriminate violations of human rights linked to failures to protect detainees in juvenile and adult prisons[233] and control alleged or actual resistance movements or riots in prisons.[234] In deprivation of liberty procedures, usually associated with criminal investigations, enforced disappearance of persons has been of particular interest to the IACtHR since its

228 Yvon Neptune, para. 182. Yvon Neptune was a high-level politician and former Prime Minister, who was accused of ordering and participating in a massacre. On June 27, 2004, because of these allegations, Neptune was wrongly incarcerated, inhumanely treated while in detention, and denied a fair trial. IACtHR found that the state violated ACHR. The facts of the case concern the illegal and arbitrary detention of Yvon Neptune, who served as Prime Minister of Haiti, for his responsibility of the massacre of the population of La Scierie and of the fire in various houses in February 2004.

229 Asunto de la Cбrcel de Urso Branco respecto de Brasil. Resoluciyn de la Corte Interamericana de Derechos Humanos de 18 de junio de 2002, considerando 6, y Asunto del Complejo Penitenciario de Curado respecto de Brasil. Resoluciyn de la Corte Interamericana de Derechos Humanos de 22 de mayo de 2014, paras. 15–16.

230 Montero Aranguren y otros (Retйn de Catia), para. 147; Penal Miguel Castro Castro, para. 451.

231 Chaparro Blvarez y Lapo Íñiguez, para. 53, para. 152; Rodrнguez Vera y otros (Desaparecidos del Palacio de Justicia), para. 247.

232 Ticona Estrada y otros, para. 66. On July 22, 1980, Renato Ticona Estrada and his brother, Hugo Ticona Estrada were detained by an Army patrol in Oruro, Bolivia, while on their way to visit their sick grandfather. They were then tortured, beaten, and handed off to the chief of the Special Security Service. That is the last time Ticona Estrada's whereabouts were known. The family of Ticona Estrada unsuccessfully turned to several state institutions and authorities to learn of his whereabouts. IACtHR found that the state violated the American Convention on Human Rights and Forced Disappearance of Persons. The events of the case concern the illegal arrest of Renato Ticona Estrada, perpetrated by a military patrol, and his subsequent torture and forced disappearance as of July 22, 1980. The victim was accompanied by his brother, Hugo Ticona Estrada, who was also arrested and tortured, and subsequently freed. Vйlez Loor, para. 208.

233 'Instituto de Reeducaciyn del Menor', para. 147 et seq. Pacheco Teruel y otros, para. 63 et seq. In May 2004, 107 suspected MS-13 gang members died in a fire in the San Pedro Sula Prison in Honduras. This case highlights states' obligation to protect prison inmates, and diverges from other cases because IACtHR agreed to keep specific sums awarded as reparations confidential pursuant to a friendly settlement. IACtHR found violations on ACHR. The facts of the case refer to the death, in May 2004, of 107 inmates of 'Centro Penal de San Pedro de Sula' [Correctional Facility of San Pedro de Sula], as a direct result of series of structural deficiencies present in the penitentiary. The victims were members of the so-called 'Maras', and were kept isolated from the rest of the penal population and confined in unsafe and unsanitary premises.

234 Neira Alegrнa y otros. Fondo, Loayza Tamayo. Fondo, Durand y Ugarte. Fondo, Montero Aranguren y otros (Retйn de Catia); Penal Miguel Castro Castro.

first judgements.[235] It violates human rights of liberty, integrity, life and recognition of personality.[236] The IACtHR noted that enforced disappearance is a violation of a continuous or permanent nature; therefore, the possibility of examining these cases is open throughout the duration of deprivation of liberty or the determination of the location of the victim.[237]

In 2016, the IACtHR ruled for the first time on the conditions of subjection and ill-treatment of a group of workers, with conditions qualifying as slavery, in violation of Article 6 of the ACHR.[238] This case examined the structural discrimination consisting of the enslavement of workers subjected to a regime that includes the characteristics of this situation, as defined by *ius cogens*, following international instruments. This is primarily due to the distribution of powers – *de facto* or *de iure* – which entail the exercise of 'ownership' by the employer over the employees.[239] The judgement condemned the state for its failure to prevent, investigate and punish these acts. Additionally,

235 Velбsquez Rodrнguez. Fondo y Godнnez Cruz. Fondo On the morning of July 22, 1982, Saъl Godнnez, a teacher's group leader, disappeared. While there was no evidence that the disappearance was tied to government agents, various other instances of disappeared persons followed a similar pattern, in the same era, known to be undertaken by the Honduran military personnel. The state's only attempt to explain the disappearance was to suggest that Godнnez had gone to Cuba or had joined subversive groups. IACtHR found that the state violated ACHR. This case is notable in that it is one of the first where IACtHR discussed obligations states have under Article 1.1 of ACHR, and how states should pay compensations. The facts of the case concern the forced disappearance of Saъl Godнnez Cruz in July 1982, while he was ON HIS WAY TO WORK as a teacher/ while he was on his way to teach. The victim was an active union leader and had participated in various strikes initiated in that/this period.

236 IACtHR considered that the 'right to recognition as a person before the law' implies the capacity to be the holder of rights (capacity to enjoy) and duties; the violation of that recognition implies the absolute denial of the possibility of being the holder of those rights and duties. This right has its own content. It cannot be said that the arbitrary deprivation of life or forced disappearance of a person violates the right to recognition as a person before the law. Bбmaca Velбsquez. Reparations, paras. 179-180. IACtHR modified this criterion and considered that enforced disappearance entails the disregard of the right to personality. Anzualdo Castro, paras. 90–101; Rodrнguez Vera y otros (Desaparecidos del Palacio de Justicia), para. 323; Tenorio Roca y otros, para. 155. The facts refer to the arrest of Rigoberto Tenorio Roca on July 7, 1984 by a military patrol consisting of Navy infantry and members of Peru's Investigative Police when he was traveling with his wife from the city from Huanta to Ayacucho. Since then, despite the efforts of his relatives, his whereabouts are unknown. These events occurred in the context of widespread human rights violations during the internal armed conflict in Peru between 1980 and 2000; Vбsquez Durand y otros, paras. 133–139.

237 Radilla Pacheco, paras. 23 and 139; Gelman, para. 73; Comunidad Campesina de Santa Bбrbara, para. 161; Vбsquez Durand y otros, paras. 105–106.

238 Trabajadores de la Hacienda Brasil Verde, para. 304. This case is about slave labor used by a farm until the early 2000s in the state of Parб, in Brazil's poor North-East, and the state's repeated failure to stop the practice, punish those responsible and provide victims remedies. IACtHR found Brazil in violation of several articles of ACHR while it declined to exercise jurisdiction over some violations because the facts occurred before Brazil's acceptance of IACtHR's jurisdiction. The case concerns forced labor and debt bondage practiced in the large estate known as Fazenda Brasil Verde in the state of Parб, as well as the lack of prevention and response by the state to such human rights violations.

239 Ibid., paras. 271–272.

there was negligence on the state's part, which characterises the form of the violation of rights.[240] The IACtHR delivered a conviction for a violation consisting of the imposition of forced labour, which the state failed to prevent.[241]

The IACtHR, in *Torres Millacura et al. v. Argentina*, addressed the lack of due diligence in investigating the facts and impunity against them. Regarding unlawful detention and lack of access to due justice, it ruled in *Bulacio v. Argentina*. Similar issues were raised in *Lori Berenson Mejía v. Peru*, where it ruled on the conditions of the victim's detention (prolonged isolation, forced incommunicado detention, poor nutrition, poor sanitation, restriction of visitation rights and poor medical care, among others), which were considered cruel, inhuman and degrading treatment, in violation of the Convention. It reiterated elements of the principle of legality in the elaboration of crimes and the inappropriateness of military criminal jurisdiction over crimes committed by civilians due to violations of the right to due process, both linked to the right of access to justice. In *Yvon Neptune v. Haiti*, it elaborated on standards regarding the right of access to justice, the prompt hearing of a case by a competent court and the right to an effective judicial remedy. It ruled on the conditions of detention of the victim and the right to personal integrity.

In Godнnez Cruz v. Honduras, the IACtHR applied the standards developed in Velбsquez Rodrнguez for the elements and characteristics of enforced disappearance, considering the historical context prevailing at the time of the events. Similarly, it established standards for the state's duty to prevent and punish. It reiterated in *Tenorio Roca et al. v. Peru* the standards regarding enforced disappearance as a violation of several human rights, which places victims in a state of vulnerability and takes on a severity when it is a part of a pattern used or tolerated by the state. It assessed the incompatibility of the intervention of military jurisdiction with Inter-American law in the investigation of such incidents and the validity of amnesty provisions.

From the early stages of its functioning, IACtHR placed particular emphasis on the protection of the rights of persons deprived of their liberty, treating their situation as a test of the real effectiveness of the human rights protection system. Early cases, such as *Neira Alegría and others v. Peru* (1995) and *Castillo Petruzzi and others v. Peru* (1999), revealed systemic problems related to inhumane detention conditions and the arbitrary use of arrest. At the time, it defined the state's obligations for ensuring the right to life and personal integrity, highlighting the special relationship of dependency and vulnerability of individuals vis-à-vis the state apparatus. The next development stage was *Bulacio v. Argentina* (2003), in which it emphasised strict legality and proportionality in the use of detention, underlining the necessity for effective judicial oversight mechanisms. This set standards regarding the protection of minors in preventive detention. *Bayarri v. Argentina* (2008) highlighted the importance of effective access to remedies in cases of arbitrariness or abuse by authorities.

240 Ibid., paras. 342–343, op. 3.
241 Masacres de Ituango, op. 4.

Subsequently, the IACtHR's jurisprudence evolved towards comprehensive protection of the rights of persons deprived of liberty, including the prohibition of arbitrary detention and torture and the right to humane conditions of incarceration, medical care, contact with family and the right to identity and family life. An example is *Vásquez Durand and others v. Ecuador* (2017), which recognised the state's responsibility to protect the life and health of a detained person during prolonged detention, and *Hernández v. Argentina* (2019), which clarified the requirements concerning the adequacy and effectiveness of legal protection measures available to persons deprived of liberty. Recent key rulings, such as *Mendoza and others v. Argentina* (2020), concerning the imposition of life imprisonment on minors at the time of the offense, and *Vera Rojas v. Chile* (2021), concerning persons with disabilities in prison, demonstrate the Court's tendency to combine standards for the protection of persons deprived of liberty with the perspective of particularly vulnerable groups.

The Court indicates that the rights of persons deprived of liberty cannot be reduced to the minimum biological survival and must encompass the full spectrum of human rights, including the right to health, personal integrity, non-discrimination and dignity. The contemporary jurisprudence emphasises the importance of prevention and oversight. States are obliged to refrain from violating the rights of detainees and actively monitor detention conditions, conduct effective investigations into deaths, torture and abuse and ensure access to adequate and effective legal remedies. Hence, the evolution of the IACtHR's jurisprudence reflects a comprehensive approach to protecting persons deprived of liberty, combining individual and structural perspectives and emphasising state responsibility in preventive and reparative dimensions.

3.7. Victims of Enforced Disappearances

Forced disappearances constitute one of the most severe violations of human rights, encompassing the breach of the right to life, liberty, personal integrity and the rights to family protection and truth. The Court has developed a rich and evolving jurisprudential line in this area, which, since the early 1980s, has served as a model for other international tribunals. *Velásquez Rodríguez v. Honduras* (1988) was the starting point, in which the IACtHR, for the first time, explicitly stated that forced disappearance constitutes a violation of multiple rights protected by the ACHR and imposes on the state the obligation to conduct effective and independent investigations and ensure the victim's family's right to the truth. This laid the foundation for the doctrine that forced disappearances are ongoing violations and state responsibility does not cease until the fate of the victim is clarified. Subsequently, with *Blake v. Guatemala* (1998) and *Radilla Pacheco v. Mexico* (2009), the IACtHR expanded its protection standards, indicating that victims of forced disappearances include individuals, who have disappeared, and their families, who suffer psychological distress and violations of their rights. Emphasis was placed on the prohibition of amnesty, statutes of limitations and the *ne bis in idem* principle in cases involving serious human rights violations, which explicitly excludes the practice of impunity.

In *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil* (2010), the IACtHR reaffirmed that states are obliged to fully disclose the truth and provide families with information about the fate of the victim. This judgment had a structural character, emphasising the need for reform of national legislation and the abolition of amnesty provisions. In the latest jurisprudence, it broadened its perspective by linking the classical approach to forced disappearances with an analysis of intersectional human rights violations. In *Tenorio Roca et al. v. Peru* (2016), the importance of the right of families to participate in investigations and access archives was highlighted, while in *Munárriz Escobar et al. v. Peru* (2018), the obligation to search for victims was emphasised as an inseparable element of the right to truth. In *Pérez Lucas v. Guatemala* (2023), the IACtHR reaffirmed the absolute nature of the prohibition of impunity, including the ban on amnesty and other measures limiting criminal responsibility of perpetrators.

In *Ticona Estrada et al. v. Bolivia Tribune*, the Court recognised the specific features and elements of the crime of enforced disappearance of persons, which enabled it to determine the violation of personal liberty and the prohibition of practice, permit or tolerance of enforced disappearance of persons. It set standards for due diligence in the investigation, performing all the necessary steps to determine the fate or whereabouts of the missing person. It found that the criminal proceedings initiated were not effective and were not conducted within a reasonable time. It held that the failure to investigate, punish and redress acts of torture results in international liability.

The evolution of this jurisprudential line indicates that, from initial rulings focused on individual responsibility for arbitrary detention, the IACtHR has moved to a comprehensive approach that includes structural obligations of states: legal reforms, effective search efforts, access to archives and strengthening the rights of families to truth and memory. Contemporary jurisprudence treats forced disappearances as individual violations and a systemic phenomenon, whose eradication requires combining individual, institutional and historical accountability.

3.8. The Poor

The term 'poverty' covers a broad category of vulnerable people. The poor, explicitly mentioned in the Brasilia Rules,[242] constitute a large segment of the Latin American population, which faces numerous, sometimes insurmountable, obstacles in exercising their rights, including access to justice. There are interesting IACtHR rulings that aim to ensure that the poor have access to national and international justice, despite the limitations imposed by law in most cases. Those complaining of violations are entitled to appeal directly to the IACtHR, without having to exhaust domestic remedies, if they are unable to access them due to economic hardship.[243] Similarly, the state must provide these vulnerable persons with an adequate defence, regardless of whether they are involved in criminal proceedings, if they are unable to obtain

242 Brasilia Rules on Access to Justice for Persons in Conditions of Vulnerability (2008), Section 2a, pt. 7.
243 OC-11/90, para. 31.

it on their own.[244] The Court gradually developed a jurisprudential line concerning the protection of the rights of persons living in poverty, recognising that poverty is a socio-economic category and a structural factor conducive to violations of fundamental human rights. Initially, this issue appeared in cases related to ESCR; however, over time, it formulated a holistic approach that treats poverty as a discriminatory factor and a source of systemic violations.

A groundbreaking case was *Lagos del Campo v. Peru* (2017), in which the IACtHR, for the first time, unequivocally recognised the autonomous nature of Article 26 of the ACHR and found a violation of the right to work concerning workers' rights protection. This opened the gate for the protection of a range of socio-economic rights, particularly significant for individuals in difficult economic conditions. Subsequent cases, such as *Cuscul Pivaral and others v. Guatemala* (2018), concerned access to healthcare for people living with HIV/AIDS, with the IACtHR indicating that the state's neglect primarily affects impoverished and marginalised groups. In *Sawhoyamaxa Cooperative v. Paraguay* (2006) and *Comunidad Indígena Yakye Axa v. Paraguay* (2005), it pointed out that lack of access to land and basic public services results in a direct violation of the right to life and dignity. These became the foundation for developing the rights of impoverished persons considering the rights of indigenous peoples and rural communities.

More recent jurisprudence extends these standards to the right to social security, housing and health. In *Hernández v. Argentina* (2019), the IACtHR clarified the criteria for the adequacy and effectiveness of legal protection measures, emphasising that poor persons are particularly vulnerable to a lack of access to justice. *Poblete Vilches and others v. Chile* (2018) recognised that elderly persons in difficult economic situations require special protection of the right to health, aligning with a broader judicial trend concerning vulnerable groups. In *La Oroya v. Peru* (2023), concerning an environmental disaster and its impact on the rights of residents of impoverished regions, a new direction is evident, linking environmental protection with the rights of communities living in poverty. The Court explicitly stated that poor persons are disproportionately exposed to the effects of environmental degradation and states have an obligation to take preventive and remedial measures in this regard. The evolution of jurisprudence demonstrates that the IACtHR has moved from treating poverty as a circumstance accompanying other violations to perceiving it as a structural discriminatory category requiring special protective measures.

3.9. Other Vulnerable Groups

The profile of vulnerable persons includes members of certain minority groups, defined based on various factors. One of them is the sexual orientation of people. This concerns the LGBTQ community, which is becoming increasingly present before international bodies responsible for the protection of fundamental rights. The IACtHR's case law highlights the case concerning discrimination against the mother of a

244 Ibid., para. 28.

family, and minors, based on her sexual orientation who applied for the custody of her children. The IACtHR rejected social stereotypes that combat equality and emphasise discrimination, questioned the existence of a single-family model and rejected the idea that the best interests of the child are automatically used to justify discriminatory solutions. It called for impartiality of judges hearing such cases.[245] Similarly, it noted that the lack of consensus in a state on the legal treatment of sexual orientation is not a valid argument for denying or restricting human rights or perpetuating historical and structural discrimination.[246] The problems of human rights defenders, who are exposed to various pressures and attacks, are becoming increasingly important. Inter-American case law establishes special guarantees for human rights defenders against the state and private individuals, along with specific measures depending on the risk involved.[247]

In recent years, the IACtHR has systematically developed standards for the protection of LGBTQ individuals, encompassing the right to gender identity and marry and form families, along with protection against violence and discrimination. The jurisprudence illustrates the IACtHR's evolution from a narrowly understood protection of personal liberty to a comprehensive concept of equality and dignity for LGBTQ persons. In *Olivares López and others v. Peru* (2016), it, for the first time, recognised that states have an obligation to ensure effective legal protection for transgender individuals concerning the recognition of their gender identity. The judgment emphasised that the absence of procedures allowing formal changes of name and gender markers in official documents constitutes discrimination and a violation of dignity, privacy and the right to family life. This became the foundation for further standards of

245 Atala Riffo y niñas, paras. 111, 140, 142 and 237.

246 Atala Riffo y niñas, para. 92; Duque, para. 123; Flor Freire, para. 124.

247 Nogueira de Carvalho y otros, para. 77. Gilson Nogueira de Carvalho was a lawyer and human rights defender who spent most of his professional career working to denounce crimes committed by the 'golden boys,' a Brazilian death squad composed of civilian police and other state officials. After his murder on October 20, 1996, the state failed to undertake an effective investigation into his death and failed to punish the responsible parties. IACmHR presented the case to IACtHR in 2005, alleging violations that occurred after December 10, 1998, the date that the state recognised IACtHR's jurisdiction. IACtHR found that the state violated ACHR. The facts of the case refer to the threats and eventual murder suffered by Wilson Nogueira de Carvalho, a human rights lawyer and activist campaigning against death squads and the impunity which they enjoyed. Luna Lypez, para. 123. Defensor de Derechos Humanos y otros, para. 142. Following an internal conflict in Guatemala, in the 1980s many human rights defenders were targeted, threatened, and attacked by state military forces. This case stems from the murder of a community mayor, who was also a notable human rights defender. Members of the family of the victim, some of whom were also politically active, were persecuted after the victim's death. Multiple investigations were launched, and though the state eventually concluded that the victim had been deprived of his right to life, it did not identify or punish those responsible. Additionally, the state failed to protect the victim's family from the threats and harassment they received after his death, and they were ultimately forced to flee their homes. IACtHR found that the state violated ACHR. The facts of the petition refer to the murder of human rights defender A.A. on December 20, 2004 that has gone unpunished due to irregularities and the lack of government diligence in the investigations.

protection for transgender people in the region, outlining the state's duties to eliminate legal and administrative barriers. Furthermore, it expanded protections against violence directed at LGBTQ individuals. In *Vicky Hernández v. Honduras* (2020) and *Azul Rojas v. Peru* (2021), it stated that the state is responsible for the failure to provide effective protection to victims of hate-motivated violence based on sexual orientation or gender identity. It highlighted the necessity of conducting thorough investigations, prosecuting perpetrators and ensuring reparations for victims, including material and non-material measures, such as safeguarding the right to truth and memory.

Regarding the right to marry, the IACtHR consistently indicates that bans on same-sex marriage constitute discrimination incompatible with the principle of equality and the prohibition of arbitrary restrictions on rights protected by the ACHR. Although jurisprudence in this area is evolving, it affirms the states' obligation to amend domestic laws to allow same-sex couples to enjoy all rights arising from marriage, including the right to family life, inheritance, child custody and social security. The evolution of jurisprudence demonstrates a shift from protecting specific aspects of LGBTQ individuals' private lives to a comprehensive concept of equality, autonomy and protection against discrimination across various spheres of life. The Court unequivocally treats the right to gender identity, access to marriage and protection from violence and discrimination as integral human rights that states must actively defend. Contemporary case law emphasises that states are obliged to refrain from discriminatory actions and proactively implement protective legislative and administrative mechanisms that eliminate systemic barriers for LGBTQ persons, ensuring their full participation in social, family and public life.

4. Reparation as a Legal Consequence of a Human Rights Violation

The IACtHR must rule on the violations of human rights or the interpretation of the provisions on human rights. This has a twofold content: on the one hand, it is declaratory in nature regarding the alleged or actual violation, on the other hand, it is condemnatory in nature, after the violation has been established.[248] The latter refers to the so-called reparation or legal consequences of a very different nature. The most obvious form of redress is financial compensation for the damage and wrongs done to the victim. It is necessary to ensure appropriate conditions to satisfy the wronged victim and society and create new circumstances to prevent future violations. These are the objectives of the system of reparations or legal consequences for human rights violations, which the IACtHR implements within the scope of its jurisdictional

248 Asunto del Periydico la 'La Naciyn'. Medidas Provisionales respecto de Costa Rica. Resoluciyn de la Corte de 7 de septiembre de 2001, considerando cuarto, Asunto Wong Ho Wing. Medidas provisionales respecto de Perъ. Resoluciyn del Presidente en ejercicio de la Corte de 6 de diciembre de 2012, considerando quinto, y Asunto B. respecto de El Salvador. Medidas Provisionales. Resoluciyn de la Corte Interamericana de Derechos Humanos de 29 de mayo de 2013, para. 5.

powers. Regarding reparations, the IACtHR in San Josй stands out from other courts protecting human rights. While the first judgements of the IACtHR referred primarily to financial compensation, reparations now encompass a wide range of obligations. Its decisions in this area, like many advisory opinions concerning the interpretation of norms, refer to monetary and other benefits for victims and other means of redress, including public recognition of the international responsibility of the state, changes to the texts of the constitution, adoption or abolition of laws, changes in case law, reopening of proceedings, preparation and implementation of community programs, training of public officials, international judicial assistance and actions to modify cultural patterns.

Previously, there were separate judgements on preliminary objections, merits and satisfaction apart from the interpretation of the judgements. The procedural proceedings were concentrated, as far as possible, in a single procedure, covering the previous stages and a single judgement covering the charges, merits and satisfaction. Thus, the declaration and the judgement of conviction were combined in a single document. The Inter-American norms on reparations have gone farther than the European norms. Hence, they encompass reparations of a patrimonial nature, that is, compensatory damages, and lead to integral reparations, which encompass multiple diverse consequences. These are transformative measures, protected by the idea of preventing future violations, seriously modifying the conditions or determinants of the violations committed. The broad catalogue of remedies includes restitution, compensation, guarantees of non-repetition, investigation of the facts, physical, psychological or social rehabilitation and redress through actions on behalf of victims.

The right to redress constitutes a fundamental element of human rights protection in the IACtHR's jurisprudence, closely linked to the principle of state responsibility for violations protected by the ACHR. The Court has systematically developed standards regarding the reparation of material and moral damages, including financial reparations, restoring the situation to before the violation, rehabilitation, the right to truth and measures ensuring the non-repetition of violations. In *Velásquez Rodríguez v. Honduras* (1988), it emphasised that the state bears the responsibility for any harm caused due to human rights violations, regardless of whether such harm results from actions or omissions by state authorities. These rulings introduced the concept of comprehensive redress, encompassing financial compensation and moral measures, such as restoring the victim's dignity, access to truth and historical memory.

In cases concerning victims of crimes that violate life and personal integrity, such as *Barrios Altos v. Peru* (2001) and *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil* (2010), the IACtHR developed standards regarding collective reparations, including educational initiatives, historical memory programs and public acknowledgment of state responsibility. The right to redress is not limited to material compensation and involves the state's obligation to ensure preventive measures to prevent similar violations in the future. Subsequently, the Court emphasised that redress should be individually tailored to the nature of the violation and the needs of the victims. In *Hernández v. Argentina* (2019), it stated that the state must provide measures restoring

the victims' mental and physical integrity, including access to medical care, psychological therapy and rehabilitation. This introduced specific criteria for the adequacy and effectiveness of reparative measures, which have become benchmarks for subsequent rulings. In the most recent jurisprudence, *Pérez Lucas v. Guatemala* (2023), it highlighted the link between the right to redress and the prohibition of impunity, indicating that full redress involves repairing the harm suffered by victims and effectively investigating the perpetrators' responsibility and addressing systemic causes of violations. Thus, redress becomes an integral part of realising the right to justice and human rights.

The evolution of the IACtHR's jurisprudence demonstrates that the right to redress is comprehensive and multi-dimensional, encompassing material compensation, moral measures, restoration of victims' rights, access to truth, educational actions and measures ensuring non-repetition of violations. The Court consistently emphasises that effective redress is essential for restoring victims' dignity and ensuring the proper functioning of the rule of law in the Latin American region.

5. Summary

The Inter-American system of human rights shares a similar catalogue of human rights and freedoms with other protective systems. However, its procedural system is adapted to the specific cultural, social and economic context of the American region. It is characterised by a unique relationship between the individual and the state and between individuals, shaped by the region's history, social stratification and economic instability. Its case law focuses on protecting the rights of indigenous people, women, children and the environment, along with addressing issues of truth commissions and settling accounts of dictatorships. The IACtHR has made significant contributions to the Inter-American human rights law, particularly concerning reparations. Its jurisdiction goes beyond compliance with individual resolutions and its case law addresses a range of human rights violations, including torture, extrajudicial executions and denial of access to justice. The Court has examined complex cases involving the rights of natural persons, the right to truth and the role of international humanitarian law.

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Part II
African System of Human Rights Protection

| Chapter 5 |

Legal Framework for Human Rights Protection in Africa

Lilla Garayová

ABSTRACT

This chapter examines the development and framework of the African regional human rights system, emphasising its evolution within the broader context of international human rights law. Following World War II, regional human rights systems emerged alongside the United Nations' (UN) efforts, with Africa establishing a distinct framework in response to global standards and regional needs. The study explores how the youngest regional system of human rights protection evolved, what influenced the creation of instruments, such as the African Charter on Human and Peoples' Rights, the African Charter on the Rights and Welfare of the Child, and protocols addressing specific issues, including women's rights, disability rights and the rights of older persons. Additionally, the study addresses the roles of key African human rights institutions, including the African Commission and African Court on Human and Peoples' Rights.

KEYWORDS

African human rights system, African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, regional human rights instruments, African Union, Maputo Protocol, Kampala Convention, African Charter on the Rights and Welfare of the Child, human rights institutions in Africa

1. Introduction

Following World War II, the United Nations (UN) emerged as the foremost international body advocating for universal human rights. Alongside the UN, various regional human rights systems developed globally, notably in Europe, the Americas and Africa, each contributing distinct perspectives and mechanisms to the broader human rights discourse.

Since the mid-20th century, the global community has actively worked to establish an international framework for the protection and promotion of human rights, which obligates Member States to uphold universal standards. To achieve this vision, the international human rights system developed a body of norms to be applied universally, transcending political and geographical boundaries. While this international framework is designed to be enforceable at the regional and national levels, there

Lilla Garayová (2026) 'Legal Framework for Human Rights Protection in Africa' in Zombory, K. (ed.) *Regional Human Rights Protection Systems Outside Europe.* Miskolc–Budapest: Central European Academic Publishing, pp. 209–248. https://doi.org/10.71009/2026.kz.rhrpsoe_5

are significant challenges in providing comprehensive human rights protections solely through an international mechanism. For human rights commitments to be realised, effective and credible regional and national systems must complement the international framework. These regional and national mechanisms are essential for bridging gaps in enforcement and adapting protections per specific regional contexts, bringing the ideals of human rights closer to individuals.

For several years, the UN was cautious, if not outright sceptical, of regional human rights protection systems, such as those emerging in Europe and the Americas. There was a concern that these regional systems may fragment global human rights efforts by setting lower standards than those promoted by the UN, undermining the universality of human rights protections. Some feared that states might use these regional mechanisms as an avenue to evade stricter global human rights scrutiny. By subjecting themselves to regional frameworks, perceived as less demanding, these states could argue that they fulfilled their obligations, avoiding the stringent expectations of the international community under the UN's oversight.

However, this perspective shifted in the 1970s, following the entry into force of two landmark UN treaties: the International Covenant on Economic, Social and Cultural Rights (ICESCR)[1] and the International Covenant on Civil and Political Rights (ICCPR),[2] both were adopted in 1966 and enforced by 1976. With these legal frameworks reinforcing the UN's human rights mandate, the organisation became more open to the idea of regional approaches as complementary to its universal agenda. In 1977, the UN General Assembly formally encouraged states without regional human rights mechanisms to consider establishing them,[3] marking a significant endorsement of regionalism. This new perspective paved the way for the creation of the African regional human rights system, formally established in June 1981, which has become an essential component of the global human rights architecture.

The formation of regional human rights frameworks was driven in part by the need to fill gaps in the international system and address specific regional challenges. The disconnect between universal standards and the diverse regional realities highlighted the importance of adapting human rights principles to reflect regional contexts and priorities. An exclusively international approach could feel remote from local concerns, necessitating the creation of systems that respected regional differences while upholding universal values. These considerations played a significant

1 UN General Assembly (1966) International Covenant on Economic, Social and Cultural Rights. United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966.

2 UN General Assembly (1966) International Covenant on Civil and Political Rights. United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966.

3 UN General Assembly (32nd sess.: 1977) Regional arrangements for the promotion and protection of human rights, A/RES/32/127, UN General Assembly, 16 December 1977, 'The General Assembly, Mindful of the suggestions made for the establishment, in regions where it does not already exist, of regional machinery for the promotion and protection of human rights,[...] Appeals to States in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights.'.

role in the establishment of the African regional human rights system, designed to promote and protect rights based on Africa's socio-political context.

2. The Historical Background of the African Human Rights System

The African regional human rights system seeks to harmonise universal human rights standards with the continent's cultural values. It integrates globally recognised human rights norms with an appreciation for African traditions and communal principles. The struggle for human rights in Africa is deeply rooted in the continent's enduring history of hardship, marked by centuries of exploitation, oppression and resistance. The periods of slavery, colonial subjugation, apartheid and neo-colonialism have left a profound imprint on the African society, shaping their collective resolve to establish a robust framework for human rights protection.

A significant milestone in formalising regional human rights protection came in June 1981, when the African Charter on Human and Peoples' Rights (AChHPR),[4] the cornerstone of the African human rights system, was adopted by the 18th Assembly of the Heads of State and Government of the Organisation of African Unity (OAU). However, the journey to adopting the Charter was neither quick nor straightforward. It unfolded over several decades and involved numerous consultations, seminars and conferences, largely driven by African jurists, civil society organisations and human rights advocates, supported by key international entities, such as the UN and the OAU Secretary-General.

The concept of creating a human rights protection mechanism for Africa emerged in the early 1960s. At the first Congress of African Jurists in Lagos, Nigeria, in 1961, delegates adopted a declaration known as the 'Law of Lagos', which urged African governments to establish a regional human rights treaty that would include a court and a commission to oversee compliance.[5] Despite this call to action, African governments at the time did not actively pursue the development of such a framework.

Similarly, the OAU, founded in 1963, made no explicit commitment to human rights protection in its founding Charter.[6] While it encouraged respect for the Universal Declaration of Human Rights (UDHR) in international relations, it imposed no binding national obligation. The OAU addressed issues, such as decolonisation, racial discrimination and the refugee crisis; however, it avoided confronting human rights

4 Organisation of African Unity (OAU) (1981) *African Charter on Human and Peoples' Rights (Banjul Charter)*, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.

5 African Conference on the Rule of Law, Lagos, Nigeria, 3-7 January 1961: A report on the proceedings of the Conference. [Online]. Available at: https://www.icj.org/wp-content/uploads/1961/06/Africa-African-Conference-Rule-of-Law-conference-report-1961-eng.pdf (Accessed: 3 November 2024).

6 Organisation of African Unity (OAU) (1963) Charter of the Organisation of African Unity [Online]. Available at: https://www.refworld.org/legal/constinstr/oau/1963/en/20810 (Accessed: 3 November 2024).

abuses within Member States due to its focus on state sovereignty, territorial integrity and socio-economic development. Despite this limited mandate, the OAU gradually recognised the importance of establishing a regional human rights mechanism. This evolution reflects Africa's commitment to addressing individual and collective rights within its historical and political context, paving the way for a system tailored to the continent's needs and aspirations.

The momentum for regional human rights protection resurfaced in 1967 at the first Conference of Francophone African Jurists in Dakar, Senegal. Building upon the ideas outlined in the Law of Lagos, the delegates reaffirmed the need for an African human rights framework. The resulting Dakar Declaration urged the International Commission of Jurists, in collaboration with other African institutions, to explore ways of establishing a regional mechanism that could better protect human rights on the continent.[7] This renewed effort, though gradual, set the stage for future developments that would lead to the adoption of the AChHPR in 1981.[8]

The UN was instrumental in encouraging the development of a regional human rights system in Africa by organising a series of seminars and conferences across the continent. The UN Human Rights Commission established an ad hoc working group, passing a resolution that urged the UN Secretary-General to provide necessary support for the establishment of a regional mechanism. The Commission's resolution 24 (XXXIV), dated 8 March 1972, explicitly invited the OAU to take proactive steps for establishing a regional human rights mechanism. To underscore the seriousness of this invitation, the resolution offered the UN Secretary-General's support, should the OAU require assistance in realising this goal. Despite these proactive efforts, there was hesitation among African states to endorse a regional convention. To overcome this resistance, conference participants formed a follow-up committee tasked with personally engaging African heads of state and other influential leaders on the importance of a regional human rights framework. The committee undertook numerous missions across Francophone Africa, targeting countries whose leaders were likely to support human rights initiatives and wield influence within the OAU. During these visits, committee members emphasised to heads of state and political authorities the pressing need for a regional human rights commission in Africa, highlighting the urgency of creating a body that would uphold and promote human rights within the African context.

During one of these visits, Léopold Sédar Senghor, then President of Senegal, agreed to propose a resolution for the establishment of an African Human Rights Commission at the next OAU Assembly.[9] He appointed the President of the Supreme Court of Senegal as the head of the committee responsible for drafting the initial

7 Congrès de Juristes Africains Francophones (1967) *Déclaration de Dakar: Conclusions*. Dakar, 5-9 January 1967.

8 Organisation of African Unity (OAU) (1981) *African Charter on Human and Peoples' Rights (Banjul Charter)*, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.

9 International Commission of Jurists (1985) Human and Peoples' Rights in Africa and the African Charter: Report of a Conference held in Nairobi from 2 to 4 December 1985. Nairobi.

text. This preliminary draft, known as the 'Senghor draft', laid the foundation for the AChHPR. This groundwork culminated in the adoption of Resolution 115 (XVI) at the 16th Ordinary Session of the Assembly of Heads of State and Government of the OAU in Monrovia, Liberia, from 17 to 20 July 1979.[10] Through this resolution, the OAU formally instructed its Secretary-General to convene a committee of African experts for developing the AChHPR's preliminary draft. This draft was to include provisions for creating institutions dedicated to the promotion and protection of human and peoples' rights, marking a significant step forward in establishing a regional human rights system for Africa. The committee, composed of 20 African experts and chaired by Judge Kéba M'baye, gathered in Dakar, Senegal, in 1979. During the opening session, President Senghor encouraged the committee to craft a document that would resonate with African values, address Africa's specific needs, prioritise the right to development and emphasise the duties of individuals within society.[11] Following 10 days of intense deliberation, the committee produced a preliminary draft of the AChHPR.

In 1979, the UN General Assembly passed Resolution 34/171, which addressed the need for regional frameworks for the promotion and protection of human rights.[12] Among other recommendations, it called upon the UN Secretary-General to assess the feasibility of organising a seminar in developing regions to engage in discussions on establishing and strengthening regional human rights mechanisms. Despite this progress, resistance from certain African governments nearly derailed the AChHPR's adoption. A critical conference, originally scheduled to finalise the draft in Ethiopia, was postponed due to political opposition. During this tense period, the project faced substantial threats, and the future of the Charter remained uncertain. Amidst this uncertainty, the OAU Secretary-General invited the President of The Gambia to host two ministerial conferences in Banjul, where the draft was completed.

The final draft, later known as the 'Banjul Charter' in recognition of The Gambia's role, was adopted by the OAU Assembly on 28 June 1981 in Nairobi, Kenya.[13] The first country to ratify the Charter was Mali, on 21 October 1981, initiating a wave of regional support.[14] By 21 October 1986, the Charter officially came into force after sufficient ratifications, signalling a new era for human rights protection in Africa. By 1999, every Member State had ratified the Charter, with South Sudan, Africa's newest state, joining in 2016. Morocco was the last country to join the AU, reinstating its membership in 2017 after initially withdrawing from the OAU in 1984. Although Morocco rejoined the African Union after over three decades of isolation, it has not

10 Organisation of African Unity (1979) Resolution 115 (XVI) at the Sixteenth Ordinary Session of the Assembly of Heads of State and Government. Monrovia, Liberia, 17–20 July.
11 Ouguergouz, 2003, pp. 377–378.
12 United Nations General Assembly (1979) Resolution 34/171 on Regional Arrangements for the Promotion and Protection of Human Rights. A/34/829. Adopted without vote. 17 December 1979.
13 Organisation of African Unity (OAU) (1981) African Charter on Human and Peoples' Rights (Banjul Charter), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.
14 Ibid.

yet taken steps to ratify this key human rights instrument, making it the only country of the 55 Member States that is yet to ratify the Charter.[15]

The African Commission on Human and Peoples' Rights (ACHPR), the system's main body for monitoring and promoting the Charter's provisions, was established in 1987.[16] On 2 November of that year, the Commission held its first ordinary session in Addis Ababa, Ethiopia, where it adopted its inaugural resolution, officially designating its headquarters in Banjul, The Gambia. The Commission was designed as the primary institution to monitor and promote the principles enshrined in the Charter. The following year, on 28 April 1988, the Commission presented its first activity Report, documenting its early efforts and setting a precedent for ongoing operational transparency.[17] This report laid the foundation for a practice of accountability that continues to define the Commission's work. Through these reports, the Commission maintained an open dialogue with African governments and civil society, building trust in the system's legitimacy and encouraging states to engage constructively with its findings and recommendations. On 12 June 1989, the Commission's headquarters were formally inaugurated in Banjul, establishing the city as a focal point for regional human rights work. Later that year, on 21 October 1989, the Commission adopted this date as the African Human Rights Day, recognising the Charter's entry into force and as a day to promote human rights awareness across the continent. In June 1989, it convened its first extraordinary session to address urgent issues.

Meanwhile, as Africa's commitment to human rights grew, the OAU took further steps by adopting the Protocol on the African Court on Human and Peoples' Rights (ACtHPR) on 10 June 1998 at the OAU summit in Burkina Faso.[18] This new judicial body was to provide binding resolutions for human rights violations, offering an additional layer of protection to the people of Africa. The Protocol entered into force on 25 January 2004, enabling the Court to start handling cases. In 2006, significant strides were made, as the first judges of the Court were sworn in on 2 July and, by November of that year, the Court began its official operations. The African Union has extended the mandate of the ACtHPR to crimes under international law and transnational crimes, reflected in the 2014 Malabo Protocol.[19,20] With both the ACHPR and

15 African Commission on Human and Peoples' Rights (n.d.) State Parties to the African Charter on Human and Peoples' Rights [Online]. Available at: https://achpr.au.int/en/states (Accessed: 3 November 2024).

16 African Commission on Human and Peoples' Rights (n.d.) About ACHPR. [Online]. Available at: https://achpr.au.int/en (Accessed: 3 November 2024).

17 African Commission on Human and Peoples' Rights (1988) 1st Annual Activity Report [pdf]. [Online]. Available at: https://archives.au.int/bitstream/handle/123456789/2074/1st%20Annual%20Activity%20Report_E.pdf?sequence=1&isAllowed=y (Accessed: 3 November 2024).

18 Organisation of African Unity (OAU) (1998) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998.

19 African Union (2014) Decision on the Draft Legal Instruments, Assembly/AU/Dec.529(XXIII).

20 The Malabo Protocol has not yet received the required 15 ratifications to enter into force. As of 2025, the African Court does not exercise the expanded criminal jurisdiction that the Malabo Protocol would confer, since the instrument remains dormant pending further ratifications.

the ACtHPR actively functioning, Africa's regional human rights system solidified its institutional structure.

The African Charter on the Rights and Welfare of the Child (AChRWC), known as the Children's Charter, was adopted by the OAU in 1990 during its 26th ordinary session in Addis Ababa, Ethiopia.[21] The Charter officially entered into force on 29 November 1999 after ratification by 15 OAU Member States. With the transition of the OAU into the African Union in 2001, the Charter has continued to serve as a cornerstone of the AU's commitment to child protection and welfare. Similar to the UN Convention on the Rights of the Child (UN CRC),[22] the Children's Charter serves as a comprehensive instrument outlining the rights of children and establishing universal principles and norms for their well-being. However, it is distinctive in its approach, tailored to address the unique challenges faced by children in Africa, including issues like harmful cultural practices, child labour and child exploitation.

The Children's Charter is an independent legal document, separate from the AChHPR. It was not designed as an amendment or supplement to the AChHPR, nor is it institutionally tied to it. Instead, it is a dedicated instrument for the explicit protection of children's rights in Africa. The responsibility for monitoring and enforcing the Charter's provisions rests with the African Committee of Experts on the Rights and Welfare of the Child, an autonomous body tasked with overseeing state compliance, advising on best practices and providing recommendations to improve the status and protection of children across African nations.

Another milestone came with the adoption of the Maputo Protocol on 11 July 2003, focusing specifically on women's rights within the African human rights framework.[23] It defines a comprehensive set of rights for African women, addressing areas often overlooked in traditional human rights frameworks. It guarantees women's right to participate in political processes, ensuring equal access and representation alongside men in social and political spheres. The Protocol enhances women's autonomy over reproductive health decisions, empowering them to make choices about their bodies. Additionally, it mandates the eradication of harmful practices, such as female genital mutilation (FGM). Adopted by the African Union in 2003 in Maputo, Mozambique, the Protocol serves as an amendment to the AChHPR.

The year 2016, designated as the 'African Year of Human Rights with a particular focus on the Rights of Women', stressed the region's growing focus on gender equality and women's rights across the continent. The year commemorated the 35th anniversary of the adoption of the AChHPR, the 30th anniversary of its entry into force, the 29th anniversary of the ACHPR's operationalisation and the 10th anniversary of the establishment of the ACtHPR. Additionally, it marked the 13th year of the adoption

21 Organisation of African Unity (OAU) (1990) African Charter on the Rights and Welfare of the Child. CAB/LEG/24.9/49, 11 July 1990.

22 UN General Assembly (1989) Convention on the Rights of the Child. United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.

23 African Union (2003) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. African Union, 11 July 2003.

of the Maputo Protocol. This campaign highlighted the ongoing challenges faced by women and the need for effective implementation of the Maputo Protocol and other frameworks aimed at gender equity. The same year, the AU adopted the Protocol on the Rights of Older Persons in Africa, the first regional instrument dedicated to protecting the welfare of the elderly.[24] Recognising the unique vulnerabilities of older individuals, the protocol addressed issues, such as healthcare access, protection from abuse and social security, ensuring older people's dignity and security as integral members of African societies. This focus on the rights of vulnerable populations continued with the adoption of the Protocol on the Rights of Persons with Disabilities in 2018.[25] It affirms the commitment of AU Member States to promote equal treatment and inclusion of individuals with disabilities, aligning Africa's standards with international instruments, such as the UN Convention on the Rights of Persons with Disabilities, and ensuring that people with disabilities have access to opportunities and protections.

In 2019, the AU adopted the Transitional Justice Policy,[26] providing a framework for post-conflict African states to help AU Member States recover from violent conflicts and repression to achieve accountability, lasting peace, justice and reconciliation. The policy addresses current issues in transitional justice and serves as a flexible guide that countries can adapt when creating and implementing their transitional justice systems. This policy represents the AU's broader commitment to address human rights violations and their long-term impacts. Recent efforts to increase transparency and public access to the African human rights system have led to the adoption of digital tools by the ACHPR and ACtHPR. Through online databases and digital access to case documents, individuals, legal practitioners and advocacy groups can easily track case developments and decisions, making the system more accessible and accountable to the public.

Despite these significant advancements, there are widespread human rights violations in the region, caused by contemporary forms of slavery, racism, poverty, corruption, illiteracy, religious intolerance, population displacement and several other factors that expose millions to vulnerabilities. Compounding these challenges, dictatorial regimes and their monopoly are major contributors to human rights violations in the region. The ACHPR has done a lot to bring the issue of human rights into the political discourse in Africa. Nevertheless, the response has been lukewarm. To this day, the AChHPR remains inaccessible to the majority of the people it was designed to serve and largely unknown in the region.[27] A significant barrier lies in the ACHPR's limited accessibility. For many Africans, especially those in remote or marginalised communities, its mechanisms remain out of reach. Many governments have demonstrated limited political will to fully comply with the AChHPR's standards

24 African Union (2016) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa. 31 January 2016.
25 African Union (2018) Protocol on the Rights of Persons with Disabilities. 29 January 2018.
26 African Union (2019) Transitional Justice Policy. 6 February 2019.
27 Ssenyonjo, 2011, p. xv.

or prioritise human rights in their national agendas. In the future, these challenges will need to be addressed to realise a vision of human rights that originally inspired this regional human rights framework.

3. Key Legal Instruments in the African Human Rights System

The African human rights system is built upon a framework of legal instruments designed to address the rights of individuals and communities across the continent. Key among these instruments is the AChHPR (1981), or the Banjul Charter, which lays the foundation for human rights protections in Africa by encompassing civil, political, economic, social and cultural rights. Subsequent protocols and conventions expand on this framework to address specific groups and issues, reflecting the evolving understanding of human rights within the African context. These include the Maputo Protocol (2003), which centres on women's rights, the Protocol establishing the ACtHPR (1998), which enforces the Charter's provisions, and the AChRWC (1990), which focuses on children's rights. Other specialised instruments, such as the Kampala Convention (2009) for internally displaced persons, the Protocol on the Rights of Older Persons (2016) and the Protocol on the Rights of Persons with Disabilities (2018), address specific vulnerabilities. Together, these instruments form the African human rights system.

3.1. The AChHPR

The recognition of human rights as a formal legal concept emerged gradually in Africa, with the notion of human dignity slowly being integrated into the region's legal framework. This evolving recognition of human rights within the African context must be viewed alongside the broader developments in international law and the UN human rights system. Africa's path to embracing human rights was heavily influenced by the political and social struggles of African states during the colonial era and post-independence period.[28] These experiences provided the impetus for establishing human rights mechanisms tailored to the African experience, culminating in the AChHPR in the 1980s.

The Charter reflected Africa's distinctive historical trajectory and was strongly influenced by the OAU's formation, which was founded on 25 May 1963, with the adoption of the OAU Charter.[29] This OAU Charter laid out the organisation's main objectives, including fostering solidarity among African states, promoting economic and social development, supporting anti-colonial efforts, defending the sovereignty of African nations and encouraging international cooperation. Despite these progressive goals,

28 Bösl and Diescho, 2009, p. 12.

29 Organisation of African Unity (OAU) (1963) Charter of the Organisation of African Unity [Online]. Available at: https://www.refworld.org/legal/constinstr/oau/1963/en/20810 (Accessed: 3 November 2024).

it did not explicitly address human rights protection as a foundational objective. This omission resulted in a stance of non-interference in human rights abuses within Member States, often prioritising sovereignty and non-intervention over accountability. For example, the organisation remained silent on the large-scale massacres in Burundi in 1972 and 1973, where thousands of Hutu were killed. Similarly, the brutal targeting of Muslims in Western Uganda in 1979, which included acts intended to decimate Muslim communities through violence, arson and destruction of religious sites, went unaddressed.[30] The OAU refrained from condemning these events or initiating discussions about them, viewing such issues as internal matters within the sole jurisdiction of sovereign states.

While the OAU Charter did not explicitly include human rights within its formal mandate, it set an important groundwork for future human rights protections in Africa through four significant means. First, one of its key objectives was to foster international cooperation, with 'due regard' to the principles of the UN Charter[31] and the UDHR.[32] This reference to both foundational international instruments implicitly bound African states to uphold human rights principles, ensuring that human rights concerns would not be wholly sidelined in African governance. Second, the OAU became a powerful advocate for the self-determination of African people under colonial rule, actively supporting independence movements across the continent. In its stance against apartheid in South Africa and white minority rule in Rhodesia (now Zimbabwe), it emphasised liberation as an intrinsic human right and rallied international support to dismantle these oppressive regimes.

Third, the OAU addressed the humanitarian crisis of refugees, which was a pressing issue across post-colonial Africa. In 1969, it adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa, an instrument that protected refugees, established state obligations for their welfare and set a precedent for human rights concerns within the region.[33] Fourth, it prioritised the peaceful settlement of border disputes, a significant move in a continent with arbitrary colonial borders. It successfully mediated territorial disputes between countries, such as Algeria and Morocco, Somalia and Ethiopia, and Niger and Dahomey (now Benin).[34] By facilitating peaceful solutions to these conflicts, the OAU promoted regional stability, a necessary condition for developing a framework to protect human rights.

By the 1970s, several factors converged to advance the idea of a formal human rights system in Africa, leading to the adoption of the AChHPR in June 1981. Among these influences was the UN's emphasis on establishing regional mechanisms tailored to specific human rights issues faced by different continents. Simultaneously, the

30 Ssenyonjo, 2011, p. 5.
31 United Nations (1945) Charter of the United Nations. 1 UNTS XVI, 24 October 1945.
32 UN General Assembly (1948) Universal Declaration of Human Rights, 217 A (III), 10 December 1948.
33 Organisation of African Unity (OAU) (1969) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention). 1001 U.N.T.S. 45, 10 September 1969.
34 Ssenyonjo, 2011, p. 6.

international community experienced a heightened focus on human rights. Additionally, the horrific human rights abuses in countries such as Uganda under Idi Amin (1971–1979), Equatorial Guinea under Macias Nguema (1969–1979) and the Central African Empire under Jean-Bédel Bokassa (1966–1979) underscored the urgent need for a regional framework that could monitor and address such violations.[35] During this period, regional human rights systems were firmly established in Europe and the Americas, setting a precedent that highlighted the need for Africa to establish its regional human rights mechanism. Recognising this gap, influential African leaders advocated for a regional charter.

Senegal's President Senghor committed to bringing the proposal for a regional human rights mechanism to the OAU's attention. In 1979, the Assembly of Heads of State and Government of the OAU gathered in Monrovia, Liberia, and unanimously called upon the OAU Secretary-General to convene a committee of experts to draft a regional human rights instrument for Africa, inspired by the European and Inter-American human rights conventions. Later that year, a conference was held in Dakar, Senegal, where 20 African experts, led by Judge Kéba M'baye, began drafting the African Charter. After 10 days of intensive discussions, the committee produced the Charter's initial draft. In his opening address at the Dakar conference, President Senghor set a distinct tone for the development of the Charter, urging the committee to create a document that would be rooted in African values and reflect the continent's social, economic and cultural realities.[36] President Senghor emphasised that the Charter should not merely list rights but highlight responsibilities, especially addressing Africa's unique needs, such as the right to development. He emphasised African traditions and priorities, ensuring that the Charter would be a product of African perspectives rather than an adoption of external frameworks.

President Senghor's call for an authentically African approach stemmed from his personal experiences with the European human rights project. As a former member of the French parliament, he had participated in the early discussions surrounding the European Convention on Human Rights (ECHR). He recalled advocating for the Convention's automatic application to European colonial territories, arguing that human rights should extend universally, irrespective of national borders. However, his French colleagues rejected this notion, signalling an unwillingness to apply European human rights protections to African and other colonised populations. For President Senghor, this episode symbolised the hypocrisy embedded within the European human rights model, which championed universal rights while simultaneously denying those rights to colonised people. He stated:

> 'You have therefore to be careful that your Charter may not be a Charter of the right of the "African Man" … There is neither frontier, nor race when the freedoms and the rights attached to the human beings are to be protected.

35 Ibid.
36 Senghor, 1979, pp. 78–79.

> That does not mean that we have to give up thinking by ourselves and for ourselves. Europe and America built up their system of rights and freedoms by referring to a common civilization: to their respective peoples and to specific aspirations... As Africans we shall neither copy, nor strive for originality, for the sake of originality... We could get inspirations from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.'[37]

This personal history lent a sense of purpose to President Senghor's address and framed the African Charter as a deliberate departure from the European model. From the outset, the Charter was envisioned as a new framework that would validate African identities, uphold collective responsibilities and address the specific realities faced by African states and peoples. However, the process was not without significant obstacles. Some African governments were resistant to a regional human rights system, fearing that it might challenge their authority or interfere with national sovereignty. This opposition nearly derailed the Charter's progress, as a planned conference on the Charter in Ethiopia to formally adopt the draft was cancelled due to political tensions. In response, the President of The Gambia stepped forward to host two conferences in Banjul, where the draft Charter was finalised. It was in honour of The Gambia's role in rescuing the Charter that the document came to be known as the 'Banjul Charter'. On 28 June 1981, the OAU Assembly adopted the Banjul Charter in Nairobi, Kenya. After ratification by an absolute majority of OAU Member States, the Charter officially came into force on 21 October 1986, marking a major milestone in the establishment of a regional human rights system for Africa.

However, the absence of *travaux préparatoires* on the AChHPR leaves a significant gap in understanding the drafting process.[38] Without these records, the specific contributions, positions and motivations of individual states during negotiations remain unknown. This makes it difficult to trace how certain provisions were included or excluded, or which nations advocated for specific protections or limitations. However, it is known that the draft developed during the Dakar conference was taken forward to the OAU Ministerial Meeting in Banjul in 1980. Here, it underwent minimal language revisions. In June 1981, the OAU Assembly formally adopted the African Charter in Nairobi, Kenya. The final version of the Charter fell short of expectations for a comprehensive human rights system, notably omitting provisions for a judicial body. Instead, it established the ACHPR, with a broad, vague mandate to promote and protect rights, conduct research and interpret the Charter upon request. While the Commission made progress, its limited enforcement powers highlighted the need for a stronger mechanism. This prompted the adoption of the 1998 Protocol to establish the ACtHPR.

37 Ibid.
38 Akinyemi, 1985, p. 210.

The Charter is often compared to the UDHR. While both the African Charter and the UDHR aim to uphold and protect fundamental rights, they differ significantly in scope and focus. The UDHR is universal in nature, designed to apply globally, whereas the AChHPR is grounded in Africa's regional priorities and challenges. For instance, the AChHPR addresses rights that are particularly relevant to the continent's development, such as the right to development (Article 22) and the right to a healthy environment (Article 24), highlighting the shared responsibility of African states. Other unique provisions include the right to participate in cultural life (Article 17) and the right to self-determination (Article 20). It is a legally binding instrument for the states that have ratified it, with compliance overseen by the ACHPR. Similarly, the UDHR's implementation is monitored by bodies, such as the UN Human Rights Committee.

The AChHPR embodies several unique features that distinguish it within international human rights law. It upholds the indivisibility of all rights, encompassing civil, political, socio-economic and cultural rights within a single framework. It recognises all generations of rights, positioning socio-economic rights alongside civil and political rights as fully justiciable. This ensures that socio-economic rights, often marginalised in other international treaties, carry equal weight and enforceability within the African system. As the ACHPR affirmed in the case of *SERAC v. Nigeria*:

> 'Clearly, collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.'[39]

This shows the Charter's intent to provide comprehensive human rights protection, without privileging one category of rights over another. Another defining feature is the absence of a derogation clause. Unlike several human rights instruments that permit states to temporarily suspend certain rights during states of emergency, the AChHPR explicitly disallows derogations. This means that states cannot invoke emergencies or special circumstances as grounds to restrict the rights and freedoms enshrined in the Charter. The only permissible limitations on rights are found in Article 27(2), which allows restrictions solely for the purpose of safeguarding rights and freedoms of others, collective security, morality and the common interest. This strict non-derogation stance, emphasised in *Media Rights Agenda v. Nigeria*, shows the Charter's commitment to rights protection, even under challenging national circumstances.[40]

Additionally, the Charter uniquely enshrines people's rights, recognising the rights of communities and nations as collective entities rather than solely focusing

39 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, African Commission on Human and Peoples' Rights, Communication no. 155/96 (2001), para. 68.

40 *Media Rights Agenda v. Nigeria*, African Commission on Human and Peoples' Rights, Communication no. 224/98 (2000), paras. 68–69.

on individual rights. This includes the rights to self-determination, development and free disposal of natural resources, establishing an important precedent for collective rights in international law. Such provisions address the historical context of Africa, where issues of colonialism, resource exploitation and community rights remain pressing. In the *Endorois* case, the ACHPR highlighted this focus, affirming that 'the Charter recognises the rights of peoples'.[41] This collective approach aligns with African values of community welfare and underscores the significance of economic and social development as integral to human rights. Furthermore, it imposes duties on states and individuals, which is unique in human rights law. According to the Preamble of the AChHPR, 'the enjoyment of rights and freedom also implies the performance of duties on the part of everyone'. This reciprocal relationship reflects African communal traditions, where individual actions are often seen in light of their impact on the community. Thus, the Charter positions duties as intrinsic to the exercise of rights.

The AChHPR has long been noted for its incorporation of 'African values' and communitarian ideals, a feature that scholars like Makau Mutua have characterised as the African human rights system's value-based exceptionalism. Mutua's seminal critique described the Charter's emphasis on collective rights and individual duties as reflecting an 'African cultural fingerprint', positing that it diverged from Western liberal norms by embedding traditional African communal values.[42] This approach, including Articles 27–29's enumeration of individual duties to family and society, is often seen as an attempt to reconcile universal human rights with Africa's communitarian cultural heritage.

Recent literature offers a more critical and nuanced reflection on this exceptionalism. Some scholars observe that early Africanist discourse split between embracing cultural relativism and universalism; however, today there is broad agreement that one must avoid overly romanticising a monolithic 'African' concept of human rights.[43] African societies are internally diverse and have changed significantly over time; therefore, appeals to static tradition can be misleading. Some scholars caution that uncritical exaltation of 'African values' can be co-opted by governments to justify authoritarian practices or deflect criticism of human rights violations under the guise of cultural sovereignty.[44] For example, measures like denying LGBTQ+ groups legal recognition or clamping down on dissent are sometimes defended as upholding African morals, which is the abuse of cultural relativism.

41 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v. Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003 (2009), para. 155.
42 Mutua, 1995, pp. 341–417.
43 African Legal Studies. (2024, August 30). Universalism of human rights versus cultural relativism within the African discourse. [Online]. Available at: https://africanlegalstudies.blog/2024/08/30/universalism-of-human-rights-versus-cultural-relativism-within-the-african-discourse/#_ftn4.
44 Ibid.

Thus, while the Charter's drafters deliberately infused regional norms with African communitarian ideals, commentators stress that such ideals must be pursued in tandem with, not at the expense of, universal human rights guarantees. This view echoes earlier moderate positions in African scholarship, which recognise a core of universal rights, yet welcome diverse cultural expressions in implementing those rights.[45] Simultaneously, the prevailing consensus in recent literature is that African human rights exceptionalism should be about innovation and inclusion, such as recognition of collective rights and duties, rather than a rejection of universality. The Charter's unique values (solidarity, dignity and communal responsibility) can enrich global human rights discourse, provided they are not instrumentalised for oppression by state actors. Hence, these unique features of the Charter, including its indivisibility of rights, prohibition on derogations, recognition of peoples' rights and emphasis on individual and collective duties, illustrate a uniquely African perspective on human rights.

Despite its innovations, the African Charter has faced significant criticism in scholarly literature and jurisprudence. Commentators have identified several weaknesses in its provisions and implementation mechanisms. Many civil and political rights in the Charter are subject to 'claw-back' clauses; that is, qualifying language, such as 'except within the law,' which permits national legislation to limit the guaranteed rights. Critics argue that these broad limitations can effectively hollow out the Charter's protections by allowing states expansive latitude to restrict rights under the guise of domestic law.[46] According to Michelo Hansungule, unlike the UDHR (which the Charter draws upon), the African Charter's drafters borrowed broad limitation clauses that 'allow suspension or violation of enunciated rights based on *ordre public* in accordance with domestic legislation', undermining the scope of the rights guaranteed.[47] For example, the rights to freedom of expression, assembly and association are circumscribed by such claw-back clauses, enabling repressive governments to cite national law to justify practices that would violate universal human rights standards.

Another oft-cited weakness is the vagueness of the Charter's enforcement mechanisms and the historical ineffectiveness of its supervisory bodies. The ACHPR, originally the sole implementation mechanism, was given a broad promotional and protective mandate; however, no binding adjudicatory power. In practice, the Commission's decisions have been treated as recommendations, easily ignored by the states. Early critics, such as U. Oji Umozurike and Vincent Nmehielle, noted that the system lacked strong enforcement teeth, with Nmehielle describing Africa's human rights regime at risk of becoming 'a façade, a yoke that African leaders have put around our necks' – a system more ornamental than effective.[48] The Charter entrusts

45 Ibhawoh, 2001, pp. 43–62.
46 Viljoen, 2012, pp. 232–233.
47 Hansungule, 2012, pp. 417–453.
48 Nmehielle, 2001, p. 325.

ultimate oversight to the Assembly of Heads of State and Government, meaning that those accused of violations collectively judge each other – a 'faulty oversight system' that undermines the credibility of enforcement.[49]

State non-compliance has been a persistent problem. Many governments failed to submit the required periodic reports under Article 62 of the Charter, and even egregious violations have, at times, gone unremedied. A notorious example was the execution of Ken Saro-Wiwa and others in Nigeria in 1995 despite the ACHPR's urgent appeal to stay the executions. Nigeria's disregard for the Commission's communication starkly illustrated the Commission's lack of authority to compel compliance.[50] Such incidents expose the institutional weakness of the ACHPR. Additionally, in many African countries domestic human rights NGOs, who are crucial for bringing cases and monitoring implementation, are weak or suppressed, leaving the Commission with little local information or leverage.

3.2. The AChRWC

The AChRWC,[51] known as the Children's Charter, was adopted by the OAU in 1990. Similar to the UN CRC,[52] the Children's Charter serves as a comprehensive instrument outlining the rights of children and establishing universal principles and norms for their well-being. Since the UN CRC is the most widely ratified international treaty worldwide, ratified by every African nation, the question arises why there was a need for a special regional instrument? Recognising the unique challenges faced by children in Africa, regional leaders pursued a stronger framework for child rights at a supranational level, ensuring that African children have a distinct platform for their voices to be heard. Thus, Africa has set a precedent in advancing children's rights, becoming the first region to adopt a binding legal instrument focused specifically on child protection – the AChRWC.

The UN General Assembly has acknowledged the value of regional agreements for human rights promotion, noting that regional treaties are often better suited to address localised human rights challenges while respecting the cultural, traditional and historical contexts unique to each region.[53] This regional focus allows the Children's Charter to tackle issues particularly relevant to Africa, where certain priorities may differ from those addressed in international treaties. For example, while the European context may place significant emphasis on a child's right to know their origins in cases of assisted reproduction, African concerns may be more aligned with protecting children from discriminatory regimes and harmful traditional practices.

49 Heyns, 2004, pp. 679–695.
50 Mutua, 1999, pp. 342–367.
51 Organisation of African Unity (OAU) (1990) African Charter on the Rights and Welfare of the Child. CAB/LEG/24.9/49. 11 July 1990.
52 UN General Assembly (1989) Convention on the Rights of the Child. United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.
53 United Nations General Assembly (1957) Draft International Covenants on Human Rights. Third Committee Report no. 362, GA/SHC/362.

The Children's Charter specifically addresses these issues, prohibiting practices that endanger children's welfare or perpetuate prejudice within regional contexts. Another key reason for creating a regional charter is the challenge of safeguarding children's rights in contexts marked by severe economic hardship.[54] The Children's Charter acknowledges these economic realities by omitting provisions such as Article 4 of the UN CRC, which ties the implementation of economic, social and cultural rights to the 'maximum extent of available resources'. Instead, the Children's Charter obligates states to pursue the full realisation of these rights, aiming for more concrete commitments despite economic limitations.

The Children's Charter offers a heightened level of protection compared to the UN CRC, addressing critiques that the UN CRC reflects a predominantly Western perspective. The Children's Charter is attuned to the specific needs, cultural considerations and socio-economic conditions of Africa, providing a more relevant framework for the protection and promotion of children's rights on the continent. The two treaties, the Children's Charter and the UN CRC, represent the sole international and regional human rights agreements covering the entire spectrum of civil, political, economic, social and cultural rights for children. Both treaties encompass numerous similar provisions and share common overarching principles, such as non-discrimination, participation, upholding the best interests of the child and ensuring their survival and development.

African states advocated for several additional issues to be addressed within the Children's Charter, including, but not limited to, children facing the challenges of apartheid, addressing harmful practices targeting girls, such as FGM, dealing with internal conflicts and the displacement of children, providing a clear definition of a child, safeguarding the rights of children with imprisoned mothers, rectifying poor and unsanitary living conditions, acknowledging the African perspective on the responsibilities and duties of communities, fortifying enforcement and monitoring mechanisms, delineating the family's role in adoption and fostering and elucidating the obligations and responsibilities of the child towards their family and community. Hence, the Children's Charter acknowledges the unique status of children in African society, underscoring their need for protection and special care. It recognises that children are entitled to exercise various freedoms, including freedom of expression, association, peaceful assembly, thought, religion and conscience. Its objectives encompass the safeguarding of a child's private life and protection against all forms of economic exploitation, harmful labour, interference with education and actions that jeopardise their well-being, whether physical, social, mental, spiritual or moral. It emphasises the prevention of abuse, maltreatment, detrimental social and cultural customs, exploitation, sexual abuse, including commercial sexual exploitation, and illicit drug use. Additionally, it aims to prevent child trafficking, sale, abduction and begging.

54 Essombe and Diop Tine and Enew, 1998.

The Children's Charter was born out of the belief of African nations that the UN CRC did not adequately address critical socio-cultural and economic aspects specific to Africa. It underscores the importance of incorporating African cultural values and experiences into the discourse on children's rights, addressing issues such as:

- Challenging traditional African beliefs that may clash with children's rights, such as child marriage, parental rights and responsibilities and the status of children born out of wedlock
- Prohibiting the exploitation of children as beggars
- Promoting affirmative action to enhance girls' access to education
- Ensuring that girls have the right to return to school after pregnancy
- Safeguarding expectant mothers and mothers of infants and young children who are incarcerated
- Explicitly stating that the Children's Charter takes precedence over any custom, tradition, cultural practice or religious belief that contradicts the rights, duties and obligations outlined in the Charter
- Offering a clearer definition of a child as an individual under 18 years old
- Outright prohibiting the recruitment of children (those under 18 years old) in armed conflict and addressing child conscription into armed forces
- Prohibiting child marriages
- Protecting internally displaced and refugee children
- Emphasising the role of extended families in the care of the child
- Ensuring the protection of children with disabilities

The key principles guiding the implementation of these rights encompass non-discrimination, the best interests of the child, the right to life, survival, development of the child and child participation. Unfortunately, this chapter cannot go into an in-depth analysis of the Children's Charter; however, it points out some of its distinguishing features compared to the UN CRC. One such distinguishing feature is the best interest principle. Article 4(1) of the AChRWC explicitly establishes the child's best interests as the primary consideration. The use of 'the' rather than 'a' best interests standard, as found in the UN CRC, may seem a minor linguistic difference; however, it carries substantial implications. In the UN CRC, the principle is often interpreted as a procedural fairness requirement, where decision-makers must consider the child's best interests but are not necessarily obligated to prioritise them in their final decision.[55] The principle, while fundamental in international law, remains open to interpretation and is often influenced by prevailing cultural norms around child-rearing. This relative language allows for certain practices to be justified under cultural contexts, which has, at times, led to conflicting interpretations. For example, some regional perspectives have historically viewed the recruitment of child soldiers as an aspect of cultural tradition.[56]

55 Todres, 1998, p. 176.
56 Bennett, 1998, p. 1.

However, the Children's Charter prioritises the child's best interests, asserting that cultural practices cannot override the child's well-being. Article 21 reinforces this by prohibiting any customs that may harm the child's health or life, ensuring that children's safety and welfare take precedence over cultural rights. Under the Children's Charter, Member States are legally obligated to treat the best interests of the child as the central consideration. However, this standard can vary significantly in application within domestic legal systems, where interpretations may reflect local cultural values. Family law is a particularly complex area where the Charter's philosophy is tested. In some contexts, the concepts of parental autonomy and children being considered the 'property' of their parents remain deeply embedded in cultural heritage. These values conflict with the Charter's call to place children's best interests above all else, creating challenges in implementing child-centred protections within the framework of traditional family structures.

While the AChRWC is widely lauded as a progressive, context-sensitive instrument, critics have underscored the gap between its promises and actual practice. In many African countries, deeply entrenched cultural and religious norms have posed obstacles to the implementation of the AChRWC's more transformative provisions. For example, the AChRWC explicitly prohibits child marriage (Article 21(2)); however, the eradication of child marriage has proven difficult in societies where it is an accepted tradition. One prominent case is Nigeria, which ratified the AChRWC and, in 2003, enacted a federal Child Rights Act to domesticate the Children's Charter. However, under Nigeria's federal system, each of the 36 states must separately adopt the Child Rights Act for it to be enforceable locally. For years, several states, particularly in the predominantly Muslim northern regions, have refused to domesticate this Act, objecting to provisions banning child marriage as inconsistent with local custom and Shari'a law.[57] As a result, implementation of the AChRWC in Nigeria has been uneven. This hesitation is rooted in social norms; in some communities, girls are considered ready for marriage at puberty, and attempts to set 18 years as a uniform minimum marriage age have met with pushback.[58]

These challenges have prompted an important debate. On one side, some scholars argue that legal reform is needed to eliminate loopholes that allow child marriage to persist, pointing to Section 61 of the Nigerian 1999 Constitution (which deals with matters of personal law) as a provision that has been interpreted to permit underage marriage under customary or religious auspices, undermining the spirit of the AChRWC.[59] Without constitutional amendment and the passage of a uniform national law prohibiting child marriage, the rights of the girl child will remain illusory in parts of Nigeria. On the other hand, commentators such as Enyinna Nwauche contend that Nigeria's constitutional framework, if properly understood, does not sanction child

57 Braimah, 2014, pp. 474–488.
58 United Nations Population Fund. (2025). Early marriage in Nigeria. [Online]. Available at: https://nigeria.unfpa.org/en/topics/child-marriage-1 (Accessed: 22 June 2025).
59 Braimah, 2014, pp. 474–488.

marriage and no religious or customary marriage can trump the fundamental rights of children.[60] Nwauche calls for a negotiated consensus on minimum marriage age, engaging with cultural and religious leaders to reconcile the AChRWC's requirements with local values, and emphasises that even in the case of absent state legislation, the courts should interpret existing law in line with the Children's Charter's object and purpose. This discourse highlights the tension between universal human rights norms and local traditions. A similar tension exists regarding FGM, another practice unequivocally banned by the AChRWC (Art. 21(1)(a)). In some communities, FGM persists due to cultural inertia, despite national laws outlawing it. The mere existence of the AChRWC and domestic legislation is not enough to end such practices; sustained public education and cultural dialogue are required, alongside enforcement, to effect change.

Importantly, the implementation mechanisms for the AChRWC have faced scrutiny. The Children's Charter's enforcement relies on state compliance and the oversight of the African Committee of Experts on the Rights and Welfare of the Child. The Committee, much like the ACHPR, issues recommendations that lack binding force. Without strong domestic incorporation of the AChRWC, the Committee's concluding observations and decisions on communications have had limited impact. For instance, where social or religious opposition to AChRWC norms is strong, governments may be slow to act on the Committee's recommendations. Out of the African Union's 55 Member States, 50 have ratified the AChRWC. The Democratic Republic of Congo became the 50th state to ratify the Children's Charter in December 2020.[61] The Children's Charter, legally and culturally, contextualises the rights of children. To truly impact and positively transform the lives of children in Africa, it is imperative that individuals and governments collectively acknowledge and embrace children's rights as legally binding principles, with corresponding obligations. Nevertheless, the Children's Charter serves as a source of inspiration for African Member States, representing a collective commitment to the rights and well-being of African children, while providing a legal framework for their safeguarding.

The Children's Charter calls for the establishment of an African Committee of Experts on the Rights and Welfare of the Child. This Committee is tasked with promoting and safeguarding the rights delineated in the Children's Charter, actively applying these rights and interpreting the provisions of the Children's Charter as required by state parties, African Union institutions or any other organisations recognised by the African Union or a Member State. The Committee was established in July 2001, approximately a year and a half after the AChRWC became effective. It commenced its operations in 2003. It derives its authority from Articles 32–46 of the AChRWC.[62]

60 Nwauche, 2015, pp. 421–432.

61 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), n.d., Overview of the African Charter on the Rights and Welfare of the Child [Online]. Available at: https://www.acerwc.africa/en/page/about-the-charter (Accessed: 3 November 2024).

62 Organisation of African Unity (OAU) (1990) African Charter on the Rights and Welfare of the Child. CAB/LEG/24.9/49. 11 July 1990.

The Committee comprises 11 members elected by the Assembly of Heads of State and Government of the African Union. These members serve in their individual capacities. The selection process involves a secret ballot, with the candidates nominated by State Parties to the Children's Charter.[63] Previously, members were elected by the Executive Council and appointed by the Assembly. However, in February 2020, the Assembly decided to delegate this authority to the Executive Council. Candidates are required to possess high moral standing, impartiality and competence in matters concerning children's rights and welfare. According to the Children's Charter, the members have a five-year term of office. Initially, Article 37 of the Children's Charter prohibited members from being re-elected. However, in January 2015, the African Union Assembly adopted an amendment to Article 37(1), allowing members to be re-elected once for a five-year term.[64] The Committee convenes in two regular annual sessions, each lasting no more than a fortnight. Its inaugural session took place in July 2001. Additionally, the chairperson has the authority to call extraordinary sessions in response to a request from the Committee or any State Party to the Charter.

The Committee is entrusted with the mission of safeguarding human rights across Africa and interpreting the provisions of the Children's Charter. Until December 2020, the Committee had its headquarters in Addis Ababa, Ethiopia. However, subsequently, it relocated its main office to Lesotho, following an agreement between the African Union and Lesotho. Its activities encompass gathering information, issuing general comments, offering guidance and interpretation of the Children's Charter, monitoring the implementation of the Children's Charter and reviewing reports submitted by states and civil society organisations concerning the implementation of the Children's Charter by State parties, accompanied by the issuance of recommendations known as concluding observations. The Committee provides recommendations to governments in collaboration with children's rights organisations and investigates the measures taken by states to execute the Children's Charter, achieved through missions, data collection and state interrogations (as defined in Article 45 of the Children's Charter).

Moreover, the Committee handles communications, which are complaints alleging violations of the Children's Charter by State parties, conducts fact-finding and promotional missions to address systematic child rights violations in State parties and establishes standards and guidelines to assist State parties in fulfilling their obligations. It is tasked with selecting the theme for the annual Day of the African Child, observed on 16 June, to commemorate those who perished in the Soweto uprisings in South Africa. While it lacks the authority to bring cases before the ACtHPR, it is empowered to seek advisory opinions from the Court regarding legal matters about human rights instruments. The Committee is the only treaty body addressing child rights issues that features a unique complaints procedure. This mechanism allows non-party states to submit communications to the Committee on behalf of a child

63 Article 34, African Charter on the Rights and Welfare of the Child. CAB/LEG/24.9/49. 11 July 1990.

64 African Union Assembly (2015) Decision 548 (XXIV), Assembly/AU/Dec.548(XXIV).

from a State that has ratified the Children's Charter. However, this is contingent upon the complaint's ability to demonstrate that it is in the child's best interest.

The Committee's mandate is specifically defined compared to the UN CRC. Article 42 of the Children's Charter emphasises the Committee's role in promoting and protecting these rights. Its responsibilities encompass various actions, including the collection and documentation of information, the initiation of interdisciplinary assessments on children's rights issues in Africa, the organisation of meetings, the support of national and local institutions dedicated to child rights and well-being and the provision of opinions and recommendations to governments as needed. Many of these powers are not granted to the UN CRC. Consequently, the Children's Charter has established a progressive and action-oriented enforcement mechanism. furthermore, the Committee oversees the Children Charter's implementation and ensures the protection of the rights it enshrines. In contrast, the UN CRC is primarily focused on assessing the progress made by State parties in implementing the CRC. In principle, the Children's Charter represents a robust instrument compared to its parent charter and holds the potential to strengthen children's rights in Africa by establishing effective monitoring and enforcement mechanisms.[65] Nevertheless, there are challenges related to the enforcement mechanisms and the Committee's impact on promoting and safeguarding children's rights appears to be evolving slowly.

3.3. Protocol to the AChHPR on the establishment of an ACtHPR

The final version of the AChHPR, though a significant achievement, did not fulfil earlier aspirations for a fully comprehensive human rights system in Africa, as it lacked provisions for a dedicated African human rights court. Several advocates and drafters had envisioned a judicial mechanism that could enforce human rights protections with binding authority across the continent. Instead, the AChHPR established the ACHPR, which, while valuable, was granted a broad and vague mandate. Article 45 of the AChHPR assigned the ACHPR various roles, such as promoting and protecting human rights, conducting research, organising seminars and developing principles and rules to address human rights issues across the continent. Furthermore, it was tasked with interpreting the AChHPR's provisions upon request by any Member State, OAU institution or African organisation recognised by the OAU. Although this marked a step forward, the ACHPR's powers were limited to an advisory and promotional capacity.

Historians and legal scholars, such as Christof Heyns, have explored the motivations behind the decision not to establish a judicial body from the outset.[66] Heyns suggests two main explanations for this choice. First, there is an 'idealistic' explanation, rooted in the value placed on traditional African methods of conflict resolution, which emphasise mediation and conciliation over confrontation. In many African cultures, dispute resolution is aimed at restoring harmony and reaching mutually

65 Heyns and Viljoen, 1999, p. 421.
66 Heyns, 2004, p. 684.

agreeable solutions, which could be an explanation for the ACHPR's advisory and non-confrontational mandate. Second is about the political situation in post-colonial Africa, where states were newly independent and fiercely protective of their sovereignty. Having recently overcome colonial rule, African leaders were cautious about creating a supranational court that might impose decisions on their domestic matters, threatening their ability to govern independently.

In 1986, the African Charter officially came into force, leading to the establishment of the ACHPR. The ACHPR took on a role in promoting and monitoring human rights across the continent. However, its limitations soon became evident, especially as it encountered severe human rights violations that required stronger enforcement mechanisms. Recognising these limitations, the OAU adopted the Protocol to the AChHPR on the Establishment of the ACtHPR in 1998.[67] This marked a turning point, reflecting a broader consensus within the continent on the importance of a judicial mechanism that could hold states accountable for human rights violations. According to the Protocol, the ACtHPR would become operational 30 days after the 15th ratification by an African state. This was reached on 25 January 2004, when the Union of Comoros ratified the Protocol in December 2003. The ACtHPR became operational in 2006, with its first judges appointed, and issued its inaugural judgment in 2009.[68] Its primary mandate is to complement and strengthen the ACHPR's functions.[69] Its jurisdiction encompasses all cases and disputes related to the interpretation and application of the Banjul Charter, the protocol associated with the Charter and any other relevant human rights instruments. It holds the authority to issue advisory opinions on legal matters and adjudicate contentious cases.

As mentioned, the AChHPR has been ratified by 54 of the 55 African Union Member States, except Morocco. By ratifying or acceding to the Charter, these states have committed to upholding the principles and obligations outlined within it. However, the number of states participating in the African human rights judicial system is further limited. Only 34 AU Member States have ratified the Protocol establishing the ACtHPR at the time of writing this study. Out of these 34, only 8 states have deposited a declaration under Article 34(6) of the Protocol, which allows direct access to the ACtHPR for individuals and NGOs with observer status before the ACHPR. Without Article 34(6), individuals and NGOs cannot directly submit cases to the ACtHPR. Instead, they must first approach the Banjul Commission, which conducts a preliminary examination and may decide to refer the case to the Court. This additional procedural requirement limits direct individual and NGO access to the Court.

As of October 2024, the 34 African Union countries that have ratified the Court Protocol include Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Congo, Gabon, The Gambia, Ghana, Guinea-Bissau, Kenya, Libya,

67 Organisation of African Unity (OAU) (1998) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998.

68 Rodríguez and Álvarez, 2020, p.102.

69 Stone, 2012, p. 20.

Lesotho, Mali, Malawi, Madagascar, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Republic of Congo, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia, Uganda and Zambia. The 8 AU Member States that have deposited Article 34(6) are Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Mali, Malawi, Niger and Tunisia. This means that they have recognised the Court's jurisdiction to accept complaints by individual citizens and NGOs.

3.4. Protocol to the Achhpr on the Rights of Women in Africa

The Protocol to the AChHPR on the Rights of Women in Africa, commonly referred to as the Maputo Protocol, is a legally binding supplement to the African Charter, specifically for protecting the rights of women across the continent.[70] Adopted by the African Union Assembly of Heads of State and Government in July 2003 in Maputo, Mozambique, this Protocol marked a significant step forward in human rights. The Protocol formally entered into force on 25 November 2005. At the time of writing this study, in October 2024, 44 of the 55 AU Member States had ratified the Protocol, all of whom were parties to the broader African Charter.

The Maputo Protocol is the result of two interconnected drafting efforts: one initiated by the African women's rights movement and another led by the Inter-African Committee on Harmful Traditional Practices Affecting Women's and Children's Health. Together, these groups worked to elevate the visibility of women's issues, such as reproductive rights, protection from gender-based violence and harmful practices, such as FGM. As a legally binding instrument, the Protocol draws its authority from the AU Constitutive Act,[71] which replaced the OAU in 2002, and it supplements the AChHPR. Adopted at the AU's inaugural summit in Durban, South Africa, the AU Constitutive Act introduced significant reforms, which touched on women's rights. It included the 'promotion of gender equality' as a founding principle, which was absent from the 1963 OAU Charter.

The AU has shown a strong commitment to gender equality within its structures. At its founding, it introduced the '50/50 parity principle' for electing AU Commission members, ensuring balanced gender representation. This principle has influenced other institutions, such as the ACHPR, where female leadership has increased. Following the adoption of the Maputo Protocol in 2004, the AU Assembly adopted the Solemn Declaration on Gender Equality in Africa, reaffirming its commitment to women's rights. Although non-binding, the Declaration urges Member States to address issues such as HIV/AIDS, conflict prevention, gender-based violence and gender-sensitive development.

The Maputo Protocol addresses the widespread discrimination and harmful cultural practices faced by African women, despite the existence of the African Charter

70 African Union (2003) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. African Union, 11 July 2003.

71 Heads of State and Government of the Member States of the Organisation of African Unity (2000), Constitutive Act of the African Union. Organisation of African Unity (OAU), 1 July 2000.

and other international instruments. It seeks to ensure the effective implementation of existing commitments. The Protocol, in Article 32, protects women's rights in several key areas:

- Equality and non-discrimination: The Protocol explicitly addresses the elimination of all forms of discrimination against women. Articles 2, 8 and 9 mandate measures to eliminate discrimination, ensure equal access to justice and promote women's participation in governance. Article 12 guarantees equal education for women and girls as a foundation for societal equality.
- Protection against violence: Articles 3–5 affirm women's rights to bodily autonomy and freedom from violence, including domestic abuse, sexual harassment, trafficking and harmful practices, such as FGM.

Furthermore, the Protocol dedicates several provisions to rights relating to marriage and family life. Articles 6 and 7 protect women's rights within marriage and family, covering issues such as property rights, marriage registration, the minimum age of marriage and protections in polygamous unions. Women are guaranteed equality during separation, divorce or annulment. Another element of the Protocol is health and reproductive rights. Unlike several human rights instruments, the Maputo Protocol explicitly addresses women's reproductive health, including access to comprehensive health services, maternal health, autonomy over reproductive choices, maternal mortality, HIV/AIDS prevention and sex education. The Protocol extends its protections to economic, social and cultural rights, recognising that women's rights extend beyond political and civil spheres into economic and cultural domains. Articles 13–19 extend protections to economic participation, employment, housing, food security and environmental health, while advocating for property ownership and sustainable development.

In addition to securing basic rights, the Protocol acknowledges the important role women play in peace and security. Articles 10 and 11 recognise women's roles in peacebuilding and provide protection during armed conflicts, including for refugees, displaced women and prohibitions against child soldier recruitment. The Maputo Protocol pays special attention to vulnerable groups among women, including widows, elderly women, women with disabilities and women in distress. Articles 20–24 offer protection for these groups, acknowledging the unique challenges they face. At the time of its adoption, the Maputo Protocol complemented existing instruments, such as the African Charter and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which were widely ratified but often poorly implemented. The AChRWC, addressing children's rights, including protections for the girl child, had less support. Following the Protocol, two additional instruments emerged. The AU Solemn Declaration on Gender Equality in Africa, though non-binding, urged Member States to address key issues, such as gender-based violence, healthcare and conflict resolution. Moreover, the SADC Gender Protocol, applying only to ratifying

Southern African Development Community (SADC) states, introduced stronger but regionally limited obligations for gender equality.

3.5. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa

The Kampala Convention, officially named the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa,[72] addresses internal displacement within the African continent. Adopted in 2009, this treaty confronts internal displacement caused by armed conflicts, natural disasters and large-scale development projects. With the continent consistently facing substantial numbers of internally displaced persons, the Kampala Convention provides a legally binding framework for African Union Member States to protect and assist these vulnerable populations. Despite widespread ratification, internally displaced populations in Africa remain high. This shows ongoing challenges related to the Convention's implementation.

Historically, internal displacement in Africa has been caused by various societal and political factors, although global attention to internally displaced persons grew only after the Cold War. Unlike refugees, who benefit from specific protections under the UN High Commissioner for Refugees (UNHCR), internally displaced persons lack equivalent international support, as no single UN agency has been designated to meet their needs. However, efforts to address forced migration in Africa are not entirely new. The Kampala Convention builds on previous legal frameworks, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the UN's 1998 Guiding Principles on Internal Displacement. Before the full ratification of the Kampala Convention, sub-Saharan Africa was already home to nearly 10 million internally displaced persons, representing more than half of the world's internally displaced population at the time, with significant numbers in the Democratic Republic of the Congo, Sudan and Somalia.[73] Several of these displacements were triggered by violence, which has often been tied to historical factors, such as colonial legacies, political instability and internal conflicts, compounded by environmental factors, such as drought and climate change.

The Kampala Convention, adopted in 2009 by the AU, is the first regional treaty to address internal displacement. Drafted with input from organisations such as the UNHCR and the International Committee of the Red Cross, it defines displaced persons as those forced from their homes due to conflict, violence, rights abuses or disasters without crossing international borders. The Convention places primary responsibility on states to protect and assist displaced persons and outlines protections in 23 articles, from preventing arbitrary displacement to ensuring durable resettlement solutions. Widely praised for advancing standards on internal displacement, the

72 African Union (2009), African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009.
73 Maru, 2011, p. 102.

Convention builds on the 1998 UN Guiding Principles; however, it faces uneven implementation. Key states, such as Sudan, have yet to ratify it or adopt national policies. To bolster its impact, the AU has introduced measures such as the 2017 Harare Plan of Action, a 2018 model law for domestic legislation, and declared 2019 the 'Year of Refugees, Returnees and Internally Displaced Persons'.

3.6. Protocol to the AChHPR on the Rights of Older Persons in Africa

The Protocol to the AChHPR on the Rights of Older Persons in Africa represents a significant step towards recognising and protecting the rights and welfare of older people in Africa.[74] Adopted by the African Union in 2016, this Protocol addresses the unique challenges faced by older persons, a group whose rights have often been overlooked within broader human rights frameworks. In line with the African Charter's principles of dignity, equality and social justice, the Protocol acknowledges the importance of safeguarding the rights of older individuals to ensure they lead dignified, secure and fulfilling lives.

The Protocol, adopted on 30 January 2016, in 32 articles, ensures that older persons can fully and equally enjoy their inherent human rights while upholding African values, customs and traditions. As of now, 20 countries have signed the Protocol, with 12 formally ratifying it. Its provisions address equality and non-discrimination, obliging states to prohibit all forms of age-related discrimination, combat stereotypes and ensure older persons' equal protection under the law. It requires states to adapt their legal systems to provide fair treatment, legal aid and training for officials to handle issues affecting older persons sensitively. Respect for autonomy is emphasised, as states must protect older persons' right to make decisions about their well-being and offer support in cases of incapacity.

To address economic exclusion, the Protocol calls for the removal of age-related barriers in employment and the development of systems ensuring access to adequate pensions or a universal income for retirees. It mandates protection against abuse, including harmful traditional practices, such as accusations of witchcraft, particularly targeting older women. Additionally, the Protocol guarantees the property and inheritance rights of older women, protecting them from gender-based violence and discrimination. It promotes family- and community-based care systems, urging states to strengthen traditional support networks and prioritise older persons in service delivery. It provides a framework to incorporate older persons' rights into national legislation and social policies across the continent, aiming to uphold their dignity, equality and well-being.

3.7. Protocol to the AChHPR on the Rights of Persons With Disabilities in Africa

The Protocol to the AChHPR on the Rights of Persons with Disabilities in Africa, adopted on 29 January 2018, represents a significant step forward in the promotion

74 African Union (2016) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa, 31 January 2016.

and protection of the rights of persons with disabilities across the continent. It emphasises the equal dignity and inherent rights of persons with disabilities, addressing the social, economic and cultural factors that have disproportionately affected them. Building on the African Charter, it addresses specific challenges, such as poverty, systemic discrimination and harmful cultural practices. It emphasises equality, dignity and the full participation of persons with disabilities in all areas of life, setting standards for Member States to eliminate discrimination and enhance accessibility. To date, 13 African countries have signed the Protocol and 10 have ratified it.

The Protocol's 44 articles outline key protections and obligations for states, including adopting legislative, administrative and budgetary measures to uphold its principles. It mandates the mainstreaming of disability considerations into policies, reforming discriminatory laws and prohibiting harmful practices. States are required to actively engage persons with disabilities and their representative organisations in decision-making processes. Core rights include non-discrimination, equality before the law, life, liberty and security. The Protocol ensures equal recognition before the law, guarantees dignity and access to services and protects against arbitrary detention, violence and abuse. It establishes a detailed framework for African states to follow for promoting and safeguarding the rights of persons with disabilities. The goal is to achieve a more inclusive society where persons with disabilities can exercise their rights, live with dignity and fully participate in all aspects of life.

4. Institutional Framework for Human Rights Protection in Africa

This section provides an overview of the institutional framework for human rights protection in Africa. The focus will primarily be on the ACHPR and the ACtHPR, two central institutions that play direct roles in monitoring, promoting and enforcing human rights. The ACHPR, as the primary human rights body, oversees state compliance with the African Charter, while the ACtHPR offers a judicial mechanism for accountability, issuing binding decisions on cases of rights violations. Together, these institutions form the backbone of the African human rights system, advancing human rights protections and standards across Member States. While both institutions play central roles in monitoring, promoting and enforcing human rights, they are analysed in greater detail in other chapters of this publication. Consequently, this section provides a concise discussion to set the context for their roles within the broader African human rights system.

The broader institutional landscape includes several other important bodies and mechanisms that contribute to human rights protection in Africa. The African Committee of Experts on the Rights and Welfare of the Child focuses specifically on children's rights, addressing issues such as child labour, exploitation and education, and advocating for policies that support the well-being of Africa's youth. The Peace and Security Council plays an important role in addressing conflicts and security threats that can result in human rights abuses, working to maintain stability and prevent

crises through peacekeeping missions and early warning systems. The Pan-African Parliament serves as a deliberative body representing African citizens, promoting democratic principles and ensuring that human rights remain a priority within the AU's legislative and policy-making processes.

The African Peer Review Mechanism complements these efforts by reviewing Member States' governance and human rights performance, encouraging accountability, transparency and reform. The AU Commission acts as the executive arm, coordinating and implementing AU human rights policies, while the Economic Community of West African States (ECOWAS) Court of Justice, though primarily a regional body for West Africa, contributes to human rights protection by addressing violations within its jurisdiction. The role of non-governmental organisations (NGOs) cannot be overlooked. NGOs are essential partners in the human rights framework, often serving as intermediaries between AU institutions and local communities. However, both the African Court and the ACHPR have been criticised for their over-reliance on civil society organisations and NGOs, raising concerns about representativeness, sustainability and the limited engagement of national governments and institutions in the system's implementation.

4.1. ACHPR

The ACHPR is a quasi-judicial entity with the responsibility of advancing and safeguarding human rights across the African continent. Its mandate includes the interpretation of the AChHPR and the examination of individual complaints related to Charter violations. Its functions encompass the investigation of human rights abuses, the formulation and endorsement of action plans to promote human rights and the establishment of effective channels of communication with Member States to gather firsthand information on human rights violations.

The African Union, which was originally established under the name OAU (in 2001, the OAU legally became the African Union), was conceived and established in 1963 in Addis Ababa, Ethiopia, with 32 signatory governments,[75] during a time when state sovereignty held paramount importance and the heads of state were particularly focused on safeguarding the hard-won independence of their nations. The OAU Charter made only a passing reference to human rights. Nevertheless, 18 years later, in response to widely condemned violations of fundamental liberties in various Member States, the OAU's governing body endorsed the AChHPR (commonly known as the Banjul Charter).[76] In late 1987, the ACHPR, established by the Banjul Charter, commenced its operations. The Banjul Charter draws considerable influence from previous international human rights documents, notably the UDHR[77] and the two

75 Organisation of African Unity (OAU) (1963) Charter of the Organisation of African Unity.
76 Organisation of African Unity (OAU) (1981) African Charter on Human and Peoples' Rights (Banjul Charter), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.
77 UN General Assembly (1948) Universal Declaration of Human Rights, 217 A (III), 10 December 1948.

International Covenants – the Covenant on Civil and Political Rights[78] and the Covenant on Economic, Social, and Cultural Rights.[79] However, the drafters of the Banjul Charter, led by the distinguished Senegalese jurist Kéba M'baye aimed to imbue the document with a distinct African character.[80] While the Charter's 29 articles, detailing rights and freedoms, largely pertain to individuals, a significant number involve the collective rights of peoples. The Charter commences with an assertion of non-discrimination, explicitly prohibiting differentiation based on factors such as 'race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'.[81] It enumerates a range of civil and political rights and subsequently addresses economic, social and cultural rights. The Charter breaks new ground by including rights of peoples in Articles 19–24, along with outlining duties in Articles 25–29. These duties apply to both state parties and individuals. The Commission was inaugurated on 2 November 1987, following elections during the 23rd Assembly of Heads of State and Government. Initially based in Addis Ababa, Ethiopia, it relocated to Banjul, The Gambia, in 1989. It meets biannually, with sessions lasting 8–10 days, raising concerns about whether this timeframe is sufficient for thorough deliberation. Furthermore, the Charter lacks provisions for emergency procedures, limiting the Commission's responsiveness to urgent human rights issues.

The ACHPR has eleven members who are elected through secret ballots at the Assembly of Heads of State and Government. Based on Article 31 of the Charter, these members, each serving six-year terms that can be renewed, are selected from among individuals of the highest repute in Africa, known for their exceptional moral character, integrity, impartiality and competence in human and peoples' rights matters, particularly emphasising on individuals with legal expertise.[82] The Charter ensures impartiality in the election and tenure of Commission members, as outlined in Article 39(2), which permits removal only if the Commission unanimously deems a member unable to fulfil their duties. Article 31 mandates that members act independently, serving in a personal capacity rather than as state representatives, with a limit of

78 UN General Assembly (1966) International Covenant on Civil and Political Rights. United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966.

79 UN General Assembly (1966), International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

80 Kannyo, 1984, p. 128.

81 Organisation of African Unity (OAU) (1981) African Charter on Human and Peoples' Rights (Banjul Charter), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, 27 June 1981.

82 'The Commission shall consist of eleven members chosen from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience'. Article 31, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). [Online]. Available at: https://www.refworld.org/docid/3ae6b3630.html (Accessed: 30 October 2023).

one national per state on the Commission.[83] Members elect a chairperson and vice-chairperson for renewable two-year terms. Article 43 safeguards the Commission's autonomy, granting members diplomatic privileges to prevent state interference. These provisions collectively establish the Commission as an independent entity capable of performing its functions impartially.

However, the Commission faces significant challenges that undermine its independence and authority. Article 33 allows state parties to appoint Commission members, raising concerns about bias, as nominees may align with their states' views on human rights. Allocating seats to independent entities, such as bar associations or NGOs, could enhance impartiality. Article 50 further limits the Commission's authority by requiring the exhaustion of domestic remedies, which is often impractical in non-democratic nations. Unlike the Inter-American system, the Charter lacks an escape clause for cases where local remedies are unavailable, leaving this provision vague and reliant on domestic laws. Confidentiality requirements under Article 59 weaken the Commission's impact. Closed-door proceedings and non-disclosure of offending states prevent international pressure from being leveraged effectively. Moreover, the Commission lacks the authority to independently investigate violations and relies on the Assembly to act on its findings, further limiting enforcement powers.

Despite these constraints, the Commission utilises specialised mechanisms, such as rapporteurs, working groups and committees, to address specific concerns, including freedom of expression, women's rights and the prevention of torture. These mechanisms report their findings during regular sessions, contributing to the Commission's broader human rights efforts. The Commission's primary functions, as outlined in Article 45 of the African Charter, include promoting and protecting human and peoples' rights, interpreting the Charter and performing tasks assigned by the Assembly of Heads of State and Government. These functions encompass conducting studies, formulating legal principles, cooperating with other institutions and providing recommendations to governments. However, it lacks the authority to declare domestic laws incompatible with the Charter's provisions, limiting its ability to address rights violations effectively. While the Rules of Procedure, adopted in 1988, softened the rigid language of the Charter, they did not fully overcome its constraints. These rules introduced improvements, such as recognising NGOs and legal experts, and emphasised the importance of petitions; however, the Commission's powers remain restricted. Despite these efforts, the limitations of the Charter hinder the Commission's ability to fulfil its mandate, reducing its impact as a protector and advocate for human rights.

83 'The members of the Commission shall serve in their personal capacity'. Article 31, African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). [Online]. Available at: https://www.refworld.org/docid/3ae6b3630.html (Accessed: 30 October 2023).

The Commission employs three distinct human rights monitoring procedures: the state-reporting procedure, the inter-state complaints procedure and the individual complaints procedure.

1. State-reporting procedure: States must submit reports every two years on their adherence to the Charter. NGOs can submit shadow reports and may obtain observer status.
2. Inter-state complaints procedure: States can resolve disputes through written communication or lodge complaints directly with the Commission. If unresolved within three months, the Commission examines the case and submits a report to the Assembly of Heads of State and Government. This procedure is rarely used.
3. Individual complaints procedure: According to this procedure, states, individuals or organisations acting on behalf of an individual may submit a complaint to the Commission. Complaints should be sent to the Commission's Secretariat, which registers the complaint upon receipt. Subsequently, the complaint is forwarded to the Commission for examination. The Commission must decide by a simple majority (at least six members) whether it should consider the complaint. This decision hinges on whether the complaint alleges a *prima facie* violation of the Charter and conforms to the provisions of Article 56 of the Charter.[84] Admissible cases involve gross human rights violations. If accepted, the Assembly may request a detailed report. The Commission's recommendations are not legally binding and confidentiality is maintained unless the AU Assembly approves public disclosure.

Despite the formal language used in the Charter, the Programme of Action, the Guidelines for National Periodic Reports and the current State of the Commission is less than satisfactory. Several factors contribute to the Commission's demonstrated weaknesses. First, many states fail to fulfil their reporting obligations under Article 62 of the Charter. Early reports, such as those from Rwanda, Tunisia and Libya, were

84 Communications relating to human and peoples' rights referred to in Article 55 received by the Commission shall be considered if they:
1. Indicate their authors, even if the latter request anonymity,
2. Are compatible with the Charter of the Organisation of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organisation of African Unity,
4. Are not based exclusively on news disseminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter,
7. Do not deal with cases that were settled by the states involved following the principles of the UN Charter, the Charter of the Organisation of African Unity or the provisions of the present Charter.

vague, lacked detailed content and were hindered by inadequate preparation time, translations and review durations. This undermined the establishment of a reliable baseline for future assessments. Second, as stated in a 1989 workshop organised by the African Association of International Law and several Nordic human rights institutions, the African Commission has 'suffered from insufficient equipment, resources, and support to make it fully operational'.[85] Financial constraints of the OAU further affected its operations.

Third, the most significant challenge facing the Commission is beyond its control. In many African states, human rights NGOs are either absent or weakly established, leaving the Commission without critical local information or advocacy networks. South Africa is an exception, hosting a significant number of active NGOs; however, elsewhere, the scarcity of such organisations limits the Commission's capacity to address rights abuses effectively.[86] In nearly 20 Member States, no openly active human rights or social justice organisations could be identified, while in another dozen or so, the editors found just one or two institutions with somewhat tangential objectives.

4.2. ACtHPR

The ACtHPR, based in Arusha, Tanzania, is an international judicial body established by African Union Member States to implement the AChHPR. It is one of three regional human rights tribunals, alongside the European and Inter-American Courts of Human Rights. The Court was created to address the ACHPR's limitations, whose non-binding decisions and resource constraints hindered its effectiveness. This led to the adoption of a Protocol to the Banjul Charter in 1998, which came into force in 2004 after the 15th ratification. The Court became operational in 2006, delivering its first judgment in 2009.[87] The Court complements the Commission's work, with jurisdiction over cases related to the interpretation and application of the Charter, its protocol and other human rights instruments. It issues advisory opinions and adjudicates contentious cases, strengthening the African human rights system.

The Court comprises 11 judges nominated by AU Member States and elected by the Assembly of Heads of State and Government. Judges serve six-year terms, renewable once. The president works full-time in Arusha, while the other 10 judges serve part-time, with administrative functions handled by a registrar. At the time of writing this chapter, in October 2024, the Court had delivered 416 decisions, comprising 246 judgments and 170 orders, and had 124 pending cases.[88] Furthermore, the Court has delivered 15 advisory opinions.

The ACtHPR possesses authority over all cases and disputes brought before it concerning the interpretation and application of the Charter and other pertinent human

85 Benedek, 1990, p. 250.
86 Wiseberg and Reiner, 1990, p. 185.
87 Rodríguez and Álvarez, 2020, p.102.
88 African Court Cases|Statistic. [Online]. Available at: www.african-court.org (Accessed: 1 October 2024).

rights instruments ratified by the involved states. It exercises adjudicatory and advisory jurisdiction. Regarding adjudicatory jurisdiction, complaints may be initiated by the Commission, states, individuals and non-governmental organisations. Additionally, the Court may permit relevant non-governmental organisations with observer status before the Commission and individuals to directly file cases before it, given that the state against which the application is lodged has declared its acceptance of the Court's competence to receive such communications. The Court's judgments are legally binding and the respective states are obligated to comply with and ensure the execution of these judgments. The African Union's Council of Ministers oversees the enforcement of these judgments. Regarding advisory jurisdiction, the Court, at the request of a Member State of the African Union, the African Union or any African organisation recognised by the African Union, can provide legal opinions on matters related to the Charter or other relevant human rights instruments. This is permissible as long as the subject matter of the opinion is not concurrently under examination by the Commission.

A unique feature of the ACtHPR is its direct accessibility for individuals and NGOs, aligning it with the European and Inter-American Courts of Human Rights. This provision allows cases to be filed directly against governments, provided the state has accepted the Court's jurisdiction. At present, 34 AU Member States have ratified the protocol establishing the African Court. However, only eight of these countries – Burkina Faso, Malawi, Mali, Ghana, Tunisia, The Gambia, Niger and Guinea Bissau – have formally recognised the Court's jurisdiction to accept complaints from individual citizens and NGOs. Four countries – Rwanda, Tanzania, Benin and Côte d'Ivoire – initially supported this jurisdiction; however, they withdrew later, citing various national interests and concerns. Legal scholarship has started describing this wave of withdrawals as a looming 'crisis of design and judicial practice' that threatens to undermine the Court's purpose. Adjolohoun (2020) argued that unless institutional and political incentives are recalibrated, more states may follow Rwanda, Tanzania, Benin and Côte d'Ivoire in disengaging from the Court's individual-access regime.[89]

To hear a case, the Court must confirm its jurisdiction by meeting four criteria: material (human rights violations under the Charter or similar instruments), personal (authorised complainants), temporal (violations after ratification) and territorial (violations within the state's territory). The Court's rulings are binding for all AU Member States, carrying concrete legal and reputational significance for all parties involved.[90] Every case brought before the Court, moreover, advances norms of human rights and the rule of law. The Court handles around eight cases annually, reflecting the complexity of its work. Its caseload is expected to grow as more countries accept its jurisdiction and the awareness of its role increases. However, a key challenge is the

89 Adjolohoun, 2020, pp. 1–40.

90 Africa Center for Strategic Studies, n.d., African Court on Human and Peoples' Rights. [Online]. Available at: https://africacenter.org/spotlight/african-court-on-human-and-peoples-rights/ (Accessed: 3 November 2024).

lack of coordination between the ACtHPR and the ACHPR. Although their mandates are complementary, the two institutions have yet to develop a cohesive strategy for collaboration, limiting their effectiveness in harmonising human rights protections.

5. Conclusion

The African human rights system, anchored by the AChHPR and supported by instruments such as the Maputo Protocol and various protocols on children's and older persons' rights, stands as a promising framework for human rights protection across the continent. Despite political and procedural challenges, the ACHPR has laid the foundation for a regional system capable of addressing Africa's unique socio-political realities and advancing human rights in the region. One of the most important achievements is the ACtHPR, which, though underutilised, represents an avenue for binding recourse for victims of human rights abuses. The Court's establishment generated significant hope among marginalised groups, such as indigenous and minority peoples, who have often found themselves disenfranchised within national justice systems. However, the limited ratification of its Protocol and the hesitancy of many states to grant individuals and NGOs direct access to the Court restrict the full realisation of its potential. Additionally, the need for cooperation and procedural alignment between the ACtHPR and the ACHPR remains critical. Addressing these obstacles requires African states' political will through increased ratifications, declarations granting individual and NGO access and adherence to the Court's rulings. Furthermore, public awareness and accessibility are essential for a stronger human rights culture in Africa. Many African citizens, particularly in remote and vulnerable communities, remain unaware of their rights under the Charter and the recourse available through regional mechanisms.

As the youngest human rights system matures, it faces significant challenges and opportunities. Regional bodies are grappling with emerging issues. For example, the African Charter contains no explicit right to privacy or digital freedom, limiting adaptability to today's interconnected digital era.[91] African civil society and experts have highlighted widespread internet shutdowns and online censorship as threats: at least 12 African countries experienced 19 internet disruptions in 2021, often during elections or protests.[92] The ACHPR has acknowledged that digital rights require attention – it created a Special Rapporteur on Freedom of Expression in 2004 and updated its Declaration of Principles on Freedom of Expression and Access to Information in 2019 to address internet-era challenges. Nevertheless, concrete enforcement against digital rights violations remains nascent.

91 Chekol and Doğan, 2024, pp. 1598–1634.

92 Collaboration on International ICT Policy for East and Southern Africa (CIPESA). (28 October 2022). Digital rights prioritised at the 73rd session of the ACHPR. Available at: https://cipesa.org/2022/10/digital-rights-prioritised-at-the-73rd-session-of-the-achpr/.

Similarly, the climate crisis poses a dire test for the African system. The ACHPR has recognised climate change as 'one of the most defining human rights challenges of our time', commissioning a study on the human rights–climate nexus and urging states to adopt rights-based climate policies.[93] In a landmark move, a coalition of African NGOs and the Pan African Lawyers Union in 2025 petitioned the African Court for an advisory opinion on states' obligations regarding climate change – the first time the Court's advisory jurisdiction was invoked for climate justice.[94] However, institutional responses are slow. The African Union's 2014 Cyber Security and Personal Data Protection Convention entered into force in 2023.[95] Overall, the African system's engagement with digital and environmental rights is cautiously advancing, marked by normative progress and bold civil society advocacy. However, it is hampered by limited resources and political will to confront these 21st-century challenges. Nonetheless, the promise lies in a rights-based framework that respects Africa's cultural diversity and addresses its socio-economic realities. Moving forward, a stronger African human rights system, backed by political commitment, cooperative institutional reform and widespread public engagement, can serve as a transformative force, advancing justice and dignity for all African people.

93 African Commission on Human and Peoples' Rights. (6 November 2022). The African Commission on Human Rights: Policy measures towards climate change and human rights protection. [Online]. Available at: https://achpr.au.int/en/news/press-releases/2022-11-06/african-commission-human-rights-policy-measures-towards-climate (Accessed: 22 June 2025).

94 Business & Human Rights Resource Centre. (28 October 2022). Africa: Climate justice activists to submit petition to ACHPR seeking Court's opinion on human rights obligations of African states in the context of climate change. [Online]. Available at: https://www.business-humanrights.org/en/latest-news/africa-climate-justice-activists-to-submit-petition-to-achpr-seeking-courts-opinion-on-human-rights-obligations-of-african-states-in-the-context-of-climate-change/ (Accessed: 22 June 2025).

95 Carnegie Endowment for International Peace. (July 2023). Continental cyber security policymaking: Implications of the entry into force of the Malabo Convention for digital financial systems in Africa. https://carnegieendowment.org/events/2023/07/continental-cyber-security-policymaking-implications-of-the-entry-into-force-of-the-malabo-convention-for-digital-financial-systems-in-africa?lang=en (Accessed: 22 June 2025).

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| Chapter 6 |

Institutional Framework for Human Rights Protection in Africa: The African Commission on Human and Peoples' Rights

Tena Konjević

ABSTRACT

The African Commission on Human and Peoples' Rights stands as a cornerstone of human rights protection in Africa. This chapter examines the Commission's evolution, structure, and function within the broader context of human rights in Africa. We trace the historical roots of human rights abuses on the continent, highlighting the exploitation and deprivation endured during colonial times, and the establishment of the Organization of African Unity (OAU) in 1963 as a response to these injustices. We then analyse the adoption of the African Charter on Human and Peoples' Rights (Banjul Charter) in 1981, a landmark document that solidified the commitment to protecting human rights in Africa. Furthermore, the chapter delves into the structure and composition of the African Commission, established in 1987 as a quasi-judicial body tasked with monitoring the implementation of the Charter. We examine the Commission's unique position as a sui generis entity, operating between the Charter's aspirations and the realities of Africa's political landscape. We explore its key functions: reporting, communication, and promotional activities. The reporting procedure involves reviewing reports submitted by African states on their human rights records, while the communication procedure handles complaints alleging human rights violations. We also examine the Commission's promotional activities, which aim to raise awareness of human rights and promote the implementation of the Charter. Finally, the chapter explores the Commission's strengths and weaknesses, acknowledging its challenges in fulfilling its mandate. These challenges include limited resources, a lack of awareness of the Charter and its procedures, a lack of political will on the part of some African states, and insufficient enforcement mechanisms. The chapter concludes by discussing the Commission's potential for advancing human rights in Africa, emphasizing the need for greater support from African states, international organizations, and civil society.

KEYWORDS

African Commission on Human and Peoples' Rights, African Charter on Human and Peoples' Rights, human rights, African Union

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1. Introduction

Human rights abuses have historically been widespread in Africa, taking forms of slavery, apartheid, (neo)colonialism and multifaceted (severe) poverty. During colonial times, Africa's resources and people were exploited primarily for the benefit of external powers, leading to severe deprivation of resources, capabilities, choices, security and power, which plunged the continent into poverty.[1] In response, the Organisation of African Unity (OAU) was established in 1963, as African state leaders worked diligently to maintain their newly won independence. Although the OAU Charter briefly mentioned human rights, it was only 18 years later, after numerous fundamental rights violations, that the African Charter on Human and Peoples' Rights, known as the Banjul Charter, was adopted by the OAU's policy-making body.[2] Therefore, its primary objective was the eradication of colonialism in African governments, despite reiterating allegiance to the United Nations (UN) Charter[3] and the Universal Declaration of Human Rights (UDHR)[4] in its preamble. This necessitated the establishment of a regional framework to uphold, protect and fulfil human rights.[5] Therefore, the Banjul Charter,[6] approved by the Assembly of Heads of State and Governments of the OAU in Nairobi, Kenya, on 26 June 1981, constituted this framework to protect and advance human rights across Africa.[7] The Charter came into effect on 21 October 1986.[8] After achieving its primary mission of freeing Africa from colonialism and apartheid, the OAU was eventually replaced by the African Union (AU) in 2001. The newly established Union pledged to 'promote and protect human and peoples' rights in accordance with the African Charter and other relevant human rights instruments'.[9]

The Charter filled a critical gap in the promotion and defence of human rights on the continent by striving to harmonise international norms with African customs and values.[10] As the primary tool for human rights advancement and protection in

1 Ssenyonjo, 2018, pp. 2–4.
2 Welch, 1992, pp. 44–45.
3 Charter of the United Nations, United Nations, San Francisco, October 24, 1945. [Online]. Available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf (Accessed: 12 July 2024).
4 Universal Declaration of Human Rights, United Nations, Paris, December 10, 1948. [Online]. Available at: https://www.ohchr.org/sites/default/files/UDHR/Documents/UDHR_Translations/eng.pdf (Accessed: 12 July 2024).
5 Ssenyonjo, 2018, pp. 2–4.
6 African Charter on Human and Peoples' Rights, OAU, June 01, 1981. [Online]. Available at: https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf (Accessed: 12 July 2024) (hereinafter: African Charter on Human and Peoples' Rights).
7 Odinkalu, 1998, pp. 359–360.
8 Ssenyonjo, 2018, pp. 2–4.
9 Ibid.
10 Abioye, 2014, p. 82.

Africa,[11] it represented the beginning of a coordinated effort across the continent, despite its provisions often being less robust compared to those of Western Europe and several American nations.[12,13] Overseen by the AU, the African regional human rights system became a part of the 'pan-continental human rights system', including several human rights treaties.[14] However, the Charter could not be effective without a proper institutional framework. Therefore, the African Commission on Human and Peoples' Rights (ACmHPR), a quasi-judicial entity,[15] was established in 1987, as the main body overseeing and defending these rights under the Charter.[16,17] Despite being described as an organisation under construction, caught between the Charter's aspirations and Africa's harsh realities, it has moved slowly amid significant deference to the AU's political apparatus.[18,19] Notably, the establishment of a human rights Commission in Africa, with its main office in Banjul, The Gambia,[20] given these limitations, remains significant, albeit challenged in effectiveness.[21]

However, the chosen type of institution was surprising. In 1979, when the OAU decided to establish a regional human rights body, it opted for a Commission over

11 Gumedze, 2003, pp. 118–119.

12 The African human rights system shows certain weaknesses. Unlike the European and American Conventions, the African Charter lacks a general derogation clause for emergencies, making its standards less clear. Its focus on duties and collective rights, though rooted in African traditions, often lacks enforcement and legal clarity, especially for socio-economic rights. While the European Court is permanent and issues binding judgments, with strong follow-up through the Committee of Ministers, the African Commission issues non-binding recommendations, with no similar oversight. The Inter-American system offers stronger interim measures and better tools for ensuring state compliance. These gaps reflect design choices and broader political and financial limitations. See more in: Viljoen, 2012; Murray, 2019.

13 Welch, 1992, pp. 44–45.

14 Gumedze, 2003, pp. 118–119.

15 Bekker, 2013, pp. 500–501; P. Ambrose, 1995, p. 81; Murungu, 2010, p. 67; Killander, 2013, p. 383.

16 Gumedze, 2003, pp. 118–119.

17 Onoria, 2003, pp. 1–3.

18 This political deference appears in several ways. The Commission must submit its recommendations to the AU Assembly of Heads of State and Government, which decides whether to act on them. For example, in its 2015 decision on the Endorois community's land rights in Kenya, the Commission found serious violations; however, the AU delayed action for years. Similarly, in 2018, the AU Executive Council controversially asked the Commission to revoke the observer status of the Coalition of African Lesbians, widely seen as political interference. These cases highlight how political considerations block or dilute the Commission's work, limiting its authority and independence. See more in: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and Peoples' Rights. Available at: https://achpr.au.int/en/decisions-communications/centre-minority-rights-development-kenya-and-minority-rights-group-27603. Amnesty International, African Union: End discrimination against African LGBTI activists, 27 July 2018. [Online]. Available at: https://www.amnesty.org/en/wp-content/uploads/2021/05/ACT3011392019ENGLISH.pdf (Accessed: 12 July 2024).

19 Hansungule, 2004, pp. 5–6.

20 Ssenyonjo, 2018, p. 5.

21 Welch, 1992, pp. 44–45.

a Court. This choice has been linked to an African preference for conciliation over adjudication, though no official justification was provided by the OAU or its representatives.[22] While the original drafting of the Charter involved discussions about establishing a court to 'judge crimes against humanity and violations of human rights', this idea was considered premature. Nevertheless, this notion was later actualised through an additional protocol to the Charter, leading to the establishment of the African Court on Human and Peoples' Rights (ACtHR), which began hearing cases in 2007. Until the Court became operational,[23] the Commission was the sole institution tasked with monitoring the Charter's implementation. With the Court's establishment, the Commission was required to clarify precisely how the Court would complement its responsibilities, ensuring a comprehensive and coordinated approach to human rights protection in Africa.[24] However, the Court's role[25] will be the subject of the next chapter, while here the focus will be on the Commission's composition, appointment and vacancy process, its scope of competencies and role in protecting human rights, including the supervision mandate, protective mandate and promotional activities.

2. Composition, Appointment and Vacancy of the Commission

The ACmHPR, the monitoring body of the African Charter,[26] consists of 11 members, selected from distinguished African individuals known for their exemplary moral character, integrity, impartiality and expertise in human and people's rights, particularly valuing legal experience.[27] Commissioners are nominated by state parties to the African Charter; however, they are elected by the AU Assembly of Heads of State and Government. They are expected to serve in their individual capacity on a part-time basis,[28] guided by human rights principles rather than political agendas.[29] According to Article 31(1) of the Charter,[30] the selection of Commission members must be based

22 Odinkalu, 1998, pp. 360–364.
23 Naldi, 2014, pp. 367–368.
24 Murray, 2019, pp. 598–600.
25 To give a fuller picture of the African human rights system, it is important to briefly note the African Commission's relationship with the African Court. The two bodies work together – the Commission handles promotion, protection and quasi-judicial tasks, while the Court issues binding judgments. Under Article 5(1)(a) of the Court's Protocol, the Commission can refer cases, especially when states ignore its recommendations or a legal ruling is needed. As Elsheikh (2002) notes, this dual structure works best with good coordination, with the Commission as the starting point and the Court as the final step. While this chapter focuses on the Commission, its link to the Court is essential. See more in: Elsheikh, 2002, pp. 252–271.
26 See more in: Viljoen, 2012, pp. 289–299.
27 See more in: Revised Rules of Procedure of the African Commission on Human and Peoples' Rights, 1996, p. 981.
28 Ssenyonjo, 2018, pp. 5–6; Odinkalu, 1998, pp. 365–369; Wiseberg, 1994, p. 35.
29 Badawi El-Sheikh, 1989, pp. 273–275.
30 Art. 31(1) of the African Charter on Human and Peoples' Rights.

on their expertise in human and peoples' rights and legal background,[31] underscoring the high standards required by the Charter.[32] Though nominated by states, members are elected by the AU Assembly as per Article 33 and serve six-year terms, as stipulated in Article 36. These members are expected to be impartial and serve in a personal capacity, not as government representatives, as highlighted in Article 31.[33]

Furthermore, the Commission mandates specific capabilities for its members. Before the 2007 Commission elections, Amnesty International emphasised the need for an open, transparent and widely publicised national nomination process, inclusive of diverse groups, including civil society. Transparency should be maintained through public discourse of candidate lists and their compliance with the Charter guidelines, along with the reasons for the AU's decisions.[34] Unfortunately, these recommendations are not widely implemented by several states, which need to ensure high morality, reputation, rights expertise, legal background and impartiality, along with considerations of nationality, regional diversity, language and gender balance.[35] Furthermore, the process of nominating Commissioners at the national level is minimally documented, leaving the selection criteria by states for AU nominations unclear. The available data suggests a limited candidate pool. The AU Commission advises that regions propose more candidates than the number of open positions and develop systems to ensure this. However, national processes, except in Zambia, are reportedly neither transparent nor inclusive, with little equivalency for nominees to those eligible for top judicial roles.[36,37]

Additionally, Article 33 specifies that elections for members are conducted by secret ballot, with Article 36 ensuring that the terms of initial members do not coincide, avoiding a completely new Commission. While states that are not party to the Charter cannot nominate, they may elect Commissioners, reflecting a practice seen in other systems. Elections have traditionally occurred at the OAU and AU summer summits, with the Executive Council selecting and deciding on Commissioners for Assembly endorsement and appointment.[38] Moreover, the Commission holds two

31 Badawi El-Sheikh, 1989, pp. 273–275.
32 Abioye, 2014, p. 84.
33 Ambrose, 1995, pp. 81–83.
34 Murray, 2019, p. 600.
35 See more about the suggestions that have not been considered by the States: Murray, 2019, pp. 600–604.
36 The opaque and exclusive nomination process casts doubt on the Commission's independence and legitimacy. When Commissioners seem politically appointed or not properly vetted by civil society, it undermines trust in their impartiality, especially in cases against powerful states. The Commission needs to be seen as an independent rights body, not just an AU arm. As Dinokopila (2010) points out, government influence over nominations can weaken Commissioners' independence and make the Commission less willing to challenge Member States. See more in: Dinokopila, 2010, pp. 37–38.z
37 Murray, 2019, pp. 598–609.
38 Ibid, pp. 598–609.

ordinary sessions annually, with its Secretariat[39] based in Banjul, The Gambia. The Commissioners elect a Chairperson and Vice-Chairperson from among themselves.[40] Their work is supported by 15 special mechanisms, such as special rapporteurs and working groups.[41] All the members, including elected officials, may seek re-election.[42] They are required to publicly pledge to perform their duties with impartiality and fidelity.[43] The Rules of Procedure establish precedence based on seniority following the Chairperson and Vice-Chairperson. Resignation procedures allow members to resign by writing to the Chair, with the process taking effect three months from submission.[44]

3. Scope of Competences

The African Commission is not a supranational court or a political agency of the AU. It functions as a quasi-judicial body, characterised by the legal essence of the African Charter's provisions, alongside its independent status and the autonomy of its members.[45] Nevertheless, it maintains a close relationship with the Assembly of Heads of State and the Government of the AU, which inherently has political dimensions. This unique position makes the Commission a *sui generis* entity, necessitating that it carries out its responsibilities with finesse and assertiveness.[46]

According to Article 45 of the Charter, the Commission is tasked with the promotion, protection and interpretation of human rights. It convenes twice annually for regular sessions, which can last up to two weeks.[47] The key functions of the Commission include:

39 According to the Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020, African Commission on Human and Peoples' Rights, 27th Extra-Ordinary Session held in Banjul (The Gambia), 19 February to 04 March 2020. [Online]. Available at: https://achpr.au.int/sites/default/files/files/2021-04/rulesofprocedure2020eng1.pdf. Rule 20: 'The Secretariat of the Commission is composed of the Secretary and the Commission's professional, technical and administrative staff'.

40 According to the Rules of Procedure, a Chairperson and a Vice-Chairperson compose the Bureau of the Commission, which performs the functions set forth in the African Charter and in these Rules of Procedure.

41 Manrique Gil and Bandone and Calvieri, 2013, p. 5.

42 Umozurike, 1983, pp. 907–908.

43 Badawi El-Sheikh, 1989, pp. 273–275.

44 Murray, 2019, pp. 598–609.

45 The Commission's quasi-judicial nature comes from its role in handling complaints about Charter violations. It assesses facts, applies legal standards and issues reasoned recommendations, often guided by its Rules of Procedure and international human rights norms. However, unlike a court, its decisions are not legally binding or directly enforceable. This mix of legal reasoning and non-binding outcomes places the Commission somewhere between a tribunal and an advisory body.

46 Badawi El-Sheikh, 1989, p. 283.

47 Wiseberg, 1994, pp. 35–36.

1. Promoting human rights through research on issues specifically affecting Africa in the realm of human and peoples' rights, disseminating information and collaborating with other African and international organisations devoted to promoting and protecting these rights.[48]
2. Interpreting the provisions of the African Charter at the request of a state party, an AU institution or an African organisation recognised by the AU. The Commission has undertaken these interpretations in various instances, including resolutions on trafficking, education and slavery.[49] For instance, in its 2018 Resolution on the Protection of African Migrants and Asylum Seekers, it interpreted the rights to dignity (Article 5) and non-discrimination (Article 2) to cover issues of xenophobic violence and arbitrary detention.[50] Similarly, its 2016 Resolution on the Right to Education in Africa broadened the meaning of Article 17 by highlighting states' duties to ensure that education is accessible, adaptable and acceptable, particularly for marginalised groups.[51] In its 2012 mission report on Mauritania, the Commission interpreted the Charter's ban on slavery (Article 5) to include modern forms, such as hereditary servitude and forced marriage.[52] These show how the Commission uses interpretation to expand the Charter's protections and adapt its norms to contemporary human rights challenges.
3. Handling inter-state communications, where one state files a complaint concerning human rights violations allegedly committed by another state.
4. Examining regular reports submitted by states on how they implement the African Charter domestically, including its Protocol on the Rights of Women, and subsequently adopting concluding observations.[53]
5. Reviewing complaints submitted by individuals and non-governmental organisations (NGOs), as long as these meet the criteria for admissibility, without necessitating that the complainant be a victim or related to a victim.[54]

48 Ssenyonjo, 2018, pp. 6–7.
49 Abioye, 2014, p. 95.
50 Resolution on the Protection of African Migrants and Asylum Seekers, African Commission on Human and Peoples' Rights, ACHPR/Res.398(LXIII)2018, 13 November 2018. [Online]. Available at: https://achpr.au.int/en/adopted-resolutions. (Accessed: 12 July 2024).
51 Resolution on the Right to Education in Africa, African Commission on Human and Peoples' Rights, ACHPR/Res.357(LIX)2016 (4 November 2016). [Online]. Available at: https://achpr.au.int/en/adopted-resolutions. (Accessed: 12 July 2024).
52 African Commission on Human and Peoples' Rights, *Report of the African Commission on Human and Peoples' Rights on the Mission to Mauritania*, 2012. [Online]. Available at https://achpr.au.int/en/node/537 (Accessed: 12 July 2024).
53 Mujuzi, 2012, pp. 89–91.
54 Ssenyonjo, 2018, pp. 6–7; Abioye, 2014, pp. 84–85.

Additionally, the Commission performs tasks delegated by the Assembly of Heads of State and Government.[55] These activities align with the Commission's overarching goals of safeguarding, promoting and elucidating human rights across the continent.[56] Furthermore, it is tasked with gathering documents, conducting studies and research on African challenges regarding these rights, organising seminars, symposia and conferences, distributing information and encouraging involvement from national and local institutions concerned with human and peoples' rights.[57] It can offer opinions or recommendations to governments, despite a lack of clear guidelines on how and when to provide these recommendations.[58] In executing its functions, the Commission can employ any suitable investigative techniques, including obtaining insights from the Secretary-General of the OAU or other knowledgeable individuals.[59] It holds broad powers under the African Charter, notably helpful in swiftly addressing urgent matters, such as extrajudicial killings. Article 46 grants the Commission further authority, allowing it to utilise any appropriate investigative methods in its operations.[60,61]

To clarify the procedure, during its second session, the Commission adopted its rules,[62] effectively translating the African Charter's provision into an operational framework. These rules cover the organisation of the Commission's work, the conduct of its business, the publication of its documents and the participation of representatives from states, national liberation movements and intergovernmental and NGOs in its sessions.[63]

55 Ambrose, 1995, pp. 81–83.
56 Abioye, 2014, p. 85.
57 Umozurike, 1983, pp. 907–908.
58 Hansungule, 2004, p. 6.
59 Essien, 2000, p. 95.
60 The Commission's wide investigative powers, such as fact-finding missions, urgent appeals and on-site visits, are strong in theory, yet limited in impact due to the lack of binding enforcement. Their effectiveness often depends on political will. For example, in its 2012 report on Mauritania, the Commission exposed systemic slavery and made strong recommendations; however, without follow-up mechanisms, compliance remained uncertain. Even urgent provisional measures lack legal force. This highlights a core paradox: the Commission has meaningful procedural tools, yet little power to ensure implementation. See more in the African Charter on Human and Peoples' Rights; Rules of Procedure of the African Commission on Human and Peoples' Rights; African Commission on Human and Peoples' Rights, Report of the African Commission on Human and Peoples' Rights on the Mission to Mauritania. Banjul, 2012. [Online]. Available at: https://achpr.au.int/en/node/537. (Accessed: 12 July 2024).
61 Wiseberg, 1994, pp. 36–38.
62 See the amended version of the rules as follows: Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020, African Commission on Human and Peoples' Rights, 27th Extra-Ordinary Session held in Banjul (The Gambia), 19 February to 04 March, 2020. [Online]. Available at: https://achpr.au.int/sites/default/files/files/2021-04/rulesofprocedure2020eng1.pdf (Accessed: 12 July 2024).
63 Badawi El-Sheikh, 1989, p. 276.

3.1. The Role in Protecting Human Rights

The African Charter outlines two main procedures or measures to ensure that human rights are upheld and protected: the reporting procedure and the communication (or complaints) procedure. Through the reporting procedure, the Commission receives reports from states parties to the Charter. This process verifies whether each state has adopted administrative, legislative and other measures to implement the Charter's provisions. The communication or complaints procedure is utilised when there are allegations of violations of protected rights, seeking to address and remedy these violations.[64] The overall role of reviewing these communications and making recommendations to the Assembly of Heads of State and Government of the AU is referred to as the Commission's protection mandate. Additionally, the protection of human and peoples' rights includes a promotional element. By making recommendations regarding violations, the Commission indirectly promotes these rights.[65] To further elucidate the Commission's multifaceted mandate, subsequent sections will provide an in-depth analysis of its three principal roles: the reporting procedure, the communications mechanism and promotional activities.

3.1.1. Reporting Procedure: Supervision Mandate

According to Article 62 of the African Charter, each state party is required to submit a report every two years, detailing the legislative or other measures implemented to uphold the rights guaranteed by the African Charter.[66] The Commission examines these reports, engages in a 'constructive dialogue' with the state representatives and, since 2001, has adopted concluding observations.[67] However, the Charter does not explicitly empower the Commission to review these reports. Nonetheless, in 1988, the Assembly of Heads of State and Government of the OAU authorised the Commission to receive, examine and make relevant observations on the reports submitted by state parties, effectively establishing the Commission as the supervisory body for the Charter. By reviewing these periodic reports, it monitors state behaviour, subjecting them to public scrutiny and encouraging compliance with international standards. Government representatives are required to present their reports to the Commission and address any questions posed by its members.[68]

Therefore, the reporting procedure of the Charter, as governed by the Commission's rules, is closely modelled after the UN Covenant on Civil and Political Rights.[69] This process seeks to establish a dialogue with state parties, assisting them in meeting their obligations through this interaction and 'general observations' provided by the

64 Badawi El-Sheikh, 1989, p. 280.
65 Gumedze, 2003, pp. 120–121.
66 Article 62 of the African Charter of Human and Peoples' Rights.
67 Essien, 2000, p. 98; Ssenyonjo, 2018, pp. 29–30.
68 Wiseberg, 1994, pp. 36–38.
69 International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), 16 December 1966. [Online]. Available at: https://www.ohchr.org/sites/default/files/ccpr.pdf (Accessed: 12 July 2024).

Commission. It took some time for the Commission to develop guidelines for state parties to consider when preparing and submitting their reports.[70] However, the reporting by state parties has been largely ineffective within the African human rights framework. Several states are overdue in their submissions, and those that do report often do so inconsistently and without attention to detail. The Commission attempted to remedy the backlog by offering an amnesty to any state that submits at least one report, waiving past missed reports. This approach, which is not supported by Article 62, given its specific reporting requirements, may further demotivate those states that are genuinely trying to meet their obligations on time. The reporting process is plagued by poor-quality submissions, as preparation guidelines are frequently ignored. Furthermore, unlike the UN system, there are no mechanisms for follow-up, feedback or observations to assist states in understanding their deficiencies and improving subsequent reports.[71]

3.1.2. Communications: Protective Mandate

The protective mandate of the Commission is outlined in Article 45(2) of the African Charter, which empowers the Commission to 'ensure the protection of human and people's rights under the conditions laid down by the present Charter'.[72] Since its inception in 1987, the African Commission has received over 500 communications under Article 55 of the Charter from individuals, civil society organisations and others alleging rights violations. If deemed admissible, the Commission assesses the merits of the case and, where violations are established, recommends actions for the state to remedy these breaches.[73] Over the years, the Commission has cultivated a substantial and uniquely African body of human rights jurisprudence, particularly in clarifying the economic, social and cultural rights within the Charter.[74,75] Given the wide-ranging rights covered by the Charter, it is uncommon to encounter a complaint about

70 Badawi El-Sheikh, 1989, pp. 280–281.
71 Hansungule, 2009, pp. 255–256.
72 Art. 45(2) of the African Charter of Human and Peoples' Rights.
73 Murray, 2019, pp. 2–4.
74 Some key cases highlight the Commission's growing influence. In the Endorois case (Comm. 276/03), it found that Kenya violated several Charter rights concerning property, culture, natural resources and development, marking a major step for indigenous rights in Africa. In *Purohit and Moore v. The Gambia* (Comm. 241/01), the Commission ruled that detaining people with mental disabilities without legal safeguards breached their rights to health and dignity. In *Free Legal Assistance Group v. Zaire* (Comm. 25/89 et al.), it held that arbitrary detention and lack of fair trials violated the Charter. These decisions show how the Commission has progressively shaped socio-economic rights and moved beyond narrow legal interpretations. See more in: African Commission on Human and Peoples' Rights. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communications 276/03, 283/03, 299/05, 301/05. Decided February 2010.; African Commission on Human and Peoples' Rights. Purohit and Moore v. The Gambia, Communication 241/01. Decided 29 May 2003.; African Commission on Human and Peoples' Rights. *Free Legal Assistance Group v. Zaire*, Communications 25/89, 47/90, 56/91, 100/93. Decided October 1995.
75 Ssenyonjo, 2015, pp. 157–160.

a right not encompassed by its provisions.[76] Even though some rights, such as privacy and personality, are absent from the Charter, it remains a comprehensive document, addressing a wide spectrum of individual and collective human rights. However, the Commission's Secretariat has occasionally dismissed complaints without forwarding them to Commissioners to establish a *prima facie* case for investigation, such as in instances where the accused state is not a party to the Charter.[77] Despite these gaps, the Commission has made efforts to fill them through its Special Procedures, especially through special rapporteurs, working groups and soft law instruments. For example, its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa offer privacy protections in court settings, even though the Charter does not explicitly guarantee this right.[78] Working Groups, like the one on Specific Issues Related to the Commission's Work,[79] have sparked discussions on rights not named in the Charter, using Articles 60 and 61 to draw on other international standards.[80] These interpretive efforts bridge legal silences and allow the Commission's case law to evolve.

Under this mandate, any individual, not limited to citizens, within a state party to the Charter can file a complaint with the Commission if they believe their rights, as specified in the Charter, have been violated.[81] The Charter facilitates the exercise of this protective function through inter-state communications and the 'other communications' procedure. Article 47 authorises the Commission to receive communications from state parties, provided these communications adhere to the stipulated conditions within the Charter.[82] Consequently, communications can originate from either state or non-state actors, contributing to the body of jurisprudence developed by the Commission.[83] Individuals and NGOs, within and outside Africa, are eligible to submit complaints, and several have done so over the years. The volume of complaints often correlates with a state's political climate; for instance, during Nigeria's era of military

76 Hansungule, 2009, pp. 259–260.
77 Ibid.
78 Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, The African Commission on Human and Peoples' Rights, May 29, 2003. [Online]. Available at: https://achpr.au.int/en/node/879 (Accessed: 12 July 2024).
79 See more at: Working Group on Specific Issues Related to the work of the African Commission. [Online]. Available at: https://achpr.au.int/en/mechanisms/working-group-specific-issues-related-work-african-commission (Accessed: 12 July 2024).
80 Arts. 60 and 61 of the African Charter provide the Commission with interpretive tools that go beyond the text of the Charter. Art. 60 allows the Commission to draw on a wide range of international sources, including African human rights instruments, the UN and OAU Charters, the UDHR and other relevant documents adopted by UN bodies or African states, to guide its work. Art. 61 complements this by identifying additional, subsidiary sources that the Commission may use, such as other international treaties recognised by OAU Member States, African practices consistent with human rights standards, customary international law, general legal principles recognised by African states and authoritative legal scholarship and case law. Together, these articles empower the Commission to interpret rights dynamically and contextually, even in areas where the Charter is silent.
81 Ibid.
82 Essien, 2000, p. 102.
83 Abioye, 2014, pp. 87–88.

rule, it dominated the communication docket, and Zimbabwe was prominently featured. Although no complaints have come from legal entities, such as corporations, such occurrences are not entirely out of the question.[84]

3.1.2.1. Who Can File Communications?

As mentioned, the ACmHPR is empowered to handle communications from states and individuals. Since its inception, the Commission has handled numerous individual and a few inter-state communications.[85] However, the Charter does not specifically identify who may submit a communication to the Commission. Article 56 mentions communications related to human and peoples' rights discussed in Article 55; however, it does not specify who can bring them. Article 55 addresses communications other than those from state parties, while the Rules of Procedure do not expand on this point. Article 56(1) requires the communications to identify their 'author', yet does not define the possible authors. Rule 104 of the Rules of Procedure mentioned 'his/her communication', implying that the complainant can be an individual, specifically a human being.[86] Previously, the Commission's Rules of Procedure complemented Article 55 by indicating who might file a complaint, suggesting that anyone can submit a communication to the Commission. In practice, the Commission accepts communications from any individual or organisation, with most submissions from NGOs, both African and international, on behalf of specific individuals when addressing serious or widespread human and peoples' rights violations.[87] Therefore, notably, aside from individuals, any NGO, regardless of having observer status before the Commission, can be deemed an 'individual' for the purposes of litigation. NGOs submit communications on behalf of people; however, they can file complaints for their alleged rights violations in Africa.[88]

Communications differ based on whether they originate from states or non-state entities. For state communications, one state accusing another of a Charter breach must inform the alleged violator in writing while sending copies to the Secretary-General and the Commission's Chairman. If unresolved after three months, either state can bring the matter to the Commission. The accusing state may directly submit the issue to the Commission, which must verify that local remedies were exhausted unless delays would unduly persist. The concerned states can present written or oral submissions to the Commission. After reviewing submissions and attempting all feasible means to achieve an amicable solution, the Commission sends a report with recommendations to the concerned state and the OAU Assembly, including an annual report of its activities to each Ordinary Session of the Assembly.[89]

84 Hansungule, 2009, pp. 259–260.
85 Mujuzi, 2019, p. 27.
86 Gumedze, 2003, pp. 121–122.
87 Essien, pp. 105–106.
88 Gumedze, 2003, p. 122.
89 Umozurike, 1983, pp. 907–908.

For communications from non-state entities, the Commission can receive submissions from NGOs and individuals.[90] Before an individual communication is deemed admissible, the complainant must exhaust all local or domestic remedies,[91] as stipulated by Article 56(5) of the Charter. This provision states that individual communications are only admissible if they are submitted after exhausting local remedies unless those procedures are unduly prolonged.[92] To prevent misuse, the Charter requires that such communications avoid language insulting to a state, its institutions or the OAU and not rely solely on mass media information. Whether the Commission considers these complaints is decided by a majority of its members. If a communication reveals a special case involving serious or massive human and peoples' rights violations, the Commission should alert the Assembly, potentially leading to an in-depth Commission study, with a report and recommendations. In emergency cases, the Commission refers the matter to the Assembly's Chairman, who may request a thorough investigation. The Commission operates confidentially until the Assembly decides otherwise, except for reports considered by the Assembly or factual reports whose publication is directed by the Assembly.[93]

3.1.2.2. The Seizure Procedure, Admissibility and Recommendations

According to Article 55(1) of the Charter, once a communication is submitted to the Commission, the Secretariat compiles a list and distributes it to the Commission members. This list is prepared ahead of each session of the Assembly of Heads of State and Governments.[94] After being included on this list and distributed to the commissioners, the commissioner assigned to the case, known as the rapporteur, must recommend whether the Commission should take up the communication. This stage is referred to as the 'seizure procedure'. As outlined in Article 55(2), a communication can only move forward if a majority of Commission members agree to consider it. For the Commission to proceed, it must present a *prima facie* case, suggesting a violation of the Charter's provisions. Once a communication is approved for consideration, the complainant and the state are notified accordingly.[95]

90 Ibid.

91 The African Commission has taken a flexible approach to the exhaustion of local remedies under Article 56(5), recognising that strict enforcement could unfairly block access in weak legal systems. In *Free Legal Assistance Group v. Zaire* (Comm. 25/89), it waived the requirement due to prolonged detention without trial. In *Jawara v. The Gambia* (Comm. 147/95–149/96), it found that ineffective domestic remedies need not be pursued. These cases show the Commission's effort to balance procedure with access to justice, avoiding technicalities that would deny real protection. See more in: African Commission on Human and Peoples' Rights. *Free Legal Assistance Group v. Zaire*, Communication 25/89. Decided October 1995.; African Commission on Human and Peoples' Rights. *Jawara v. The Gambia*, Communications 147/95-149/96. Decided May 2000.

92 Mujuzi, 2019, p. 27.

93 Umozurike, 1983, pp. 907–908.

94 Gumedze, 2003, pp. 125–126.

95 Ibid, pp. 126–127.

Once a list of communications is complied and approved for review under Article 55(2) of the Charter, the Commission must determine if the communications meet the admissibility criteria set forth in Article 56.[96] Seven conditions must be fulfilled for a complaint to be considered:

1. The complainant must clearly identify themselves, even if anonymity is requested.
2. The complaint must align with the principles of both the OAU Charter and the African Charter.
3. It must avoid using disparaging or insulting language.
4. The complainant cannot rely solely on information from media reports.
5. All domestic legal remedies must be exhausted before the complaint is filed.
6. The complaint must be submitted within a reasonable timeframe.
7. The complaint should not involve cases already settled or being examined by another treaty-monitoring body.

After the Commission verifies that these conditions are met, both the complainant and the concerned state are notified that the case will proceed.[97] Regarding the requirement of exhausting local remedies, the Commission has interpreted it flexibly. It has accepted a communication as admissible in situations where the broad scope of alleged violations and the general conditions in the country make it impractical to seek recourse through domestic courts.[98] Consequently, the rationale for giving domestic legal systems the first opportunity to address human rights violations is vital, which reflects an established principle of international law embedded in various human rights treaties and jurisprudence of international and regional bodies. Under the African Charter, this rule applies to communications by state parties and 'other communications', primarily submitted by individuals and NGOs, as outlined in Articles 47 and 55.[99]

Once the Secretariat informs the complainant and the state, the state must provide a written statement explaining the issue and any actions taken within three months. These responses are communicated to the complainant via the Secretariat. The complainant can provide additional information within a timeframe set by the Commission. The Secretariat further notifies the state that failure to respond within the designated time will result in the Commission proceeding based on available evidence. The Commission informs both parties of the hearing date through its Chairperson and the Secretariat forwards the admissibility decision and relevant documents to the involved state party, notifying the complainant.[100]

96 Ibid, pp. 126–127.
97 Ambrose, 1995, pp. 81–83.
98 Essien, 2000, pp. 106–107.
99 Onoria, 2003, pp. 1–3.
100 Gumedze, 2003, p. 136.

The merits of the communication involves evaluating the substantive issues presented. A separate session is dedicated to this review, distinct from those assessing seizure and admissibility. The Secretariat prepares a draft decision on the merits based on the facts presented. As highlighted, presenting a communication to the African Commission involves applying international law principles.[101] Once a decision on the merits is reached, the Commission forwards its recommendations to the Assembly of Heads of State and Government.[102] These recommendations can range in detail and complexity, from simple directives to ensure compliance with international obligations to detailed actions, such as forming inquiry commissions, releasing individuals, compensating victims and amending legislation.[103]

However, the actual implementation of these recommendations by states remains uncertain, as systematic follow-up by the African Commission has not yet been established. Some information is available, publicly (through annual reports or civil society organisation statements) and privately; however, there is no consistent policy on which information should remain confidential.[104] Therefore, even though the Commission was originally intended as a body to promote human rights, it does not have the authority to award damages, restitution or reparations, nor can it formally condemn a state. Instead, it issues recommendations. Consequently, Member States often disregard the Commission's recommendations and decisions.[105] Nevertheless, there is limited documentation in academic literature or policy papers about what happens to the African Commission's decisions after publication, either at the national or regional level. While some notable research has attempted to track decision implementation, the literature tends to be general, pointing to issues, such as poor human rights records in African states, the lack of political will, low literacy rates, insufficient human rights education and other factors affecting successful implementation.[106]

3.1.3. Promotional Activities

The Commission's promotional mandate, as outlined in Article 45(1) of the Charter, involves disseminating information and raising public awareness about human rights issues to enhance respect for and recognition of the rights enshrined in the Charter.[107] It undertakes various activities, such as collecting documents, conducting studies and research on African issues related to human and peoples' rights and organising seminars, symposia and conferences. It works to spread information and support national and local institutions focused on human and people's rights. In certain situations, it provides opinions or recommendations to the governments. Additionally, it

101 Ibid, pp. 141–142.
102 Ibid, p. 144.
103 Murray, 2019, pp. 2–4.
104 Ibid, pp. 2–4.
105 Hansungule, 2004, pp. 7–8.
106 Murray, Mottershaw, pp. 350–353.
107 Art. 45(1) of the African Charter on Human and Peoples' Rights.

develops principles and rules to resolve legal issues concerning human and people's rights and fundamental freedoms, which African governments can use as a foundation for their legislation. The Commission collaborates with other African and international institutions dedicated to promoting and protecting human and people's rights.[108] Its quasi-legislative activities include encouraging African states to ratify the African Charter and international human rights instruments and incorporate Charter obligations into their domestic legal systems. Cooperation efforts extend to interactions with relevant international, regional and African organisations, including governmental and non-governmental entities, and involvement in the periodic reports of states.[109] Furthermore, the Commission assigns individual Commissioners to different geographic regions, focusing on the countries within the region where the Commissioner resides or is a national. These Commissioners are responsible for organising promotional activities in their designated countries.[110]

However, although the Commission actively pursues its promotional mandate across Africa, it is important to recognise that a significant portion of the population lives in rural and underdeveloped areas. These communities are often the most in need of human rights protection and the empowerment that comes from understanding their rights.[111] Therefore, the primary goal of the promotional activities is to increase public awareness of the Charter's existence and engage individuals, groups, organisations and states in actively implementing its provisions.[112] Notably, the Commission's promotional mandate is vast and it is only beginning to address it. Across the continent, significant ignorance remains about the concept of rights, necessitating considerable effort and resources to close this gap.[113]

4. Conclusion

Although there has been notable progress in creating human rights instruments within the African system, it is widely recognised that these instruments require active enforcement.[114] Both the African Commission and Charter emphasise peaceful resolutions, though an analysis of the political environment during drafting challenges this preference as inherently 'African'. Therefore, it is likely that weakening the enforcement mechanisms was a compromise to satisfy leaders who were not fully committed to democracy, human rights and the rule of law.[115]

108 Essien, 2000, p. 96.
109 Badawi El-Sheikh, 1989, p. 278.
110 Abioye, 2014, p. 85.
111 Ibid., pp. 86–87.
112 Badawi El-Sheikh, 1989, pp. 278–280.
113 Nmehielle, 2004, p. 10.
114 Ibid., 2004, p. 9.
115 Viljoen, 2019, p. 206.

However, over the past decades, the African Commission has evolved in the organisation and execution of its duties under the African Charter. This includes promoting and protecting human rights, interpreting the Charter and undertaking additional tasks assigned by its regional government body, initially the OAU and now the AU.[116] Nevertheless, despite having the option of seeking legal recourse through the Commission, the continent continues to suffer from widespread human rights violations. A significant part of this issue stems from the general lack of awareness about the complaint procedures. Additionally, a strong human rights culture is absent across much of the continent, particularly at the government level.[117] Even though the Charter did mandate the Commission to 'ensure the protection of human and people's rights', it imposes conditions that significantly limit individuals' ability to access the Commission. The state-centric nature of the Charter raises questions about its commitment to safeguarding individual rights, now and in the future.[118]

By creating effective practice methods, the Commission could harness its powers to address these limitations. Regular evaluations would be crucial to fine-tune this process. The initial focus should be on resolving the financial, administrative and technical challenges. At a deeper level, it should consider Africa's specific human rights issues and priorities, which would supply a guiding framework for its activities. Additionally, the Commission should maintain ongoing communication with entities, such as the AU, the UN and other global human rights organisations.[119] Therefore, submitting communications to the Commission is a constructive step towards stronger protection of human rights in Africa. Nevertheless, internationally, the Assembly of Heads of State and Government of the AU must establish a robust system to enforce the Commission's rulings. Without this, the litigation process may prove ineffective.

Ensuring human rights in Africa depends on the Commission being a vigorous and innovative body and relies on support from the African states, intergovernmental organisations, national human rights bodies and civil society. An efficient Secretariat is vital for the Commission to carry out its responsibilities, as outlined in the Charter.[120] Though Africa experiences severe and large-scale human rights violations, the Commission has seldom declared governments responsible for serious breaches. Consequently, the Commission has insufficiently provided reparations to victims of such violations, often avoiding accountability by referring cases elsewhere.[121] Furthermore, confidentiality requirements restrict public access to and understanding of the Commission's work, further hampering its effectiveness.[122] For the communications procedure to effectively remedy victims' violations, the Commission must shift its overall approach, as the lack of enforcement and follow-up on its decisions

116 Ibid., 2004, p. 9.
117 Gumedze, 2003, pp. 147–148.
118 Hansungule, 2004, pp. 5–6.
119 Badawi El-Sheikh, 1989, pp. 281–282.
120 Gumedze, 2003, pp. 147–148.
121 Bekker, 2013, p. 523.
122 Hansungule, 2004, pp. 5–6.

undermines its authority. Relying on states violating the Charter to report their compliance has proven ineffective.[123]

An important turning point in the process of achieving human rights realisation on the African continent was the establishment of the ACmHPR. However, strong barriers stand in its way, such as insufficient funding, a lack of public awareness and a lack of enforcement. Nonetheless, there is no denying the Commission's capacity to advance equality and justice throughout Africa. By straightening its current structure and resolving its flaws, the Commission may transform into a force for good, protecting the rights of every African. To assist the Commission in carrying out its work, the AU, African nations and international human rights actors must pledge their assistance.

123 Bekker, 2013, p. 524.

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| Chapter 7 |

Institutional Framework for Human Rights Protection in Africa: The African Court on Human and Peoples' Rights

Anna Dąbrowska

ABSTRACT

The African Court on Human and Peoples' Rights (ACtHPR) is an institution of fundamental significance to the African system of human rights protection, established to support and complement the actions of the African Commission on Human and Peoples' Rights (ACHPR). Its emergence is a result of a complex historical and political process dating back to the 1960s and 1970s, at the time of African decolonisation. The process involved the struggle for the independence of African states, the development of anti-colonial movements and a growing awareness of the need to protect human rights on the continent. In response to these challenges, the Organisation of African Unity (OAU), which later became the African Union (AU), were created to play a crucial role in promoting human rights. The African Court was founded by a protocol to the ACHPR to act as a judicial authority protecting human rights, a major addition to the African Commission's actions. The body wields an extensive jurisdiction that includes the interpretation and application of the African Charter and other human rights instruments ratified by African states. Its operation rests on working with the AU; however, its effectiveness is restricted by political and economic challenges faced by African states. Nonetheless, the creation of the African Court was an important step towards a stronger human rights protection on the continent and opened new opportunities for enforcing these rights in the region. Although it plays a key role in promoting human rights, the evaluations of its effectiveness vary. On the one hand, it is seen as an institution capable of fostering the legal awareness and obligations of the African states regarding human rights, while, on the other hand, some critics fear that it may lack sufficient potential to face the challenges of chronic problems afflicting the continent, such as military conflicts, political instability or poverty. Despite these fears, the Court remains the central element of the African system of human rights protection, and its importance to the future of human rights in Africa is bound to grow.

KEYWORDS

African Court on Human and Peoples' Rights, human rights protection, the regional system of human rights protection, international jurisdiction

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1. The Background and the Legal Foundations of the African Court

The African Court on Human and Peoples' Rights (hereafter, the African Court or the Court) is a pivotal institution in the human rights protection system on the African continent, established to strengthen and complement the functions of the African Commission on Human and Peoples' Right (hereafter, the African Commission). It is the most recent fully specialised regional human rights court. Like the earlier courts, such as European (Strasbourg) and American (San José), its formation is indissolubly linked with the existence and operations of a regional intergovernmental organisation. Looking for motivations to exercise this authority, one needs to study the historical developments on the African continent. However, notably, its background is complex and consists of several key stages.

In the 1960s and 1970s, several African states became independent from Western colonial powers. This decolonisation, initiated after World War II, was a turbulent period in the history of the continent, bringing hopes of self-determination and problems of building modern state structures.[1] The states were forced to tackle a range of challenges, such as building state institutions, economic development and the integration of diverse ethnic and social groups into homogeneous nation states.[2] The process varied across regions, often accompanied with military conflicts that complicated the situation. Hence, the new African states realised the need for human rights protection as a foundation of stability and development.[3]

In response, the Organisation of African Unity (OAU) was formed at a conference of African leaders in Addis Ababa (Ethiopia) on 23–25 May 1963[4] to support cooperation among African states, promote continental solidarity and defend the sovereignty and territorial integrity of its members. Human rights promotion was among its priorities, though it initially focussed on political and economic issues.[5] It relied on the OAU Charter,[6] adopted at a time when decolonisation was at its most intense. The document's provisions concern the sovereign equality of states, non-interference with internal affairs, peaceful dispute resolution, the need to eliminate the residues of colonialism, brotherhood, solidarity, etc.[7] The OAU's establishment expressed the aspirations of African nations towards unity and joint struggle against the challenges emerging after the end of the colonial era. Despite recurrent crises, due to the internal diversity of its Member States,[8] the OAU survived until 2001, to be replaced at

1 Cf. more in Cooper, 1996.
2 Cf. more in Evans and Murray, 2002, pp. 15–18.
3 Cf. more in Murray, 2004, pp. 28–32.
4 Cf. more in Sidi Diallo, 1999, pp. 47–56.
5 Cf. more in Viljoen, 2007, pp. 210–215.
6 Charter of the Organization of African Unity, 25 May 1963, Addis Ababa, United Nations Treaty Series, vol. 479, no. 6947. The OAU Charter became effective on 13 September 1964.
7 Murray, 2004, pp. 7 and ff.
8 More on the OAU's role in the process of handling international disputes in Africa, cf. Sidi Diallo, 1999, pp. 47–56.

an African summit in Durban (South Africa) on 9 July 2002 with the African Union[9] (AU), founded by the African Union Constitutional Act,[10] signed in Lomé (Togo) on 11 July 2000.[11]

As the ranks of independent African states grew, the need to create regional mechanisms of human rights protection began to be noted. A range of nongovernmental organisations and social initiatives emerged focussing around these issues. Inspired by European and American systems of human rights protection, the African states collaborated to build some structures of their own, better adapted to local cultural, social and political conditions.[12]

Hence, the African Charter of Human and Peoples' Rights (hereafter, the African Charter) was announced at a conference of the OAU state and government leaders in Banjul (Gambia) on 27 June 1981, effective as of 21 October 1986, and ratified by all the OAU (later AU) Member States. Its authors tried to address the unique African culture and legal philosophy, so that it could become a suitable instrument of satisfying specific African needs and dispelling any doubts.[13] The African Charter encompasses individual civil, political, economic, social and cultural rights, along with group rights and individual and state obligations.

Its creation was partly a result of the pressure the international community exerted on African governments to ensure human rights and partly a desire to create a document that would be the African equivalent to the Universal Declaration of Human Rights[14] of 4 November 1948. Furthermore, the authors were inspired by the Convention for the Protection of Human Rights and Fundamental Freedoms[15] (hereafter, the European Convention) of 4 November 1950, although many commentators and observers regarded it as an innovative document, designed to reflect the history, values and traditions of Africa.[16] Therefore, the treaty highlighted people's rights, human obligations and limitations to human rights.

Following the African Charter, the African Commission was established and began its operation in Addis Ababa (Ethiopia) on 2 November 1987. It is charged with monitoring that the rights under the African Charter are observed, promoting human rights and advising the OAU/AU Member States on related issues. Although its functions are important, the African Commission is not authorised to issue binding judgments, limiting its effectiveness.[17] In line with its mandate, it realises three principal objectives: promoting human and peoples' rights, assuring their protection and

9 Cf. more in Baimu, 2001, p. 312.
10 The Constitutive Act of the African Union, 11 July 2000, the English text is Available at https://au.int/en/Treaties/1157 (Accessed: 15 July 2024).
11 The document became effective on 26 May 2001.
12 Killander, 2010, pp. 95–99.
13 Mubangizi, 2006, p. 148.
14 The Universal Declaration of Human Rights adopted by the UN General Assembly in Paris on 10 December 1948 as resolution no. 217 A (III).
15 The OJ of 1993 No. 61, item 284 as amended.
16 Cf. more in D'Sa, 1985, pp. 72–81.
17 Gumedze, 2011, p. 134.

interpreting the African Charter. The possibility of presenting the African Commission with notices (complaints) from states, individuals or nongovernmental organisations is the major instrument of human and peoples' rights protection. Complaints are directed against one or more states charged with violating human rights.

The idea of setting up a regional human rights court emerged at the African *Conference on the Rule of Law* in Lagos (Nigeria) in 1961. African lawyers called on regional governments to create an authority accessible to everybody under the jurisdiction of the African Charter signatories. The Court finally commenced its operations four and a half decades later. The question of founding the African Court was taken up by the OAU in 1994, 13 years after the adoption of the African Charter, when the Assembly of the OAU Heads of State and Government requested the organisation's General Secretary to convene a meeting of experts that would consider the establishment of a judicial authority. The African Commission additionally drove the acceptance of the proposal to initiate a court that would supplement and strengthen its operations.[18] All commentators agree that the African Commission proved a disappointment.[19]

Given the African Commission's ineptitude, demands to create a judicial body became increasingly vocal. Preparations for the Protocol to the African Charter continued for nearly three years. The milestones were marked with two expert drafts, namely, the Cape Town draft (the Republic of South Africa, compiled in September 1995)[20] and the Nouakchott draft (Mauritania, compiled in April 1997),[21] along with the Addis Ababa draft (Ethiopia, compiled in December 1997), prepared with the participation of particular state representatives.[22] The latter was accepted promptly (in December 1997), though with some minor amendments, by the OAU Ministerial Conference, and submitted to the Assembly of the OAU Heads of State and Government, which approved it (without any in-depth discussions) at its 34th session in Ouagadougou (Burkina Faso) from 8–10 June 1998.[23] The African Court was instituted by force of Article 1 of the Protocol to the African Charter concerning the creation of the African Court on Human and Peoples' Rights (hereafter, the Protocol), which became

18 Cf. more in Naldi and Magliveras 1998, pp. 431–456.

19 Makau, 1999, p. 345.

20 Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PRO(I) Rev. 1.

21 Draft (Nouakchott) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Drafted by the Second Governmental Legal Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, 11–14 April 1997, Nouakchott, Mauritania, OAU Doc. OAU/LEG/EXP/AFCHPR/PRO(2).

22 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III) Rev. 1.

23 Wasiński, 2017, pp. 311–313.

effective on 25 January 2004.[24] The treaty is believed to have been adopted after a protracted lobbying of the scientific community and nongovernmental organisations.[25]

The enforcement of the Protocol did not mean the prompt institution of a new authority with operational capabilities. It was chiefly due to the AU's indecision regarding the relation of the African Court to the AU's Court of Justice.[26] Thus, the African Court was constituted formally, given the AU's organisational and financial difficulties.[27] Hence, a judicial mechanism had not evolved on the African continent for seeking claims for violations of the African Charter, as opposed to the European or Inter-American systems. However, the democratic process in African states improved the standards of human and civic rights protection.[28] The adoption of the Protocol in June 1998 was hailed around Africa, as it was a symbol of political modernity and awoke great hopes. The Protocol instituting the Court was the missing link in the African system of human rights protection. Some representatives of the doctrine hoped that its creation would reinforce in African leaders the awareness of their human rights obligations. However, the opponents believed that the new institution might lack the potential to change the deteriorating situation, especially as economic, political and demographic factors were the prevailing causes of human rights violations on the continent.[29] Considering both arguments, it should be emphasised that the undertaking marked a huge step in promoting human rights in the region. It came as a breakthrough in the development of human rights protection in the region and, although the Court's formation took decades, human rights defenders saw this as the moment the rights truly began to be enforced in Africa.

2. The Procedure of the African Court Judge Selection and the Operation of the Court – The Principles, Structure and Political Conditions

The procedure of electing the African Court judges is laid down in the Protocol and specified in the authority's internal by-laws to assure justice, representativeness and diversity, reflecting the nature of the continent. The nomination and selection of judges is political and not very transparent, including complex national nomination mechanisms. The doctrine claims that the choice of official candidates by the governments is a natural indication of the political hue of international justice and

24 These provisions were expanded by the internal by-laws of the African Court on 2 June 2010, regularly updated to reflect the changing needs and challenges of human rights protection on the continent. The most recent amendment was introduced on 1 September 2020. Cf. African Court on Human and Peoples' Rights, Rules of Court, 1 September 2020 [Online]. Available at: https://www.african-court.org/wpafc/wp-content/uploads/2021/04/Rules-Final-Revised-adopted-Rules-eng-April-2021.pdf (Accessed: 15 July 2024).
25 Cole, 2010, pp. 23–26.
26 Wasiński, 2017, p. 313.
27 Balcerzak, 2008, p. 259.
28 Michałowska, 2008, p. 42.
29 Cf. more in Bekker, 2007, p. 153.

a practical condition for governments to become involved in deciding which of their citizens is adequately qualified and fit for handing down international judgments.[30]

The African Court judges are elected by the Assembly of the OAU/AU Heads of State and Government, with an absolute majority of votes in a secret ballot.[31] The procedure is appropriate, given the number of states party to the African Charter. The selection is made from among candidates presented by states party to the Protocol, providing that a state can submit a maximum of three candidates, two of whom may be the citizens of a given state.[32] The Secretary General of the organisation requires each state party to the Protocol to propose their candidates within 90 days, before compiling the list of candidates in alphabetical order and distributing it among the Member States at least 30 days before the next session of the Assembly of the AU Heads of State and Government.[33]

Although the candidates are appointed by the AU Member States, once they become judges, they no longer represent the states and consider the cases as private individuals. They become Court members and cannot request or rely on instructions from the states that delegated them to become international judges.[34] The African Court's membership is elite,[35] since there are 11 judges,[36] equal to the number of states in the African Commission. Where the Assembly of the AU Heads of State and Government finds it necessary, it may change the number of judges.[37] Neither the Protocol nor the Court's by-laws provides for any chambers, yet the question may come up on the agenda in future, as the Court is overwhelmed with complaints. The judges should be citizens of the Member States. This is expected to help entrench 'the African' composition of the court and contribute to the human rights tradition of the continent. The Protocol sets the minimum number of judges required for the court to sit, while the internal by-laws envisage the option of setting up committees and working groups to facilitate the Court's work. Any recommendations from these groups are presented to the Court for approval.[38]

30 Mahoney, 2008, p. 327.
31 Article 14 Section 1 of the Protocol. The Court judges were first elected in January 2006 in Khartoum (Sudan). They were sworn in before the 7th Assembly of the AU Heads of State and Government in Banjul (Gambia) on 2 July 2006, and the Court officially commenced its operations in Addis Ababa (Ethiopia) in November 2006. Read more on the procedure of judge selection in Sow, 2001, pp. 38–54.
32 Article 12 Section 1 of the Protocol. The Court judges can be appointed by 27 states that have ratified the Protocol, out of 54 AU states. One judge only of a given nationality may be a member of the Court. The judges work part-time, unless the Assembly of the AU Heads of State and Government decides otherwise (Article 15 Section 4 of the Protocol).
33 Article 13 Sections 1 and 2 of the Protocol.
34 Giorgetti, 2016, p. 210.
35 Cf. Przyborowska-Klimczak, 2014, pp. 301–302.
36 Article 11 of the Protocol. The list of judges is available at the Court's official website. [Online]. Available at: https://www.african-court.org/wpafc/current-judges/ (Accessed: 15 July 2024).
37 Article 3 Sections 2 and 3 of the Protocol.
38 Rule 26 Sections and 2 of the African Court's by-laws.

The African solutions do not provide for *ad hoc* judge appointments. This may be because their authors, unlike those of the European and American Conventions on Human Rights,[39] do not allow 'national representation'. The judges do not hear cases involving the state they are citizens of or the state which submitted their candidacy.[40] This provision is crucial to assuring an impartial and objective hearing of cases and prevents any suspicions of partiality or conflicts of interest that could undermine the Court's credibility as an international institution protecting human rights.[41] Such regulations express the Court's broader undertaking to maintain the best standards of international judicial independence. This differs from other courts, where the option of ad hoc judge nominations by states party to a dispute is treated as an instrument which strengthens state sovereignty in international proceedings.[42] This difference in approach may arise from a desire to avoid potential conflicts of interest and preserve the judges' full independence from the states that nominated them.[43] Such a construction minimises the states' impact on the judicial process and ensures that the judges act as independent individuals, not representatives of their states.[44]

In the African Court, the quorum, or the minimum number of judges needed for a valid trial, is seven.[45] The quorum is determined at the beginning of each session.[46] If it is not reached, a session cannot be held, and the hearing is postponed until such time as the requirement is fulfilled. This approach guarantees lawful decisions and relies on a broad judicial consensus. Thus, this principle is essential for ensuring that the Court's decisions are made in a representative manner and involve sufficient numbers of judges to reinforce the legitimacy of verdicts.[47] The requirement of a seven-judge quorum applies to all Court meetings, both ordinary and extraordinary sessions or hearings of particular cases. Such a solution guarantees that the decisions issued by the Court reflect extensive reviews of law and result from collegiate decisions, which is important for the international human rights judiciary. The high quorum is intended to ensure that all the African regions and varied legal systems are represented when decisions are made, an expression of the continent's diversity and a reinforcement of the Court's legitimacy in the eyes of the Member States and the international community.[48]

The African Court is headed by a president[49] and vice-president, elected by and from among the Court judges. The president and vice-president are chosen every two

39 American Convention on Human Rights, San José, 22 November 1969, United Nations Treaty Series, vol. 1144, p. 123.
40 Article 22 of the Protocol.
41 Dersso, 2012, p. 137.
42 Murray, 2004, p. 217.
43 Dersso, 2012, p. 136.
44 Viljoen, 2012, p. 423.
45 Article 23 of the Protocol.
46 Rule 25 of the African Court's by-laws.
47 Viljoen, 2012, p. 425.
48 Dersso, 2012, p. 142.
49 At present, the President of the African Court is Judge Sylvain Oré of the Ivory Coast.

years for a term of six years and may be re-elected only once.[50] Only the president of the Court resides and works full time at the seat of the Court, while the other judges (including the vice-president) work part time.[51]

According to the internal by-laws, if the president or a vice-president is, for any reason, no longer the Court judge before the end of their term, the Court elects their successors for two years. They, too, may be re-elected only once.[52] The functions of the president and their deputies are defined by the internal by-laws,[53] as managing the work and supervising the administration of the Court and promoting its activities and conducting the annual reviews of the judges' performance. No judge may take part in a case where they have already appeared as counsellors, attorneys or representatives of a party, judges on a national or international court, members of an investigation committee or in any other capacity.[54] This regulation is different from other regional human rights courts, whose procedures provide for the representation of such a state by means of an ad hoc judge appointment in another manner.

The African Court convenes regularly to hear cases and make decisions concerning human rights protection on the continent. Its operations are based on a schedule of the ordinary sessions four times a year. Each session normally continues for four weeks and involves hearing day-to-day cases, holding necessary trials and issuing judgments. This is the key to assuring the continuous operations of the authority and an effective and timely hearing of cases.[55] The Court may additionally convene extraordinary sessions as needed. They are arranged *ad hoc*, usually in response to urgent cases that must be considered promptly. These may include the risk of grave human rights violations requiring quick interventions of the Court or cases that may substantially affect the system of human rights protection in Africa.[56] Decisions to call extraordinary sessions are made by the president on consultation with other judges and based on the determination of the urgency of the case. The extraordinary sessions may be longer or shorter than ordinary, depending on the cases' complexity and procedural requirements. Hence, the Court can flexibly respond to dynamic and unpredictable developments on the continent.[57]

Candidates for the African Court judges should be selected from among lawyers enjoying moral authority and holding recognised professional or academic qualifications or necessary experience in human rights, international law or related areas.[58] The Court's membership must reflect the diversity of the continent, varied culturally, legally and politically, which the Court attempts to address by choosing its judges

50 Article 21 Section 1 of the Protocol.
51 Article 21 Section 2 of the Protocol.
52 Rule 13 Section 4 in conjunction with Section 1 of the African Court's by-laws.
53 Rule 14 of the African Court's by-laws.
54 Article 22 of the Protocol.
55 Murray, 2004, p. 214.
56 Dersso, 2012, p. 126.
57 Cf. more in The African Cout, 2010, p. 102.
58 Article 11 Section 1 of the Protocol.

from various regions, such as North Africa, Sub-Saharan and East, West and South Africa.[59] Additionally, the judges should represent a range of legal specialisations.[60] A solution for geographical representation is debated in the doctrine. Its opponents point out that regional rivalry based on different languages, religions, customs and geographies may interfere with this multi-party cooperation. They believe that the states party to the Protocol should not forget the objective of creating a quality institution composed of the ablest men and women, and the issue of geographical representation should not impair the authority.[61] This solution is a novelty, since the criterion is not envisaged by the regulations of the European and American regional human rights courts. Furthermore, the membership should reflect the main legal systems applied in Africa, such as customs law, Islamic law, continental law (chiefly inspired by the French law) and the Anglo-Saxon system. This diversity is crucial for the Court to effectively resolve cases relating to varied legal systems and cultures on the continent.[62]

The Protocol imposes the duty of ensuring 'an appropriate gender representation' in the Court's membership. Female representation in international judicial authorities is seen as a key part of promoting gender equality and strengthening women's equality. In the African context, where women's rights are commonly breached, their presence in the Court's composition is particularly symbolic and practically significant. Although this progressive formula is an improvement on other, comparable authorities, it fails to specify the 'appropriate representation' to be attained or set a minimum number of women in the Court. The internal by-laws are not specific, either. A discretionary element can be noted here, although there is no guarantee that any particular post will necessarily be held by a woman. However, given the maximum number of candidates, the introduction of this principle may prove problematic. In practice, the Assembly of the AU Heads of State and Government tries to make at least a third of the judges female, in line with the organisation's wider-ranging undertakings to promote equal rights. Such a representation influences the way cases concerning the rights of women and other sensitive social groups are considered.

The judges are elected for six years and may be re-elected once to ensure the stability and continuity of the operations. At the end of their first term, judges may seek to have their mandates extended for another six years. Thus, the maximum time in a judge's position is 12 years, in line with several international courts, where the restricted number of terms guarantees independence and avoids potential conflicts of interest.[63] Newly elected judges discharge their duties on the first day of an ordinary session. The mandates of four judges chosen in the first election expire after two

59 The following division was set in the 5 April 2004 memorandum: West Africa – 3 judges, Central Africa – 2 judges, East Africa – 2 judges, South Africa – 2 judges, North Africa – 2 judges.
60 Article 14 Section 2 of the Protocol.
61 See: Padilla, 2002, p. 189.
62 Dersso, 212, p. 120.
63 Murray, 2002, p. 202.

years, and of the remaining four judges, selected at the same time, after four years.[64] To ensure continuity, rotational systems of renewing the judges' composition have been adopted for all the regional human rights courts. This means that, at the first election, the term in office is reduced to a third or a half of a full term. A judge elected to replace a judge whose term has not yet ended holds their office until the end of their predecessor's term. This principle of part-time office applies to all the judges, except the president. However, it may be modified by the Assembly of the AU Heads of State and Government.[65]

Before proceeding to hold their offices, the judges make solemn oaths or declarations.[66] This is of great symbolic and legal significance and emphasises the judges' undertakings to maintain the highest ethical and professional standards. The contents of the oath are laid down by the Court's internal by-laws. It binds the judges to fulfil their functions 'honorably, loyally, impartially, and conscientiously' and keep confidential the cases, during and after their terms. The judges swear that they shall protect the principles of human rights and justice in Africa by acting independently of any political influences or other pressures that could undermine their impartiality. The judges make the oath in an open session soon after their election, as practicable, or, if necessary, at a special public meeting.[67] This adds weight to the oath. The judges undertake to maintain complete neutrality and fairness in their decisions, which is required to maintain public confidence in the Court as an institution of international justice. This is particularly important, since the African Court operates in an environment of high cultural and political diversity, where the independence and impartiality of the judges are essential for its effectiveness.[68]

A judge's function should not be combined with any activities that could interfere with independence and impartiality or breach the office's requirements.[69] The Court's internal by-laws specify prohibited activities, including political, diplomatic or administrative posts and acting as legal advisors to national governments, although the phrase 'in particular' suggests that the catalogue may be longer.[70] The African Court is supported by a Secretariat, which fulfils administrative and technical functions. It keeps documentation, handles correspondence and organises the Court's sessions. It is headed by a Secretary, an official appointed by the Court president and responsible for managing the Secretariat staff. Crucially, the Secretariat supports the Court in decision-making and organisational issues by providing legal and administrative assistance.

The African Court's seat is not designated in the Protocol. It is appointed by the Assembly of the AU Heads of State and Government from among the organisation's

64 Article 15 Section 1 of the Protocol.
65 Article 15 Sections 3 and 4 of the Protocol.
66 Article 16 of the Protocol.
67 Rule 19 of the African Court's by-laws.
68 Murray, 2002, p. 223.
69 Article 18 of the Protocol.
70 Rule 5 of the African Court's by-laws.

Member States. The African Court may sit at another location in the territories of any Member States, provided most judges find it desirable and the chosen state consents. The African Court's seat may be changed by the Assembly on consultation with the authority. Initially, the Court met at Addis Ababa (Ethiopia); however, it moved to Arusha (the United Republic of Tanzania) in August 2007.[71] This is a strategic choice as the city is centrally situated in East Africa. It provides easier access to the AU's Member States and international observers, which highlights the Court's significance in the regional system of human rights protection.[72]

The official languages of the African Union are the Court's languages, too,[73] in line with the multilingual policy promoted by the organisation. Following Article 25 of the Act Constituting AU, Arabic, English, French, Portuguese, Spanish, Swahili and all the other African languages are the official languages of the organisation and its institutions. The multilingual proceedings of the Court are key to assuring fair access to justice for all parties, regardless of their linguistic background. It enables parties, witnesses and other participants to use their everyday languages, which is important for a full understanding of judicial procedures and ensuring fair process.[74] The Court's official languages are specified in its internal by-laws. If necessary, the Court may choose one or more of the official languages to serve as its working language(s). It may permit any individual appearing in court to use any language of their choice if such an individual proves they have insufficient knowledge of the Court's official languages. In the event, the rules and conditions of obtaining an interpreter are determined by the Court.[75] In practice, English and French are most commonly used, owing to their historical and political significance and because they are the most often used official languages in many African states. However, the Court tries to consider other official languages, such as Arabic or Portuguese, especially in cases involving states where they are dominant.

The African Court is financed by the AU, reflecting its status as the main judicial body of the organisation regarding human rights protection. This funding is crucial to its independence, effectiveness and the ability to carry out its mandate of protecting and promoting human rights in Africa. The judges' salaries and the operating costs of the Secretariat are financed out of the organisation's budget. The funding by a regional organisation, that is, the AU, guarantees that the Court acts independently from external influences, including the Member States, potential parties to proceedings before the Court. The African Court prepares an annual draft budget[76] and

71 Cf. The Treaty between the government of the United Republic of Tanzania and the African Union on the seat of the African Court of Human and Peoples' Rights of Arusha, Tanzania [Online]. Available at: http://en.african-court.org/images/Protocol-Host%20Agrtmt/agreement-Tanzania%20and%20AU.pdf (Accessed: 15 August 2024).
72 Viljoen, 2007, p. 414.
73 Article 50 of the Protocol.
74 Murray, 2002, p. 225.
75 Rule 16 of the African Court's by-laws.
76 Article 54 of the Protocol. The 2024 budget of the African Court totalled $ 12.4m.

submits it to the Assembly of the Heads of State and Government via the Executive Board. It involves detailed planning of expenditure to address the Court's operating requirements for the coming year, including the costs of hearings, judges' travels, infrastructure maintenance and staff salaries.[77] The Court's budget is financed by the AU's Member States. Each is bound to contribute to the AU, a part of which is assigned to the funding of the authority. This distributes the financial burden to all the Member States, ensuring stable funding and building a shared responsibility for the body's functioning.[78]

3. The Competences and Jurisdiction of the African Court – A Broad Scope of Human Rights Protection

The African Court discharges judicial and advisory functions by issuing legal opinions, as requested by authorised parties.[79] Regarding the former function, the Court is competent for hearing and resolving any cases and disputes regarding the interpretation and application of the African Charter and the Protocol[80] and applying the provisions of the African Charter and 'any other appropriate human rights instruments ratified by the interested states'.[81] Hence, the African Court's jurisdiction is more extensive than that of the African Commission.

The first two legal foundations – the African Charter and the Protocol – are not surprising, as opposed to the third. The African Court is not forced to restrict itself to the African Charter and may, and should, cite other international human rights agreements. This may comprise any regional and subregional treaties, both bi- and multilateral, and international,[82] for example, the International Labour Organisation or the international humanitarian legislation on military conflicts in the UN framework. This is important since many of those documents have relatively weak implementation mechanisms, especially the judicial ones, which are conducive to their breaches in the African conditions.[83] The African Court's jurisdiction[84] is substantially different from the remaining regional human rights courts or other international institutions deciding on individual rights. They are most often only competent for deciding solely based on a treaty that institutes them, possibly admitting supplementary regulations.[85] However, the Court's objective competence is a major novelty[86] and its creators

77 Dersso, 2012, p. 155.
78 Cf. more Orlu Nmehielle, 2000, pp. 59–60.
79 Cf. Articles 3 and 4 of the Protocol. See also: Eno, 2002, pp. 223–233. More on the advisory opinions in Pasqualucci, 2003, p. 29.
80 Article 3 Section 1 of the Protocol.
81 Article 7 of the Protocol.
82 Udombana, 2000, p. 45.
83 Michałowska, 2008, p. 43.
84 Cf. Eno, 2002, pp. 227–228; Sanchez, 2023, pp. 352–366.
85 Dąbrowska, 2023, p. 103.
86 Cf. Yakaré-Oulé (Nani) Jansen, Curling, 2019, p. 78.

intended to provide the continent's populations with the broadest possible protection of their rights. Nonetheless, the acceptance of the African Court's jurisdiction is voluntary. The states party to the Protocol should accept it by making a unilateral declaration when ratifying the treaty or at a later date.[87]

The Protocol to the African Charter envisages two types of jurisdiction for the African Court – obligatory (automatic) and facultative. Under the former, the African Commission, a state party that has filed a complaint with the African Commission, a state party against which a complaint has been filed with the African Commission, a state party whose citizen is a victim of a human rights violation,[88] an African nongovernmental organisation and other states interested in the case are entitled to submit a complaint to the Court upon filing an appropriate request and being granted permission by the Court.[89] The doctrine believes in presenting a complaint directly to the Court, without it being first considered by the African Commission, an exception compared with other human rights systems. This possibility is available to a state whose citizen is a victim of a human rights violation. However, given the poor performance of such procedures in African states, the possibility seems rather notional. Nonetheless, the one under Article 5 Section 3 of the Protocol seems more accessible, although it may only be triggered after a state has made an appropriate declaration.[90]

Since the subjective competence of active legitimacy has been solved in this manner, the class of those eligible for filing cases with the Court is broad, far wider than other regional systems, encompassing intergovernmental organisations or regional economic communities.[91] The Court's competence for their requests is automatic. As part of the voluntary jurisdiction, private individuals and nongovernmental organisations are authorised to submit their complaints to the Court. A state may consent to extending the African Court's jurisdiction to individual complaints filed directly with it by nongovernmental organisations with an observer status,[92] with African Commission or by private individuals by making statements to the AU's Secretary General when ratifying the Protocol or at a later date.[93] The direct access to the Court for private individuals and nongovernmental organisations is severely limited as it depends on the states where they are based to make suitable declarations

87 Cf. Dąbrowska, 2021, p. 110.
88 This regulation paves the way for the states to submit their complaints directly to the Court if they believe their citizens' rights are violated by other states.
89 Article 5 Section 1 of the Protocol.
90 Kenig-Witkowska, 2001, pp. 112–123.
91 Article 5 Section 1 of the Protocol.
92 The observer's status is equivalent to gaining the right to petition the Court in its proceedings. Cf. the African Commission, The catalogue of nongovernmental organisations with the observer's status [Online]. Available at: www.achpr.org/english/_info/directory_ngo_en.html (Accessed: 15 August 2024).
93 Article 5 Section 3 in conjunction with Article 34 Section 6 and Article 34 Section 7 of the Protocol.

of accepting the authority's jurisdiction.[94] Group eligibility for filing complaints is heavily restricted, too. The African Court does not handle complaints submitted in this way without receiving a statement from the state to which these complaints relate. Hence, the authority deciding the admissibility of a complaint may request an opinion from the African Commission. This goes against the idea of the African Charter that individual and peoples' rights are of fundamental importance. This should be regulated in the Court's internal by-laws.

The extent of the African Court's jurisdiction should be viewed within the socio-political environment of the continent at a time when the memories of recent colonisation were still fresh in many states. This precluded a compromise that would restrict their sovereignty or allow a supranational court to supervise or interfere with their internal jurisdictions. Hence, the requirement of an additional declaration on individual complaints should be treated as a means of inducing states to at least ratify the Protocol. This weakened the authority's capacity for developing its judicial practice and fulfilling the mandate of assuring the protection and promotion of human rights across the continent. Hence, the Member States introduced a two-step system of state affiliation when drafting the Protocol. First is ratifying the Protocol, which allows indirect access to the Court via the African Commission. The second involves a statement under Article 34 Section 6 of the Protocol, granting direct access to the Court.[95]

Since only a minority of the states have ratified the Protocol, the Court does not exercise its jurisdiction in most AU countries. Merely nine out of thirty-two states[96] party to the Protocol (and of the fifty-five Member States) have declared recognising the Court's competences. Only nine states have allowed the Court to decide in individual human rights disputes. Direct access to the African Court for private individuals and nongovernmental organisations is restricted by the requirement of a facultative declaration to be made by an interested state that recognises the body's competence in admitting cases from private individuals and nongovernmental organisations. Since such declarations are voluntary, states may withdraw unilaterally. Most states party to the Protocol have not submitted such declarations. Hence, the African Court is not competent to admit complaints from private individuals and nongovernmental organisations against these states. The restriction of individual access to the Court considerably narrows the more crucial of the two channels of presenting disputes. Out of nearly 130 cases, both closed and pending, merely three (a meagre 2%) did not relate to cases brought by individual parties or nongovernmental organisations. Thus,

94 Cf. Ssenyonjo, 2013, pp. 51–54.

95 As of 1 September 2024, the Protocol was ratified by 32 out of 55 AU Member States. Relevant statements have been made by Benin, Burkina Faso, the Ivory Coast, Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia. None of the five largest AU Member States – Algeria, Egypt, Morocco, Nigeria and South Africa – has presented their statements on direct access to the Court.

96 Benin, Burkina Faso, Ivory Coast, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia. Rwanda withdrew its earlier declaration in early 2016. See: Centre for Human Rights, University of Pretoria, 2016.

the prediction that the Court's dispute competence would be used as a pretext to carry on proceedings before the African Commission have not come true.[97]

The African Court is not excluded from cases that the African Commission finds inadmissible. Therefore, a complaint may be submitted to the Court directly, without it being first considered by the African Commission. It is advantageous for states whose citizens have fallen victim to human rights violations. Nonetheless, this option remains theoretical in African states.[98] The Protocol does not stipulate that all cases must be resolved by the African Commission before being presented to the Court. If the African Commission, however, transfers all cases directly to the Court by force of Article 5 Section 1 of the Protocol, without first finding anything, the optional declaration mechanism under Article 34 Section 6 is redundant.

The Court's ratione loci jurisdiction is closely related to the Member States that have ratified the Protocol. This means it can decide cases concerning human rights breaches in these states' territories. Thus, the jurisdiction is limited to the states that have agreed to recognise it by ratifying the Protocol and, regarding individual cases, by making suitable statements recognising the African Court's competence for hearing the complaints of individuals and nongovernmental organisations.[99] Furthermore, the Court may hear cases concerning human rights violations in the territories of states party to the Protocol or connected with such parties' actions outside their territories whose consequences apply to such states.

The effective dates of documents in relation to a given state jointly determine the African Court's temporal jurisdiction.[100] These documents are the African Charter, the Protocol, a treaty whose provisions are alleged to have been breached and the facultative declaration of recognising the African Court's competence for hearing such cases[101] (regarding individual complaints). A case is beyond the African Court's temporal jurisdiction if a violation takes place before any of the foregoing dates. However, relying on the African Commission's experience, the African Court points out that failing this condition in case of a continuing violation does not preclude its competence. Hence, the Court may handle a case where a violation is continuous and continues after the condition of temporal jurisdiction is fulfilled, and where a violation occurred before the condition was met; however, its effects occur after this date.[102] Applicants' rights are protected until such a time as a Member State ratifies the African Charter, yet not the Protocol. Applicants may bring cases of rights violations before the Protocol is ratified, giving them more opportunities. All the Member States

97 Viljoen, 2004, p. 23.
98 Diallo, 2010, pp. 180–181.
99 Naldi, 2002, pp. 90–92.
100 Cf. The African Court's judgment in *Lohe Issa Konate v. Burkina Faso*, complaint No. 004/2013.
101 The judgment in *Actions pour la Protection des Droits de l'Homme v. Ivory Coast* dated 18 November 2016, complaint No. 001/2014, implies that, where the facultative declaration is the basic jurisdiction of the African Court, the Court assumes that it gives rise to legal consequences as of the time it is presented to the custodian, unless the document's contents imply otherwise.
102 The African Court's judgment in *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinable Human and Peoples' Rights Movement v. Burkina Faso* dated 21 June 2013, complaint No. 013/2011.

(except South Sudan) have ratified the African Charter; therefore, this may open the door for complainants from the Member States that have not ratified the Protocol.

Resolving disputes is not the Court's sole function. It is tasked with interpreting and explicating treaties by means of advisory opinions.[103] Requested by a Member State, any of its authorities or any African organisation recognised by the AU, the Court can issue opinions about any legal questions connected to the African Charter or other human rights documents. Hence, the Court's competence for advisory opinions is discretionary. However, the object of an application for such an opinion should not be related to a case considered by the African Commission,[104] and the Court provides reasons for its opinion, with each dissenting judge entitled to submit their separate or contrary opinions.[105]

Compared to other human rights courts, both regional and subregional, the African Court stands out in the broad range of entities authorised to request advisory opinions. As mentioned, a legal query may be directed to the Court by the OAU/the AU Member States, the AU and its authorities and African organisations recognised by the AU.[106] This regulation implies three important points. First, the procedure is open to all AU Member States, irrespective of whether they are parties to the Protocol. Second, the Protocol does not make the AU authority's entitlement to an application dependent on a connection between the objective of its operations and the question asked. Third, African organisations recognised by the AU include both governmental and nongovernmental organisations.

Since the African Commission retains the right to issue advisory opinions,[107] the relationship between the Commission and the Court remains vague in light of the documents and the likely undermining of their positions. The problem can be resolved by harmonising their collaboration on the interpretation of the African Charter and the Protocol to avoid issuing double opinions on the same questions. The Court may issue advisory opinions about human and peoples' rights; therefore, exercising this right remains at its discretion.[108] To better illustrate the practical significance of the Court's advisory competences, let's take advisory opinion No. 001/2020, requested by the Pan African Lawyers Union (PALU)[109] and concerning the fairness and transparency of

103 Article 4 of the Protocol. See more on the issuance of advisory opinions by the African Court in Van Der Mei, 2005, pp. 27–46.
104 Article 4 Section 1 of the Protocol.
105 Article 4 Section 2 of the Protocol.
106 Article 4 Section 1 of the Protocol and Article 68 Section 1 of the African Court's internal by-laws.
107 In light of Article 45 Section 3 of the African Charter, the African Commission's function is to 'interpret any provisions of this Charter at the request of a party state, the Organisation of African Unity institutions or African institutions recognised by the Organisation of African Unity'.
108 Article 4 Section 1 of the Protocol.
109 The African Court, Advisory Opinion on the Compatibility of National Electoral Laws with the African Charter on Democracy, Elections and Governance, *PALU v. AU,* No. 001/2020, dated 4 December 2020, [Online]. Available at: https://www.african-court.org (Accessed: 17 June 2025).

elections in the context of the COVID-19 pandemic. The Court was asked to interpret the duties of the AU Member States regarding the rights to civic participation in government when public health was at risk. The Court pointed out the need to ensure safe voting conditions, the transparency of the electoral process and observing the rule of equal access to political participation. It stressed that any decisions to hold or delay elections must be proportional and based on law and cannot lead to abuses of power. Such opinions, though not binding, serve as reference points for the Member States for establishing their public policies and interpreting human rights under difficult circumstances. The instance of the PALU opinion shows the Court's preventive function and its contribution to the development of African democratic standards.

An advisory opinion can be issued at the request of the AU Member States, the AU authorities and international organisations recognised by the AU. The Court's advisory competences explain and interpret human rights regulations in the regional context to help reinforce legal standards in Africa. The objective scope of the Court's advisory opinions extends to any legal case related to the African Charter or any other human rights instruments, provided the object of an opinion is unrelated to a case handled by the African Commission.[110] This regulation implies that the African Court has the broadest jurisdiction regarding the subject matter. The reference to other instruments, without the condition of their ratification, suggests that the African Court is competent in issuing advisory opinions on non-binding legal acts (e.g., international organisations' resolutions) insofar as their object includes human rights issues.

The advisory opinions issued by the Court are not binding, distinct from judgments in disputed cases. However, they are important in practice as they constitute major interpretative tools that may affect the practice of the Member States and other entities within the African system. The Court's advisory competence plays a key role in developing and consolidating human rights standards on the continent. The African Court, through its advisory opinions, is capable of interpreting the African Charter and other significant legal documents, which influence the Member States' policies and the practice of regional authorities. The issuance of advisory opinions is a preventive instrument that helps resolve potential disputes even before they escalate to an international scale.

Insofar as the solution adumbrated in the Protocol raises no doubts regarding the African Court's judicial competences, it is not clear how the Court is supposed to act when issuing advisory opinions, as it is not specified how many and which states must ratify a given act of international law applicable to a given opinion. Regional African acts of international law, ratified by all the parties to the Protocol, may play a decisive role in the matter. The Court's experience in this respect is a model for the solutions adopted in Africa, although they point to an extensive interpretation of the regulation that addresses all human rights treaties prevailing in one or more states. If a legal act has been interpreted by another authority, the African Court should harmonise that

110 Article 4 Section 1 of the Protocol.

interpretation with its own. This may contribute to the development of international legal practice in this field.[111]

4. Proceedings Before the African Court – A Comprehensive Process of Hearing Cases and Enforcing Judgments

The procedure before the African Court is a complex process, including the acceptance of a complaint and its detailed consideration and the enforcement of judgments. The Court's jurisdiction and its accessibility to individuals fulfilling certain criteria are pivotal. Proceedings before the Court are, in several ways, similar to the actions before general state courts. They consist of written and oral stages followed by the judges' meeting and voting on a verdict, which is read out. Any party to the proceedings is represented by legal counsel of their choice,[112] whose services may be free of charge, if so required by the interests of the judicial system. This is particularly important where parties do not have the means to hire expert legal representatives.

Proceedings commence when a complainant files a written complaint with the Court Secretariat in one of the AU's official languages using an official form. The complaint must be signed by the complainant (or their representative) and its receipt should be confirmed by the Court Secretary.[113] Complainants must present all necessary information, including the facts of their case, the nature of their complaint, the exercise of national appeal remedies and charges or identification of what rights have been breached.[114] Complaints must be filed within a specific time of occurrences, usually after the legal remedies available in the state of the complaint's origin have been exhausted.

A complaint submitted in compliance with Article 5 Sections 1 and 3 of the Protocol is transmitted by the Court Secretary to the president and the remaining judges[115] and to the states against which it is filed, unless not necessary,[116] and to any other parties – private individuals, nongovernmental organisations or institutions – that may become parties to the proceedings. In an individual complaint against a state that has failed to submit the facultative declaration, the African Court strikes the case off its agenda as the *ratione personae* is absent, without notifying the state of the

111 Sidi Diallo, 1999, p. 181.
112 Article 10 Section 2 of the African Charter.
113 Rule 40 Section 1 of the African Court's by-laws. According to Section 24 of the Court's labour regulations, meanwhile, (one copy of) a complaint may be posted, submitted in person or sent via electronic mail, with the original document delivered to the Court Secretariat in the latter case.
114 Rule 41 of the African Court's by-laws and Sections 12–21 of the Court's labour regulations.
115 Rule 42 Section 1 of the African Court's by-laws.
116 Rule 42 Section 3 of the African Court's by-laws.

complaint.[117] All writs received by the Court Secretary are recorded and their copies transmitted to the opposing party.[118]

The respondent has 90 days to answer the charges and submit their arguments related to the Court's jurisdiction connected to the case's admissibility. These timelines may be extended by the Court.[119] Comments on a complaint may be presented by other entities as well – individuals, nongovernmental organisations and interested institutions. Should the Court find no material grounds for considering a complaint, it is rejected and reasons for such a decision are given.[120] At no stage of the proceedings in individual complaints is the representation by a lawyer compulsory. The African Court decides the admissibility considering the conditions set out in Article 56 of the African Charter,[121] all of which must be met. Complaints will be considered if their authors are identified (even if they request to remain anonymous), if they comply with the OAU Charter or the African Charter, are not phrased in offensive or insulating language against a given state and its institutions or the AU, do not rely solely on news spread by mass media, are submitted after local remedies, if any, have been exhausted, unless such a procedure is too protracted, if they are presented within a reasonable time after exhausting local remedies[122] of the date of case registration by the African Commission and do not relate to matters settled by a state concerned in accordance with the UN, the OAU or the African Charter.[123] The African procedure does not require that the complainant must be 'the victim', as is the case under European regulations.[124]

In June 2016, the African Court issued a practical guide on the conditions of complaint admissibility.[125] It was a response to applicants' practical needs and part of the Court's institutional development, intended to reduce the number of formally rejected complaints, improve the quality of submissions and disseminate knowledge about procedural regulations, which directly enhances access to regional human rights protection in Africa. The initiative was designed to improve the Court's efficiency by standardising the procedural practice and supporting potential complainants, particularly private individuals and non-government organisations, with the correct

117 Article 34 Section 6 of the Protocol implies that the Court rejects complaints against states that have failed to submit their declarations. This means that the Court Secretary should notify complainants in writing about the lack of the Court's jurisdiction in these circumstances.
118 Rule 43 Sections 1-2 of the African Court's by-laws.
119 Rule 44 Sections 1-2 of the African Court's by-laws.
120 Rule 48 of the African Court's by-laws.
121 This provision lays down the requirements to be met when notifying the African Commission.
122 Onoria, 2003, p. 24.
123 Similar conditions are listed in Rule 40 of the African Court's by-laws.
124 The European Human Rights Court requires, in line with Article 34 of the European Convention, that complainants be private individuals, non-government organisations or groups of individuals claiming they are victims of violations by a state party to the Convention. Under the African system, however, complaints may be filed by parties who have not been injured directly, which considerably expands the accessibility of the human rights protection mechanism.
125 Admissibility of complaints before the African Court. Practical guide, June 2016.

formulation of their applications. In line with these provisions, regardless of whether a case is presented to the AU Commission or the Court, the admissibility phase is a crucial but hard stage of the proceedings, which may constitute the chief barrier to a successful case settlement.[126] When evaluating the conditions of a complaint's admissibility, the African Court may call upon parties to submit documents and explanations concerning their case.[127] It may request the African Commission's opinion as well on the complaint's admissibility.[128]

Another requirement is that complaints must be filed within a reasonable time after local remedies are exhausted.[129] On admitting a complaint, the Court may hold interviews at which parties advance their arguments. In some cases, it may award temporary remedies to prevent irreversible damage before a final verdict is issued.[130] The procedure of internal remedies is set out in detail in the authority's internal by-laws, according to which the Court orders parties to present adequate information about the implementation of these remedies. In practice, the state parties are expected to comply with any such remedies immediately. For instance, in *Tanganyika Law Society and The Legal and Human Rights Centre v. Tanzania*, the Court ordered proceedings to suspend capital punishment promptly, pointing to the need to protect human rights before the case is decided.[131]

On considering a case, the Court issues its decision based on evidence and parties' arguments, made with a majority of votes from judges present at a meeting.[132] Such a decision may comprise an order to discontinue a violation, pay compensation or other remedies. The Court's decisions are binding on parties to the proceedings. The Court monitors the execution of its decisions by means of parties' periodic reports and possible additional steps if a decision is found not to be carried out properly. The case of *Ogiek v. Kenya*,[133] where the African Court found some breaches of the native population's rights and awarded compensation measures, is an instance of challenges associated with the enforcement of its decisions. Although years have passed; however, compensation payments and full enforcement remain suspended, which highlights the difficulties of enforcing obligations of state parties. The case illustrates the tension between the binding nature of the decisions and the limited mechanisms of enforcing them, a key challenge to the African system of human rights protection. The internal by-laws allow for a decision to be revised if new facts are discovered with a potentially significant effect on a case. A petition to review a case must be filed within six months of such a discovery and supported with evidence of the new

126 Ibid., p. 8.
127 Rule 41 Section 10 of the African Court's by-laws.
128 Article 6 Section 1 of the Protocol.
129 Article 56 Section 6 of the Protocol.
130 Article 27 Section 2 of the Protocol.
131 Tanganyika Law Society and The Legal and Human Rights Centre v. Tanzania, complaint no. 009/2011.
132 Article 28 Section 1 of the Protocol.
133 The African Court's judgment in African Commission on Human and Peoples' Rights v. Republic of Kenya (Ogiek case), dated 26 May 2013, complaint No. 006/2012.

circumstances.[134] The Court does not provide for appealing its decisions to another authority.

5. Future Legal Challenges to the African Court

The African Court, despite its growing importance in human rights protection on the continent, faces major legal challenges that influence its effectiveness and the perception of its role in the AU's structure. The overlapping competences of the Court and the African Commission regarding advisory opinions are a grave problem. Both the authorities have the power to interpret the provisions of the African Charter and other treaty documents. However, the absence of a coordinated mechanism of cooperation and clear limits between their competences poses the risk of duplication or interpretative inconsistency. This may impair the system's transparency and the authority of both institutions. Therefore, a more harmonised model of their cooperation will need to be developed in future.

The problem of enforcing the Court's decisions is another challenge. Despite their binding force, practice shows that the implementation of judgments by the Member States often experiences delays or lack of response. The case of *Ogiek v. Kenya*, where, despite an unambiguous finding, the native population's rights have been violated and having awarded a compensation, the actual execution of the judgment remains incomplete and delayed, is a distinct example. This instance demonstrates the institutional limitations of the system and the need to strengthen the mechanisms of judgment monitoring and enforcement.

The restricted access of individuals to the Court is another systemic challenge. Individual complaints can only be heard concerning states that have presented their declarations by force of Article 34 Section 6 of the Protocol. The declarations are voluntary; however, their absence prevents citizens from effectively seeking their rights at the regional level. Furthermore, some states that had filed such declarations have withdrawn them (e.g., Rwanda), which further limits the Court's jurisdiction in this respect. Actions to standardise individual access to the Court across the continent will have to be taken in future. Some interpretative doubts arise regarding the legitimacy of non-government organisations initiating advisory opinion proceedings. The current absence of clear-cut criteria of what 'recognised by the African Union' means leads to legal uncertainty and may restrict the participation of NGOs operating at local or regional levels. With a view to the prospects of the system, this requirement would need to be more specific to improve transparency and inclusivity. There is a need for a better integration of the Court and parallel subregional courts, such as the Court of the Economic Community of West African States (ECOWAS) or the Court of the East African Economic Community (EACJ). The lack of mechanisms for coordinating decisions may produce inconsistent standards of human rights protection, which weakens

134 Rule 78 of the African Court's by-laws.

the consistency of the entire African legal system. A platform of decision-making and institutional collaboration could enhance the homogeneity and effectiveness of human rights efforts.

6. Conclusion

The African Court was formed as a result of a long historical process to create a regional legal institution supporting human rights protection in Africa. Its establishment was a response to the continent's needs, as it was forced to face several challenges, such as the building of statehood, economic development and ensuring stability after decolonisation. The idea took decades to mature, and the Court's creation was founded on the African Charter. Although it was designed to protect human and peoples' rights, its enforcement was initially limited, since the African Commission, formed on the Charter's basis, was not authorised to issue binding judgments.

The question of creating the Court was addressed seriously in the 1990s, and the final decisions were made in 1998, when the Protocol was signed, which formally constituted the African Court. Its mission was to complement and reinforce the African Commission's activities and directly resolve cases relating to human rights violations on the continent. The Court began its operation in 2004; however, the process of its institutionalisation was complicated and required further organisational actions, *inter alia*, determining the relationship between the Court and other AU authorities. The Court consists of eleven judges elected from among the AU's Member States for six years, who can be re-elected. The judges, though chosen by the states, act independently and cannot be bound by their states' instructions. The quorum requirement and a prohibition of national representation by the judges to ensure the impartiality of their decisions are crucial principles of the Court's operations.

The Court has both judicial and advisory competencies, which means that it can consider complaints concerning human rights violations and issue legal opinions about the interpretation of legal documents. The complaints may be submitted by the African Commission, the state parties and, on meeting certain conditions, private individuals and nongovernmental organisations. However, individual access to the Court is restricted, since many AU Member States have not submitted appropriate declarations recognising the authority's jurisdiction in individual cases.

In procedural terms, the Court's proceedings are similar to court litigations, including written and oral stages followed by the issuance of a decision. The Court may rule on temporary remedies to prevent irreversible damage. Its decisions are binding, and the states must carry them out, which is monitored periodically. Despite considerable challenges, the institution is considered a key part of the African system of human rights protection and an important step towards ensuring justice and promoting human rights on the continent.

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| Chapter 8 |

Main Human Rights Concerns and Typical Issues in the African System of Human Rights

Cocou Marius Mensah

ABSTRACT

The African human rights system, embodied in frameworks such as the African Charter on Human and Peoples' Rights (ACHPR) and the African Charter on the Rights and Welfare of the Child (ACRWC), represents a regional effort to safeguard the rights of African citizens, especially vulnerable populations. However, African countries continue to face significant human rights challenges. Climate change and its impact on the right to a satisfactory environment, child labour, forced marriages and gender inequality remain constant concerns. To address these, various mechanisms, such as the African Commission on Human and Peoples' Rights (ACmHPR), the African Court on Human and Peoples' Rights (ACtHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), have been established. Unfortunately, weak enforcement, impunity and the reluctance of states to comply with human rights judgments hinder progress. This chapter explores the legal frameworks, key issues and landmark cases within the African human rights system, emphasising the pressing need for effective implementation to protect fundamental rights across the continent.

KEYWORDS

African Charter on Human and Peoples' Rights, African Charter on the Rights and Welfare of the Child, Environmental rights, African human rights system, Human rights enforcement

1. Introduction

The African human rights system is a set of regional legal mechanisms that address human rights issues across the continent. Although it tackles the concerns of African countries, it conforms with the provisions of international human rights instrument.[1] It comprises institutions, such as the African Commission on Human and Peoples' Rights (ACmHPR) and the African Court on Human and Peoples' Rights (ACtHPR). It is grounded in key legal instruments, such as the African Charter on Human and

1 Mbaku, 2024, p. 89.

Cocou Marius Mensah (2026) 'Main Human Rights Concerns and Typical Issues in the African System of Human Rights' in Zombory, K. (ed.) *Regional Human Rights Protection Systems Outside Europe.* Miskolc–Budapest: Central European Academic Publishing, pp. 299–322. https://doi.org/10.71009/2026.kz.rhrpsoe_8

Peoples' Rights (ACHPR, 1981), commonly known as the Banjul Charter, a major step in the advancement of human rights in Africa.[2] Based on the Banjul Charter, African citizens have a comprehensive legal protection for their civil, political, economic, social, cultural and environmental rights.

The recognition of environmental protection as a human right by the United Nations (UN) General Assembly's 2022 adoption of the right to a clean, healthy and sustainable environment reflects the vital connection between environmental sustainability and the fulfilment of basic human rights.[3] With climate change severely impacting Africa, the primary human rights concerns become environmental, superseding the traditional rights highlighted in the ACHPR, such as the right to life and integrity of the person (Article 4), the right to a fair trial (Article 7), freedom of expression (Article 9) and the right to health (Article 16).

Despite contributing only about 3.9% of the world's carbon emissions, Africa suffers disproportionately from the consequences of environmental degradation, such as droughts, floods and food insecurity.[4] These environmental impacts affect millions of people across the continent, highlighting the urgent need to address environmental protection as a human rights issue (World Meteorological Organization, 2024). The UN General Assembly's 2022 adoption of the right to a clean, healthy and sustainable environment reflects the increasing recognition of environmental protection as a human right, as demonstrated by the UN Human Rights Council's 2021 Resolution 48/13, highlighting the connection between environmental sustainability and basic human rights.[5]

Africa has certain human rights priorities, which reflect the continent's specific challenges and aspirations, such as the right to development (Article 22), the right to self-determination (Article 20) and the right to natural resources and control over wealth (Article 21).[6] The ACHPR is particularly unique in this sense as it recognises collective and individual rights, highlighting its different approaches to human rights protection in Africa. This is especially relevant for environmental human rights, as it underscores the need to safeguard individual freedoms and the collective rights of communities to a healthy and sustainable environment.

In this chapter, we will analyse the main human rights concerns in Africa, such as the right to freedom of expression (Article 9), gender equality (Article 18(3)) and children's rights (Article 18(3)) under the ACHPR, African Charter on the Rights and Welfare of the Child (ACRWC) Articles 1, 3, 4, 11 and 16), the right to a safe and healthy

2 Chekol, 2024, pp. 1598–1634.
3 United Nations General Assembly (UNGA) (2022)The human right to a clean, healthy and sustainable environment. A/RES/76/300.
4 Statista (2024) Africa: Share in global CO2 emissions [Online]. Available at: https://www.statista.com/statistics/1287508/africa-share-in-global-co2-emissions/ (Accessed: 15 October 2024).
5 Limon, 2024.
6 OAU (1981) African Charter on Human and Peoples' Rights [Online]. Available at: https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf (Accessed: 15 October 2024).

environment (Article 24 of the ACHPR) and typical issues within the African human rights system and the efforts made to address them.

2. Legal Framework of the African Human Rights System

2.1. The African Charter on Human and Peoples' Rights (ACHPR)

The ACHPR, commonly called the Banjul Charter, is a pivotal document within Africa's human rights framework. Its establishment was shaped by the continent's unique historical circumstances, particularly the legacy of colonialism and the subsequent formation of the Organisation of African Unity (OAU) in 1963.[7] The OAU, created to support the fight against colonial rule, was critical in developing the ACHPR. The Charter was unanimously adopted at the OAU's 18th Assembly in Nairobi, Kenya, in June 1981 and came into effect on October 21, 1986, which is celebrated as African Human Rights Day. Established by 32 African nations on May 25, 1963, The OAU was initially focused on supporting independence movements and opposing apartheid. Most of the African countries had a past linked to colonialism and struggled for self-determination. Once these objectives were largely achieved, the OAU shifted its attention to emerging global challenges, such as regional integration and globalisation, while increasingly emphasising human rights.

This Charter laid the foundation for human rights protection across Africa. The OAU played a crucial role in developing human rights treaties in the continent. On May 26, 2001, it evolved into the African Union (AU), a broader organisation promoting political unity and addressing pressing social, economic and environmental issues in Africa. The AU, officially launched on July 9, 2002, in Durban, South Africa, incorporated human rights and sustainable development as key aspects of its mission.

As mentioned, the ACHPR is Africa's foremost regional human rights instrument, covering a broad spectrum of civil, political, economic, social and cultural rights for individuals and groups. The ACmHPR and the ACtHPR empower the Charter. The ACmHPR is the primary body responsible for upholding the ACHPR provisions. It was established under Article 30 of the Charter on November 2, 1987, to safeguard and promote human rights across Africa. Headquartered in Banjul, The Gambia, it is a quasi-judicial body. While its recommendations are not legally binding, they carry significant moral and political influence, often pressuring states to honour their obligations.[8] However, the ACtHPR has a binding authority and was established

7 African Union (AU) (no date), About the African Union [Online]. Available at: https://au.int/en/overview (Accessed: 25 September 2024).

8 African Commission on Human and Peoples' Rights (ACHPR) (no date), About the African Commission on Human and Peoples' Rights. [Online]. Available at: https://achpr.au.int/en/about (Accessed: 25 September 2024).

through the 1998 Protocol to the ACHPR, which came into effect on January 25, 2004.[9] The Court's decisions are legally enforceable in states that have ratified the Protocol.

2.2. Jurisdiction and Admissibility of Cases

Effective human rights protection requires multiple complementary mechanisms, as current systems need significant improvement. As mentioned, at the continental level, two key institutions work in tandem to provide essential safeguards: ACmHPR and ACtHPR. Together, these bodies form a critical framework for human rights protection across the continent. They have distinct yet complementary roles in the African human rights system. The role of the Commission is defined in the African Charter. The Commission, a quasi-judicial body, receives and reviews complaints, as enshrined in Article 45 of the Banjul Charter, while the Court is a judicial body that hears appeals and issues binding judgments. The Court's jurisdiction is established through the Protocol, and under Article 3 of the Protocol, it has jurisdiction to deal with all cases and disputes submitted to it regarding the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the concerned states.

The Court can only deal with cases submitted against countries that have ratified the Protocol and deposited the Article 34(6) Declaration in cases involving individuals and non-governmental organisations (NGOs). The case must involve allegations of human rights, and the alleged violations must have taken place in the state after it ratified the Protocol, unless the alleged violations are ongoing. Several jurisdictional criteria must be met before the Court hears a case. These include:

- Material jurisdiction: Whether the alleged violations pertain to rights protected under the Charter or other relevant human rights treaties.
- Personal jurisdiction: Whether the claimant is eligible to bring the case to the Court, as a recognised individual, group or organisation.
- Temporal jurisdiction: Whether the violation occurred after the state ratified the Protocol establishing the Court.
- Territorial jurisdiction: Whether the violation occurred within a state's borders under the relevant protocol.

By adhering to these criteria, the Court ensures that only cases meeting the necessary standards are heard, offering a robust system of legal protection for human rights. Weak institutions, impunity and lack of accountability are typical governance issues contributing to human rights violations. To tackle these, the continent has universal legal frameworks that countries are bound to implement, such as the UN and regional conventions. The Court's decisions are legally enforceable in states that have ratified the Protocol. Currently, 34 AU Member States have signed the Protocol, and 8 have

9 African Court on Human and Peoples' Rights (no date), The African Court on Human and Peoples' Rights (the African Court) in brief [Online]. Available at: https://www.african-court.org/wpafc/basic-information/ (Accessed: 25 September 2024).

accepted the Court's jurisdiction to hear cases brought by individuals and NGOs. These countries include Burkina Faso, Malawi, Mali, Ghana, Tunisia, The Gambia, Niger and Guinea-Bissau. However, four countries – Rwanda, Tanzania, Benin and Côte d'Ivoire – have withdrawn their support from the Court. Generally, countries that have withdrawn from the ACtHPR (specifically by withdrawing the declaration under Article 34(6) of its Protocol) are not bound by its rulings concerning individual or NGO complaints filed after the withdrawal takes effect.

However, despite withdrawals, the Court's rulings remain binding in some cases. The Court holds that the withdrawal has no bearing on pending cases and new cases filed before the withdrawal comes into effect. This situation has been witnessed several times, the most recent being *Ligue Ivoirienne des Droits de l'Homme (Lidho) & Others v Côte d'Ivoire*. Since withdrawal is not the best option for NGOs and citizens to protect their human rights, the Commission and the Court can employ monitoring and diplomatic pressure to influence countries that have withdrawn from their jurisdiction. This includes utilising existing mechanisms to monitor human rights situations, engaging in diplomatic dialogue and leveraging the influence of other AU organs. Overall, the Court's rulings remain of paramount importance for all AU Member States, providing an essential safeguard when national courts fail to protect human rights.[10]

2.3. African Human Rights Architecture

a. Civil and Political Rights: These define the right to freedom of expression (Article 9), association (Article 10), fair trial (Article 7) and life (Article 5) under the Banjul Charter. Regarding economic, social and cultural Rights, these include the right to health (Article 16), education (Article 17) and work (Article 15).
b. Collective and peoples' rights under Articles 20, 21, 22, 23 and 24 concern self-determination, resource control, the right to national and international peace and security and a satisfactory environment.
c. Vulnerable groups have specific rights protections. Women's rights are enshrined in the Maputo Protocol's provisions on gender equality, reproductive health and protection from gender-based violence, addressing ongoing challenges, such as female genital mutilation (FGM) and access to education. FGM includes the rights to reproductive health and safe abortions (Article 14). They are further granted the right to participate in political and public life (Article 9). Despite progress, gender-based violence, maternal mortality and discriminatory cultural practices remain significant problems.
d. Refugees, internally displaced persons (IDPs) and migrants are protected by the 1969 OAU Convention governing the specific aspects of refugee problems in Africa, adopted by African heads of state in Addis Ababa to address

10 Sègnonna Horace and Nantulya, 2024.

the growing refugee crisis.[11] Recognising the humanitarian imperative and political tensions caused by displacement, it establishes protections for genuine refugees while preventing abuse by subversive elements. The Convention aligns with the UN principles of non-discrimination and builds upon earlier African resolutions on asylum and subversion. It connects with Article 12 of the Banjul Charter, which guarantees the right to asylum. However, implementation gaps persist across the continent. Refugees, IDPs and migrants frequently face xenophobia, inadequate camp conditions and refoulement violations. The Kampala Convention (2009) complements the OAU Refugee Convention by creating binding standards for internal displacement caused by conflicts, disasters and development projects. Together, these frameworks demonstrate Africa's progressive approach to respecting the rights of the displaced, even though challenges remain in harmonising state practices with legal commitments.

e. Convention on Preventing and Combating Corruption (2003). The AU Convention on Preventing and Combating Corruption (2003) represents a crucial effort to tackle the systemic corruption that continues to plague many African states. As a cross-cutting issue, corruption fundamentally undermines good governance, erodes human rights protections and stifles sustainable development across the continent. Effective anti-corruption measures are not merely about financial accountability but can constitute an essential prerequisite for the full realisation of human rights in Africa. This Convention's comprehensive approach, which includes preventive measures, criminalisation of corrupt practices and international cooperation provisions, provides a vital framework for addressing this persistent challenge that disproportionately affects vulnerable populations.

3. Enforcement Challenges

The African system has often struggled with enforcement and compliance due to the reluctance of states to implement decisions from the ACHPR or the African Court. The ACHPR lacks binding authority, while some states have refused to acknowledge the Court's jurisdiction. Furthermore, there is limited awareness of these rights at the national level, weak national human rights institutions and a lack of resources for effective monitoring and reporting. These concerns reflect the complex interplay of political, economic and social factors affecting the African human rights landscape.

11 Organisation of African Unity (OAU) (1969) Convention Governing the Specific Aspects of Refugee Problems in Africa. Addis Ababa: OAU. [Online]. Available at: https://www.african-court.org/wpafc/wp-content/uploads/2020/10/17-OAU-CONVENTION-GOVERNING-THE-SPECIFIC-ASPECTS-OF-REFUGEE-PROBLEMS-IN-AFRICA.pdf (Accessed: 2 July 2025).

While progress has been made, several challenges remain in ensuring full protection and enforcement of the rights enshrined in the African human rights system.

The ACtHPR has adjudicated several significant cases concerning human rights violations, such as torture, lack of freedom of expression and the right to health. According to Amnesty International, there is much to do in Africa to fully implement the rights enshrined in the regional legal framework. The Amnesty International Report 2023/24 highlights that criticising governments continues to be highly perilous in several African nations, where dissent is often met with harsh reprisals.[12] A combination of factors, including rampant inflation, widespread corruption, climate change and ongoing conflicts, has created intolerable living conditions for millions. Hence, access to fundamental economic and social rights remains limited for large portions of the population. Persistent armed conflicts, coupled with extreme weather events, have led to the displacement of millions. Gender-based discrimination and violence against women and girls remain deeply ingrained in several societies. Simultaneously, attacks on the rights of LGBTI communities have intensified, with an alarming increase in homophobic violence and oppressive laws. Additionally, several governments have failed in fulfilling their duties to safeguard refugees and IDPs, leaving these populations highly vulnerable and lacking adequate support.

As of 2024, Statista reports that several African countries rank among the worst on the Human Rights and Rule of Law Index, which uses a scale from 0–10, with zero representing the best conditions for human rights and the rule of law. African nations with the highest scores, indicating severe challenges, include Libya (9.4), Sudan (9.3), the Democratic Republic of Congo (9.0), Egypt (8.9), Eritrea (8.9), Burundi (8.7), the Central African Republic (8.7), Somalia (8.7) and Ethiopia (8.5). Iran holds the maximum index score globally, followed by Burma and China, while Norway ranks as the best country for human rights and rule of law conditions.[13] This underscores the significant work that remains for African governments to implement human rights standards.

According to the UNESCO Director-General's Report on the Safety of Journalists and the Danger of Impunity, between 2006 and 2020, 174 journalists were killed across Africa.[14] Alarmingly, only 10.3% of these cases have been judicially resolved, highlighting the severe lack of accountability for such crimes. Despite these negative figures, the ACtHPR has made a significant impact through a series of landmark rulings that have strengthened freedom of expression and advanced the fight against impunity for crimes committed against journalists across the continent. These

12 Amnesty International (2023), Amnesty International Report 2023/24. [Online]. Available at: https://www.amnesty.org/en/location/africa/report-africa/ (Accessed: 15 October 2024).
13 Statista (2024). Worst countries according to the Human Rights and Rule of Law Index as of 2024 [Online]. Available at: https://www.statista.com/statistics/1256220/highest-human-rights-and-rule-of-law-index-by-country/ (Accessed: 15 October 2024).
14 UNESCO (no date), African Court's landmark decisions ensure prosecution of crimes against journalists [Online]. Available at: https://www.unesco.org/en/articles/african-courts-landmark-decisions-ensure-prosecution-crimes-against-journalists (Accessed: 15 October 2024).

decisions have been pivotal in upholding the rights of media professionals and enhancing legal protections for press freedom in Africa.

4. Landmark Human Rights Cases at the ACtHPR

4.1. Abdoulaye Nikiema (Norbert Zongo) and Others v. The Republic of Burkina Faso[15]
This case dealt with the beneficiaries of Norbert Zongo, a well-known investigative journalist who was assassinated on December 13, 1998, alongside his companions, Abdoulaye Nikiema (alias Ablassé), Ernest Zongo and Blaise Ilboudo. The applicants, including the Burkinabè Human and Peoples' Rights Movement, alleged that Burkina Faso had failed to adequately investigate the murders and prosecute those responsible, leading to several human rights violations. Key allegations included the violation of the right to life under Article 4 of the ACHPR and Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). Additionally, it constituted a violation of Article 7 of the ACHPR and Article 14 of the ICCPR, which guarantee the right to a fair trial. The murder of Norbert Zongo, who was investigating political scandals, was further considered a violation of Article 9 of the ACHPR and Article 19 of the ICCPR, which protect freedom of expression.

In its rulings, the Court pointed out that it lacked *ratione temporis* jurisdiction over the murder, which occurred in 1998, before the Court's jurisdiction was established in Burkina Faso in 2004. However, it did have jurisdiction over the continuing violation due to Burkina Faso's ongoing failure to investigate, prosecute and hold those responsible accountable, which constituted a persistent breach of the victim's rights to justice. The Court further ruled that Burkina Faso had violated freedom of expression by failing to protect Norbert Zongo as a journalist investigating sensitive political issues. This amounted to a violation of the state's duty under the ACHPR to protect journalists. The Court rejected the Burkinabè government's argument that local remedies had not been exhausted, determining that the national legal processes had been unduly prolonged and ineffective, justifying the applicants' recourse to the Court. Additionally, the Court ordered Burkina Faso to pay compensation to the victims' families.

The state was directed to pay CFA 25 million (approximately USD 43,000) to each of the victims' partners and CFA 15 million (approximately USD 26,000) to each of their children. It mandated that Burkina Faso publish a French summary of the judgment in its official gazette and a widely circulated national newspaper, and on the government's official website, for a period of one year. Additionally, Burkina Faso was required to report to the Court on its compliance with the judgment within six months

15 Columbia University (no date), Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo, *Burkinabè Human and Peoples' Rights Movement v. The Republic of Burkina Faso.* [Online]. Available at: https://globalfreedomofexpression.columbia.edu/cases/abdoulaye-nikiema-ernest-zongo-blaise-ilboudo-burkinabe-human-and-peoples-rights-movement-v-the-republic-of-burkina-faso/ (Accessed: 15 October 2024).

from the date of the ruling. This underscored the Court's commitment to addressing continuing human rights violations and holding states accountable for failing to provide justice.

While the Court could not rule on the initial murder due to jurisdictional limits, it made clear that persistent state inaction, particularly in cases involving freedom of expression and the protection of journalists, would not go unaddressed. The significant compensation awarded to the victim's families and the requirements for publicising the Court's decision further highlight the Court's efforts to promote accountability and transparency in Burkina Faso and in Africa.

4.2. Alex Thomas v. United Republic of Tanzania (Application No. 005/2013)[16]

In this case, Alex Thomas was convicted of armed robbery and sentenced to 30 years in prison. He filed a complaint alleging that he had been subjected to torture and inhuman treatment during his detention and trial, claiming that he did not receive a fair trial. The Court found that Tanzania had violated several of the applicant's rights, including Article 7(1)(a) of the ACHPR (right to have one's cause heard, especially the right to defence). The Court noted that Thomas had not been provided with legal aid, even though he was charged with a serious offence carrying a heavy sentence. This denied him a fair trial. Additionally, Tanzania failed in its obligation to implement the rights enshrined in the Charter (Article 1 of the ACHPR), particularly ensuring a fair trial process. However, the Court concluded that there were no violations of Article 3 of the ACHPR (right to equality before the law and equal protection of the law), as Thomas could not substantiate claims that he was treated differently from others in similar circumstances.

Concerning Article 5 of the ACHPR (prohibition against torture, cruel, inhuman or degrading treatment or punishment), the Court found insufficient evidence that the delays and conditions Thomas faced amounted to such treatment. In its ruling, the Court declared that Tanzania violated Articles 1 and 7 of the ACHPR, particularly regarding the applicant's right to defence and fair trial. However, it did not grant the request for his release from prison and Tanzania was ordered to take all necessary measures to remedy the violations and report back to the Court within six months.

4.3. African Commission on Human and Peoples' Rights v. Libya (2016)[17]

The is the first judgment to be delivered in default in the ACtHPR.[18] The case arose when Saif al-Islam Gaddafi, son of the late Libyan leader Muammar Gaddafi, submitted a communication to the African Commission, claiming violations of Article 6 (right to personal liberty and protection from arbitrary arrest) and Article 7 (right to a fair

16 African Union (no date), In the Matter of Alex Thomas v. United Republic of Tanzania (Reparations). [Online]. Available at: https://archives.au.int/handle/123456789/8736 (Accessed: 20 October 2024).
17 Ayissi, 2017, pp. 738–744.
18 Windridge, 2018, pp. 758–776.

trial) of the African Charter.[19] The Court took up the case in February 2013 and issued further provisional measures, demanding Libya cease judicial proceedings against Gaddafi, allow access to legal counsel and safeguard his physical and mental integrity. Libya continued to defy these orders, prompting the Court to extend compliance deadlines and ultimately report Libya's non-cooperation to the AU. By March 2015, after multiple failed attempts to engage Libya, Gaddafi filed for a judgment in default due to the country's persistent non-compliance. The Court ruled that Libya's actions constituted a failure to uphold its obligations under the African Charter, leading to a judgment in default. It emphasised the necessity for Libya to respect Gaddafi's rights and ensure a fair trial according to international standards. This ruling marked a significant precedent regarding the enforcement of human rights protections in non-compliant states.

4.4. Lohé Issa Konaté v. Burkina Faso (2014; Application No. 004/2013)[20]

This is a landmark ruling concerning freedom of expression. Lohé Issa Konaté, a journalist, was sentenced to one year in prison for defamation after publishing articles that exposed alleged corruption by a state prosecutor. In its ruling, the Court found that this imprisonment constituted a disproportionate violation of Konaté's rights under Article 9 of the ACHPR and Article 19 of the ICCPR. The Court emphasised that public officials must be subject to greater scrutiny and criticism, as imposing harsh penalties would deter journalists from fulfilling their essential role in holding the government accountable. Consequently, it ordered Burkina Faso to amend its criminal defamation laws, reinstate Konaté's banned newspapers and pay him over USD 75,000 in compensation for material and moral damages. This landmark decision underscores the importance of protecting journalists' rights to speak freely and criticise public governance without fear of retribution.

4.5. Mouvement Ivoirien Des Droits Humains (Midh) v. Côte D'Ivoire (2016)[21]

This case originated on February 8, 2002, when the Secretariat of the ACmHPR received a communication from Ibrahim Doumbia, the first vice-president of the *Movement Ivoirien des Droits Humains* (MIDH), submitted under Article 55 of the African Charter. The communication was directed against the Republic of Côte d'Ivoire, alleging that

19 Database and commentary on jurisprudence of the African Court on Human and Peoples' Rights (no date), *The African Commission on Human and Peoples' Rights v Libya*. [Online]. Available at: https://afchpr-commentary.uwazi.io/en/entity/65aa3w7rrnzl04v250ikny7gb9 (Accessed: 20 October 2024).

20 Columbia University (no date), *Lohé Issa Konaté v. The Republic of Burkina Faso.* [Online]. Available at: https://globalfreedomofexpression.columbia.edu/cases/lohe-issa-konate-v-the-republic-of-burkina-faso/ (Accessed: 20 October 2024).

21 African Human Rights Case Law Analyse (no date), *Mouvement Ivoirien des Droits Humains (MIDH) v. Cote d'Ivoir,*. [Online]. Available at: https://caselaw.ihrda.org/entity/1x8fxvejohpycw-lapw4vbtvs4i?file=1512403268215q3z43ns8jzcbpktkzoq7iudi.pdf&page=9 (Accessed: 20 October 2024).

the Constitution adopted through a minority vote during the constitutional referendum on July 23, 2000, included provisions that discriminated against certain citizens by prohibiting them from holding political office.

Additionally, the communication claimed that provisions granting immunity to members of the National Committee for Public Security (CNSP), the military body that ruled during the transitional period from December 24, 1999, to October 24, 2000, and to the authors of the December 24, 1999, coup d'état were discriminatory. The complaint asserted violations of Articles 2, 3 and 13 of the African Charter and urged the Commission to recommend a review of Articles 35, 65 and 132 of the Constitution. The African Commission found that Côte d'Ivoire violated Articles 1, 2, 3(2), 7 and 13 of the Charter and requested the state to take corrective measures.

4.6. Ingabire Victoire Umuhoza v. Republic of Rwanda (Application no. 003/2014)[22]

The Applicant, Ingabire Victoire Umuhoza, a Rwandan citizen, asserted that she was studying in the Netherlands to pursue her university education in economics and business administration when the genocide in Rwanda began in April 1994. After returning to Rwanda 17 years later to contribute to national development by establishing a political party, she was arrested and charged with multiple offences, including spreading the ideology of genocide, aiding and abetting terrorism, sectarianism and divisionism. Additionally, she was accused of undermining state security, creating an armed faction of a rebel movement and attempting to use violence to destabilise the government and violate constitutional principles. These charges stemmed from statements made by Umuhoza, which the domestic courts deemed as denying the Tutsi genocide.

However, the Court determined that the remarks did not constitute a minimisation of the genocide and concluded that her conviction violated her right to freedom of expression. Although this case did not involve a journalist, it serves as a critical interpretative guide for understanding the limitations placed on freedom of expression, especially in the context of genocide, where governments may exploit such restrictions to silence dissenters, including media professionals. In its ruling, the Court ordered the respondent state to restore Umuhoza's rights. It awarded her approximately USD 64,000 in compensation for material and moral damages suffered by her and her family.

22 African Human Rights Case Law Analyser (no date), *Ingabire Victoire Umuhoza v Rwanda.* [Online]. Available at: https://caselaw.ihrda.org/en/entity/l07kgnz8a9qr3nugrudutbj4i (Accessed: 20 October 2024).

4.7. Tanganyika Law Society and Others V United Republic of Tanzania; Mtikila V United Republic of Tanzania (Application no. 009/2011; Application no. 011/2011) [2013] (June 14, 2013)[23]

In June 2011, two sets of applicants filed cases against Tanzania, challenging amendments to its Constitution that banned independent candidates from running in presidential, parliamentary and local government elections. The applicants argued that this restriction violated citizens' rights to freedom of association, participation in public affairs, protection against discrimination and the rule of law. They contended that Tanzania's constitutional review process, which addressed an issue pending before the courts, further breached the rule of law. The first applicants requested the court to declare that Tanzania violated Articles 2 and 13(1) of the ACHPR and Articles 3 and 25 of the ICCPR. They sought an order for Tanzania to make necessary constitutional changes and report back to the Court within 12 months. The second applicant asked for a ruling that Tanzania violated his rights and sought compensation for the legal costs and prolonged judicial processes.

The applicants argued that the constitutional amendments requiring candidates to be affiliated with a political party violated their right to participate in public affairs, as protected under various international human rights instruments. They challenged specific provisions in the Tanzanian Constitution and election laws that mandated party membership for candidates. Additionally, they stated that the prohibition of independent candidates violated Article 13(1) of the Charter, which guarantees the right to participate freely in government, either directly or through freely chosen representatives. They maintained that these restrictions contradicted this provision by forcing citizens to join political parties. Tanzania countered that the prohibition on independent candidates was necessary for maintaining social order and avoiding political chaos. The government justified this rule based on the country's historical and social context, citing national unity and the need to strengthen the multi-party system established in the 1990s.

The Court examined Article 13(1) of the Charter, determining that the right to participate in government includes individual and collective rights. It concluded that requiring political party affiliation for candidates infringes on individuals' political participation rights. The Court recognised the need for lawful restrictions; however, it found that Tanzania's justification – grounded in its political and historical circumstances – did not fully justify the prohibition of independent candidates. It noted the balance between individual rights and collective security yet ruled that the current restrictions were excessive.

23 Data for Governance Alliance, no date, *Tanganyika Law Society and Others v United Republic of Tanzania*; *Mtikila v United Republic of Tanzania* (Application No. 009/2011; Application No. 011/2011) [2013] ACHPR (14 June 2013). [Online]. Available at: https://africanlii.org/akn/aa-au/judgment/afchpr/2013/8/eng@2013-06-14 (Accessed: 20 October 2024).

5. Environment-Related Human Rights

The ACHPR strongly emphasises environment-related human rights. Article 24 of the Charter explicitly guarantees the right to a satisfactory environment, requiring states to ensure environmental protection and preservation for the benefit of all citizens. This article is particularly significant in light of Africa's growing environmental challenges, including deforestation, climate change and biodiversity loss. It aligns with global discourses on sustainable development, highlighting the relationship between human rights and environmental protection. These linkages have become especially pertinent as African countries face increasing pressure to address their development needs and environmental responsibilities.

One of the continent's most ambitious environmental initiatives is the AU's Great Green Wall project. This nature-based solution aims to combat desertification, restore degraded lands and preserve biodiversity across the Sahel region. Such efforts are vital in ensuring that the right to a healthy environment is upheld. Environmental rights are a cornerstone of other AU strategies as well, including Agenda 2063: The Africa We Want. Agenda 2063 outlines Africa's long-term vision for sustainable development and underscores the need for balancing socio-economic progress with environmental sustainability.[24] Although it does not exclusively focus on environmental rights, it incorporates climate resilience, sustainable natural resource management and environmental protection into its overall strategy. It stresses the need for policies integrating national, regional and continental environmental considerations, ensuring that the continent's economic growth is climate-resilient and ecologically sustainable. Its holistic approach highlights the intersection of human rights and environmental protection, particularly in key sectors like agriculture, water management and renewable energy development. By emphasising these issues, Agenda 2063 aligns with the broader human rights framework, underscoring that a clean and healthy environment is essential for the enjoyment of fundamental human rights, such as the right to health, clean water and adequate living conditions. Climate change adaptation and mitigation are crucial aspects of this strategy, as they are directly tied to realising environmental rights. Africa's climate action efforts, including initiatives like AFR100 (the African Forest Landscape Restoration Initiative), showcase the continent's commitment to restoring degraded landscapes and enhancing biodiversity. These projects are critical for safeguarding environment-related human rights and ensuring sustainable development.

24 African Union (AU) (2015), Agenda 2063: The Africa We Want. [Online]. Available at: https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (Accessed: 15 October 2024).

5.1. Agenda 2063 and Sustainable Development Goals (SDGs)

Agenda 2063 works in tandem with the UN's Sustainable Development Goals (SDGs), particularly SDG 6 (Clean Water and Sanitation) and SDG 13 (Climate Action), both highlighting environmental protection as central to upholding basic human rights. African nations, as members of the UN General Assembly, are committed to implementing the SDGs alongside Agenda 2063. These frameworks collectively address Africa's environmental challenges, reinforcing the need to protect human rights through sustainable development and responsible resource management. The 2024 Africa Sustainable Development Report highlights African countries' progress in integrating environmental policies into national development strategies.[25] However, the report identifies challenges, such as external economic shocks, political instability and climate change, which hinder the pace of implementation. Despite these difficulties, countries like Ethiopia, Kenya and South Africa have made significant strides in embedding climate resilience into their policies, reflecting a growing recognition of the importance of environmental sustainability in securing human rights.

One of the primary obstacles to achieving these goals is the limited availability of climate finance. According to the report, Africa receives only a small portion of global climate finance, which is far below the amount needed to meet its climate action commitments. The gap between the continent's needs, an estimated at USD 2.8 trillion by 2030, and the current mobilisation of funds (USD 29.5 billion annually as of 2020) is stark. Addressing this financial shortfall is critical for ensuring that African nations implement the necessary measures to protect environment-related human rights. Both Agenda 2063 and the SDGs emphasise the need for substantial investments in climate adaptation, renewable energy and sustainable resource management to achieve long-term development goals while safeguarding human rights.

5.2. Case Studies in Environmental Rights Litigation

Cases involving climate refugees or individuals affected by environment-related human rights violations are likely to increase as the impacts of climate change intensify. Africa has the necessary legal arsenal to address these challenges, including climate change displacement litigation (Mativo, 2024). However, despite the AU's commitment to environmental sustainability, landmark cases concerning the right to a healthy environment under Article 24 of the ACHPR remain relatively rare in regional human rights courts. In contrast, national and sub-regional courts, such as the Economic Community of West African States (ECOWAS) Court of Justice, increasingly adjudicate environmental cases, reflecting the growing judicial attention to these critical issues. This reflects a growing awareness of the inextricable link between environmental harm and human rights violations. One of the most notable cases

25 The African Union, African Development Bank, United Nations Development Programme, and the United Nations Economic Commission for Africa (2024), 2024 Africa Sustainable Development Report. [Online]. Available at: https://www.undp.org/sites/g/files/zskgke326/files/2024-07/asdr_2024_-_en_0.pdf (Accessed: 15 October 2024).

in this regard is *SERAC v. Nigeria (155/96)*, heard by the ACmHPR.[26] In this case, the Nigerian government, in collaboration with multinational oil companies, was found to have violated several provisions of the African Charter, including the right to a satisfactory environment. The Ogoni people, whose land had been severely degraded by oil exploitation, suffered from significant environmental damage, which undermined their rights to health and adequate living conditions. The Commission ruled in favour of the Ogoni people and made several key recommendations to the Nigerian government, including the cessation of harmful activities, adequate compensation for the affected communities and the implementation of environmental and social impact assessments for future oil developments.

Another pivotal case highlighting the growing importance of environmental harm and human rights in Africa is *Ligue Ivoirienne des Droits de l'Homme (Lidho) & Others v. Côte d'Ivoire*. In this landmark ruling, the ACtHPR mentioned Article 24, when it condemned the state's failure to shield its citizens from corporate environmental negligence. The case is an aftermath of a catastrophic incident in August 2006, when the Probo Koala, a vessel leased by the multinational Trafigura Ltd., offloaded 528 cubic meters of toxic waste in Abidjan, Côte d'Ivoire. The waste was improperly disposed of across multiple sites, none equipped to handle hazardous materials. The consequences were immediate and devastating. Residents in affected areas reported severe health issues, including nausea, respiratory problems, air pollution and skin conditions. Official records attributed 17 deaths to toxic exposure, with hundreds of thousands suffering long-term health effects. Subsequent environmental tests revealed extensive groundwater contamination, exacerbating the crisis. The ACtHPR's ruling exposed systemic failures by the Ivorian government, citing violations of multiple Charter provisions, such as Article 4 (right to life) due to the state's failure to prevent fatal exposure, Article 16 (right to health) owing to insufficient medical intervention, Article 24 (right to a healthy environment) for allowing uncontrolled toxic dumping, Article 9(1) (right to information) as authorities withheld critical risk disclosures and Articles 1 and 7 (access to justice) due to the barriers to legal redress for victims. The Court's attitude in this case is commendable as it mandated far-reaching remedies, such as:

- Implementing nationwide medical rehabilitation programmes
- Enacting stricter hazardous waste regulations
- Enhancing corporate oversight to prevent future abuses
- Establishing compensation funds for victims (paras. 223–236)

Notably, while the Court stopped short of ordering a public apology, it underscored that financial compensation alone could not rectify the harm done (para. 228). This

26 ACHPR (2001) Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR)/Nigeria – 155/96. [Online]. Available at: https://achpr.au.int/en/decisions-communications/social-and-economic-rights-action-center-serac-and-center-economic-15596 (Accessed: 15 October 2024).

decision stands as a critical affirmation of Article 24's role in holding states accountable for environmental degradation that violates fundamental human rights.

In the same framework of African environmental cases, the following case is well-known to legal scholars as it highlights the link between human rights and environmental protection. The Ogiek Case (*Ogiek Indigenous Peoples v. Kenya*), heard by the ACtHPR,[27] is a landmark, even if the Court did not explicitly cite Article 24 in its judgment. The case focused on the Ogiek community's land rights and the role of environmental protection in preserving their way of life. The Ogiek, an indigenous group, was ordered to vacate their ancestral lands in the Mau Forest. However, the court found that their eviction violated their rights to life, health and cultural integrity, which are inherently linked to environmental rights. Its decision underscored the principle that protecting indigenous communities' land rights is crucial for safeguarding their environmental rights and cultural heritage. It emphasised that denying land rights to indigenous communities undermined cultural preservation and weakened ecological safeguards. The eviction of the Ogiek people, for 'forest conservation', ignored their historical role as custodians of the forest ecosystem in which they lived and thrived, actively contributing to biodiversity conservation. The government's displacement of the Ogiek had consequences, as it eroded their cultural survival while enabling environmental harm. This case illustrates a clear nexus between environmental degradation and human rights violations, where the denial of land rights breached ecological and cultural protections. For the indigenous populations living in Africa, this judgment established a landmark precedent by:

- Recognising indigenous land rights as integral to environmental protection
- Affirming that conservation policies must comply with human rights standards
- Mandating state obligations to ensure meaningful community participation in environmental governance

5.3. Climate Change Litigation and Corporate Accountability

Africa's growing environmental challenges have spurred a rise in climate change litigation. Global trends in environmental lawsuits, particularly against corporations, are mirrored in African countries, where companies are increasingly being held accountable for environmental damage. This aligns with global climate strategies and the recognition that environmental degradation can infringe upon fundamental human rights. Cases like the *Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation* demonstrate the increasing role of the judiciary in addressing environmental harm. In this case, the Nigerian Supreme Court recognised the right to a clean and healthy environment as a fundamental human right under the Nigerian

27 ACtHPR (2012) Application 006/2012 – The African Commission on Human and Peoples' Rights vs Republic of Kenya. [Online]. Available at: https://www.african-court.org/cpmt/details-case/0062012. (Accessed: 15 October 2024).

Constitution and the ACHPR, setting a precedent for future environmental litigation in Africa.

Similarly, in the *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd*,[28] the Federal High Court of Nigeria ruled that Shell's gas-flaring activities violated the rights to life and dignity of the community living in the Niger Delta. This case, which drew on the Nigerian Constitution and the ACHPR, is a landmark decision linking environmental degradation with human rights violations, particularly the right to a healthy environment.

5.4. The Role of Sub-Regional Courts in Enforcing Environmental Rights

Sub-regional courts, such as the ECOWAS Court of Justice, have significantly advanced African environmental justice. The court, established under Article 15 of the ECOWAS Revised Treaty, has adjudicated cases where environmental degradation has violated human rights. These cases emphasise the need for regional action to protect environmental rights and ensure that individuals have recourse when their governments fail to uphold them. The ECOWAS Court's rulings reinforce the importance of collective regional efforts to address environmental challenges, ensuring that human rights are protected in the context of Africa's socio-economic and environmental realities.

While environmental degradation threatens fundamental rights to health, livelihood and dignity under the African Charter, children, as one of Africa's most vulnerable groups, face rights violations exacerbated by climate change and social crises. The same systemic weaknesses that undermine environmental protections, weak enforcement, state non-compliance and impunity, perpetuate child rights abuses, from climate-induced displacement to exploitative labour and forced marriages. Just as Article 24 of the ACHPR safeguards the right to a healthy environment, the ACRWC provides a normative framework to address these challenges.

6. Protection of Children in the African Human Rights System

The ACRWC is a key regional legal framework for safeguarding children's rights.[29] Designed specifically for Africa, it addresses the distinct challenges that African children face while incorporating African culture and traditions. Adopted in 1990 and enforced in 1999, the ACRWC sets out specific provisions to promote children's welfare and outlines the duties of state parties to ensure their well-being. While the intentions behind the charter are admirable, children in Africa continue to face significant challenges, including child labour, child marriage and child trafficking,

28 Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (2005) AHRLR 151 (NgHC 2005). [Online]. Available at: https://leap.unep.org/sites/default/files/court-case/COU-156302.pdf (Accessed: 15 October 2024).

29 African Union (1999), African Charter on the Rights and Welfare of the Child. [Online]. Available at: https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf (Accessed: 15 October 2024).

exacerbated by factors like poverty and the COVID-19 pandemic. The ACRWC was established to counter various forms of child abuse and exploitation that prevalent in Africa. It introduces a range of protections for children, emphasising their holistic development and safeguarding them against harmful practices. Among the issues addressed by the charter are child labour, forced marriages, FGM and other harmful social practices. Article 16 of the Charter specifically requires states to protect children from economic exploitation and hazardous work, which may harm their health, development or education.

Despite this robust legal framework, child labour remains a pressing issue, particularly in Sub-Saharan Africa. According to recent UNICEF and the International Labour Organization (ILO) reports, nearly 16.6 million children in this region have been involved in child labour in the past four years.[30] The prevalence of child labour in Sub-Saharan Africa (24%) is significantly higher than any other region, highlighting the disparity in global efforts to address this issue. Additionally, the Charter establishes a Committee of Experts to monitor its implementation and assist African governments in improving children's condition. Nevertheless, extreme poverty, lack of social protection and unplanned urban expansion continue to push children into exploitative situations.

The ACRWC addresses harmful cultural practices, such as child marriage and FGM, through Article 21, which emphasises the protection of children from such practices. Other harmful rituals, such as breast ironing, witchcraft accusations and forced marriages, are targeted as well. The Charter highlights the importance of combating these practices to protect young girls from physical and psychological harm. Article 22 focuses on the need to eradicate child marriage and Article 27 calls for comprehensive measures to protect children from sexual exploitation.

Moreover, the Charter mandates the protection of children from trafficking and abduction (Article 29), with specific provisions for refugee and internally displaced children (Article 30). It recognises the child's right to rest, leisure and play (Article 31), which contributes indirectly to protecting them from exploitation and abuse. By addressing various forms of abuse, including physical, emotional and sexual abuse, the Charter provides comprehensive protection for children. In addition to combating harmful practices, the ACRWC includes specific provisions for promoting education and awareness. Article 11 emphasises every child's right to education and the need for state measures to eliminate illiteracy and provide quality education. By focusing on education and awareness, the ACRWC seeks to empower children and reduce their vulnerability to exploitation.

30 International Labour Organization (no date), ILO Business case: Eradicating child labour and forced labour. [Online]. Available at: https://webapps.ilo.org/business-case/cases/child-labour-forced-labour (Accessed: 15 October 2024).

A key mechanism for enforcing the Charter's provisions is the ACERWC, established under Articles 32–46.[31] The Committee plays a vital role in monitoring the implementation of the Charter and protecting children's rights across Africa. It convenes twice a year and interacts with governments and civil society organisations to promote the protection of children's rights. Its main functions include monitoring the implementation of the Charter, interpreting its provisions and addressing alleged violations through investigations, research and country visits. ACERWC members are selected based on their high moral character, expertise and commitment to child welfare. The Committee includes a Working Group on the Implementation of Decisions, which ensures that state parties implement recommendations and decisions. Although the ACERWC's decisions are not legally binding, they hold significant moral authority, influencing states to adopt child protection laws and policies.

The Agenda 2040 initiative, developed in 2015, represents a strategic framework to ensure the effective realisation of the ACRWC by 2040. Agenda 2040 was launched to commemorate the 25th anniversary of the Charter and set a course for the next 25 years.[32] This aligns with Africa's Agenda 2063, which outlines the continent's development aspirations. Agenda 2040 outlines 10 goals, including establishing child-friendly laws, access to education, protection from violence and creating a criminal justice system sensitive to children's needs. One of the key aspirations of Agenda 2040 is to ensure that all children in Africa are registered at birth, providing them with access to legal protection and essential services. Other goals include ensuring access to quality healthcare, preventing child exploitation and safeguarding children from the effects of armed conflict and natural disasters. By focusing on these areas, Agenda 2040 creates a secure and thriving environment for Africa's children.

The success of Agenda 2040 relies on the collaborative efforts of governments, civil society organisations and international partners. These partnerships are crucial for achieving the Charter's long-term goals and ensuring that African children's rights are upheld. A significant component of these efforts is the establishment of the African Child Rights Case Law Database, which provides legal precedents and judgments on child rights cases across Africa. It enables the ACERWC to make informed decisions and offer authoritative recommendations to state parties. State Party Reports are a key mechanism for monitoring progress under the Charter. Countries are required to submit regular reports detailing the measures taken to implement the Charter's provisions. These reports allow the ACERWC to assess the effectiveness of child protection laws and identify areas that need improvement. In response to these

31 African Union (no date), African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Secretariat. [Online]. Available at: https://au.int/en/sa/acerwc#:~:text=Banner%20Slides-,African%20Committee%20of%20Experts%20on%20the%20Rights%20and%20Welfare%20of,and%20Welfare%20of%20the%20Child (Accessed: 15 October 2024).

32 African Union (no date), Agenda 2040. [Online]. Available at: https://www.acerwc.africa/en/page/agenda-2040 (Accessed: 15 October 2024).

reports, the Committee provides concluding observations and recommendations to ensure continued progress.

The ACRWC represents a significant commitment to protecting children's rights in Africa, addressing their unique challenges. However, as the persistent issues of child labour, marriage and trafficking demonstrate, much work remains to be done. The ACERWC, supported by initiatives like Agenda 2040, will continue to play a crucial role in advancing child protection efforts and ensuring that the rights of Africa's children are safeguarded for future generations. The commitment to upholding these rights ensures the well-being of the continent's children and contributes to the broader goal of human rights and sustainable development across Africa.

7. Conclusion

The African human rights system, established through comprehensive legal frameworks and institutions, has been created to address the continent's diverse and complex human rights challenges. The ACHPR and ACRWC are foundational instruments that provide robust protections for individual and collective rights, particularly for vulnerable groups, such as children, refugees and IDPs. These legal frameworks, alongside transformative regional agendas, such as Agenda 2063 and Agenda 2040, reflect Africa's commitment to sustainable development, human dignity and child protection. Nonetheless, while notable advancements have been achieved, pressing challenges persist, notably in areas like child labour, gender inequality, environmental degradation and human trafficking. These issues are dealt with at the judiciary level with the ACtHPR, the ACmHPR and sub-regional courts, which are the fundamental enforcement bodies of the African human rights system, ruling through landmark judgments. Examples of such landmark rulings include *SERAC v. Nigeria* and *Lohé Issa Konaté v. Burkina Faso*. These decisions underscore the Courts capacity to hold states accountable and provide remedies for violations of fundamental rights, including freedom of expression, access to justice and environmental protection. They illustrate that the African human rights system can offer legal redress at national and regional levels, especially when national courts fail to provide effective remedies.

However, there are significant limitations in state compliance, weak enforcement mechanisms and political reluctance. Many governments have been slow or unwilling to implement the ACtHPR decisions, diminishing the system's potential impact as a whole. Such non-compliance threatens the Court's credibility and the regional human rights framework, making it essential for African states to demonstrate stronger political will to uphold their obligations under international treaties. Moreover, climate change, political instability and economic inequality exacerbate the region's human rights concerns. Despite contributing minimally to global carbon emissions, Africa disproportionately suffers from environmental degradation impacts, including droughts, floods and biodiversity loss. These environmental crises add to existing socio-economic issues, significantly affecting marginalised communities and

intensifying poverty. Similarly, political turmoil and economic instability hinder the continent's ability to realise its human rights objectives. In conflict-ridden areas, for instance, violations such as gender-based violence, displacement and arbitrary detention are more prevalent, highlighting the need for stronger peace-building initiatives alongside human rights efforts.

Regional cooperation, resource mobilisation and institutional strengthening are paramount to addressing multifaceted challenges threatening African human rights. Effective collaboration between African states, regional bodies, civil society organisations and international partners is essential for promoting accountability and enhancing the capacity of human rights institutions. Resource constraints, particularly regarding climate finance, pose significant obstacles to implementing effective environmental policies that safeguard human rights. Therefore, mobilising financial resources and strengthening institutional capacities at the national and regional levels is critical for ensuring that insufficient infrastructure or governance deficits do not undermine human rights protections.

Additionally, Africa has ambitious goals outlined in Agenda 2063, Africa's blueprint for socio-economic transformation, and Agenda 2040, which focuses on children's rights, both requiring the sustained commitment of all stakeholders. Governments must enact progressive legal reforms and ensure that these laws are effectively enforced. Public awareness campaigns, capacity-building initiatives and legal reforms are necessary to foster a culture of human rights where violations are systematically addressed and rights are universally respected. Civil society organisations play a crucial role in this process by advocating reforms, raising awareness and holding governments accountable.

With the legal framework available at the regional and international levels, Africa has the capacity to realise its vision of a future where all citizens enjoy complete human rights. However, substantial efforts must be made to bridge the gap between legal norms and practical implementation by insisting on compliance with legal decisions at the national level. This requires a collective effort by governments, regional bodies, civil society and international partners to foster peace and justice in Africa, leading to security, development and prosperity.

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Part III
Other Regional Human Rights Frameworks: Islamic, Asian, and CIS

| Chapter 9 |

The Islamic, Asian and CIS Perspectives on Human Rights Protection

Andrzej Pogłódek

ABSTRACT

This chapter presents lesser-known non-European regional systems of human rights protection, which, unlike the Inter-American System of Human Rights Protection and the African System of Human Rights Protection, do not have mechanisms for individual complaints and a court-type body for the control of undertaken commitments. The regional systems of Arab-Muslims, ASEAN, SAARC and CIS will be discussed. All the mentioned regional systems (except SAARC and CIS) were built as a supplement to the universal system of human rights protection, yet partly in opposition to it, based on Muslim or Asian values. Therefore, the universalism of fundamental rights was undermined in favour of particularism, the conditioning of these rights and their content and scope by civilisational, cultural and religious conditions of individual countries. Currently, the acts in force in these systems concerning the protection of fundamental rights differ in their possible scope of limitations of fundamental rights, foundations and the scope of freedom of the States Parties. The systems provide limited mechanisms for monitoring the undertaken human rights commitments; however, they are being expanded. Among the systems discussed, the OIC and ASEAN systems have the greatest practical significance, while the GCC has the smallest.

KEYWORDS

Fundamental rights, human rights particularism, ASEAN, Arab-Muslim system, SAARC, CIS

1. Introduction

The subject of the chapter will be the presentation of lesser-known non-European regional systems of human rights protection, which, unlike the Inter-American and African Systems of Human Rights Protection, do not have mechanisms for individual complaints and a court-type body for the control of undertaken commitments. The regional systems of Arab-Muslims, ASEAN, SAARC and CIS will be discussed. All the mentioned regional systems (except SAARC and CIS) were founded on, and in a sense still are, supplements to the universal system of human rights protection, and partly in opposition to it, based on Muslim or Asian values. Therefore, the universalism of

Andrzej Pogłódek (2026) 'The Islamic, Asian and CIS Perspectives on Human Rights Protection' in Zombory, K. (ed.) *Regional Human Rights Protection Systems Outside Europe.* Miskolc–Budapest: Central European Academic Publishing, pp. 325–376. https://doi.org/10.71009/2026.kz.rhrpsoe_9

fundamental rights was undermined in favour of particularism, the conditioning of these rights, their content and the scope of civilisational, cultural and religious conditions of individual countries. Furthermore, currently, in the acts in force in these systems for the protection of fundamental rights, one can notice differences in the possible scope of limitations of fundamental rights, its foundations and the scope of freedom of the state's parties.

2. Islamic Perspective on Human Rights

The Islamic human rights system is established under the auspices of the Arab League and the Organisation of Islamic Cooperation (OIC), with a partly overlapping membership of 22 and 57 states, respectively. However, in the Gulf Cooperation Council, the Gulf Declaration of Human Rights was adopted in 2014.[1]

2.1. The Arab League

The League of Arab States is an intergovernmental organisation of Arab states. Today the Arab League has 22 Member States (Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen). The Arab League Charter (1945)[2] is the organisation's founding document and contains the main provisions governing the structure and function of the League and its bodies. According to Article 2, the Arab League's purpose is the strengthening of the relations between the Member States, the coordination of their policies to achieve cooperation, safeguarding their independence and sovereignty and a general concern with the affairs and interests of the Arab countries. The same article identifies cooperation in six areas: economic and financial affairs, communications, cultural affairs, nationality, passports and visas, social affairs and health affairs. There is no mention of human rights in the Arab League Charter. Moreover, at the time of its adoption, there was no international system for the protection of human rights (the Universal Declaration on Human Rights was adopted in 1948). The Arab states have widely ratified international human rights treaties, although with reservations and exclusion provisions that enable individuals to submit complaints to the UN treaty bodies or the established national structures of monitoring the implementation of a respective treaty.

1 Gulf Declaration of Human Rights, 9 December 2014. See more: Alfadhel, 2017, pp. 89–98; El-Mumin, 2020, pp. 241–266; El-Mumin, 2020, pp. 1– 10.
2 Charter of the League of Arab States, 22 March 1945.

2.1.1. Arab Charter on Human Rights

The Arab Charter on Human Rights[3] (ACHR) is the main Arab League treaty in the field of human rights. The ACHR, adopted in May 2004 in Tunis at the 16th Summit of the League of Arab States, entered into force on 15 March 2008, two months after the date of ratification by a seventh state, the United Arab Emirates, following its Article 49, which requires ratification by seven Member States of the League.[4] Currently, it is ratified by 14 states. Its 1994 predecessor never entered into force due to a lack of ratifications. The Charter contains a preamble and 53 articles.

The preamble affirms:

> 'The sovereignty of the law and its contribution to the protection of universal and interrelated human rights and convinced that the human person's enjoyment of freedom, justice and equality of opportunity is a fundamental measure of the value of any society.'

The preamble provides that Member States adopt the Charter '[i]n furtherance of the eternal principles of fraternity, equality and tolerance among human beings consecrated by the noble Islamic religion' and 'having regard to the Cairo Declaration on Human Rights in Islam'. It rejects all forms of racism and Zionism, which constitute a violation of human rights and a threat to international peace and security, recognising a close relationship between them. It reaffirms the principles of the Charter of the United Nations (UN), the Universal Declaration of Human Rights (UDHR) and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, taking into account the Cairo Declaration of Human Rights in Islam.[5]

The rights and freedoms are formulated in a similar way to the international standards of human rights, with some important exceptions. Article 11 emphasises the importance of human rights, including the principle that 'all human rights are universal, indivisible, interdependent and interrelated' (Article 11(4)). However, some of the rights contained in the ACHR are, unlike in the international human rights system, guaranteed only to citizens. Article 4 regulates the suspension of rights in emergency situations, provided that these measures are not in conflict with other obligations under international law and do not entail discrimination solely on the grounds of race, colour, sex, language, religion or social origin. Article 43 states:

> '[N]othing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set force in the international and regional human rights instruments

3 The Arab Charter on Human Rights, 22 May 2004, entered into force 15 March 2008.
4 The first seven countries to ratify the Charter are: Jordan (28 October 2004), Algeria (11 June 2006), Bahrain (18 June 2006), Libya (7 August 2006), Syria (6 February 2007), Palestine (28 November 2007) and the United Arab Emirates (15 January 2008).
5 Mao and Gady, 2021, pp. 425–446.

> which the states parties have adopted or ratified, including the rights of women, the rights of the child and the rights of persons belonging to minorities.'[6]

Additionally, according to Article 23, every violated person whose rights or freedoms are recognised in the Charter has the right to an effective remedy, even if the violation was committed by persons acting in an official capacity. Article 2 speaks of the right of all people to self-determination, free choice of political system, sovereignty and territorial integrity, with all forms of racism, Zionism and foreign occupation and domination constituting an obstacle to human dignity and a major barrier to the enjoyment of the fundamental rights. Moreover, all such practices must be condemned and efforts must be made to eliminate them. All people have the right to resist foreign occupation. Article 3 emphasises that its signatories:

> 'Undertake to ensure to all persons subject to its jurisdiction the right to enjoy the rights and freedoms set forth in this document, without distinction based on race, color, sex, language, religion, opinion, thought, national or social origin, property, birth, physical or mental disability.'

It further emphasises the equality of men and women:

> 'Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Sharia, other divine laws and by applicable laws and legal instruments.'[7]

The right to life is recognised in Article 5, even though the ACHR allows the death penalty. According to Article 6, the death penalty may only be applied in cases of the most serious crimes, following the laws in force at the time of the crime, based on a final judgment delivered by a competent court. Anyone sentenced to death has the right to apply for pardon or commutation of punishment. An additional limitation is provided in Article 7, which states that this penalty may not be imposed on persons under the age of 18 years, unless otherwise provided for by the laws in force at the time of the crime. Article 11 declares that everyone is equal before the law. The ACHR prohibits torture and cruel or degrading treatment (Article 8), experimentation on human beings against their will and trade in human organs (Article 9) and slavery, sexual slavery, human trafficking, forced labour and the use of children in armed conflicts (Article 10). It guarantees the independence of the judiciary (Article 12) and the right to a fair trial (Article 13) that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge or decide on rights or his obligations. Trials shall be public, except

6 On the meaning of Article 43, see: Mattar, 2013, pp. 91–147.
7 Almutawa and Magliveras, 2020, pp. 1–27.

in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights. Legal aid is guaranteed to those without requisite financial resources.

The criminal law guarantees in the ACHR include prohibition of arbitrary arrest (Article 14), retroactive application of the law (Article 15), the presumption of innocence and the right to defence, appeal or respect for the personal safety of the accused and their privacy in all circumstances (Article 16). Additionally, it prohibits the deprivation of liberty solely because of the inability to fulfil contractual obligations (Article 18), to be tried twice for the same crime (Article 19) and treating prisoners humanely (Article 20).

Furthermore, everyone has the right to the protection of the law against unlawful interference with his private, family or home life (Article 21) and to the recognition of his legal personality (Article 22). According to Article 24, every citizen has the right to participate in the management of public affairs directly or through freely chosen representatives and to run for office in accordance with the principle of equal opportunities, freedom of association and assembly. Article 32 expresses the right to information and freedom of opinion and expression, along with the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries, following the fundamental values of society, subject only to the restrictions required to ensure respect for the rights or reputation of others or protect national security, public order and public health or public morality.

Article 26 recognises freedom of movement per the applicable provisions of law. The expulsion of a foreigner requires a decision per the law; the expelled person may file a complaint unless important reasons of national security preclude this. Expelled collective are prohibited in all circumstances. Article 27 prohibits arbitrary or unlawful prohibition of leaving the country or forcing one to stay in any part of it, along with banishment and prohibition to return. The ACHR recognises the right to nationality (Article 29) and the right to seek political asylum (Article 28).

Regarding freedom of thought, conscience and religion, Article 30(1) states that 'no restrictions may be imposed on the exercise of such freedoms except as provided for by law'. Whereas, under Article 30(2), the freedom to manifest one's religion or beliefs or perform religious observances, either alone or in community, shall be subject only to such limitations as prescribed by law and are necessary in a tolerant society that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others. It is guaranteed that the parents or guardians have the freedom to provide for the religious and moral education of their children (Article 30(3)).

Article 31 guarantees the right to private property, emphasising that anyone 'shall not under any circumstances be arbitrarily or unlawfully divested of all or any part of his property'. Article 33 speaks of the right of a man and a woman to enter into marriage with the consent of both parties, leaving the age required unspecified (the details are left to the law in force in the specific state). It prohibits forms of violence

and abuse in relations between family members, especially towards women and children.

The right to work, recognised in Article 34, includes the right to just and favourable conditions of work, appropriate remuneration to meet essential needs and those of family and regulate working hours, rest and holidays with pay, along with the rules for the preservation of occupational health and safety and the protection of women, children and disabled persons in the place of work. The ACHR recognises the right to freely form trade unions or join trade unions and freely pursue trade union activity for the protection of interests and the right to strike (Article 35), the right of every citizen to social security, including social insurance (Article 36), the right to an adequate standard of living for oneself and one's family (Article 38), the right to the enjoyment of the highest attainable standard of physical and mental health and the right of the citizen to free basic health-care services and access to medical facilities without discrimination (Article 39) and the rights of the disabled (Article 40).

The right to free and compulsory education, at least throughout the primary and basic levels, is recognised in Article 41, while Article 42 recognises the right to take part in cultural life and enjoy the benefits of scientific progress and its application. Additionally, it guarantees the freedom of scientific research and creative activity and ensures the protection of intellectual property. The ACHR recognises collective rights, that is, the rights of minorities, and the right to economic, social, cultural and political development (Article 37). According to Article 25, persons belonging to minorities may not be deprived of the right to enjoy their culture, use their language and practice their religion.

Articles 45–48 contain provisions relating to the Arab Human Rights Committee (AHRC), which supervises the implementation of the provisions of the ACHR. Article 48 obliges the parties to submit periodic reports and publish the final report of the AHRC. There is no provision for submitting individual complaints, as the ACHR does not have individual or collective complaint mechanisms.

2.1.2. Other Relevant Arab League Treaties

Among other human rights treaties in the Arab League system, the following should be noted:

The Charter of the Rights of the Arab Child[8] was issued in 1983 and has been ratified by seven states (Jordan, Syria, Iraq, Palestine, Libya, Egypt and Yemen). The Charter emphasises that the rights guaranteed therein are to be provided to children without any discrimination. It emphasises the role of the natural family in raising, educating and caring for children. The basic rights of an Arab child are the right to family care and upbringing, the parents and/or guardian have the right to provide moral and religious education to the child, the social security and growing up in health and wellness, a suitable home that protects him and provides complete, balanced nutrition that is appropriate for his stage of growth, be known by a specific

8 Charter of the Rights of the Arab Child, 6 December 1983.

name and nationality from birth, free education and upbringing in the pre-school and basic education stages, integrated and balanced community and institutional social service, care and protection of the state from exploitation and physical and spiritual neglect, including limiting the possibility of employing children for work and 'be open to the world around him, to be raised on the love of human good, and to realise the importance of peace and friendship among peoples, and the love of his brothers in humanity'.

To guarantee these rights, states are obliged to strengthen the legislative framework by amending the relevant laws affecting children, and comprehensive policies and programmes to benefit children's development and well-being. All measures should be guided by the best interest of the child. Furthermore, the Charter provides for cooperation between Arab countries for protecting children's rights. It establishes a regular reporting procedure to the General Secretariat (Article 50) about the measures taken and achievements made to fulfil the provisions of the Charter, provided that these reports include a statement of the factors and difficulties that affect the degree of fulfilment of the obligations stipulated in the Charter.

The Arab Convention on the Status of Refugees in Arab Countries[9] of 1994 has not entered into force to date. Additionally, attention should be paid to the Casablanca Protocol on the Treatment of Palestinian Refugees, adopted in 1965,[10] which calls upon Member States to take the necessary measures to guarantee Palestinians full residency rights, freedom of movement within and among Arab countries and the right to work on par with citizens. However, these treaties provide narrower protection than the 1951 UN Convention Relating to the Status of Refugees, for example, they have no specific provisions relating to the number of rights, including the right to education and health.

The Arab Convention on the Status of Refugees obliges states to provide refugees a level of treatment no less than that accorded to foreign residents on their territories (Article 4) and prohibits discrimination against refugees based on race, religion, gender, country of origin and political or social affiliation (Article 7). The expulsion of a refugee is possible for reasons of national security or public order; however, it is subject to judicial review (Article 8). States shall issue to refugees lawfully residing in their territories identification cards and travel documents (Article 10). Refugees are obliged to respect the law of the host country (Article 11), refrain from performing any terrorist or subversive activity levelled against any country, including country of origin (Article 12) and for practicing his freedom of opinion and expression, a refugee shall refrain from attacking any country, including country of origin, nor shall he/she convey, by any means whatsoever, any such opinions or news that may create tension between the host country and other countries (Article 13). Nonetheless, there is no treaty body overseeing the implementation of the Arab Convention on the Status of Refugees. According to Article 15 of the Convention, this is entrusted to the Arab

9 Arab Convention on the Status of Refugees in Arab Countries, 27 March 1994.
10 Casablanca Protocol on the Treatment of Palestinian Refugees, 11 September 1965.

League Secretary General, who may request information from states, including on laws, regulations and decisions.

The Arab Convention on the Suppression of Terrorism,[11] adopted in 1998 and ratified by 16 Member States, entered into force on 7 May 1999. Among the Convention's problematic provisions is an overly broad definition of terrorism. According to it, terrorism is:

> '[A]ny act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources (Article 1(2)).'

Moreover, the scope of a terrorist offence is defined broadly (Article 1(3)). Article 2 provides an exclusion from the scope of terrorism: '[a]ll cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence'. However, it does not apply 'to any act prejudicing the territorial integrity of any Arab State'. It further excludes certain acts from the scope of political offence. The Convention establishes common procedures for intelligence (Articles 3–4) and judicial cooperation, with no guarantees for due process or non-refoulement (Articles 5–24).

2.1.3. Monitoring and Enforcement Mechanisms

The Arab regional human rights system currently has two bodies – the Arab Human Rights Committee and the Permanent Arab Committee on Human Rights – responsible for monitoring and enforcement mechanisms of the human rights obligations of States Parties. Furthermore, the establishment of an Arab Court of Human Rights (ACtHR) is envisaged.

2.1.3.1. Arab Human Rights Committee

The AHRC is the treaty body established in 2009 to oversee the implementation of the ACHR.[12] The ACHR is the first and, so far, the only Arab League treaty to have an independent supervisory mechanism embodied in the treaty. Pursuant to Article 45 of the ACHR, the AHRC shall consist of seven members elected by secret ballot by the States Parties to the Charter. The Committee shall consist of nationals of the States Parties, who must be highly experienced and competent in the Committee's field of work. The members shall serve in their personal capacity and shall be fully independent and impartial. They serve for four years and can be re-elected for one

11 Arab Convention on the Suppression of Terrorism, 22 April 1998.
12 Magliveras, 2016, pp. 155–157.

term. Only one expert from each country may sit on the Committee at any given time and due regard shall be given to the rotation principle.

Article 47 states that the members of the Committee shall enjoy the necessary immunities against any form of harassment, moral or material pressure or prosecution on account of the positions they take or statements they make while carrying out their functions. The Committee is responsible for:

1. Reviewing state reports: According to Article 48 of the Arab Charter, initial state reports are to be submitted within a year of the Charter entering into force in the State Party, with periodic reports to be submitted every three years. The Committee may request the States Parties to supply it with additional information regarding the implementation of the Charter. It shall consider each submitted report in the presence of the representative of the respective State Party. It shall discuss the report, comment thereon and make the necessary recommendations in accordance with the ACHR's aims. The AHRC shall provide State Parties with the guidelines on the form and content of the reports to ensure that they are prepared in a unified and comprehensive manner that would sufficiently explain the human rights situation in each state and the extent to which it is consistent with the ACHR's provisions.
2. Submitting annual reports to the Arab League: The Committee shall submit an annual report, with its comments and recommendations, to the Council of the League, through the intermediary of the Secretary-General.
3. Request information from Arab League bodies and Arab institutions
4. Interpret the Arab Charter: According to its Rules of Procedures, adopted in November 2014,[13] the Committee has the authority to interpret the Charter to ensure the optimal implementation of its provisions. The absolute majority adopts the Committee's decisions, remarks and recommendations.

The Committee's reports, concluding observations and recommendations shall be public documents, which the Committee shall disseminate widely. The AHRC does not have the authority to receive individual complaints regarding human rights violations committed by Member States. The AHRC meetings are quorate if attended by the majority of members. The meetings and sessions are held at its headquarters or at those of the Arab League General Secretariat. It can hold meetings and sessions in any of the State Parties by invitation.

2.1.3.2. Permanent Arab Committee on Human Rights

The Permanent Arab Committee on Human Rights (PACHR) is the main political human rights body of the Arab League, established in 1968. Each Member State of the

13 Rules of Procedure of the Arab Human Rights Committee, 4 January 2021.

Arab League sends one representative. The PACHR[14] provides that states should give due consideration to expertise in human rights when nominating representatives. Its main role is controlled by its internal regulations, including (Article 3):

1. Providing advisory opinions to Member States on various human rights issues based on the request of Member States.
2. Proposing the harmonisation of Arab agreements related to human rights in a manner consistent with international human rights standards and the international obligations of Member States in this regard.
3. Proposing and preparing draft Arab agreements related to human rights in accordance with international standards and the obligations of Member States in this regard.
4. Harmonising Inter-Arab agreements upon the request of the Member States.
5. Preparing studies and research related to human rights.
6. Studying the topics related to human rights referred to the Committee by the Council of the League, the General Secretariat or one of the Member States and submitting recommendations in this regard.
7. Cooperation with Arab committees within the framework of the League of Arab States on issues related to human rights.
8. Cooperation with the missions of the League of Arab States abroad regarding human rights issues.
9. Preparing a vision for the Arab position on human rights, regionally and internationally.
10. Strengthening cooperation with governmental bodies at the level of Member States in spreading and promoting human rights.
11. Providing technical support to Member States to follow up on the implementation of the recommendations of the treaty committees and non-treaty mechanisms of international and regional charters and agreements upon their request.

The PACHR's sessions are held twice a year. It can hold an extraordinary session as well. The Committee's meeting shall be valid if attended by representatives of the majority of the Member States. In the event of a lack of quorum, the meeting shall be held after 24 hours. (Article 4). The PACHR is restricted in what it can comment on. It can study matters referred to it by the Council, the Secretary General or Member States and prepare drafts of human rights treaties. However, it cannot mandate their adoption. Each Member State has one vote in the Committee. The Committee's recommendations shall be issued by consensus. If consensus cannot be achieved, the recommendations shall be issued by a majority of the members (Article 7).

Arab non-governmental organisations and National Human Rights Institutions may attend these sessions if granted observer status. An observer status requires

14 Internal regulations of the Permanent Arab Committee on Human Rights, September 2007.

NGOs to be registered in their home countries and with the Committee (Article 9). According to information from the Arab League, only 19 NGOs and one National Human Rights Institution (Morocco) had observer status in 2020.[15] The reports of the Committee's sessions are only available in Arabic. The PACHR has a technical secretariat, which follows up on the report's implementation and the Committee's recommendations (Article 11).

2.1.3.3. Arab Court of Human Rights

In 2012, the Kingdom of Bahrain proposed the creation of an ACtHR.[16] In 2014, the Ministerial Council of the Arab League adopted the statute of an ACtHR[17] and opened it for ratification. The statute will enter into force after seven ratifications. The first country to ratify it was Saudi Arabia in 2016. The Court shall be constituted of seven judges and be based in Bahrain.

The Court's subject-matter jurisdiction, according to Article 16 of the statute, is: '… all suits and conflicts resulting from the implementation and interpretation of the ACHR, or any other Arab convention in the field of Human Rights involving a member State'. It may only look into facts that are committed after the entry into force of the statute regarding the state in question (Article 17). The jurisdiction is complementary to the national judiciary and does not supplant it. The Court may hear a case in the following cases: a) exhaustion of local remedies in the respondent state by a final and definitive judgment according to the national legal regime, b) the case with the same subject matter has not been filed before another regional human rights court or c) the case has been filed six months after the notification of the claimant of the definitive judgment (Article 18).

The statute restricts access to the Court to State Parties and accredited NGOs permitted by the state to submit complaints on behalf of individuals (Article 19).[18] Article 21 allows the Court to issue opinions regarding any legal issue relating to the ACHR or any other Arab convention on human rights, based on the request of the League of Arab States' Assembly or any of the subsidiary organisations or authorities. Additionally, each judge is entitled to express dissenting opinions from the majority.

The Court shall be constituted of seven judges who are citizens of the States Parties. This number can be increased to 11 judges. Judges shall be elected for a four-year term and may be re-elected for a second non-renewable tenure. The Court may not include in its primary or reserve membership more than one judge of the same nationality (Articles 5 and 8). The judges should be persons known for their integrity and commitment to high moral values and possess competence and experience in legal or judicial office. They must have the qualifications required for appointment in the highest judicial or legal offices in their countries. Candidates with experience in

15 See: http://www.lasportal.org/ar/sectors/dep/HumanRightsDep/Pages/CommitteeSuperVisor.aspx.
16 Magliveras, 2016, pp. 157–170; Almutawa, 2021, pp. 506–532; Idem, 2022, pp. 479–500.
17 The Statute of the Arab Court of Human Rights, 7 September 2014.
18 Al-Dabbas *et al.*, 2024, pp.1793–1804.

the field of human rights are preferred (Article 7). The election of judges will be made by the Assembly of representatives of the States Parties by a secret ballot from a list of candidates. The candidates who receive the highest number of votes shall be selected as primary judges. The Assembly shall establish a list of reserve judges from among the candidates who were not elected as primary judges, according to the number of votes received (Article 6).

2.2. Organisation of Islamic Cooperation (OIC)

The Organisation of Islamic Cooperation (OIC) is an intergovernmental organisation established in 1969 to strengthen solidarity among Muslims. It now comprises 57 Member States. The OIC has devised several treaties, regulating cooperation in the political, economic, cultural and scientific areas. The OIC is headquartered in Saudi-Arabia.[19] It has historically challenged the notion of universal human rights, instead promoting a conception of Islamic human rights.

The OIC Charter[20] was amended in 2008, incorporating the promotion of human rights and protection of fundamental freedoms into its objectives. Its preamble provides for 'the promotion of human rights and fundamental freedoms [...] in Member States in accordance with their constitutional and legal systems, their international human rights obligations'. In Article 15 of the OIC Charter stipulates that the Independent Permanent Human Rights Commission (IPHRC) 'shall promote the civil, political, social and economic rights enshrined in the organization's covenants and declarations and in universally agreed human rights instruments, in conformity with Islamic values'.

2.2.1. Cairo Declaration of the Organisation of Islamic Cooperation on Human Rights (CDHR)

The Cairo Declaration of the Organisation of Islamic Cooperation on Human Rights (CDHR) is a declaration of the Member States of the OIC, first adopted in Cairo, Egypt, on 5 August 1990[21] under the name Cairo Declaration on Human Rights in Islam, later revised in 2020 and adopted on 28 November 2020.[22] It is the main reference document for human rights. It is a nonbinding declaration and serves as general guidance for the OIC Member States for human rights. It provides an overview of the Islamic perspective on human rights.

Its 1990 version did not have any mention of universal human rights. Instead, the declaration was expressly based on Islamic values. The preamble stated that 'fundamental rights and universal freedoms ... are an integral part of [Islam]' and are 'binding divine commandments' revealed to the Prophet Muhammad in the Quran.

19 Gieryńska, 2017, p. 244.
20 Charter of the Organisation of Islamic Cooperation (OIC), 4 March 1972.
21 Cairo Declaration on Human Rights in Islam, 5 August 1990. See more about the provisions of the old version of this declaration: Toumi, 2023, pp. 771–773.
22 Cairo Declaration of the Organisation of Islamic Cooperation on Human Rights, 5 August 1990.

Stating that '[a]ll the rights and freedoms stipulated in this Declaration are subject to the Islamic shari'ah' (Article 24), robbing human rights of their inalienability. Article 25 further made the Islamic Shari'ah 'the only source of reference for the explanation or clarification of any of the articles of this Declaration'. Islam was present in several detailed provisions of the declaration, for example, Article 10 stated:

> 'Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism.'

The 2020 version of the Declaration is more closely aligned with universal human rights norms. The revisions secularised the document by removing many of the references to Sharia and Islam. The OIC removed the mention of Sharia from the articles, though retaining it in the preamble. The current version does not contain an equivalent of former Article 10 and does not state, 'the husband is responsible for the support and welfare of the family'. However, it omits several rights, including the freedom of peaceful assembly and association and universal suffrage. The preamble states that 'all human rights are universal, indivisible, interdependent and interrelated and must be treated globally in a fair and equal manner, on the same footing, and with the same emphasis; and that it is the duty of States'. However, 'the significance of national and regional particularities and various historical, cultural and religious backgrounds' should be taken into account. The need was emphasised to ensure and protect the human rights, as safeguarded by the teachings of Islam. The exercise of these rights is to take place 'without prejudice to the principles of Islam which affirm human dignity and the respect and protection of human rights'.

It is important to interpret the Declaration in Article 25(a) of the CDHR, which stipulates, '[E]very one has the right to exercise and enjoy the rights and freedoms set out in the present declaration, without prejudice to the principles of Islam and national legislation'. Additionally, Article 25(b) states:

> 'Nothing in this declaration may be interpreted in such a way as to undermine the rights and freedoms safeguarded by the national legislation or the obligations of the Member States under international and regional human rights treaties as well as their sovereignty and territorial integrity.'

Furthermore, the Declaration in Article 12 guarantees refugees and migrants equal rights to the enjoyment of the human rights recognised therein. Article 1 of the CDHR expresses the principle of equality, without discrimination on the grounds of race, colour, language, sex, religion, sect, political opinion, national or social origin, fortune, age, disability or other status. It prohibits gross and systematic human rights violations, including slavery, servitude, forced labour and human trafficking.

Regarding the right to life (Article 2), the CDHR recognises 'the duty of State to protect this right from any violation', adding that 'No one shall be arbitrarily deprived

of this right'. It maintains the possibility of imposing the death penalty. However, it limits it to 'the most serious crimes in accordance with the law in force at the time of the commission of the crime'. It prohibits its use against minors and pregnant or nursing women. Furthermore, it prohibits 'to resort to such means that may result in genocide or the annihilation of mankind'. The Declaration in Article 4 guarantees the right to liberty and safety and prohibits torture. In states that no one shall be 'subjected to arbitrary arrest or detention, kidnapping or enforced disappearances', 'deprived of his/her liberty except on such grounds and in accordance with such procedures as are established by law', 'subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment', ' subjected to inhuman treatment while in custody; defendants shall be separated from convicted persons' and 'subjected to medical or scientific experiments, nor can their organs be used, without their free and informed consent and full heeding of potential medical complications'.

Similarly, the first sentence in Article 3 guarantees the right to 'inviolability and the protection of his/her good name and honor, during his/her life, and after his/her death'. The right to access to justice and fair trial (Article 22) states that 'due process and justice is guaranteed to everyone through competent, independent authorities and impartial tribunals, established by law, within a reasonable time'. It includes the right to the presumption of innocence, the right to defence, personal criminal liability, the principle of *nullum crimen sine lege* and *nulla poena sine lege* and the right to be compensated for victims of lawfully proven miscarriage of justice.

Regarding women's rights, Article 6 recognises their equality with men and states that a woman has the right to 'her own legal status and financial independence, and the right to retain her maiden name and lineage' and 'the right to motherhood in line with Allah's creation'. Article 5 emphasises their equal right to marry and form a family. Additionally, Article 6 declares:

> 'State and the society shall take all necessary measures to eliminate difficulties that impede the empowerment of women, their access to quality education, basic health care, employment and job protection and the right to receive equal remuneration for equal work as well as their full and effective participation in all spheres of life.'

The article adds that 'Women and the girl child shall also be protected against all forms of discrimination, violence, abuse and harmful traditional practices'.

Article 7 of the CDHR recognises the rights of the child:

> 'To such measures of protection as are required by his status as a minor, including nursing, education as well as material, and moral care, on the part of his family, society and the State. Both the fetus and the mother must be protected and accorded special care.'

It emphasises the state's obligation:

> 'To respect the responsibilities, rights and duties of the parents, and when applicable, legal guardians to choose the type of education of their children, including the religious and moral education, in conformity with their religious beliefs and ethical values while taking into consideration child's best interest as well as their evolving mental and physical capacities.'

Additionally, it points out that 'children have commitments toward their parents, relatives and kin'. Article 8 recognises the right to recognition everywhere as a person before the law. The right to freedom of movement is recognised in Article 11. The right to work, to fair wages, rest and leisure, including reasonable limitation of working hours and holiday allowances and promotions, and the right to form with others and join trade unions are recognised by Article 14. The right to own property (Article 16) and expropriation is not permissible except for the requirements of public interest and upon payment of full and fair compensation. Article 9 of CDHR recognises the right to education, including compulsory and free primary education. The right to protection of privacy is recognised in Article 19, while the right to the enjoyment of the highest attainable standard of physical and mental health is guaranteed by Article 18.

Article 13 recognises the right to nationality. According to it, 'no one shall be arbitrarily or unlawfully deprived of his/her nationality nor denied the right to change his/her nationality'. Article 20 recognises the right to freedom of thought, conscience and religion. It indicates that 'no one shall be subject to coercion, which would impair his/her freedom to have or to adopt a religion or belief of his choice'. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the rights and fundamental freedoms of others. Article 21 recognises the right to freedom of opinion and expression. Restrictions on this freedom may be imposed by law, limited to the following categories: propaganda for war, advocacy of hatred, discrimination or violence on grounds of religion, belief, national origin, race, ethnicity, colour, language, sex or socio-economic status, respect for human rights or reputation of others, matters relating to national security and public order and measures required for the protection of public health or morals. However, it introduces restrictions to freedom of expression, stating that this right 'should not be used to violate sanctities of the dignity of prophets, religions, religious symbols or to undermine moral and ethical values of society'. Article 22 recognises the right to participate in the conduct of public affairs, directly or indirectly through freely chosen representatives, the right to assume public office in accordance with the principles of equality of opportunity and non-discrimination, following the national legislation, and the freedom of peaceful assembly and association in accordance with national legislation.

However, the CDHR contains rights that are absent from the universal system of human rights. In Article 3, the first sentence provides for the protection of honour

during life and after death, while the second sentence protects people's remains and burial place. Additionally, it protects marriage as a union between a man and a woman and points to women's right to financial independence and retaining their name, eliminating the difficulties and discrimination that women face (Article 6). Article 5 indicates that 'the family is the natural and fundamental group unit of society. It is based on the marriage between a man and a woman'. Article 15 recognises the right to legitimate economic and financial gains 'without monopolization, deceit or harm to oneself or to others' and 'usury is absolutely prohibited'. Article 17 provides additional protection for intellectual property rights. Article 10 guarantees the right to self-determination. According to it, all 'peoples freely determine their political status and freely pursue their economic, social and cultural development'. It states:

> '[F]oreign occupation, subjugation and colonialism of all types are totally prohibited. Peoples suffering from occupation, or colonialism have the full right to freedom and self-determination. It is the duty of all States and peoples to support the struggles for the elimination of all forms of colonialism and occupation.'

Additionally, it states that people 'have the right to protect their political independence, national sovereignty, territorial integrity and unity, as enshrined in the UN Charter'. Article 23 protects the rights of all persons during war and armed conflict following the International Humanitarian Law, including 'but not limited to non-combatants, older persons, the infirm, persons with disabilities, women, children, civilians, journalists, humanitarian workers and prisoners of war'. Moreover, people are 'prohibited to desecrate holy places and places of worship, damage natural resources and environment and cultural heritage'. However, it also does not contain a ban taking hostages under any form or for any purpose contained in Article 21 in the 1990 version.

2.2.2. Covenant on the Rights of the Child in Islam

The OIC Covenant on the Rights of the Child in Islam[23] was adopted in June 2005. It has not entered into force due to a lack of ratifications. The Covenant lists several children's rights, the approach to which sometimes differs from that of the UN system. Notably, the exercise of the right provided for in the Covenant takes place 'in accordance with the regulations and without prejudice to Islamic Shariah'. Furthermore, refugee children have the right to enjoy the rights guaranteed therein 'to the extent possible' (Article 21). Article 1 includes the principle of equality and the prohibition of discrimination. The right to life (Article 5) is guaranteed from 'when he is a fetus in his / her mother's womb or in the case of his/her mother's death; abortion should be prohibited except under necessity warranted by the interests of the mother, the fetus, or both of them'. Article 7 recognises the child's right to an identity, which includes,

23 Covenant on the Rights of the Child in Islam, 28 June 2005.

inter alia, the right to 'know his/her parents, all his/her relatives and foster mother by suckling'. Article 8 guarantees the preservation of family cohesion.

The Covenant recognises several personal rights and freedoms of the child, including the right to forming your personality, the right to express their opinions freely in all matters affecting them and the right to respect their personal life (Article 9). Nevertheless, the parents or legal representative of the child:

Are entitled to exercise Islamic and supervision over the conduct of the child who shall not be subject of any restrictions other than those imposed in conformity with law and are necessary for the protection of public order, public security, public morals, public health, or the protection of the fundamental rights and freedoms of others.

Article 10 recognises the right to form and join any peaceful civilian gathering. Article 11 guarantees every child the right to upbringing, that is, it is 'the responsibility of his/her parents or legal guardian, as the case may be, and in which the institutions of the state, within their means, shall assist them'. Article 12 recognises the right to free and compulsory basic education by learning the principles of Islamic education (as well as belief and Shariah) and the provision of the necessary means to develop their mental, psychological and physical abilities to allow them to be open to the common standards of human culture. The Covenant mentions the right to rest and activity times (Article 13) and the right to custody and maintenance (Article 14). The latter includes, among others, the right to benefit from social security and the right to a living standard suitable to their mental, psychological, physical and social development, along with the right to alimony.

The Covenant recognises the right to physical and psychological care (Article 15). Additionally, disabled children and children with special needs have the right to 'receive a special care that guarantees his/her full rights and is commensurate with his/her case and the conditions of his /her parents or of the one responsible for him/her, as well as with available capabilities' (Article 16). Furthermore, the Covenant requires the protection of the child from illegal use of drugs, intoxicants and harmful substances or participation in their production, promotion or trafficking; all forms of torture or inhumane or humiliating treatment in all circumstances, conditions or his/her smuggling, kidnapping or trafficking, and abuse, particularly sexual abuse. An unusual provision is the protection against cultural, ideological, information and communication invasion. It further prohibits the involvement of children in armed conflicts or wars (Article 17). Article 18 prohibits children from performing 'any risk work, or work which obstructs his/her education or which is at the expense of his/her health as well as physical or spiritual growth'. It fixes a minimum working age, with working conditions and hours.

Article 19 regulates issues related to depriving a child of liberty. It orders expeditious consideration of such cases by a specialised juvenile court, with the possibility of the judgment being contested by a higher court once the child is convicted, and the establishment of a minimum age under which the child may not be tried. Article 20

indicates that '[p]arents or the one legally responsible shall be obliged to provide good education and upbringing for the child' and must protect the child from:

> 'Practices and traditions which are socially or culturally detrimental or harmful to the health, and from practices which have negative effects on his/her welfare, dignity or growth, as well as those leading to discrimination between children on basis of sex or other grounds.'

The Covenant contains three obligations for its States Parties under Article 4:

1. Respect the rights of the child guaranteed therein
2. Respect the responsibilities and rights of parents, legal guardians or other persons that are legally responsible for the child, as required by the child's interest
3. End action based on customs, traditions or practices that conflict with Islamic Sharia and the rights and duties stipulated in this Covenant.

2.2.3. Monitoring and Enforcement Mechanisms

The Covenant of the Rights of the Child in Islam envisions an Islamic Committee on the Rights of the Child, to meet biannually to discuss implementation progress (Article 45). Since the Covenant has not been ratified by a sufficient number of OIC members, no such committee has been established. Currently, the only monitoring body is the Independent Permanent Human Rights Commission (IPHRC).

The IPHRC was commissioned in 2005 after the OIC Council of Foreign Ministers held a programme titled 'OIC Ten-Year Programme of Action'. A resolution was adopted by the 3rd Extraordinary Islamic Summit held in Mecca, Saudi Arabia, on 7 December 2005. However, the partial formation of the commission took place by the 11th Islamic Summit, which was hosted between 13 and 14 March 2008 by Senegal in Dakar. It was formally created by the 38th session of the Council of Foreign Ministers between 28 and 30 June 2011 in Astana, Kazakhstan, with the adoption of its Statute.[24]

The IPHRC consists of 18 professional human rights-trained members. They are elected by the OIC Council of Foreign Ministers from three continents – Arab, Africa and Asia – with six members from each continent. Nominated by their governments, the members are elected for a term of three years. A member may serve in the commission only twice, and the term is renewable only once. The IPHRC organises two annual sessions focused on its principles. The dates are decided by the OIC Secretariat and IPHRC's bureau. The OIC's executive director is responsible for the preparation and submission of the Draft Agenda and Programme of Works to the commission members for final approval. The sessions' documents consist of reports, proceedings, conclusions and recommendations. The Secretary-General of the OIC is responsible

24 Statute of The OIC Independent Permanent Human Rights Commission, 28-30 June 2011. Rules of Procedure of the OIC Independent Permanent Human Rights Commission (IPHRC), 28-30 June 2011.

for the annual presentation of the session report to the Council of Foreign Ministers, which includes the IPHRC's activities.

IPHRC's objectives and mandates cover a range of activities, including the following:

1. Advising OIC's policy-and-decision-making bodies on all matters concerning human rights.
2. Undertaking studies and research in the field of human rights.
3. Advancing human rights and fundamental freedoms in Member States and fundamental rights of Muslim minorities and communities in non-Member States in conformity with the universally recognised human rights norms and standards, with the added value of Islamic principles of justice and equality.
4. Promoting and strengthening human rights in Member States by providing 'technical cooperation and assistance in the field of human rights and awareness-raising'.
5. Pursuing interfaith and intercultural dialogue to promote peace and harmony among various civilisations and promote the true image of Islam.
6. Extending support to Member States and their national institutions in the promotion and protection of human rights for all in an independent manner.
7. Reviewing OIC's human rights instruments and recommending ways for their fine-tuning, as and where appropriate, including recommending new mechanisms and covenants.
8. Promoting cooperative working relations with relevant bodies of the UN and OIC, along with relevant regional human rights mechanisms.
9. Promoting and supporting the role of Member States' accredited civil society organisations.
10. Participating in missions for observing elections in Member States.

Additionally, the IPHRC has some specific mandates given to it by the Council of Foreign Ministers, such as reporting on islamophobia and incitement to hatred and monitoring the human rights situation of Muslim minorities in Kashmir, Myanmar and the Central African Republic.[25]

2.3. The Gulf Cooperation Council (GCC)

The Gulf Cooperation Council (GCC) is an intergovernmental alliance of six monarchies on the Arabian Peninsula, namely Bahrain, Saudi Arabia, Qatar, Kuwait, Oman and the United Arab Emirates (UAE). It was created in 1981, as a way of fostering regional unity and cohesion in economics, education and culture. The Gulf Human

25 OIC Independent Permanent Human Rights Commission (IPHRC) (n.d.) *Mandate of the Commission,* 30 June 2011.

Rights Declaration (GHRD) was adopted by the High Council of the GCC in its summit in Doha in December 2014. The leaders of the Gulf states reaffirmed, in the preamble of the GHRD, their commitment to universal and regional human rights benchmarks, namely, the UDHR, ACHR and the CDHR. The interpretation of rights depends on a Muslim state's interpretation of Sharīʿah. Several protected rights have an additional caveat that requires such protection to be in accordance with domestic law.

The GDHR emphasised Islamic custom and tradition in its preamble. It emphasised:

> 'Deep belief in the dignity of the human being, respect for his rights and their commitment to the protection of those rights that are ensured by the Islamic Sharia law which embody the firm and noble values and principles in the conscience of their communities and constitute the basic constants of their policies at all levels.'

According to Article 44, the exercise of rights and freedoms takes place without prejudice to the provisions of Islamic Sharia law. However, the rights are subject to restrictions that are determined by the regulation (law) for securing and respecting the rights and freedoms of others and public order (Article 46), as the GDHR may not limit the rights and freedoms contained in national law or arising from other international obligations of its signatories (Article 47).

The GDHR is composed of 47 articles, covering fundamental rights and freedoms, including the right to life (Article 1), equality before the law (Article 2), freedom from slavery (Article 3), prohibition on medical and scientific experiments without the consent of the individual (Article 5), freedom of opinion and expression (Article 9), freedom of movement (Articles 10 and 11), legal personality (Article 12), nationality (Article 13), marry and form a family (Article 15), private life (Article 16), a standard of living adequate for the well-being of themselves and their family (Article 17), the child's right (Article 18, Article 19), live in a clean environment free of pollution (Article 20), healthcare (Article 21), comprehensive care and rehabilitation and consolidation for all people with special needs (Article 22), education (Article 23), work and just and favourable employment conditions, along with employees' and employers' rights (Article 24), protection and welfare (Article 25), social security and insurance (Article 26), property (article 27), cultural rights (Article 29), political participation (Article 30), freedom of association (Article 31), access to litigate with full independence of the judiciary (article 32) and other criminal law guarantees (Articles 33, 34, 35, 37, 38 and 42), prohibition of torture (Article 36), the right to seek asylum (Article 42) and appeal in the event of a violation of rights and freedoms (Article 45).

However, the GDHR, in Article 4, expresses that '[h]uman organs trade, shall be prohibited, and shall be considered as a violation of human rights, and a crime to be penalised by the regulation (law)'. Article 28 guarantees the right to enjoy national property and resources and the right to benefit from public services. The regulations relating to freedom of religion are original. Article 6 provides 'Freedom of belief and

the practice of religious rites is a right of every human according to the system (law) without prejudice to public order and public morals'. Article 7 provides 'Respect for the heavenly religions, absence of contempt for them or insulting their prophets or symbols, and respect for the cultural diversity of other nations is guaranteed according to the system (law)'.

The declaration recognises terrorism as a violation of human rights (Article 40) and indicates the obligation to respect the rules of International Humanitarian Law concerning armed conflicts (Article 43). It recognises that '[c]onsequences (burdens) of disasters and emergencies shall be the common responsibility of both the government and the community' (Article 39). The GDHR further recognises the family as the natural and fundamental group unit of society, originally composed of a man and a woman (Article 14). It orders promotion of goodness, love, fraternity, tolerance and other noble principles and values (Article 8).

3. Asian Perspective on Human Rights

In Asia, no one human rights system covers the entire region. A major hindrance to a pan-Asian human rights system is the absence of a shared identity between its 53 diverse states. However, there are sub-regional-level initiatives. There are two regional organisations in Asia with human rights mandates: the Association of Southeast Asian Nations (ASEAN) and the South Asian Association for Regional Cooperation (SAARC).

3.1. Association of Southeast Asian Nations (Asean)

ASEAN was established in 1967 by five states – Thailand, Indonesia, the Philippines, Malaysia and Singapore. Brunei joined in January 1984. ASEAN grew substantially in the late 1990s, with the end of the Cold War when four countries joined in rapid succession – Vietnam in July 1995, Laos and Myanmar (Burma) in July 1997 and Cambodia in April 1999. Additionally, Papua New Guinea and Timor-Leste have observer status. ASEAN's main purpose was to guarantee peace and stability within the region. Currently, it has three pillars: the ASEAN Economic Community (AEC), the ASEAN Political-Security Community and the ASEAN Social-Cultural Community. Economic integration is a key focus of ASEAN.

For decades, the protection of fundamental rights has been on the sidelines of ASEAN activities. The first declaration in Asia to involve multiple nations was the Southeast Asian declaration called the Declaration of the Basic Duties of ASEAN Peoples and Governments (1983).[26] However, since the early 1990s, this issue emerged, as evidenced by the adoption of the Bangkok Declaration on 2 April 1993[27] by several

26 Southeast Asian declaration, called the Declaration of the Basic Duties of ASEAN Peoples and Governments, 9 December 1983.
27 Bangkok Declaration, 8 August 1967.

Asian countries, including all ASEAN members. It reaffirmed the commitment of its signatories to respect fundamental rights guaranteed in the UN system and emphasised respect for sovereignty, the principle of non-interference in internal affairs, peaceful resolution of disputes and the right to development.[28] The Bangkok Declaration stated:

> '[We] [r]ecognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of norm-setting, bearing in mind the significance of national and regional particularities and the various historical, cultural and religious backgrounds.'

The same year, in September, the ASEAN Inter-Parliamentary Organization (AIPO) adopted the Kuala Lumpur Declaration of Human Rights (KLDHR).[29] The KLDHR was adopted by the 14th General Assembly of the AIPO in October 1993. It represented an early initiative to include human rights in the ASEAN agenda. It is the only comprehensive enumeration of human rights from ASEAN before the adoption of the ASEAN Human Rights Declaration (AHRD). It stated that the protection of fundamental rights should take into account respect for national sovereignty, territorial integrity and non-interference in the internal affairs of sovereign states. It noted that, in these rights, the rights and freedoms of the individual should be balanced with their duties towards the community. It further stated that human rights are influenced by the historical experiences of each country and changing economic, social, political and cultural conditions. On the one hand, it pointed to the dynamism of human rights and, on the other, to the impossibility of their simple universalisation.

Both declarations were an expression of 'Asian values' presented in the early 1990s by Mahathir bin Mohamad and Lee Kuan Yew. The concept of Asian values referred to Confucian ideas, deeply rooted in these societies, indicating that the Western understanding of rights and freedoms did not fit the local cultural context and certain limitations were the price for social stability and economic development.[30] The caution of ASEAN states towards the doctrine of human rights is reflected in the relative level of ratification of various UN treaties concerning these rights and the reservations expressed when signing them. Hence, the adoption of the new ASEAN Charter on 20 November 2007 paved the way for the development of the ASEAN regional system for the protection of human rights. Next came the adoption of the Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights (2009). The subsequent adoption of the AHRD (2012) and the Phnom Penh Statement on the Adoption of the AHRD, as the framework for regional cooperation for the promotion and protection of human rights, embodied the commitment of the governments of ASEAN

28 Stępień, 2010, pp. 23–31.
29 Kuala Lumpur Declaration on Human Rights, September 1993.
30 Gawlikowski, 1999, pp. 192–237; Drelich-Skulska, 2007, pp. 96–103; Brzuszczak, 2020, pp. 115–134.

to safeguard the human rights and fundamental freedoms of its people. Hence, the protection of fundamental rights has become a part of the cooperation agenda of ASEAN Member States.

3.2. Asean Charter

The ASEAN Charter[31] was adopted on 20 November 2007. The Charter, which entered into force on 15 December 2008, includes the protection of human rights as a goal and a principle in Articles 1(7) and 2(2.7). The Charter calls for 'respect for fundamental freedoms, the promotion and protection of human rights and the promotion of social justice', giving rise to political and legal obligations on the part of the Member States. However, it reaffirms the sovereign independence of all members, alongside an explicit commitment to 'non-interference in the internal affairs of ASEAN Member States', and provides that decision-making will be based on traditional ASEAN principles of consultation and consensus. Furthermore, it highlights the need for the establishment of a human rights body, as outlined in Article 14, which states that 'In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body'.

3.3. Asean Human Rights Declaration

The AHRD[32] was adopted unanimously by the ASEAN Member States on 18 November 2012. Its adoption was accompanied by the Phnom Penh Statement,[33] which provides that ASEAN Member States:

> 'REAFFIRM (sic) further our commitment to ensure that the implementation of the AHRD be in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and other international instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights.'

However, while in Africa, Europe and Latin America, the Member States commit to binding regional human rights treaties, the AHRD is a non-binding declaration. It includes 40 paragraphs under six headings. It reiterates several human rights laid down in the UDHR and other international human rights instruments to which ASEAN Member States are parties. However, the AHRD goes beyond the UDHR by explicitly including the rights to water and sanitation and the rights to solidarity, development, a clean environment and peace.

31 Charter of the Association of Southeast Asian Nations, 20 November 2007.
32 Association of Southeast Asian Nations (ASEAN) (2012) *ASEAN Human Rights Declaration (AHRD) and Phnom Penh Statement on the Adoption of the AHRD*, 18 November 2012.
33 Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD), 19 November 2012.

The AHRD's preamble places it in the context of 'adherence to the purposes and principles of ASEAN as enshrined in the ASEAN Charter', referring to 'other international human rights instruments of which ASEAN Member States are parties'. The first part of the AHRD, entitled 'General Principles' (Articles 1-9), commences with an assertion of the inherent freedom of all persons and their equality in dignity and rights (Article 1). Article 2 holds that every person is entitled to equality in the rights set out in the AHRD. Article 3 guarantees every person's right to recognition by equality before and entitlement to protection of the law. Article 5 states that every person has the right to an effective and enforceable remedy, to be determined by competent authorities, 'for acts violating the rights granted to that person by the constitution or by law', rather than the rights granted under international law. Article 4 identifies particular social groups ('women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups') and recognises that their rights are 'an inalienable, integral and indivisible part of human rights and fundamental freedoms'.

The AHRD subjects the enjoyment of fundamental rights to a 'balancing' with state-imposed duties on individuals. Article 6 mentions that 'The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives'. However, 'It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms'. Nevertheless, in Article 7, it distinguishes regional human rights standards from universal standards and those in other regional systems, providing:

> 'All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, and cultural, historical and religious backgrounds.'

Hence, Article 7 is a limitation of rights pursuant to the international human rights law called Margin of Appreciation.

Article 8 mentions:

> 'The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order,

> public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.'

Therefore, it permits limitations and restrictions for all rights across the AHRD. Additionally, it allows them without imposing the required conditions of necessity and proportionality and for purposes more expansive than under international law. Article 9 refers to the need to avoid 'double standards' and 'politicization' in the realisation of human rights and freedoms.

The next 16 articles (Articles 10–25) set out civil and political rights. The provisions mark a relatively minor departure from the rights set out in the UDHR in 1948, with the absence of reference to the right of association notwithstanding. Article 10 affirms 'all the civil and political rights in the Universal Declaration of Human Rights'. Article 11 affirms the inherent right of people to life and includes a positive obligation to protect life 'by law'. However, it does not address the death penalty. Article 12 refers to the right of 'personal liberty and security'. However, it expresses no positive obligations in circumstances of non-arbitrary arrest, search or detention. Regarding the prohibition on servitude or slavery, Article 13 adds that persons shall not be subject to 'human smuggling or trafficking in persons, including for the purpose of trafficking in human organs'. The prohibition on torture or cruel, inhuman or degrading treatment or punishment is explicitly mentioned in Article 14.

Article 15 guarantees every person the right to freedom of movement and residence within the borders of each state. Furthermore, every person has the right to leave any country, including their own, and return to their country. Regarding the right to asylum, Article 16 states that 'Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements'. This right is contingent on national law. Article 17 includes the right of every person to 'own, use, dispose of and give' lawfully acquired 'possessions' and provides that 'no person shall be arbitrarily deprived of such property'. Article 18 asserts that every person has a right to a nationality 'as prescribed by law'. Article 19 identifies the family as the 'natural and fundamental unit of society'. It identifies the right of men and women to freely marry, form a family and dissolve a marriage; however, it does not provide for equal rights between the sexes in these instances. Article 20(1) provides for the presumption of innocence and a fair trial before an independent, impartial tribunal, before which the accused is guaranteed the 'right to defence'. However, it does not provide the right to appeal, compensation for wrongful conviction or the safeguards accorded to juveniles in the criminal justice process. Article 20(2) recognizes the principles of *nulla poena sine lege* and *nulla poena sine lege*, and Article 20(3) provides that, no person shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each ASEAN Member State.

Article 21 guarantees the 'right to be free from arbitrary interference' with people's privacy, family, home or correspondence, including personal data, or 'to attacks upon that person's honour and reputation'. The first sentence of Article 22 states that 'Every

person has the right to freedom of thought, conscience and religion'; however, it does not mention the right to 'have or adopt a religion'. The second sentence provides no positive obligation on the state to ensure the free observation, manifestation and practice of a particular religion. It only states that 'all forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated'. The AHRD does not stipulate the right to change religion and manifest religion in teaching, practice, worship and observance. Article 23 expresses the 'right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information'. According to Article 24, 'Every person has the right to freedom of peaceful assembly'. Regarding participation in the government, Article 25 guarantees that 'Every person who is a Citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law'. Furthermore, it provides 'the right to vote in periodic and genuine elections, which should be by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law'.

The third section sets out 'Economic, Social and Cultural Rights'. Article 26 affirms 'all the economic, social and cultural rights in the Universal Declaration…', with these described in Articles 27-34. However, Article 33 states that economic, social and cultural rights are to be realised 'progressively' and 'to the maximum of [Member States'] available resources'. Additionally, Article 34 provides that Member States may determine the extent to which non-nationals may avail of these rights. The AHRD recognises the rights to 'adequate and affordable food, freedom from hunger and access to safe and nutritious food' (Article 28(a)) and to clothing (Article 28(b)), housing (Article 18(c)) and medical care and social services (Articles 28(d), 29(1) and 30). However, the AHRD goes beyond the UDHR by explicitly guaranteeing 'the right to safe drinking water and sanitation' (Article 28(e)), 'the right to a safe, clean and sustainable environment' (Article 28(f)) and protection from discrimination in treatment for 'people suffering from communicable diseases, including HIV/AIDS' (Article 29).

Article 27(1) provides every person the right 'to enjoy just, decent and favorable conditions of work and to have access to assistance schemes for the unemployed'. Article 27(2) asserts the right to form and join trade unions in accordance with national law. Article 27(3) brings certain rights of children out of the family context into the work context, stating:

> 'No child or any young person shall be subjected to economic and social exploitation. Those who employ children and young people in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development, including their education should be punished by law. ASEAN Member States should also set age limits below which the paid employment of child labour should be prohibited and punished by law.'

The right to education (including universal and free access to primary education) is recognised in Article 31. Article 32 includes the rights to freely take part in cultural life, enjoy the arts and the benefits of scientific progress and its applications and benefit from the protection of the moral and material interests resulting from any scientific, literary or appropriate artistic production of which one is the author. While Articles 10–25 and 26–34 set out the first and second generation rights, Articles 35–38 set out the third generation rights, including collective rights to development and peace. However, other third-generation rights are omitted, for instance, reference to the rights of indigenous peoples, suggesting their partial or selective promotion. Significantly, the AHRD does not set out a collective right to self-determination, nor identify distinct threats such as colonialism or neo-colonialism, distinguishing the Declaration from the ACHPR (1981) and from the Bangkok Declaration (1993).

In the third substantive part of the AHRD, Articles 35–37 set out the right to development. Article 35 expresses the right to development as 'an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development'. The second sentence of Article 35 inserts a reference to inter-generational needs. The third sentence states that 'the lack of development may not be invoked to justify the violations of internationally recognised human rights'. Article 36 mentions that ASEAN Member-States 'should' adopt 'people-oriented and gender responsive' development programmes, with the aim of poverty alleviation, the creation of conditions for 'the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis' (with reference to 'the protection and sustainability of the environment') and 'the progressive narrowing of the development gap within ASEAN'. Article 37 recognises the implementation of the right to development requiring both national policy and 'equitable economic relations, international cooperation and a favourable international economic environment', and the obligation on ASEAN states to 'work with the international community to promote equitable and sustainable development, fair trade practices and effective cooperation'.

The fourth part, in Article 38, sets out the right to peace, providing that '[e]very person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this declaration can be fully realised'. The fifth and final part of the AHRD consists of two articles. Article 39 provides for cooperation among ASEAN Member States for the promotion and protection of human rights and with other national, regional and international entities, following the ASEAN Charter. Article 40 provides:

> '[N]othing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN, or at the destruction of any of the human rights and fundamental freedoms set forth in this Declaration and international human rights instruments to which ASEAN Member States are parties.'

The AHRD, in the future, may create the foundations for an Asian system of human rights protection based on values other than European values. As a non-binding document, it does not violate the international legal obligations of ASEAN Member States regarding protecting fundamental rights resulting from international treaties ratified by these states, which are a part of the universal human rights system. Additionally, it is the latest set of standards in human rights adopted by all Member States. The AHRD is an interesting document among the acts internationalising the protection of fundamental rights. It presents the fundamental rights differently from the current European human rights system. The link between fundamental rights and the performance of duties that each person has towards the community deserves special attention. It recognises the existence of some collective human rights (the right to development and the right to peace). Moreover, it devotes a lot of space to social rights. Most importantly, it indicates that the idea of human rights must take into account and respect the differences in the models of political, social and economic systems, cultural and religious differences and the different historical experiences of each country. This is especially valuable since sometimes the instrumentalisation of human rights becomes a tool for political pressure. Hence, the AHRD is a good foundation for future binding instruments of this organisation in the area of human rights.

3.4. Other Asean Declarations and Conventions

Aside from the AHRD, ASEAN Member States have adopted several declarations and conventions on the protection of specific human rights. The 2007 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (Cebu Declaration)[34] addresses the human rights obligations of both receiving as well as sending states. The obligations of the receiving states include, '[f]acilitate access to resources and remedies through information, training and education, access to justice, and social welfare services', '[p]romote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers', provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system and facilitate the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any manner.

The obligations of the sending states include, '[e]nsure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers' and regulation of the issue of 'recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin'. The provisions of the Declaration do not apply to undocumented migrant workers (Paragraph 4). The provisions of the Cebu Declaration were developed in the ASEAN Consensus on the Protection and Promotion of

34 ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 13 January 2007.

the Rights of Migrant Workers (2017)[35] and ASEAN Declaration on the Protection of Migrant Workers and Family Members in Crisis Situations and its Guidelines.[36]

The ASEAN Convention against Trafficking in Persons, Especially Women and Children[37] (ACTIP) was signed by ASEAN leaders during the 27th ASEAN Summit, on 21 November 2015 in Kuala Lumpur, and entered into force on 8 March 2017, once six ASEAN Member States had deposited the instrument of ratification of the Convention. It is ASEAN's first regional legally binding instrument to combat human trafficking, aiming to strengthen regional cooperation against human trafficking among ASEAN Member States. It builds on the ASEAN Declaration against Trafficking in Persons particularly Women and Children, which was adopted in 2004.[38] The purposes of this Convention are to (1) prevent and combat trafficking in persons, especially women and children, (2) protect and assist victims of trafficking in persons and (3) promote cooperation among the parties to meet these objectives. The ACTIP recognises the need for more coordinated collaborative efforts across the region to prevent and improve responses to human trafficking. For example, it emphasises the protection of the integrity of passports and identity documents, exchange of information on migratory flows and strengthening of the supervisory capabilities and monitoring mechanisms in migration. The overarching goal is to ensure that ASEAN Member States have effective justice systems that penalise human trafficking perpetrators and protect the human rights of the victims. Hence, it contains provisions on criminalisation of human trafficking, participation in an organised criminal group, laundering of proceeds of crime, corruption and obstruction of justice.

The Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN[39] of 2013 references the Convention on the Elimination of Violence Against Women (CEDAW) and its treaty body. The declaration provides for 1) the enactment or amendment of national legislations, 2) integration of legislations, policies and measures for the prevention and elimination of violence against women and children and protection and assistance of the victims/survivors, 3) development of strategies to eliminate harmful practices, which perpetuate gender stereotyping and violence against women and children, 4) adoption of a gender responsive, child sensitive and age-responsive public policies, 5) strengthening of existing national mechanisms, 6) promotion of research and data collection and analysis, good practices, sharing of information and exchange of experts, social workers and service providers, including NGOs and 7) bilateral and regional cooperation.

35 ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, 14 November 2017.
36 ASEAN Declaration on the Protection of Migrant Workers and Family Members in Crisis Situations and its Guidelines, 10 May 2023.
37 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015.
38 ASEAN Declaration against Trafficking in Persons Particularly Women and Children, 29 November 2004.
39 Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN, 9 October 2013.

3.5. Asean Mechanisms and Procedures

ASEAN has established several mechanisms to support the implementation of its human rights declarations. These are the ASEAN Inter-governmental Commission on Human Rights (AICHR), the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). All three are supported by the ASEAN Secretariat. These focus on the promotion rather than on the protection of human rights. In other words, they seek to raise awareness on human rights; however, they do not offer a complaints mechanism for individuals or groups or a procedure for the Member States to report on their commitments at the regional level.

3.5.1. Asean Inter-Governmental Commission on Human Rights (AICHR)

The AICHR is an 'overarching institution responsible for the protection and promotion of human rights in ASEAN'.[40] It was inaugurated by the ASEAN leaders on 23 October 2009 at the 15th ASEAN Summit in Cha-Am Hua Hin, Thailand,[41] following Article 14 of the ASEAN Charter and as a part of its political-security pillar. According to its Terms of Reference (ToR),[42] the AICHR is an intergovernmental body with an advisory function.[43] It is comprised of 10 government representatives, one per ASEAN Member State. The selection processes of the AICHR representatives differ by state; however, they must, at a minimum, take into account the individual's integrity and competence in the field of human rights and ensure gender equality within the Commission. Member States are not obliged to have a transparent or consultative selection process. Each AICHR representative serves a term of three years and may be re-appointed for a second term. The government may decide at any time to replace its AICHR representative, without notice or explanation.

The Commission operates through consultation and consensus, following Article 20 of the ASEAN Charter. This means that it cannot act without the full agreement of all 10 representatives. Its mandate includes:

1. Developing strategies for the promotion and protection of human rights and fundamental freedoms
2. Enhancing public awareness of human rights through education, research and dissemination of information
3. Undertaking capacity building for the effective implementation of ASEAN Member States' international human rights treaty obligations and ASEAN human rights instruments
4. Encouraging ASEAN Member States to ratify international human rights instruments

40 Ramcharan, 2010, pp. 204–206.
41 Cha-Am Hua Hin Declaration on the Inter-governmental Commission on Human Rights, 23 October 2009.
42 ASEAN Inter-governmental Commission on Human Rights (Terms of Reference), 20 July 2009.
43 Khoo, 2017, pp. 66–75.

5. Providing ASEAN with advisory services and technical assistance on human rights matters upon request
6. Engaging in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organisations and other stakeholders
7. Obtaining information from ASEAN Member States on the promotion and protection of human rights
8. Developing common approaches and positions on human rights matters of interest to ASEAN
9. Preparing thematic human rights studies
10. Performing any other tasks assigned by the ASEAN Foreign Ministers Meeting.

One of its mandates was 'to develop an ASEAN Human Rights Declaration'. However, it mandates do not contain explicit provisions for receiving and investigating complaints of human rights violations. The AICHR is tasked with mainstreaming human rights across sectors and can influence and engage with all three ASEAN pillars. The Commission's ToR require a review of its work 'with a view to further enhancing the promotion and protection of human rights within ASEAN' (Articles 9.6 and 9.7 of the ToR). The AICHR's priority areas are found in the Five-Year Work Plan, which is based on its 10 mandates outlined in the ToR. Each year, it specifies the high-priority programmes and activities for the year based on the Work Plan and in response to emerging exigencies on human rights in the region. It holds two regular meetings per year and additional meetings when necessary, providing annual reports to the ASEAN Foreign Ministers and other reports, as required.[44]

3.5.2. Asean Commission on the Promotion and Protection of the Rights of Women and Children (ACWC)

The ACWC was established in 2010 as part of ASEAN's socio-cultural pillar of cooperation to develop policies and programmes to benefit women and children in ASEAN countries.[45] Each ASEAN country sends two representatives to ACWC – one each for women's rights and children's rights. The representatives serve for three years and can only serve two terms. The government may decide at any time to replace its representative without notice or explanation. The ACWC ToR requires that the representatives be appointed through a transparent, open and participatory selection process. When appointing representatives, the Member States must take into account the candidates' competence in women and/or child rights, their integrity and gender equality within the Commission.

The ACWC meets at least twice a year and can hold additional meetings on special topics, if required. Its decision-making is based on consultation and consensus,

44 Wahyuningrum, 2014, pp. 13–23.
45 Pisanò, 2016, pp. 321–332; Wahyuningrum, 2015, pp. 91–98.

following Article 20 of the ASEAN Charter. This means that, like the AICHR, the ACWC cannot act without the full agreement of all its representatives. It sends an annual report to the ASEAN Ministers Meeting on Social Welfare Development (AMMSWD) and a copy to the ASEAN Committee on Women (ACW) and other relevant ASEAN sectoral bodies. The AMMSWD meets once every three years.

Like the AICHR, the ACWC does not have a specific mandate to receive and investigate complaints of human rights violations. Its ToR[46] defines its purpose, mandate and functions. Its primary purpose is to promote and protect the human rights and fundamental freedoms of women and children in ASEAN. It is tasked with upholding rights contained in the CEDAW and the Convention on the Rights of the Child (CRC), which all 10 ASEAN Member States have ratified. Its mandates include:

1. Promoting the implementation of international and ASEAN instruments on the rights of women and children.
2. Advocating on behalf of women and children, especially the most vulnerable and marginalised, and encouraging the Member States to improve their situation.
3. Promoting public awareness and education about the rights of women and children in ASEAN, including promoting research on the situation and well-being of women and children.
4. Assisting, upon request by ASEAN Member States, in fulfilling their international human rights reporting obligations on women's and children's rights.
5. Encouraging the Member States to collect and analyse sex disaggregated data and undertake periodic reviews of national legislation, policies and practices related to the rights of women and children.
6. Facilitating the sharing of experiences and good practices between ASEAN Member States to improve the implementation of CEDAW and CRC.
7. Supporting the participation of ASEAN women and children in dialogue and consultation processes in ASEAN related to the promotion and protection of their rights.

The ACWC is obliged, by its ToR, to keep the public periodically informed of its work and activities.

3.5.3. Asean Committee on the Implementation of the Asean Declaration on the Promotion and Protection of the Rights of Migrant Workers (ACMW)

The ACMW was established in 2007 to ensure the effective implementation of the Cebu Declaration. It is composed of one senior from each of the Member States and a representative from the ASEAN Secretariat. Its purpose, as defined by its Statement

46 Terms of Reference ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, 22 October 2009.

of the Establishment,[47] is to ensure that the commitments made under the Cebu Declaration are implemented and develop an ASEAN instrument for the protection and promotion of the rights of migrant workers.

Its functions are as follows:

1. Explore all avenues to achieve the objectives of the Declaration
2. Facilitate the sharing of best practices in the ASEAN region on matters concerning the promotion and protection of the rights of migrant workers
3. Promote bilateral and regional cooperation and assistance on matters involving the rights of migrant workers
4. Facilitate data sharing on matters related to migrant workers for enhancing policies and programmes to protect and promote the rights of migrant workers in both sending and receiving countries
5. Encourage international organisations, ASEAN Dialogue Partners and other countries to respect the principles and extend support and assistance to the implementation of the measures contained in the Declaration
6. Promote harmonisation of mechanisms between both sending and receiving countries that promote and protect the rights of migrant workers to implement the ASEAN commitment reflected in paragraph 17 of the Declaration
7. Work closely with the ASEAN Secretariat in the preparation of the report of the Secretary-General of ASEAN to the ASEAN Summit
8. Work towards the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers

However, the ACMW, as an intergovernmental body, does not have a complaints mechanism or a state reporting procedure. It meets annually and reports to the Senior Labour Officials Meeting (SLOM).

3.6. South Asian Association for Regional Cooperation (SAARC)

SAARC, founded in 1985, primarily aimed to further economic and regional integration. It has eight Member States – Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. SAARC's model of cooperation is based on the principles of sovereignty and non-interference.[48] The SAARC Charter of 1985[49] makes indirect references to human rights in Article 1(b), stating that all individuals should have the opportunity to 'live in dignity and to realise their full potential'. It neither lists specific measures nor encourages the development of an SAARC human rights body. However, it has adopted several conventions addressing specific human rights.

47 Statement of the Establishment of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 6 July 2012.

48 Ahammad, 2024, pp. 1–15.

49 SAARC Charter, 8 December 1985.

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Convention on Trafficking)[50] came into force in 2006. Its purpose is to promote cooperation to effectively deal with the various aspects of prevention, interdiction and suppression of trafficking of women and children, the repatriation and rehabilitation of trafficking victims and prevent the use of women and children in international prostitution networks, particularly where SAARC countries are the countries of origin, transit and destination. It emphasises that the trafficking of women and children for prostitution is a human rights violation. It recognises that trafficking can occur with or without the consent of the victim and does not require the victim to move across borders. However, it is limited to trafficking for prostitution and does not include the trafficking of men.

The SAARC Convention on Trafficking includes a commitment to recognise human trafficking as a crime 'under their respective criminal law and shall make such an offence punishable by appropriate penalties which take into account its grave nature' (Articles III and IV). Hence, in court proceedings conducted in such cases, judicial authorities 'shall ensure that the confidentiality of the child and women victims is maintained and that they are provided appropriate counselling and legal assistance' (Article V). Articles VI and VII contain provisions on mutual legal assistance and extradition. However, the Convention does not mention the need to cooperate multilaterally or inter-regionally with non-SAARC countries. The subsequent articles concern measures to prevent and interdict trafficking of women and children (Article VIII), and care, treatment, rehabilitation and repatriation of the victims (Article IX).

The 2002 Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia[51] is a regional affirmation of the international commitments made under the UN Convention on the Rights of the Child, which the Convention defines as 'as a comprehensive international instrument concerning the rights and well being of the child'. The Convention recognised 'the best interests of the child' as a principle of paramount importance, stating that 'the primary responsibility of looking after the well-being of the child rests with the parents and family'. However, the state has the right and authority to ensure the protection of the best interests of the child. A key focus is knowledge sharing through training programmes and the promotion of greater awareness through mass education.

The Convention further ensures that national laws:

1. Protect the child from any form of discrimination, abuse, neglect, exploitation, torture or degrading treatment, trafficking and violence
2. Prohibits child labour and the entry of children into hazardous and harmful labour

50 Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 5 January 2002.

51 Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 5 January 2002.

3. Orders that juvenile justice is administered in a manner consistent with the promotion of the child's sense of dignity and worth, with the primary objective of promoting the child's reintegration in the family and society
4. Provide special care and treatment to children in a country other than the country of domicile and expectant women and mothers who are detained along with infants or very young children, and promote, to the best possible extent, alternative measures to institutional correction, keeping in mind the best interest of the child
5. Introduce compulsory civil registration of births, marriages and deaths in an official registry to facilitate the effective enforcement of national laws, including the minimum age for employment and marriage

The 2004 Social Charter[52] states, as one of its objectives, the promotion of universal respect for the observance and protection of human rights. It refers to existing human rights standards, particularly women's rights (Article VI), children's rights (Article VII), the right to health (Article IV) and the right to education and human resource development (Article V). The Social Charter speaks about the fight against drug addiction (Article IX). It highlights the right to development, emphasising the need for poverty alleviation, along with:

> 'Access to basic education, adequate housing, safe drinking water and sanitation, and primary health care should be guaranteed in legislation, executive and administrative provisions, in addition to ensuring of adequate standard of living, including adequate shelter, food and clothing.'

The provisions relating to the need to stabilise the population are unusual. The Social Charter states that population stabilisation 'should aim to bring stabilisation in the growth of population in each country, through voluntary sustainable family planning and contraceptive methods, which do not affect the health of women' (Article VIII). Hence, the Social Charter may constitute the beginning of a future regional system of human rights protection.

In the Charter of Democracy[53] (2011), the SAARC Member States committed to strengthening democratic institutions and reinforcing democratic practices, including through effective coordination and checks and balances among the Legislature, the Executive and the Judiciary. It guarantees the independence of the Judiciary and primacy of the rule of law and ensures that the processes of appointments to the Judiciary and the Executive would be fair and transparent, recognising political parties and civil society.

The Technical Committee on Women, Youth and Children is the monitoring mechanism within SAARC. Its members are government representatives. It reviews

52 Social Charter, 4 January 2004.
53 Charter of Democracy, 23 January 2012.

the status of the implementation of the Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia and the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.

4. Protection of Human Rights in the Commonwealth of Independent States

The conclusion of the Agreement establishing the Commonwealth of Independent States (CIS),[54] signed by the leaders of Russia, Belarus and Ukraine at a meeting in Minsk on 8 December 1991 can be considered the starting point of regional integration processes in the post-Soviet era. On 22 January 1993, the Charter of the Commonwealth of Independent States was adopted.[55]

Concerning the protection of human rights, Article 3 of the CIS Charter proclaims one of the organisation's goals to ensure human rights and fundamental freedoms for all, irrespective of race, ethnicity, language, religion, political or other beliefs. This norm has been specified in the Declaration of the Heads of State of the CIS on international obligations in the field of human rights and fundamental freedoms on 24 September 1993.[56] This document noted the responsibility of Member States to protect the rights and freedoms of individuals and confirmed the commitment to the goals and principles enshrined in the UN Charter and the UDHR. Furthermore, Article 5 stated 'a firm intention to develop and conclude shortly the Convention of the Commonwealth of Independent States on Human Rights'. Hence, on 26 May 1995, the CIS Convention on Human Rights and Fundamental Freedoms was adopted.

4.1. Cis Convention on Human Rights and Fundamental Freedoms

The Convention on Human Rights and Fundamental Freedoms of the CIS (CIS Convention on Human Rights)[57] was opened for signature in Minsk on 26 May 1995, and signed by seven of the eleven CIS Member States (Armenia, Belarus, Georgia, Kyrgyzstan, Moldova, Russia and Tajikistan). It has since been ratified by the Russian Federation, Tajikistan and Belarus and entered into force on 11 August 1998, the day the third instrument of ratification was deposited by Belarus. It was later ratified by Kyrgyzstan. In other words, most Member States of the Commonwealth neither

54 Соглашение о создании Содружества независимых государств, Минск, 8 декабря 1991 года [Agreement on the Establishment of the Commonwealth of Independent States, Minsk, 8 December 1991].

55 Устав Содружества Независимых Государств, Минск, 22 января 1993 года [Charter of the Commonwealth of Independent States (Minsk, 22 January 1993].

56 Декларация Совета глав государств Содружества Независимых Государств от 24 сентября 1993 г., [Declaration of the Council of Heads of State of the Commonwealth of Independent States, 24 September 1993].

57 Конвенции Содружества Независимых Государств о правах и основных свободах человека, 26 мая 1995 г., Минск [Conventions of the Commonwealth of Independent States on Human Rights and Fundamental Freedoms, Minsk, 26 May 1995].

ratified the fundamental document on the protection of human rights in the Eurasian region nor signed it.

The CIS Convention comprises a preamble and 39 articles. It enshrines a broad list of fundamental human rights, incorporating the provisions and principles of several universal and regional human rights instruments. Articles 1-29 cover all the rights protected, while the remaining articles deal with interpretation, authorised restrictions, reservations, arrangements for entry into force and other matters.

The Convention recognises the right to life (Article 2), adding that 'until abolished, the death penalty may be applied only in pursuance of a judicial sentence for particularly grave offences'. The death penalty cannot be imposed on women who are pregnant at the time of sentencing and on persons for crimes committed before the age of 18 years, and cannot be executed in the case of women who are pregnant when the sentence is to be carried out. Furthermore, it includes a prohibition on torture or cruel, inhuman or degrading treatment or punishment, emphasising that '[n]o one shall be subjected to medical or scientific experiments without his free consent' (Article 3). It further prohibits slavery or servitude and being constrained to perform forced or compulsory labour (Article 4).

The Convention guarantees equality before the law and prohibits discrimination 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property or official capacity, place of birth or other status' (Article 20). Persons belonging to national minorities have the right to express, preserve and develop, without hindrance, their ethnic, linguistic, cultural or religious identity (Article 21). Following Article 19 '[e]veryone whose rights and freedoms are violated shall be entitled to be effectively restored to his rights and freedoms'. Following Article 5, everyone shall have the right to liberty and security. However, it specifies the cases in which deprivation of liberty may occur and the rights of a person deprived of liberty.

Article 6 recognises the right to a court, the presumption of innocence and the rights of the person accused of committing a criminal offence. Article 7 guarantees that no one shall be 'held liable for an act which did not constitute an offence under national legislation or International law at the time when it was committed' or 'convicted or punished a second time for an offence for which he has already been convicted or punished'. Furthermore:

> '[N]or shall a heavier penalty be imposed than the one that was applicable at the time the offence was committed. If, after an offence is committed, a law establishes a lesser punishment for it or eliminates liability for it, the new law shall be applicable'.

It includes the right to have the judgment of the court reviewed by a higher judicial body and apply for a pardon or request a lighter sentence.

The Convention prohibits the deprivation of liberty for reasons 'merely on the ground of his inability to fulfil a contractual obligation of any kind' (Article 8), and

ensures the right to respect for private and family life, home and correspondence (Article 9), the right to freedom of thought, conscience and faith (Article 10) and the right to freedom of expression (Article 11). Moreover, it recognises the right to marry and form a family (Article 13) for both men and women, according to the national legislation'. A marriage requires 'the free and full consent of the intending spouses'. Article 13 further guarantees the economic, legal and social protection of family life for creating the necessary conditions for the development of the family, which is the fundamental unit of society.

The Convention recognises the right to liberty of movement and freedom to choose residence (Article 22), the right to recognition of legal capacity (Article 23) and the right to citizenship (Article 24). It prohibits the expulsion of citizens and deprivation of the right to enter the territory of the state of which one is a citizen, and the collective expulsion of aliens (Article 25).

> 'Among the political rights, it recognises the right to freedom of peaceful assembly and to association with others, including the right to form and join trade unions for the protection of interests (Article 12). Additionally, it recognises the right to 'take part in the management and conduct of public affairs, either directly or through freely chosen representatives', 'vote and to be elected at elections held on the basis of universal and equal suffrage by secret ballot, that guarantees the free expression of the will of voters' and 'have access, on general conditions of equality, to the public service of his country' (Article 29).

The CIS Convention contains several economic, social and cultural rights. Article 26 guarantees the right to own property. Deprivation of property can only occur in public interest, under a judicial procedure, following the conditions laid down in national legislation and the generally recognised principles of international law. Article 14 recognises the right to work, protection from unemployment, equal remuneration for equal work, including work-related benefits, identical conditions for work for all and equal treatment in the quality assessment of work. Article 18 recognises the right to occupational rehabilitation, vocational training and social reintegration facilities. Article 28 lists the measures that states are obligated to follow for the right to vocational training.

Article 15 guarantees the right to health protection. Article 16 guarantees the right to social security, including social insurance, according to the person's age, in cases of illness, invalidity, loss of breadwinner and upbringing of children and in other cases provided for in national legislation. Article 17 recognises the rights of the child. The right to education (Article 27) includes compulsory and free elementary and fundamental education. The Convention adds that it 'shall respect the right of parents to ensure for their children such education and teaching as corresponds with their own convictions and national traditions'.

The rights and freedoms set out in the Convention are guaranteed to everyone (Article 1). The CIS Convention foresees a control mechanism in the form of the Human Rights Commission of the Commonwealth of Independent States (CIS Commission on Human Rights). The Commission monitors the execution of the Convention by issuing recommendations, and its members are appointed representatives of the State Parties.

4.2. Other CIS Conventions on Human Rights Protection

In addition to the 1995 Convention, attention should be paid to the Convention on Provision for Rights of Persons Belonging to National Minorities (1994) and the Convention on Standards of Democratic Election, Voting Rights and Freedoms in the Member States of the Commonwealth of Independent States (2002). Additionally, the CIS has several other conventions, treaties and agreements relating to the protection of human rights, including the Convention on the Status of Correspondents Representing Mass Media of a Member State of the Commonwealth of Independent States in Other States of the Commonwealth (2004),[58] Convention on the Legal Status of Migrant Workers and Members of Their Families of the Member States of the Commonwealth of Independent States (2008),[59] and those relating to cooperation in criminal matters and combating terrorism.

1.1.1.1. 4.2.1. Convention on Provision for Rights of Persons Belonging to National Minorities

The Convention on Provision for Rights of Persons Belonging to National Minorities[60] is an international treaty signed by 10 CIS countries (Ukraine and Azerbaijan – with reservations) in October 1994 in Moscow. It entered into force in 1997 after ratification by Belarus, Azerbaijan and Armenia. It was ratified and entered into force for Tajikistan in 2001 and in Kyrgyzstan in 2003. Monitoring the implementation of the convention is entrusted to the Commission on Human Rights, as provided for by the CIS Charter (Article 13). However, this body is not endowed with any 'hard' powers in this regard and there is no obligation to submit periodic reports on the implementation of the Convention's provisions.

The Convention is the only universally binding act of international law that contains a definition of the concept of a national minority. According to it:

58 Конвенция о статусе корреспондента, представляющего средство массовой информации государства – участника Содружества Независимых Государств в других государствах Содружества, 16 апреля 2004 года [Convention on the Status of a Correspondent Representing a Mass Media Outlet of a CIS Member State in Other CIS States, 16 April 2004].

59 Конвенция о правовом статусе трудящихся-мигрантов и членов их семей государств – участников Содружества Независимых Государств, 14 ноября 2008 года [Convention on the Legal Status of Migrant Workers and Members of Their Families of the CIS Member States, 14 November 2008].

60 Конвенция об обеспечении прав лиц, принадлежащих к национальным меньшинствам, 21 октября 1994 года [Convention on the Protection of the Rights of Persons Belonging to National Minorities, 21 October 1994].

> 'For the purposes of the Convention, the concept of persons belonging to a national minority shall be understood as persons permanently residing in the territory of one of the Contracting Parties and having its citizenship, who are distinguished by their ethnic origin, language, culture, religion or tradition from the rest of the population of the given Contracting Party' (Article 1).

However, belonging to a national minority is not, according to it, a matter of objective circumstances, that is, distinct ethnic origin, language, religion, culture or tradition; instead, it is a subjective matter, that is, related to the free choice of each individual. Furthermore, the Convention provides that recognising oneself as a member of a national minority will not cause any adverse effects for such a person (Article 2). It emphasises that persons belonging to national minorities will be guaranteed civil, political, social, economic and cultural rights and freedoms in accordance with generally recognised international standards in human rights and national law. Additionally, it contains a prohibition of discrimination against persons belonging to national minorities, indicating that each country 'shall take measures to prevent any discrimination against citizens on its territory on the grounds of belonging to a national minority'. However, the measures are not specified. It is indicated that 'respect for the rights of persons belonging to national minorities also means that these persons fulfill their duties towards the state in whose territory they live' (Article 3).

In the following part, the Convention indicates that persons belonging to national minorities have the right, individually or together with members of their group, to express, maintain and develop their ethnic, linguistic, cultural or religious identity without hindrance. This is accompanied by an obligation to consider the legitimate interests of national minorities in policies and take the necessary measures to create favourable conditions for preserving their ethnic, linguistic, cultural or religious identity. It is stipulated that such measures serve the interests of the whole society and may not lead to the infringement of the rights of other citizens (Article 4). Article 8 indicates that persons belonging to national minorities are guaranteed the right, individually or together with members of their group, to profess their religion and perform religious rites following their faith, to maintain cultural facilities, acquire and use items necessary for the performance of worship and conduct religious education in their native language. However, such activity may not be inconsistent with the national legislation.

The Convention indicates the obligation to ensure the right to participate in social and state life, resolving matters concerning the protection of national minorities' interests at the regional level. Particularly, Article 5, paragraph 2, mentions that each state guarantees persons belonging to national minorities the right to establish, following the national legislation, various organisations (associations, communities, etc.) of an educational, cultural and religious nature to preserve and develop ethnic, linguistic, cultural and religious identity. The organisations shall have the same rights as granted to other similar organisations concerning the use of public buildings, radio, television, the press and other media. According to Article 9, organisations of persons

belonging to national minorities of an educational, cultural and religious nature may be financed from voluntary monetary and other contributions and may receive assistance from the state based on its legislation. They may receive further assistance from state and social organisations of other parties to the Convention, while maintaining the requirements provided for by the legislation of the state in which they are based. In practice, in the area of participation in social and state life, the Convention does not refer to other rights that could be granted to national minorities, such as the possibility of establishing guaranteed representation in representative bodies at the local level and in the parliament and the obligation to take into account the interests of national minorities when changing the state's administrative division.

The Convention recognises the right of persons belonging to national minorities to maintain contacts among themselves without obstacles in the country of residence and the right to maintain links with citizens and organisations of states with which they share a common ethnic origin, culture, language or religious beliefs (Article 6). It further recognises the right to spell names and surnames in the manner accepted in the native language and use the native language, including access to media broadcasting in that language. Additionally, states should create, following the national legislation, conditions for the use of the language of national minorities in contacts with official authorities, where possible and necessary (Article 7). Articles 10 and 11 define the actions to be taken by states that are parties to the Convention to support the preservation of the ethnic, linguistic, cultural and religious identity of national minorities.

4.2.2. Convention on Standards of Democratic Election, Voting Rights and Freedoms in the Member States of the CIS

The Convention on Standards of Democratic Election, Voting Rights and Freedoms in the Member States of the CIS[61] is a CIS convention signed in October 2002 and entered into force in 2003 after ratification by Kyrgyzstan, Russia and Tajikistan. Later, Armenia, Moldova, Kazakhstan and Belarus became parties to the Convention. Georgia and Ukraine are signatories to the Convention (both accompanied the signing with reservations).

The Convention's preamble sets out the reasons for its adoption, including the belief 'that elections are one of the political and legal instruments of a stable civic society and a sustainable development of the state'. Democratic elections are one of the highest direct expressions of the people's power and will and are the basis of elective bodies of governmental power and local self-government, of other bodies of people's (national) representation and elective officials (Article 1(1)). The main restriction in the Convention is the inadmissibility of any direct or indirect participation of foreign subjects in the electoral process (Article 1). It describes in detail the principles of

61 Конвенция о стандартах демократических выборов, избирательных прав и свобод в государствах - участниках СНГ, 7 октября 2002 года [Convention on Standards of Democratic Elections, Electoral Rights and Freedoms in States – Members of the CIS, 7 October 2002].

electoral law, including universal suffrage (Article 2), equal suffrage (Article 3), direct suffrage (Article 4), secret ballot (Article 5), periodicity and an obligatory nature of elections (Article 6), open and transparent elections (Article 7), free elections (Article 8), authentic elections (Article 9) and fair elections (Article 10).

Article 11 states that the preparation and conducting of elections, provision for and protection of citizens' voting rights and freedoms and their observance are to be borne by electoral bodies (election commissions) whose status, competence and powers are established by the Constitution and legislative acts. Article 12 regulates the financing of elections, the election campaign of candidates and political parties (coalitions). The financing of measures connected with elections is executed at the expense of budget resources. Additionally, it enshrines the principle of forming election funds for candidates, political parties and coalitions from state funds, along with personal funds and voluntary cash donations from physical and/or national legal entities. It prohibits any foreign donations, including those from foreign physical and legal entities, for candidates, political parties (coalitions), participating in elections or other public unions and organisations, which directly or indirectly, or in any manner relate to or are under a direct influence or control of the candidate, political party (coalition) and facilitate or contribute to accomplishment of goals of the political party (coalition). The other provisions are combined into the principle of openness and transparency of election financing and donations to candidates and political parties (coalitions) participating in the elections.

Article 13 enshrines the principle of state information support for elections and campaigning activities, which is primarily revealed through the freedom to collect and disseminate information and the involvement of the media in this process. Hence, the principle of equality, equal access of all candidates and other election participants to the media and telecommunications for election campaigning is important. The Convention contains regulations concerning the observation of the electoral process by both domestic observers (Article 14) and international observers (Article 15). It proclaims the right to appeal and responsibility for the violation of electoral rights as an important right. Article 16 states:

> 'In the case of breach of the election standards, of the citizen's voting rights and freedoms, proclaimed in this Convention, the person or persons whose rights are infringed should have the right and possibility to appeal and to restore the infringed rights at courts. One should have the right to appeal to electoral bodies in the cases stipulated by the laws. … persons guilty of perpetration of actions (inaction) forbidden by the laws should bear responsibility in accordance with the laws.'

The Convention establishes, as a principle, the publication of election documentation in the state's official language, in the official languages of the composite parts of the territory of state, in accordance with the procedure stipulated by the national laws, and in languages of the nations and nationalities, national minorities and ethnic

groups in the territories of their compact living (Article 17(1)). It indicates that measures that should not be considered as discriminatory are:

> a) special measures undertaken in order to provide for adequate representation of any part of the country's population, in particular, of national minorities and ethnic groups, which actually is, due to political, economic, religious, social, historical and cultural conditions, deprived of the possibility to avail itself of an equal standing in respect of political and election rights and freedoms as the rest of the population; b) limitation of the right to elect and be elected with respect to citizens recognised by a court as incapable as well as of those being kept in detention upon the court's sentence.

It acknowledges:

> '[L]imitations regarding nomination of candidates, lists of candidates, relating to creation and activities of political parties (coalitions), citizens' voting rights and freedoms can be applied in the interests of defence of the constitutional system, national security, maintenance of public peace, protection of public wealth and morality as well as protection of rights and freedoms of citizens; however, the given limitations should comply with international obligations of the state' (Article 18).

Article 19 sets out the obligations of the parties to the Convention related to its implementation. Article 21 establishes the status of the Interstate Electoral Council to render assistance in observing elections in the states party to the Convention and observe the fulfilment of the Convention's provisions. Article 20(1) emphasises:

> '[N]othing in this Convention shall prevent fulfilment by the states of their international commitments on preserving citizen's voting rights and freedoms. In particular, the states should honestly fulfil the duties and obligations that they have undertaken in accordance with the international agreements and treaties of which they are the parties.'

4.3. Control Mechanism

The establishment of the Human Rights Commission of the CIS is provided for by Article 33 of the CIS Charter, as an advisory body of the Commonwealth that monitors the implementation of human rights obligations by the Member States (Article 34). The Regulation on the Commission was accepted, which established norms on its composition and work organisation, the procedure for considering appeals of the parties and the procedure for considering appeals of individuals and non-governmental organisations. However, the Commission was never created. Hence, until recently, the 1995 CIS Convention did not have an effective mechanism for monitoring its implementation.

On 14 October 2022, the Council of Heads of State of the CIS approved a new version of the Regulation.[62] In July 2023, the procedure for the formation of the CIS Human Rights Commission was completed, which included representatives and deputy representatives from the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan and the Republic of Uzbekistan. Following the Regulation, the Commission shall include persons who are citizens of the Member States, possessing high moral qualities and recognised competence in human rights and freedoms, and who have experience in protecting them. Each state shall appoint its representative and deputy representative to the Commission for a term of four years, notifying the CIS Executive Committee. Any state may decide to terminate the powers of its representative or deputy representative in the Commission, notifying the CIS Executive Committee. The meetings of the Commission shall be convened following its rules of procedure; however, not less than once a year. It holds closed meetings, except in cases where its decision provides otherwise. The decisions shall be made by consensus and shall be advisory in nature.

The Commission shall adopt its own rules of procedure, which shall determine the quorum, the procedure for holding meetings, making decisions, developing and reviewing reports and other aspects of its work.[63] Following the Regulation, the Commission has the right to prepare thematic reports on topical issues of promoting and protecting human rights and freedoms in the CIS. Such reports are advisory in nature and may contain proposals for improving the CIS legal framework and the legislation of states for the promotion and protection of human rights and freedoms, and as recommendations aimed at uniting the efforts of states to promote and protect human rights in the CIS (paragraph 12). The Commission has the right to consider national reports submitted by states on the promotion and protection of human rights and freedoms in their states (paragraph 13).

The Commission has the right to, within the framework of its competence, consider appeals from parties and/or individuals on issues of possible violation of human rights, if each of the interested parties has recognised the competence of the Commission regarding the relevant category of appeals following its legislation and has sent a notification to the CIS Executive Committee. Such recognition may be revoked by the relevant party (paragraph 15). However, at present, the Commission cannot consider such appeals, since the Decision of the Council of Heads of State of the CIS does not define the conditions of admissibility and the procedure for considering such appeals.

62 Положение о Комиссии по правам человека Содружества Независимых Государств, 14 октября 2022 года [Regulations on the Human Rights Commission of the Commonwealth of Independent States, 14 October 2022].

63 Правила процедуры Комиссии по правам человека Содружества Независимых Государств, Приняты решением Комиссии по правам человека Содружества Независимых Государств от 29 ноября 2023 года. [Rules of Procedure of the Human Rights Commission of the Commonwealth of Independent States, Adopted by the Decision of the Human Rights Commission of the Commonwealth of Independent States on 29 November 2023].

Additionally, when signing the Decision on the approval of the new version of the Regulation, certain states made reservations. Particularly, the Republic of Armenia declared the exclusion of the application of paragraph 15, which regulates the consideration by the Commission of appeals on issues of possible violation of human rights, while the Republic of Tajikistan did not recognise the competence of the Commission to consider appeals of parties and individuals, as provided in paragraph 15. The Commission shall submit an annual report of its activities to the Council of Heads of State of the CIS.

5. Conclusions

The human rights protection systems presented in this chapter complement the universal human rights system and allow for the specificity of individual regions and the challenges they face in this area. In the Arab system of human rights protection, there are binding documents in this area; however, in many of them, the low level of ratification is noteworthy, and some, such as the Statute of the ACtHR, which would strengthen the control mechanisms in this system, have still not been ratified. This organisation has Acts related to the protection of children's rights and the rights of refugees.

In the case of the OIC, the basic act in human rights protection is the Cairo Declaration; however, in the remaining acts, there are non-binding declarations or political statements. Within this system, there is a Pact on the Rights of the Child; however, it has not entered into force due to the insufficient number of ratifications. Similar to the Arab League, there is no extensive system of control over the OIC's implementation of obligations. In the case of the GCC, only the Gulf Declaration of Human Rights was adopted in 2014, which is a non-binding document. This subsystem lacks effective mechanisms for monitoring compliance with the commitments of the Declaration, and separate protection for groups particularly vulnerable to fundamental rights violations. Simultaneously, the Member States of this organisation are members of the Arab League and the OIC.

In ASEAN, this system is dominated by various non-binding documents (Declarations) concerning the protection of fundamental rights and the protection of the rights of certain groups, such as migrant workers and women and children, concerning human trafficking and violence. Regardless of the non-binding nature of these acts, they are supported by various guidelines and action programmes. Within the organisation, there are certain procedures for monitoring the implementation of the commitments; however, they are limited and, as in the case of other discussed systems, do not provide for individual complaints or the establishment of a judicial body. The second organisation in Asia is SAARC, which has binding conventions on the protection of women and children who are victims of human trafficking and the protection of children's rights. However, it lacks a general document on fundamental rights and is not replaced by documents, such as the Social Charter or the Charter

of Democracy, referring to democratic institutions. It has a modest mechanism for monitoring only the commitments concerning the two previously mentioned sensitive groups.

In the CIS, there are binding international agreements on human rights, including those concerning the protection of certain groups of people (e.g., members of national minorities). Until recently, it lacked any mechanism for monitoring the commitments undertaken. However, now it has the Human Rights Commission of the CIS operating, albeit with limited powers.

In my opinion, the system for protecting fundamental rights within ASEAN and the OIC has the greatest practical significance. In the future, it is possible to develop the SAARC system. The practical significance of all the discussed systems results from the possibility for the states that create them to account for the regional perspective on fundamental rights and coordinate and agree on their position at the UN forum. However, it seems difficult to establish a binding, judicial mechanism for protecting human rights in these systems due to the strong emphasis by the Member States on their sovereignty and the principle of non-interference in the internal affairs of the States Parties.

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Part IV
‘Connecting Worlds’: Interactions Between the Inter-American and European Human Rights Systems

| Chapter 10 |

Significance of the Regional Human Rights Mechanisms: Interactions Between the Inter-American and European System of Human Rights

Jakub J. Czepek

ABSTRACT

Over the years, the American and European system of human rights protection have developed their legal ecosystems, which address human rights violations. However, both systems differ based on numerous factors, including legal traditions, legal systems, culture, human rights challenges, resources and other particularities of the region. Nonetheless, both systems share certain similarities as well. They are both based on fundamental values enshrined in the Universal Declaration of Human Rights (UDHR) and initially shared the same institutional blueprint, which was procedurally visible before the adoption of Additional Protocol No. 11 to the European Convention of Human Rights (ECHR). Even though the approach to certain rights and their interpretation by both European and Inter-American Courts may differ, both systems interact and influence each other. This relation is visible in the jurisprudence of both Courts. Both approach certain rights or freedoms similarly and refer to each other's case laws. This chapter compares both systems and examines their mutual influences.

KEYWORDS

Inter-American Court of Human rights, European Court of Human Rights, ECHR, ACHR, case-law, regional human rights systems, Inter-American human rights protection system

1. Introduction

Comparing two regional human rights systems is not easy. The concept of the coexistence of universal human rights protection system and regional systems are based on the assumption that the regional human rights systems will differ based on numerous factors, such as legal traditions, legal systems, culture, religion, human rights challenges, resources and other particularities of the region. Adopting different

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approaches is necessary to address the human rights challenges in the regions more effectively. Regional human rights systems should provide legal and procedural mechanisms tailored for the needs of the region and acceptable to the states parties to proceed with ratifications. Furthermore, they must remain mindful of the cultural and traditional context of human rights. The African system sets the perfect example for this necessity. It focuses on individuals and refers to the 'peoples'.[1] This is a clear reference to the African culture, in which a person is perceived as an individual and as a member of a group, such as tribal, national, etc.

In regional human rights systems, it is crucial to adopt solutions tailored to address certain issues of a particular region. The differences will evolve over time and will result in establishing legal ecosystems that gradually vary. To some extent this may mean the existence of substantial differences between particular regional human rights protection systems. Despite such differences, regional human rights systems do not operate in vacuum and influence each other. Such mutual influences are noticeable between regional systems and between universal and regional systems.

Regional legal systems may implement human rights more effectively by giving states levers to influence the conduct of a state found to be in violation. Regional institutions possess local expertise and are better equipped to assess the significance of historical and legal facts in human rights claims.[2] In comparison to the universal human rights system, regional systems will not perceive human rights protection identically. Their insight into regional contexts will enable greater cultural and ideological homogeneity in a region. It may permit agreement on a fuller list of human rights or their detailed definition than the 'universal' processes have achieved.[3]

Even though both the European Convention on Human Rights (ECHR)[4] and American Convention on Human Rights (ACHR)[5] were inspired by the Universal Declaration of Human Rights (UDHR),[6] their differences are clearly visible. The ACHR was adopted after the ECHR and the two Covenants (International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)). This enabled wider insight in other human rights protection systems. Despite similar backgrounds, some of their provisions went in different directions.[7]

Nevertheless, there are several similarities. Despite being created in different decades, in the late 1950s and 1970s, both the European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACtHR) were based on the same institutional blueprint. They had the power to interpret the respective Conventions.

1 See: African Charter on Human and Peoples' Rights, 27 June 1981, entered into force 21 October 1986.
2 Neuman, 2008, p. 106.
3 Ibid.
4 European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms), 4 November 1950.
5 American Convention on Human Rights (Pact of San José), San José, 22 November 1969.
6 Universal Declaration of Human Rights, UN General Assembly Resolution 217A, 10 December 1948.
7 E.g. Arts. 14 and 18 of the ACHR.

Furthermore, both Courts would work with a regional human rights commission that would function as a quasi-judicial filter. Additionally, they would serve as supranational bodies and would be open to applicants who had exhausted all available domestic remedies.[8]

The initial legal and socio-political of the IACtHR and ECtHR were significantly different. The ECtHR was established as a 'product of a Cold War political compromise'[9] or to 'fine-tune established democracies and prevent them from backsliding into authoritarianism'.[10] However, the IACtHR was operating in a region 'characterised largely by authoritarian regimes, mass atrocities, and violent human rights violations, such as massacres in indigenous communities and prisons, as well as widespread forced disappearances of political dissidents'.[11] Although a lot has changed since then, it remains clear that the socio-political context significantly impacted the way both Courts operated, their approach to human rights protection and their evolution.

Before focusing on the interactions between the Inter-American and European systems of human rights regarding their jurisprudence, it is crucial to examine the similarities and differences between both systems concerning their institutional structure and organisation. Moreover, it is essential to analyse the differences and similarities between the two Conventions.

2. American and European Regional Human Rights Protection Systems: Institutional Framework

As mentioned, both the ECHR and the ACHR were conceptually based on the UDHR. Since the ACHR was established later, it was partly influenced by the ECHR system and both Covenants as well. Hence, the ECHR and ACHR, to some extent and despite visible differences, were similar in the scope of the rights protected and in their institutional sphere.

The ECtHR was established in 1959; however, it became active in the 1990s. This change was introduced by Protocol No. 11 to the ECHR.[12] The Protocol was adopted in 1994 and entered into force in 1998. It completely remodelled the ECHR institutional system. The European Commission on Human Rights (ECmHR) was decommissioned and individual applications could be brought directly to the ECtHR. This resulted in the Court opening up for individual applications, with an unprecedented increase in applications and its scale. Before the Protocol, in the 39 years since it was established (1959-1998), the Court gave 837 judgments. Three years later, in 2001, it gave 888

8 Yildiz, 2020, pp. 312–313.
9 Madsen, 2016, p. 141.
10 Yildiz, 2020, p. 313.
11 Cavallaro and Brewer, 2008, p. 774.
12 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994, ETS No 155.

judgements.[13] Hence, it gave more judgments in a single judicial year than nearly 40 years of its existence.

The ECtHR went through different stages in its functioning and number of applications. The initial 20 years were relatively calm.[14] At the time, the Court gave one judgment per year, on average. It was the time of establishing the ECtHR's jurisprudence regarding basic terminologies and interpretations of the Convention.[15] In 1970s, the Court gave several of its classical judgments, which changed the way the human rights obligations was perceived.[16] The ECtHR introduced the evolutive interpretation of the Convention, the 'living instrument' concept, which states that the 'Convention is a living instrument, which must be interpreted in the light of present-day conditions'.[17] It stressed that the Convention guarantees 'not rights that are theoretical or illusory but rights that are practical and effective'.[18] The establishment of both doctrines was crucial for ensuring the effectiveness of the rights enshrined in the Convention and guaranteeing their actualisation 'in the light of present-day conditions'. Both remain important landmarks in the ECtHR's jurisprudence. Their significantly impacted the effectiveness of the Convention system and influenced other systems of human rights protection. All the Council of Europe (CoE) Member States have signed and ratified the Convention. The only example of leaving the ECHR was Russia, which was excluded from the CoE on 16 March 2022, following the aggression on Ukraine. Russia ceased to be a party to the ECHR on 16 September 2022. However, the applications against the Russian Federation filed in the Court before this date will be examined.

The IACtHR was established in 1979, which makes it 20 years younger than the ECtHR. Nevertheless, the history of human rights protection in the Americas dates back to the American Declaration of the Rights and Duties of Man (ADRDM),[19] which was adopted in 1948, before the UDHR. Institutionally, the Inter-American Commission on Human Rights (IACmHR) was established before the IACtHR.[20] However, it is not a body of the ACHR but an organ of the Organization of American States (OAS).[21] The IACtHR started its mission in completely different circumstances than its European counterpart. It had to deal with other realities, including authoritarian regimes, mass atrocities, violence and violations of human rights.[22] Moreover, unlike the

13 ECHR, Overview 1959-2020, p. 4.
14 See: Hunneus and Madsen, 2018, pp. 140–141.
15 Dąbrowska, 2021, p. 241.
16 Ibid., p. 243.
17 ECtHR Judgment *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, § 31.
18 ECtHR Judgment *Airey v. Ireland*, 9 October 1979, Application no. 6289/73, § 24; ECtHR Judgment *Tysiąc v. Poland*, 20 March 2007, Application no. 5410/03, § 113.
19 American Declaration of the Rights and Duties of Man, 2 May 1948, Ninth International Conference of American States, Art. 19.
20 More: Hunneus and Madsen, 2018, pp.139–141.
21 See: Protocol of Amendment to the Charter of the Organisation of American States („Protocol of Buenos Aires"), 27 February 1967, Art. XII, Art. XV; Dąbrowska, 2021, p. 39. See more: Chapter Institutional framework for human rights protection in Americas: The Inter-American Commission on Human Rights.
22 More: Goldman, 2009, pp. 856–887.

ECtHR, it did not have very strong support from the regional authorities, namely the OAS.[23] In the first decade of its existence, the IACtHR issued only advisory opinions, because the IACmHR did not provide any case for the Court's examination. However, later, it started to play an effective role in human rights protection in the region.[24]

Several periods of evolution can be distinguished in the Court's history. Until the 1980s, the IACtHR had to deal with brutal political regimes, which caused mass human rights violations. At that point, the states unwillingly accepted its jurisdiction. When the Court issued its first report in 1980, only Costa Rica was under its jurisdiction.[25] It was the only state that formally deposited the instrument accepting the Court's competence in general and all cases.[26] In 1986, the Commission submitted the first cases to the IACtHR. This led to the Court's first landmark judgment in *Velásquez Rodríguez v. Honduras*,[27] which concerned enforced disappearances. With this case, the Court established international human rights standards concerning enforced disappearances.[28] Subsequently, it examined several cases per year.[29]

The wider democratisation of the region was noticeable. The IACmHR and IACtHR handled cases concerning impunity, freedom of expression and due process and focused on states obligations under Article 1 para 1 and Article 2 of the ACHR, such as duties to investigate and punish those allegedly responsible for human rights violations. Subsequently, the Court was examined numerous cases concerning second generation rights, such as inequality, exclusion and poverty. These issues are particularly pressing, since the Western Hemisphere has the most inequitable distribution of wealth in the world. The IACtHR focused on particularly vulnerable groups, such as indigenous peoples, women, minorities and children, who do not fully enjoy human rights.[30]

Currently 25 (out of 35) OAS Member States have ratified the ACHR. Only 20 of those states have accepted the Court's jurisdiction. However, there is a wide discrepancy between states parties to the Convention regarding formal compliance. This is visible in the unequal acceptance of regional human rights instruments by states. One of the issues concerns ratifications. While most states in the region are engaged in human rights protection within the OAS system, certain countries, such as the US, Canada and English-speaking Caribbean states, have not ratified the ACHR and have not accepted the IACtHR jurisdiction. Moreover, two states have denounced the Convention: Trinidad and Tobago (in 1998) and Venezuela (in 2012).[31]

23 Dąbrowska, 2021, p. 245.
24 Ibid.
25 Ibid. pp. 245–246.
26 OAS, IACtHR, Annual Report of the Inter-American Court of Human Rights to the General Assembly, 1980, OEA/Ser.LIV/III.3, 15 April 1981, p. 6.
27 IACtHR Judgment *Velásquez Rodríguez v. Honduras*, 29 July 1988, Series C No. 4.
28 See: IACtHR Judgment *Fairén-Garbi and Solís-Corrales v. Honduras*, 15 March 1989, Series C No. 6; IACtHR Judgment *Godínez-Cruz v. Honduras*, 20 January 1989, Series C No. 5.
29 Dąbrowska, 2021, p. 246.
30 Grossman, 2008, p. 1268.
31 Dąbrowska, 2021, p. 247.

Despite numerous issues in the region, the IACtHR and the whole human rights protection system emphasise on the state's obligation to guarantee human rights protection. Since its establishment, this independent organ regularly verifies whether states are complying with their international obligations concerning human rights protection. Currently, the IACtHR case law is evolving and focuses on new issues.[32]

Notably, the Court does not grant only financial compensation for the violations. In the past, it resorted to other measures of reparation. The IACtHR judgements ordered states to establish a scholarship in the name of the violation victim,[33] name a well-known street or square after the deceased applicant and place a prominent plaque,[34] express public apology and recognise the international responsibility for the violation[35] or build a monument.[36] It may order guarantees of non-repetition as well. According to S.G. Puente, this is one of the most important developments in the Court's jurisprudence. These guarantees stem from the state's obligation to respect, protect and fulfil human rights under Article 1(1) of the ACHR, with the purpose of eliminating similar violations.[37] However, the ECtHR does not resort to such measures. It focuses mostly on remuneration, which may not be granted if the Court decides that the establishment of a violation constitutes sufficient satisfaction.[38] Moreover, it may focus on the state's obligation to remedy systemic or structural disfunctions within the domestic legal system.[39]

A specific aspect of the Inter-American system is the possibility of conventionality control (*control de convencionalidad*). According to this doctrine, state courts must review the compatibility of national legislation with national Constitutions and its interpretation by the IACtHR.[40] The IACtHR stated that the judiciary must exercise a sort of 'conventionality control' between the domestic legal provisions, which are applied to specific cases and the ACHR. To perform this task, the judiciary has to take into account the treaty and the IACtHR's interpretation.[41] Such interpretations oblige domestic judges to examine whether domestic regulations are in accordance with the ACHR itself and the IACtHR's jurisprudence.[42] Moreover, the IACtHR issues advisory opinions. This competence is wider and more effective than the advisory opinions issued by the ECtHR. It may focus on the ACHR's interpretation and other Conventions

32 Ibid.
33 IACtHR Judgment *Myrna Mack Chang v. Guatemala*, 25 November 2003, Series C No. 101, § 285.
34 Ibid., § 286.
35 IACtHR Judgment Moiwana Community v. Suriname, 15 June 2005, Series C No. 124, § 216.
36 Ibid., § 218.
37 Puente, 2009, p. 79 et seq.; Antkowiak, 2008, pp. 382–384.
38 ECtHR Judgment *McHugh and Others v. United Kingdom*, 10 May 2015, Application no. 51987/08 and 1,014 others.
39 See e.g.: ECtHR Judgment *Broniowski and Others v. Poland*, 22 June 2004, Application no 31443/96; more: Czepek, 2018, pp. 347–373.
40 Deftou, 2020, p. 80; More on the doctrine of conventionality control and the discussion concerning it: Contesse, 2017, p. 422 et seq.; Villagran Sandoval and Carvalho Veçoso, 2017, pp. 1608–1609.
41 IACtHR Judgment *Almonacid Arellano et al. v. Chile*, 26 September 2006, Series C No. 154, § 124.
42 Dąbrowska, 2021, p. 249.

concerning human rights protection in American states. All OAS Member States, and its organs listed in the Charter, may request such 'consultation'. States parties use the Courts' competence to issue advisory opinions extensively, which greatly contributes to the development of international human rights law.[43]

As already mentioned, institutionally, the European and Inter-American systems were similar in the first phases of their existence. The drafters of the ACHR were, to some extent, inspired by the ECHR. The IACtHR and its relationship with the IACmHR was modelled on the European human rights system of the1960s. However, several significant differences remain. First, the IACtHR possesses broader advisory jurisdiction than the ECtHR. Second, its contentious jurisdiction relates mainly to the application of the ACHR and has been extended to a few other regional human rights treaties.[44] Third, the IACmHR partly resembles the former ECmHR. The Commission predates the adoption of the ACHR and serves a broader range of promotional, monitoring and quasi-judicial functions than the ECmHR. Moreover, it is an organ of the OAS. Hence, the IACmHR retains its pre-ACHR quasi-judicial responsibilities concerning OAS Member States that have not ratified the ACHR. It may examine their compliance with human rights on the basis of the ADRDM.[45]

The only possibility to bring a case before the IACtHR leads through the IACmHR. The IACmHR may effectively withhold cases from the IACtHR, as it did in the initial years of the Court's existence. It is not possible to bypass the Commission and have the case examined only by the IACtHR.[46] The Court stressed that Article 61(2) of the ACHR clearly indicates that the Court may not deal with any matter unless the procedures before the Commission have been exhausted.[47] It stated that the IACtHR and the IACmHR have an obligation to preserve all of the remedies of the Convention for victims of human rights violations, so that they are accorded the protection to which they are entitled.[48] In recent years, the Commission has adopted a practice of presumptively referring cases in which it has found at least one violation of the ACHR to the Court; however, it retains the option of refusing.[49]

The main difference in the structures of the European and Inter-American human rights legal systems was introduced by Protocol No. 11 to the ECHR, which greatly improved individuals' access to the Court. The Protocol abolished the two-tier structure and the ECmHR, opening the possibility of bringing individual applications before the ECtHR. The original structure of the Inter-American system was similar to the European system before the Protocol. Within that framework, victims and their families could not initiate cases before the Court and had to bring their cases before

43 Balcerzak, 2008, p. 241.
44 Neuman, 2008, p. 102.
45 Ibid., p. 103.
46 See: IACtHR judgement, *Gallardo v. Costa Rica*, 13.11.1981, No. G 101/81.
47 Ibid., § 14.
48 Ibid., § 15. See more: Chapter Institutional framework for human rights protection in Americas: The Inter-American Commission on Human Rights.
49 Neuman, 2008, p. 103.

the IACmHR and request a referral to the IACtHR.[50] Individuals began to play a larger role in the court proceedings with the introduction of the new Rules of Procedure of the Court in 1997. These rules granted victims the right to participate in the court proceedings.[51] In 2001, the Court modified its Rules of Procedure to grant direct participation to the victims, their next of kin or their representatives. According to C.M. Cerna, the petitioner does not have 'direct access'; however, once the case is presented, the petitioner has *locus standi* to present their positions at all stages of the proceedings before the Court. Before this change, the petitioner was not consulted whether the case should be submitted to the Court and was subjected to the direction of the Commission's delegate.[52] The 2001 Rules of Procedure enabled victims, their next of kin and representatives to submit their brief containing pleadings, motions and evidence.[53]

Unlike the ECtHR, the IACtHR has a tradition of public hearings and including alleged violation victims and their next of kin. This was reflected in its Rules of Procedure.[54] The Court enables alleged victims to share their experience and civil society groups to list the legal arguments or remedies they deem fit at the hearing.[55] For example, during the hearing of *Nelson Carvajal Carvajal and Family v. Colombia*, the Court heard the testimony of the victim's sister, who focused on the circumstances of her brother's death and the family's suffering.[56]

The institutional framework and approach of both Courts for handling cases may seem different. Although designed similarly, the current differences in structure stem from the Protocol and its consequences, which resulted in a heavy caseload. Hence, the ECtHR had to develop new mechanisms for decreasing its caseload. Regarding the Inter-American system, some backlog exists at the Commission.[57] Furthermore, the differences between these two regional systems stem from the context and circumstances of their operations, which are based on the material differences between the ACHR and the ECHR.

50 Yildiz, 2020, p. 327.
51 IACtHR, Rules of Procedure of the Inter-American Court of Human Rights in Effect as of 1 January 1997, Arts. 22–23.
52 Cerna, 2001, p. 3.
53 See more: Yildiz, 2020, p. 328.
54 IACtHR, Rules of Procedure of the Inter-American Court of Human Rights, Approved1 by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009, Art. 25.
55 More: Yildiz, 2020, p. 329.
56 Ibid. See also: Trotti, 2017.
57 The year 2022 ended with 1,446 petitions pending notification. The year 2023 ended with 664 petitions pending notification: More: IACmHR, Annual Report 2023, p. 65.

3. American and European Regional Human Rights Protection Systems: Comparison of the ACHR and the ECHR

The differences between the American and European human rights systems are based on numerous factors. Apart from the environment, in which both regimes evolved, and their institutional framework, the core documents of both systems differ substantially. First, they were not adopted at the same time. The ECHR dates back to 1950, whereas the ACHR was adopted in 1969 and benefitted from certain experiences and solutions introduced in the ECHR. Second, the scope of the rights and freedoms protected is significantly wider in the ACHR. Apart from first generation human rights,[58] it covers second generation rights[59] and focuses explicitly on personal responsibilities.[60] However, the ECHR focuses only on first generation of human rights, leaving the scope of economic, social and cultural rights to the European Social Charter (ESC).[61] Moreover, their material differences are noticeable after an examination of particular provisions of both treaties. Both start with a preamble, referring to the UDHR and the regional heritage of human rights values. While the ACHR relates to the OAS Charter and the ADRDM,[62] the ECHR focuses mostly on 'profound belief in fundamental freedoms' shared by European countries, which are 'like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law'.[63]

The construction of the state's obligations to ensure the rights and freedoms enshrined in both treaties differs substantially. It is very concise under the ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.[64] The realisation of this obligation was widely examined by the ECtHR's jurisprudence, which contributed to the development of a wide structure of states' positive obligations under the ECHR.[65] The ACHR is clearer in this respect and dedicates a chapter to this issue. Article 1 stresses the states' obligation 'to respect the rights and freedoms (...) and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination'.[66] It clarifies that 'person' means every human being.[67] Article 2 states that obligations should be realised with 'legislative or other measures as may be necessary to give effect to those rights or freedoms'.[68] This forms

58 See: ACHR, Chapter II.
59 Ibid., Chapter III.
60 Ibid., Art. 32.
61 See: European Social Charter, 18 October 1961, ETS No. 035; and Revised European Social Charter, 3 May 1996, ETS No. 163.
62 ACHR, Preamble.
63 ECHR, Preamble.
64 Ibid., Art.1.
65 More: Czepek, 2014.
66 ACHR, Art. 1, para. 1.
67 Ibid., para 2.
68 Ibid., Art. 2.

the basis for material, institutional and procedural obligations.[69] Moreover, Articles 1 and 2 of the ACHR are closely linked and, to some degree, may be co-dependent.[70]

The protection of the right to life differs between both treaties. This difference starts with the notion of 'person'. The Inter-American system interprets the 'person' as the human being.[71] Hence, Article 4 protects the right to life 'in general, from the moment of conception'.[72] However, the right to life in Article 2 of the ECHR does not go that far. It guarantees protection of 'everyone's right to life'. Nonetheless, as the ECtHR stressed in *Vo v. France*, it is neither desirable nor possible for the Court to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the ECHR.[73] Both provisions refer to the death penalty; however, the ACHR focuses on it extensively.[74] The ACHR prohibits imposing capital punishment on persons below the age of 18 years or over the age of 70 years. It further prohibits the sentencing of pregnant women.[75] Article 2 of the ECHR does not refer to death penalty in such detail. Both treaties developed additional protocols abolishing death penalty.[76] The protection of the right to life under the ECHR does not regard deprivation of life as a violation of Article 2 if it is a result of the absolutely necessary use of force. It concerns legitimate defence, effecting a lawful arrest or preventing the escape of a lawfully detained individual and quelling a riot or insurrection.[77] However, Article 4 of the ACHR does not foresee such exceptions.

Prohibition of torture and other forms of ill treatment differs under both treaties. Article 3 of the ECHR consists of one sentence: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[78] The necessary standards concerning Article 3 were developed in the ECtHR's jurisprudence. In comparison, Article 5 of the ACHR, guaranteeing right to humane treatment, consists of five paragraphs. It prohibits 'torture, cruel, inhuman, or degrading punishment or treatment', whereas Article 3 of the ECHR omits the adjective 'cruel'. This difference does not have severe consequences because every form of torture or inhuman treatment will, by its nature, be 'cruel'. Furthermore, Article 5 of the ACHR sets certain minimal standards, for instance, guaranteeing separation of remand prisoners from convicted persons and separation of minors form adult detainees.[79] Cases of minors are examined

69 Czepek, 2021, p. 76 et seq.
70 Ibid. See also: Hennebel, 2007, pp. 367–368.
71 ACHR, Art. 1, para. 2.
72 Ibid., Art. 4, para. 1.
73 ECtHR Judgment *Vo v. France*, 8 July 2004, App no. 53924/00, § 85.
74 ACHR, Art. 4, paras. 2–6.
75 Ibid., para 5.
76 Protocol to the ACHR to Abolish the Death Penalty, 8 June 1990, Asunción, Paraguay, 20th session of the General Assembly; Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty, Strasbourg, 28 April 1983, ETS No. 114; Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances, Vilnius, 3 May 2002, ETS No. 187.
77 ECHR, Art. 2, para. 2.
78 Ibid., Art. 3.
79 ACHR, Art. 5, paras. 4–5.

by specialised tribunals and treated in accordance with their particular status.[80] The ACHR refers to the purpose of deprivation of liberty, which should aim at reforming and social readaptation of the prisoners.[81]

Some guarantees, such as freedom from slavery, servitude, forced or compulsory labour (Article 4 of the ECHR and Article 6 of the ACHR), right to personal liberty and security (Article 5 of the ECHR and Article 7 of the ACHR) and right to a fair trial (Article 6 of the ECHR and Article 8 of the ACHR) in material terms seem alike in both Conventions. Certain differences exist; however, these should be considered as minor in comparison to those arising between other provisions. Article 10 of the ACHR provides the right to compensation in the event of sentencing of an individual by a final judgment through a miscarriage of justice. It addresses this issue in a separate provision. The drafters of the ECHR did not foresee such necessity. A guarantee providing a right to compensation for unlawful arrest or detention was added to the provision safeguarding the right to liberty and security of an individual.[82]

The right to privacy refers to private life and family (life), home and correspondence in both systems. However, while the ECHR refers to 'family life', the ACHR focuses on 'family', which is entitled to separate protection under Article 17 of the ACHR. The ACHR protects individual from 'unlawful attacks on his honor or reputation' and provides the right to the 'protection of the law against such interference or attacks'.[83] The ECHR formulated Article 8 as the 'right to respect for'. This is a unique construction and only such example under the European Convention. This provision was in initially proposed as 'immunity from arbitrary interference'.[84] The construction of 'right to respect for' entails negative obligations; however, as the ECtHR stressed in *Marckx v. Begium*, it may also include positive obligations.[85] Article 8 para 2 of the ECHR provides a limitation clause regarding the right to privacy, whereas Article 11 of the ACHR did not foresee such a necessity. In turn, Article 11 guarantees the right 'to have his honor respected and his dignity recognised'.[86] This relationship to personal dignity, concerning the right to privacy, is important in the context of establishing this guarantee. It should be stressed that the ACHR rarely uses this notion. It refers to dignity only in respect to freedom from torture, forced or compulsory labour and privacy.[87]

Freedom of conscience and religion is enshrined in Article 12 of the ACHR and Article 9 of the ECHR. While the ECHR guarantees protection of freedom of thought within this provision, the ACHR connects freedom of thought with freedom of

80 Ibid., para. 5.
81 Ibid., para. 6.
82 ECHR, Art. 5, para. 5.
83 ACHR, Art.11, paras. 2–3.
84 Council of Europe, European Commission on Human Rights, Preparatory Work on Article 8 of the European Convention on Human Rights, DH (56)12, 9 August 1956, p. 3.
85 ECtHR Judgment *Marckx v. Begium*, 16 June 1979, Application no. 6833/74, § 90. See also: Czepek, 2014, p. 145.
86 ACHR, Art. 11, para. 1.
87 Ibid., Art. 5, para 2; Art. 6, para. 2; Art. 11 para. 1.

expression (Article13). Article 12 of the ACHR and Article 9 of the ECHR are mostly similar. Both provide freedom to change one's religion or belief and manifest (profess) it either individually or in community with others, in public or private.[88] Both provide limitation clauses as well.[89] Additionally, the ACHR entails prohibition of subjecting an individual to restrictions that might impair one's religion or beliefs and enshrines the guarantee to provide for the religious and moral education of children or wards following the convictions of parents or guardians.[90]

Freedom of expression is guaranteed under Article 10 of the ECHR and Article 13 of the ACHR. As mentioned, under the ACHR, freedom of expression is connected with freedom of thought. Freedom of expression in both systems is considered a key element for individual autonomy and a major tool for the functioning of democracy.[91] Both systems perceive this right as protecting dissemination of information and ideas that are received favourably or considered inoffensive or indifferent, including those that are disagreeable for the state or any sector of the population.[92] Both stress that this guarantee includes freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers.[93] The ACHR clarifies that the above provision concerns various forms of expression: oral, in writing, in print, in the form of art or through any other medium of one's choice.[94]

However, both provisions entail limitation clause for this guarantee.[95] The ECHR stresses that freedom of expression may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[96]

Under the ACHR, the right may not be restricted:

> 'By indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used

88 ACHR, Art. 12, para. 1; ECHR, Art. 9 para. 1.
89 ACHR, Art. 12, para. 3; ECHR, Art. 9, para. 2.
90 ACHR, Art. 12, paras. 2 and 4.
91 Hennebel and Tigroudja, 2022, p. 432.
92 IACtHR Judgment, *Granier et al. (Radio Caracas Television) v. Venezuela*, 22 June 2015, Series C No. 293. § 140; IACtHR Judgment, *„The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, 5 February 2001. Series C No. 73, § 69; ECtHR Judgment, *Handyside v. The United Kingdom*, 7 December 1976, Application no. 5493/72, § 49.
93 ECHR, Art. 10, para.1, ACHR, Art. 13, para. 1.
94 ACHR, Art. 13, para. 1.
95 ECHR, Art. 10, para. 2, ACHR, Art. 13, para. 2.
96 ECHR, Art. 10, para. 2.

> in the dissemination of information, or by any other means tending to impede the communication and circulation ideas and opinions.'[97]

The ACHR further prohibits war propaganda and advocacy of 'national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds.'[98]

Article 14 of the ACHR enshrines the right of reply. Neither the ECHR nor other international human rights treaties provide for such a guarantee explicitly.[99] Article 14 provides that anyone who has been injured by inaccurate or offensive statements or even by ideas disseminated must reply or make a correction by using the same medium. This provision counterbalances the broad scope of protection of freedom of expression. It is a means to compensate for the prohibition of prior censorship.[100] The right to reply is connected to freedom of thought and expression, which is reflected in the ACHR's text, whereby the right to reply directly follows the freedom of thought and expression. This guarantee enables the right to reply of individuals injured by inaccurate or offensive statements and provides a possibility of correction using the same communications outlet.[101] Article 14 para 2 stresses that the right to reply does not exhaust other forms of liability that may be imposed in case of harm to rights of others,[102] for instance, under the provisions of domestic law. Article 14 para 3 stresses that 'for the effective protection of honor and reputation', every publisher, newspaper, motion picture radio and television company should have 'a person responsible who is not protected by immunities or special privileges'.[103]

The ACHR formulates the 'right to assembly' and 'freedom of association' separately, while the ECHR joins both guarantees and provides for a joint 'freedom of assembly and association', under Article 11 of the ECHR. The right of assembly under the ACHR assumes legal protection only of 'peaceful assemblies'. In clarifies that such assembly must be unarmed ('without arms').[104] Article 15 of the ACHR entails a limitation clause in the interest of 'national security, public safety or public order, or to protect public health or morals or the rights or freedom of others'.[105] According to Hennebel and Tigroudja, Article 15 differs from other similar provisions under other human rights treaties semantically and reflects the international and regional

97 ACHR, Art. 13, para. 3.
98 Ibid., para. 5.
99 ECtHR jurisprudence raised the issue of positive obligations in regard of defamation. "ECtHR bears in mind the positive obligation on the State to ensure that persons subjected to defamation have a reasonable opportunity to exercise their right to reply by submitting a response to defamatory information in the same manner as it was disseminated" – see: ECtHR Decision *Vitrenko and Others v. Ukraine*, 16 December 2008, Application no. 23510/02.
100 Hennebel and Tigroudja, 2022, p. 466.
101 ACHR, Art. 14, para. 1.
102 Hennebel and Tigroudja, 2022, p. 467.
103 ACHR, Art. 14, para. 3.
104 ACHR, Art. 15.
105 Ibid.

consensus in this regard.[106] Article 16 of the ACHR enshrines freedom of association, which guarantees everyone 'the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes'.[107] It stresses that this provision does not bar 'the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police'.[108]

However, the ECHR guarantees the joint protection of freedom of assembly and association. Article 11 is concise in comparison to Articles 15 and 16 of the ACHR. It guarantees the right to 'freedom of peaceful assembly and freedom of association with others, including the right to form and to join trade unions for the protection of his interests'.[109] Similar to Articles 15 and 16 of the ACHR, Article 11 provides a limitation clause. The ECHR only protects the right to assembly which is 'peaceful'. This means that it does not cover a demonstration, during which the organisers and participants have violent intentions.[110] Hence, despite visible differences, both provisions have very similar scope.

Article 17 of the ACHR guarantees the rights of a family. The ECHR does not contain such an explicit provision; however, this aspect is partly covered within the right to respect for family life (Article 8 para 1) and, regarding the right to marry and to form a family, it is provided for in Article 12 of the ECHR. However, Article 17 of the ACHR goes further in this regard. It concerns the family as an entity, as a subject of protection 'by society and by the state'.[111] It confirms the importance of and legal protection granted to family, which is 'the natural and fundamental group unit of society'. Hence, it should be perceived as a particular subject of human rights protection. Paragraphs 2 and 3 of Article 17 refer to the right to marry and raise a family. Similar to Article 12 of the ECHR, this guarantee is available to the 'men and women of marriageable age'. Although the ACHR stresses the requirement of the free and full consent of the intending spouses,[112] Article 12 of the ECHR does not refer to the consent of spouses and focuses on compliance with 'national laws governing the exercise'.[113]

Article 17 of the ACHR further stresses the importance of equality of rights of spouses and 'adequate balancing of responsibilities' between them, both 'during the marriage, and in the event of its dissolution'.[114] It requires that states parties adopt provisions under domestic law to ensure the necessary protection of children on the

106 Hennebel and Tigroudja, 2022, pp. 476–477.
107 ACHR, Art. 15, para. 1.
108 Ibid., para. 3.
109 ECHR, Art. 11, para. 1.
110 E.g. ECtHR Judgment, *Kudrevičius and Others v. Lithuania*, 15 October 2015, Application no. 37553/05, § 92; 97-99.
111 ACHR, Art. 17, para. 1.
112 Ibid., Art.17, paras. 2–3.
113 ECHR, Art. 12.
114 ACHR, Art. 17, para. 4.

basis of their best interests.[115] Article 17 para 5 recognises equal protection of rights for children born out of and those in wedlock.[116] This is a unique provision compared to other international human rights treaties. It prohibits discrimination based on birth.[117] Even though the ECHR does not provide such guarantee, the Court, in *Marckx v Belgium*, found that regulations enabling differentiating legal situation of children born in and out of wedlock should be understood as discriminatory.[118] The right to family under the ACHR is a non-derogable right, that is, it cannot be suspended in time of war, public danger or other emergency that threatens the independence or security of a state.[119] This stresses the importance of the protection of the family in the American system.

The ACHR protects the right to a name, a provision that does not appear very often in international human rights treaties. The drafters of the ECHR did not foresee such a right. However, the name and surname of a person is granted certain protection in the ECtHR's jurisprudence,[120] within the ambit of private life, under Article 8 of the ECHR. Article 18 of the ACHR grants the right to a given name and surnames of one's parents or of one of them.[121] This focuses on the aspect of domestic implementation. It stresses the importance of ensuring this right by issuance of legal provisions or other measures. Moreover, the ACHR grants Article 18 a non-derogable status under Article 27 para 2.

Article 19 of the ACHR emphasises protection of the rights of the child. The ECHR does not contain such a provision; however, it safeguards the rights of children, as all the ECHR rights apply to them as well. The ACHR grants a child the 'right to the measures of protection required by his condition'. It takes into account the particular vulnerability of a child and provides them with appropriate measures of protection to remedy the vulnerability. The rights of the child are non-derogable under Article 27 para 2 of the Convention.

The ACHR in Article 20 ensures the right to nationality. If one does not have the right to any other nationality, the ACHR provides the right to a nationality of the state in whose territory a person was born. It prohibits the arbitrary deprivation of one's nationality or the changing of it.[122] However, it does not protect an individual from statelessness.[123] Neither the ECHR nor its Additional Protocols[124] recognise the right to nationality. Generally, this right cannot be protected under human rights treaties.

115 Ibid.
116 Ibid., Art. 17, para. 5.
117 Hennebel and Tigroudja, 2022, p. 514.
118 Marckx v. Begium, § 45–49.
119 ACHR, Art. 27, para. 1.
120 ECtHR Judgment, *Burghartz v. Switzerland*, 22 February 1994, Application no. 16213/90, § 24; ECtHR Judgment, *Henry Kismoun v. France*, 5 December 2013, Application no. 32265/10, § 25.
121 ACHR, Art. 18.
122 Ibid., Art. 20, paras. 1–3.
123 Hennebel and Tigroudja, 2022, p. 600.
124 See, however: Council of Europe, European Convention on Nationality, 6 November 1997, ETS No 166.

However, the ACHR refers to Article 19 of the ADRDM[125] and Article 15 of the UDHR.[126] The right to nationality cannot be subjected to any derogations under the ACHR.[127]

Article 21 of the ACHR enshrines the right to property. It entails 'the right to the use and enjoyment' of property.[128] The expropriation is possible only for reasons of public utility or social interest, must be established by law and be followed by payment of just compensation.[129] It prohibits usury and any other form of exploitation of man by man.[130] The ECHR provides for protection of property under Article 1 of the Additional Protocol No. 1 to the Convention. The guarantee concerns natural or legal persons and refers to 'peaceful enjoyment' of possession.[131] In this regard it differs slightly from the ACHR. The ECHR enables deprivation of liberty only 'in the public interest and subject to the conditions provided for by law and by the general principles of international law'.[132] The provision under the ACHR grants wider protection of property than Article 1 of the Additional Protocol of the ECHR. However, in practice, both guarantees are similar within the jurisprudence of the IACtHR and the ECtHR, respectively. Both systems interpret the notion of property in a broad sense.[133] However, the IACtHR applies an innovative approach in the right to collective property for indigenous peoples and their right to land.[134]

The ACHR enshrines the right to freedom of movement and residence. The IACtHR stressed that this right as an essential condition for the free development of the individual.[135] It includes two sets of rights: the right of all persons lawfully within a state to move freely and choose their place of residence, and their right to enter, remain in and leave the territory of the state without unlawful interference.[136] The scope of Article 22 of the ACHR is wide and grants the right to move and reside and leave a country.[137] It prohibits expelling people from the territory of the state of one's nationality or the deprivation of the right to enter it.[138] Article 22 of the ACHR

125 See: American Declaration of the Rights and Duties of Man, 2 May 1948, Ninth International Conference of American States, Art. 19.
126 UDHR, Art.15.
127 ACHR, Art. 27, para. 2.
128 Ibid., Art. 21, para. 1.
129 Ibid., para. 2.
130 Ibid., para. 3.
131 Additional Protocol to the ECHR No 1, Art. 1.
132 Ibid.
133 IACtHR Judgment *Palamara Iribarne v. Chile*, 22 November 2005. Series C No. 135; IACtHR Judgment National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru, 8 October 2020. Series C No. 413; ECtHR Judgment *Kopecký v. Slovakia*, 28 September 2004, Application no. 44912/98, § 35-52; ECtHR Judgment *Denisov v. Ukraine*, 25 September 2018, Application no. 76639/11, § 137.
134 See e.g.: *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*, 6 February 2020, Series C No. 400; *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006. Series C No. 146; See more: Hennebel and Tigroudja, 2022, pp. 626–627.
135 IACtHR Judgment *Lysias Fleury et al. v. Haiti*, 23 November 2011, Series C No. 236, § 93.
136 Ibid.
137 ACHR, Art. 22, paras. 1-2.
138 Ibid., para. 5.

refers to the protection of aliens. An alien, who is residing lawfully in the territory of a state party, may be expelled only pursuant to a decision reached in accordance with law.[139] It prohibits deportation or returning of an alien to a country, where their right to life or personal freedom is in danger of being violated because of race, nationality, religion, social status or political opinions[140] and prohibits collective expulsion of aliens.[141] Article 22 para 7 grants the right to seek and be granted asylum, following domestic regulations and international treaties, in the event of being pursued for political offense-related common crimes.[142]

The ECHR does not approach this right so extensively. It only refers to freedom of movement and protection from expulsion.[143] It does not recognise the right to seek asylum. However, the ECtHR's jurisprudence regarding the protection of aliens is wide.[144] It prohibits expulsion if it would place an individual in danger due to the risk of violation of right to life and freedom from torture and ill-treatment.[145] Particularly, if there are substantial grounds for believing that the person concerned would, due to expulsion, face a real risk of being subjected in the host state to torture or ill-treatment, Article 3 imposes an obligation not to return the person to that state.[146]

The ACHR enshrines the right to participate in government. It focuses on political rights of citizens. Article 23 of the ACHR guarantees that every citizen will have the right to take part in the conduct of public affairs, vote and be elected in genuine periodic elections and have access, under general conditions of equality, to the public service of his country.[147] Article 23 represents one of the basic principles and the democratic aim of the OAS.[148] The IACtHR stresses that representative democracy is one of the pillars of the system of which the Convention forms a part and constitutes a principle reaffirmed by the OAS Charter.[149] The importance of the right to participate in government in the American human rights system is stressed by the fact that it is a non-derogable right under Article 27 para 2 of the ACHR.

However, the ECHR, in its core text, does not provide such provisions. The issue of free elections was raised in Additional Protocol No 1. Article 3 of the Additional Protocol states that states parties should 'hold free elections at reasonable intervals

139 Ibid., para. 6.
140 Ibid., para. 8.
141 Ibid., para. 9.
142 Ibid., para. 7.
143 AP No 4 to the ECHR, Arts. 3 and 4. See also: Czepek, 2024, pp. 48–60.
144 More: Karska *et al.*, 2023.
145 E.g. If following the expulsion an individual would be subjected to death penalty – see: ECtHR Judgment A.L (X.W.) v. Russia, 29 October 2015, Application no. 44095/14, § 66; ECtHR Judgment *Bader and Kanbor v. Sweden*, 8 November 2005, Application no. 44095/14, § 48.
146 ECtHR Judgment *Ilias and Ahmed v. Hungary*, 21 November 2019, Application no. 47287/15, § 126; ECtHR Judgment *Soering v. United Kingdom*, 7 July 1989, Application no. 14038/88, § 90–91, ECtHR Judgment *Vilvarajah and Others v. United Kingdom*, 30 October 1991, Application nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, § 103.
147 ACHR, Art. 23, para. 1.
148 Hennebel and Tigroudja, 2022, p. 690.
149 IACtHR Judgment *Petro Urrego v. Colombia*, 8 July 2020. Series C No. 406, § 90.

by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.[150] The ECtHR stressed that since Article 3 of the Additional Protocol enshrines a characteristic principle of democracy, it is 'of prime importance in the Convention system'.[151] It perceives this provision broadly, focusing on two aspects of this right: the right to vote and the right to stand for election.[152] According to the ECtHR, the unique phrasing of Article 3 of the Additional Protocol intended to give greater solemnity to the states' commitment and emphasise that they are required to take positive measures, rather than refraining from interference.[153]

Article 24 of the ACHR provides the right to equal protection. It states that 'all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law'.[154] Equality is an important value within the American system. Article 1 para 1 of the ACHR obliges states to respect the rights and freedoms 'without any discrimination'.[155] The ECHR contains prohibition of discrimination under Article 14. It stresses that 'the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground'.[156] The scope of Article 14 was expanded by Protocol No. 12 to the ECHR, which stressed that the principle of equality is of fundamental character and all persons 'are equal before the law and are entitled to the equal protection of the law'.[157]

Both Conventions provide the right to effective remedy. This guarantee was enshrined under Article 13 of the ECHR, which states that everyone whose rights and freedoms are violated 'shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.[158] The ACHR perceives this guarantee as the right to judicial protection. Article 25 para. 1 of the ACHR guarantees:

> 'The right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognised by the constitution or laws of the state concerned or by this Convention.'[159]

Hence, the scope of Article 25 para 1 is wider than Article 13 of the ECHR. The European Convention limits the right to an effective remedy only to the rights enshrined

150 AP No 1 to the ECHR, Art. 3.
151 ECtHR Judgment *Mathieu-Mohin and Clerfayt*, 2 March 1987, App. no 9267/81, § 47.
152 Ibid., § 46–51; ECtHR Judgment *Ždanoka v. Latvia*, 16 March 2006, App. no 58278/00, §102.
153 Mathieu-Mohin and Clerfayt, § 50; ECtHR Judgment *Hirst v. United Kingdom* (No, 2), 6 October 2005, Application no. 74025/01, § 57.
154 ACHR, Art. 24.
155 Ibid., Art. 1, para. 1.
156 ECHR, Art. 14.
157 AP No 12 to the ECHR, Preamble.
158 ECHR, Art.13.
159 ACHR, Art. 25, para. 1.

in the Convention, whereas Article 25 of the ACHR refers to the fundamental rights recognised by the ACHR and the constitution or laws of the state. Moreover, under the ECHR, Article 13 is not an autonomous right and must be applied in connection with other rights or freedoms (e.g., with Article 3 of the ECHR). The ACHR does not require an alleged violation of another substantive right to claim a violation of Article 25.[160] Article 25 imposes certain positive obligations on states parties, which strengthen the guarantees of this provision. Article 25 para 2 stresses that states parties should ensure determination of rights of any person claiming a remedy by a competent authority provided by the legal system of the state, develop a judicial remedy and ensure the enforcement of the remedy by the competent authorities.[161] Article 13 of the ECHR imposes certain positive obligations on the states. However, these obligations were mostly expressed by the jurisprudence of the ECtHR. Their scope is mostly dependent on the character of the material right or freedom, which was raised in conjunction with Article 13.[162]

The ACHR provides the protection of economic, social and cultural rights, which the ECHR system does not contain. The European Convention focuses on first generation of human rights, leaving the protection of second generation to the ESC.[163] The American Convention dedicates Chapter III to economic, social and cultural rights. However, this chapter is particularly short and consists only one article. Article 26 stresses that states parties should adopt measures, 'especially those of an economic and technical nature', 'with a view to achieving progressively the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the OAS Charter as amended by the Protocol of Buenos Aires'.[164] However, it does not provide subjective rights and is directed to states parties. According to Hennebel and Tigroudja, it is a normative compromise, allowing economic, social and cultural rights to appear in the ACHR without granting them a legal status.[165] Hence, the provision places the ACHR halfway between older international normative treaty instruments, such as ECHR and ICCPR, which contain no provision relating to this category of rights and treaties, and modern treaties, such as the African Charter of Human and Peoples' Rights and Arab Charter on Human Rights, which place civil and political rights and economic, social and cultural rights on equal footing and relate to individual and collective rights.[166] The IACtHR referred to the states' obligations under Article 26. It noted that the obligations regarding the progressive realisation of the economic, social and cultural rights require the continual execution

160 Hennebel and Tigroudja, 2022, p. 750.
161 ACHR, Art. 25, para. 2.
162 More on specificity of Art. 13 and its relation with other rights and freedoms: Chanturia, pp. 9–24.
163 European Social Charter, 18 October 1961, ETS No. 035; European Social Charter (revised), 3 May 1996, ETS No. 163.
164 ACHR, Art. 26.
165 Hennebel and Tigroudja, 2022, p. 759.
166 Ibid.

of actions to achieve the full enjoyment of these rights. Thus, the progressive dimension of these rights, although acknowledging the gradual nature of their realisation, includes a sense of progress, which calls for an effective improvement in the exercise of these rights, so that social inequalities are corrected and the vulnerable groups are included.[167]

Despite certain similarities, the guarantees of rights and freedoms protected within both human rights systems differ concerning the scope and formulation of particular provisions and their interpretation. The ACHR provides guarantees that the core text of the ECHR omits and the scope of certain provisions is wider under the ACHR. However, a deeper examination highlights that the ECHR system has developed wide interpretations of certain rights and freedoms within the ECtHR jurisprudence, such as Article 8. The differences between both systems stem from their regions, the scope of human rights protection within other OAS and CoE regimes, the time of adoption and the intentions of the drafters, along with the interpretation of both Conventions by the ECtHR and IACtHR.

4. The Mutual Influence of the Case Law of the Inter-American and European Systems of Human Rights

From a comparative perspective, it is crucial to examine the ECHR and ACHR based on their mutual influence. The analysis of their respective case law is crucial in this regard. The Courts may enter into judicial dialogue[168] and refer to the international standards developed within the case law of other judicial organs. The jurisprudence of other human rights bodies, universally and regionally, may develop certain interpretations of particular rights or freedoms, which serve as inspiration and a valuable comparative material.

Both Courts, and the IACmHR, enter into judicial dialogue and refer to standards of other relevant international human rights systems and their jurisprudence, universally and regionally. This means that both IACtHR and IACmHR frequently quote the ECtHR case law and vice versa. Hence, both systems, to some degree, are influenced by each other. Such exchange contributes to the development of both regional regimes and strengthens the overall standard of human rights protection. The scope of influence of the ECtHR's jurisprudence on the case law of the IACtHR and IACmHR, and the influence of the IACtHR on the ECHR case law should be examined separately.

167 IACtHR Judgment *Cuscul Pivaral et al. v. Guatemala*, 23 August 2018, Series C No. 359, §146; More: Ferrer-MacGregor, 2024, p. 217 et seq.; See also: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights : "Protocol of San Salvador" : Signed at San Salvador, El Salvador, 17 November 1988.
168 Ferrer Mac-Gregor, 2017, pp. 99–106.

4.1. The Influence of the European System of Human Rights on the Case Law of the IACMHR and the IACtHR

The ECHR system is the most effective human rights protection system worldwide. Its effectiveness stems from the reform of Protocol 11, which 'opened' the Court for individual applications. The success of the ECtHR and the scope of its jurisprudence is unprecedented. It would be difficult to compare the IACtHR and the ECtHR in their number of judgments. In 2023, the European Court decided 38,260 cases (39,570 in 2022),[169] while the Inter-American Court gave 31 judgments in 2023 (34 in 2022).[170] The wide gap shows that, even from statistical possibility, the European Court's case law influence on the IACtHR is broad. The ECtHR jurisprudence is relevant material for the interpretation of international law on human rights. The scope of the ECtHR's jurisprudence suggests that on several occasions the IACtHR may be inspired by it and refer to its case law.

This concerns the scope of interpretation of particular rights or freedoms and certain doctrines adopted by the ECtHR. An example of this approach is the evolutive interpretation of the Convention, as a 'living instrument', which should be interpreted in present-day conditions.[171] The IACtHR, in its advisory opinion 'The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law', stressed that 'this guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection'.[172] The Court emphasised that it is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention.[173] The IACtHR concluded that it must adopt such approach 'in the context of the evolution of the fundamental rights of the human person in contemporary international law'.[174]

The IACtHR referred to the ECtHR's interpretation of specificity of human rights treaties. It found that modern human rights treaties are not multilateral treaties of the traditional type, concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. Their object and purpose are the protection of the basic rights of individual human beings, irrespective of their nationality, against the state of their nationality and all other contracting states.[175] In this regard, the IACtHR referred to the former ECmHR, which stated that the obligations of the ECHR are of an objective character, designed to protect the fundamental rights of individual human beings from infringements, rather than create subjective and

169 ECtHR, Statistics 2023.
170 IACtHR, Jurisprudence of the I/A Court H.R.
171 ECtHR Judgment *Tyrer v. United Kingdom*, 25 April 1978, Application no. 5856/72, § 31.
172 IACtHR, Advisory Opinion, 'The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law', 1 October 1999, OC-16/99, §114.
173 Ibid.
174 Ibid., § 115.
175 IACtHR Advisory Opinion, The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), 24 September 1982, OC-2/82, § 29.

reciprocal rights for states parties.[176] The IACtHR further referred to the ECtHR case law when it stressed that the concept of 'laws' cannot be interpreted in the abstract and must not be divorced from the context of the legal system, which gives meaning to the term 'laws' and affects its application.[177]

Neuman notes the 'regional consensus' or 'consensus within CoE member states'[178] doctrine.[179] The role of such consensus is more modest within the ACtHR's jurisprudence than within the ECtHR's case law. According to Neuman, within the European system, 'regional consensus' serves both affirmative and negative functions. The consistent approach to a particular human rights issue between the Member States may indicate the presence of an underlying European value that guides a specific interpretation of a right or its stricter application. A similar understanding of a guarantee within the CoE sometimes substitutes the comparison of national practices and may provide elements of political consent, along with evidence of normative consensus. However, the absence of such consensus may demonstrate unresolved conflicts of values or that policy regarding new social conditions is in flux.[180] Within the Inter-American system, setting international standards by referring to existing national practice would risk the adoption of low targets. Neuman further notes the relative absence of the OAS from participation in the elaboration of human rights standards. Hence, the cooperation and harmonisation of standards within the CoE and EU have produced more common basis in this regard than the efforts in the Americas.[181]

The influence of the European human rights system on its American counterpart is significant. It is particularly visible in relation to certain rights and freedoms. On many occasions the Inter-American Court refers to the case law of its European counterpart to support progressive interpretation of the ACHR or strengthen its argumentation by presenting similar reasoning adopted by the ECtHR. Such influence is visible within the scope of rights that are universally recognised and are perceived similarly. Freedom from torture and ill-treatment is an example of such guarantee. However, within the scope of this provision, the IACtHR relies on the ECtHR's jurisprudence. The Inter-American Court referred to the ECtHR's findings in *Selmouni v. France,* concerning the necessity to classify certain forms of ill-treatment as torture due to the necessity of 'vigorous response in dealing with infractions of the basic

176 ECmHR Decision, *Austria v. Italy*, 11 January 1961, Application No. 788.60, p. 19.
177 ECtHR Judgment Sunday Times v. the United Kingdom (No 1), 26 April 1979, Application no. 6538/74, § 49; IACtHR Advisory Opinion, The word „Laws" in Article 30 of the American Convention on Human Rights, 9 May 1986, OC-6/86, § 20. See also: Neuman, 2008, p. 106.
178 ECtHR Judgment *Humpert and Others v. Germany*, 14 December 2023, Application nos. 59433/18, 59477/18, 59481/18, 59494/18, § 86. In certain cases the ECtHR refers to a wider, international consensus: ECtHR Judgment *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 9 April 2024, Application no. 53600/20, § 333.
179 Neuman, 2008, p. 107.
180 Ibid.
181 Ibid.

values of democratic societies'.[182] Furthermore, the IACtHR relied on the ECtHR case law concerning the severe character of Article 3 violation,[183] accounting for physical suffering and moral anguish.[184]

The ECtHR's jurisprudence was quoted by the IACtHR in the issue of conditions of detention. It relied on *Kudła v. Poland*[185] where the ECtHR stressed that, according to Article 3 of the ECHR, the state must ensure that a person is detained in conditions with due respect to his human dignity, the manner and methods used to exercise the measure does not submit them to anguish or difficulty that exceed the inevitable level of suffering intrinsic to the detention and, given the practical demands of the imprisonment, their health and well-being are adequately insured, offering them, among other things, the required medical assistance.[186] The IACtHR relied on the ECtHR's jurisprudence for the right to a fair trial (Article 6 of the ECHR and 8 of the ACHR). Within this guarantee, the Court referred to the right to trial within a reasonable time. The IACtHR agreed with the ECtHR that three factors should be taken into account in determining the reasonableness of the time: a) the case complexity, b) the procedural activity of the interested party and c) the conduct of the judicial authorities.[187]

The European standards were raised in the opinions provided by certain IACtHR judges. Such references may serve as an argumentation or recapitulation of international human rights standards. Regarding Article 6, Judge Cançado Trindade stressed that under the jurisprudence of both Courts, the 'reasonable time' contemplated in Article 8 of the American Convention is intimately linked to the effective, simple and prompt recourse contemplated in its Article 25.[188] Judge Trindade referred to the relation between Articles 6 and 13 of the ECtHR, following the interpretation adopted in *Kudła v. Poland*.[189] He criticised the ECtHR's approach. In his opinion, 'the attempt to dissociate Article 25 and Article 8 of the ACHR would be a setback to the prehistory of our Court's case-law'. He stressed that instead of continuing in the *avant garde* jurisprudence of the IACtHR, he fought to avoid a serious jurisprudential setback.[190]

The Inter-American Court included the European Court's approach regarding the freedom of expression. The ECtHR's landmark judgement, *Handyside v. The United*

182 ECtHR Judgment *Selmouni v. France*, 28 July 1999, Application no. 25803/94, § 101; IACtHR Judgment Cantoral *Benavides v. Peru*, 18 August 2000, Series C No. 69, § 99.
183 *Cantoral Benavides v. Peru*, § 95.
184 Ibid., § 102; *Soering v. United Kingdom*, § 110–111.
185 ECtHR Judgment *Kudła v. Poland*, 26 October 2000, Application No. 30210/96.
186 Ibid., § 94. IACtHR Judgment *López Álvarez v. Honduras*, 1 February 2006. Series C No. 141, § 106. See also: Zombory, 2023, p. 273 et seq.
187 IACtHR Judgment *Suárez Rosero v. Ecuador*, 12 November 1997, Series C No. 35, § 72; IACtHR Judgment *Genie Lacayo v. Nicaragua*, 29 January 1997, Series C No. 30., § 77; ECtHR Judgment, *Motta v. Italy*, 19 February 1991, Application no. 11557/85, § 17; ECtHR Judgment, *Ruiz-Mateos v. Spain*, 23 June 1993, Application no. 12952/87, § 30; IACtHR Judgment Hilaire, *Constantine and Benjamin et al. v. Trinidad and Tobago*, 21 June 2002. Series C No. 94, § 143.
188 IACtHR Judgment *López Álvarez v. Honduras*, Concurring vote of judge A.A. Cançado Trindade, 1 February 2006. Series C No. 141. § 18.
189 Ibid., § 43–48.
190 Ibid., § 49.

Kingdom, stressed that Article 10 para 2 of the ECHR is applicable to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference and to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[191] The Inter-American Court reaffirmed this principle and similarly stated:

> 'This freedom should not only be guaranteed with regard to the dissemination of information and ideas that are received favorably or considered inoffensive or indifferent, but also with regard to those that offend, are unwelcome or shock the State or any sector of the population.'[192]

In *Herrera Ulloa v. Costa Rica*, the IACtHR summarised the ECtHR's jurisprudence regarding the scope of criticism of public officials and found that it is logical and appropriate that such statements should be accorded, under Article 13 para. 2 of the ACHR, a certain latitude in the broad debate on matters of public interest that is essential for the functioning of a democratic system. The foregoing considerations do not, by any means, signify that the honour of public officials or figures should not be legally protected; however, it should be protected in accordance with the principles of democratic pluralism.[193] Similarly, in *Ricardo Canese v. Paraguay*, the Court emphasised that politicians and individuals, who carry out activities subject to public scrutiny, must be much greater than that of individuals.[194]

The Inter-American Court was, to some degree, inspired by the ECtHR's construction of procedural obligations. Ironically, before that, the IACtHR inspired the European Court's adoption of states procedural obligations.[195] The Inter-American Court, in the Pueblo Bello Massacre case, reiterated that the ECtHR, within Article 2, read together with Article 1 of the Convention, developed the theory of 'procedural obligation' to carry out an effective official investigation in cases of violations of that right. Furthermore, in *Ergi v. Turkey*, the ECtHR decided that, even though there was no hard evidence that the security forces had caused the victim's death, the state had failed in its obligation to protect the right to life of the victim, taking into account the conduct of the security forces and the absence of an adequate and effective investigation, so that it had violated Article 2 of the ECHR.[196] On this basis, the IACtHR

191 *Handyside v. The United Kingdom*, § 49.
192 Ibid.; *„The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*, § 69; *Sunday Times v. the United Kingdom* (No 1), § 59 and 65; ECtHR Judgment.
Lingens v. Austria, 8 July 1986, Application no. 9815/82, § 41; ECtHR Judgment *Otto-Preminger-Institut v. Austria,* 20 September 1994, Application no. 13470/87, § 49; IACtHR Judgment *Ivcher Bronstein v. Peru*, 6 February 2001, Series C No. 74, § 152.
193 IACtHR Judgment *Herrera Ulloa v. Costa Rica*, 2 July 2004. Series C No. 107, § 128.
194 IACtHR Judgment *Ricardo Canese v. Paraguay,* 31 August 2004. Series C No. 111, § 103.
195 More: Subsection 4.2. of the Chapter.
196 ECtHR Judgment *Ergi v. Turkey*, 28 July 1998, Application no. 23818/94, § 85-86. See also: IACtHR Judgment the *Pueblo Bello Massacre v. Colombia*, 31 January 2006, Series C No. 140, § 147.

concluded that the state had not complied with its obligation to guarantee the human rights embodied in Articles 4, 5 and 7 of the ACHR concerning the persons disappeared and deprived of life, because it had failed to conduct a genuine, complete and effective investigation into the facts that motivated this judgment.[197] Interestingly, the IACtHR found the violation of Article 5 (right to humane treatment) regarding victims of abduction.[198] However, it did not adopt the standard of proof 'beyond reasonable doubt', applied by the ECtHR. Hence, it decided that the right to human treatment of the victims was violated. In similar cases, the ECtHR rarely found a violation of Article 3 concerning the treatment of victims of forced disappearances.[199] Hence, the IACtHR chooses particular elements of the ECtHR's jurisprudence as inspiration.

Similarly, the IACtHR is inspired by the ECtHR case law regarding Article 8 of the ECtHR to some degree. Following the European Court's approach, the definitional methodology is negative and non-exhaustive.[200] The IACtHR states that no one may be the object of arbitrary or abusive interference with their private life, including family life, home and correspondence. The sphere of privacy is characterised by being exempt from and immune to abusive and arbitrary invasion or attack by third parties or public authorities.[201] This guarantee emphasises the regulation of matters by the state, when necessary, to protect the rights of others[202] or encompassing a range of factors pertaining to the dignity of the in dividual (e.g., the ability to pursue the development of one's personality and aspirations, determine one's identity and define one's personal relationships).[203] The IACtHR referred to the ECtHR's jurisprudence in this regard, noting that the concept of private life is a wide-ranging term, which cannot be defined exhaustively,[204] but includes, among other protected forums, sexual life,[205] and the right to establish and develop relationships with other human beings.[206] Moreover, the Inter-American Court applied the European Court's jurisprudence in the case concerning rape.[207] IACtHR does not seem to be interpreting Article 11 of the ACHR in a scope scope as broad as this of Article 8 of the ECHR. In this regard, the references to the European case law seem to be rather modest.

Despite wide possibility of resorting to the ECtHR's jurisprudence, the IACtHR does not follow its jurisdiction in all aspects. In certain areas, such as freedom of

197 *Pueblo Bello Massacre v. Colombia*, § 150.
198 Ibid., § 155.
199 More: Czepek, 2013, p.12 et seq.
200 Hennebel and Tigroudja, 2022, p. 404.
201 IACtHR Judgment *Tristán Donoso v. Panama*, 27 January 2009, Series C No. 193, § 55.
202 IACmHR Decision *María Eugenia Morales de Sierra v. Guatemala*, 19 January 2001, 4/01, case 11.625, § 47.
203 Ibid., § 46.
204 ECtHR Judgment *Niemietz v. Germany*, 16 December 1992, Application no. 13710/88, § 29, ECtHR Judgment *Peck v. United Kingdom*, 28 January 2003, Application no. 44647/98, § 57.
205 ECtHR Judgment *Dudgeon v. the United Kingdom*, 22 October 1981, Application no. 7525/76, § 41, ECtHR Judgment *X and Y v. the Netherlands*, 26 March 1985, Application no. 8978/80, § 22.
206 *Niemietz v. Germany*, § 29; *Peck v. United Kingdom*, § 57.
207 IACtHR Judgment *Fernández Ortega et al. v. Mexico*, 30 August 2010. Series C No. 215, § 129.

expression, the Inter-American Court refers widely to the European Court's case law, whereas in others, such as the right to respect for private and family life, it seems to be reluctant to 'import' the Strasbourg viewpoint. The IACtHR refers mostly to 'classic' European case law. Notably, it does not quote latest ECtHR judgments. Instead, it focuses on older jurisprudence from the 1990s, 2000s or even earlier. In this regard, IACtHR seems to choose case law that 'stood the test of time' and implement interpretation that have proven its value over time. Therefore, the IACtHR does not follow all the progressive approaches adopted by the Court, for instance, regarding positive obligations of the state or within the broad interpretation of right to respect private and family life. The American Court is mindful of certain differences between both systems and, in conformity with Judge Trindade's statement, prefers to continue the *avant garde* jurisprudence of the IACtHR and avoid a serious jurisprudential setback.[208]

4.2. The Influence of the Inter-American System of Human Rights on the Protection of Human Rights in Europe

The relation of the two regional human rights protection systems is dominated by the wide influence of the ECtHR on the IACtHR. The vast disproportion in the scope of jurisprudence and its impact might suggest such relation. However, this is not the case. The Inter-American Court is not a passive importer of human rights interpretations, is selective and engages in innovative interpretations.[209] In this regard, the Inter-American Court aspires to be also the source of human rights interpretations.[210]

The IACtHR's very first judgment in the Velásquez Rodríguez case was proof of high-quality interpretation of human rights obligations, deriving from the American Convention. In the judgment, the Court examined the case of forced disappearance of Angel Manfredo Velásquez Rodríguez. He was abducted from a parking lot and his whereabouts since then were unknown. His kidnapping was carried out by persons connected with the Armed Forces or under its direction.[211] This was an example of systematic practice of disappearances.[212] The Court took this opportunity to examine the state's positive obligations in the right to life and contribute greatly to their development. The Court stated that states parties have an obligation to 'ensure' the free and full exercise of the rights recognised by the Convention to every person subject to its jurisdiction. This implies the duty to organise a governmental apparatus and, in general, all the structures through which public power is exercised, so that they can juridically ensure the free and full enjoyment of human rights. Consequently, states must prevent, investigate and punish any violation of the rights recognised by the Convention and, if possible, attempt to restore the right violated and provide

208 *López Álvarez v. Honduras,* Concurring vote of judge A.A. Cançado Trindade, § 49.
209 Neuman, 2008, p. 116.
210 Ibid.
211 *Velásquez Rodríguez v. Honduras,* § 147 e.
212 Ibid., § 147 g. See also: Grossman, 2008, p. 1269 et seq.

compensation, as warranted, for damages.[213] The IACtHR stressed that states parties have an obligation to take reasonable steps to prevent human rights violations and use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, identify those responsible, impose appropriate punishment and ensure the victim adequate compensation.[214]

The above statement was fundamental for the development of the IACtHR, which at the time was giving its first judgment, and all human rights systems. This was a groundbreaking judgment, which enabled the development of state positive obligations within right to life and other first generation human rights. It took the ECtHR a decade to develop the positive obligations formulated in Velásquez Rodríguez in 1988. The European Court formulated the material obligations in *Osman v. the United Kingdom*[215] *and L.C.B. v. the United Kingdom*.[216] It further developed the Velásquez Rodríguez formulae according to which 'states parties have an obligation to take reasonable steps to prevent human rights violations'. It stated that Article 2 of the Convention may imply a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. However, it must be established that the authorities knew or ought to have known of a real and immediate risk to the life of an identified individual(s) from the criminal acts of a third party and failed to take measures within the scope of their powers, which, judged reasonably, might have avoided the risk.[217]

Furthermore, the ECtHR formulated the procedural obligation to conduct effective investigation. It was based on Article 2, taken together with Article 1, of the ECHR. The Court expressed it for the first time in *McCann and Others v. the United Kingdom*.[218] The inspiration of the Velásquez Rodríguez case was evident. The ECtHR stressed that the obligation to protect the right to life (Article 2), in conjunction with the state's general duty under Article 1 of the ECHR to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires that there should be some form of effective official investigation when individuals have been killed through the use of force by, *inter alios*, agents of the state.[219] This interpretation was a reaction to the IACtHR findings regarding states parties' obligations.[220]

Although the scope of procedural obligations within the ECHR system mentions only effective 'investigation', it goes beyond that notion and, similar to the ACtHR, requires effective judicial proceedings, punishment of the person responsible for the violation and compensation.[221] The material and procedural obligations under

213 Ibid., § 166. See also: Czepek, 2021, p. 78 et seq.
214 Ibid., § 174.
215 ECtHR Judgment *Osman v. the United Kingdom*, 28 October 1998, Application no. 23452/94.
216 ECtHR Judgment *L.C.B. v. the United Kingdom*, 9 June 1998, Application no. 23413/94.
217 *Osman v. the United Kingdom*, § 115–116.
218 ECtHR Judgment McCann and Others v. the United Kingdom, 27 September 1995, Application no. 18984/91. See more: Czepek, 2021, p. 167 et seq.
219 Ibid., § 161.
220 *Velásquez Rodríguez v. Honduras*, § 174.
221 Czepek, 2021, pp. 232–235.

Article 2 of the ECHR have evolved greatly since McCann and Others and Osman cases. Currently they form separate, independent[222] obligations under Article 2 and do not require the joint applications of Article 2 and 1. The impressive evolution of states' positive obligations within the ECHR system would not be possible without the Velásquez Rodríguez judgment, which influenced the ECtHR case law at the time.

Even though the Velásquez Rodríguez case is probably the most significant and visible example of the IACtHR's influence on the ECtHR's jurisprudence, the European Court frequently refers to the IACtHR's case law. Its judgments contain a section, in which the Court refers to relevant international human rights standards, both regional and universal. This section is valuable for strengthening the argumentation of the Court and presenting regional and universal perspectives. It may further serve comparative purposes. The ECtHR frequently refers to the ACHR and the IACtHR standards as well. According to Ferrer-MacGregor, the European Court has used the jurisprudence of the Inter-American Court on those 'paths' where the latter has already walked. The issue of enforced disappearances of individuals is an example of how the jurisprudence of the Inter-American Court 'inspired' the European Court in the construction of its jurisprudence.[223]

The European Court, before formulating its approach, relied on the OAS system, ACHR and IACtHR case law. In *Kurt v. Turkey,* ECtHR referred to the Inter-American Convention on Forced Disappearance of Persons[224] and IACtHR jurisprudence.[225] Furthermore, the case law of the Inter-American Court on enforced disappearances was cited extensively in *Varnava and Others v. Turkey.*[226] The ECtHR referred to IACtHR findings that procedural obligations arise in killings and disappearances under several provisions of the ACHR. In several cases, particularly those where the substantive limb of Article 4 (right to life) had not been breached, the IACtHR examined such procedural complaints autonomously under Article 8 (the right to a fair trial) and Article 25 (the right to judicial protection), in conjunction with Article 1 § 1 (obligation to respect rights).[227] The ECtHR referred to the IACtHR's jurisprudence in *Blake v. Guatemala,*[228] *Serrano-Cruz Sisters v. El Salvador*[229] *and Heliodoro Portugal v.*

222 See: ECtHR Judgment *Šilih v. Slovenia,* 9 April 2009, Application no. 71463/01.
223 Ferrer MacGregor, 2017, p. 105.
224 Inter-American Convention on Forced Disappearance of Persons, 9 June 1994, OAS/Ser. P AG/doc. 3114/94.
225 *Velásquez Rodríguez v. Honduras*; IACtHR Judgment *Godínez Cruz v. Honduras,* 20 January 1989, Series C No. 5; IACtHR Judgment *Cabellero-Delgado and Santana v. Colombia,* 8 December 1995; ECtHR Judgment *Kurt v. Turkey,* 25 May 1998, Application no. 24276/94, § 66–67.
226 ECtHR Judgment *Varnava and Others v. Turkey,* 18 September 2009, Application nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90.
227 Ibid., § 93.
228 IACtHR Judgment *Blake v. Guatemala,* 24 January 1998. Series C No. 36; *Varnava and Others v. Turkey* § 94–96.
229 IACtHR Judgment *Serrano Cruz Sisters v. El Salvador,* 1 March 1, 2005. Series C No. 120; *Varnava and Others v. Turkey* § 97.

Panama, in which the IACtHR examined the violation of the relatives' right to humane treatment.[230]

The Strasbourg Court is referring[231] to the San José Court jurisprudence in enforced disappearances. The ECtHR seemingly appreciated and noted the wide experience of the ACtHR in this regard. Despite the visible influence, the European Court relies on them mostly regarding relevant international human rights law and prefers to develop its interpretation on that basis. Similarly, the ECtHR refers to the American system regarding relevant international law and practice concerning other rights or freedoms regularly. Recently, the ECtHR relied on the Inter-American system in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*.[232] It concerned the states' obligations relating to diminishing greenhouse gas emissions. The European Court referred to the Additional Protocol of the ACHR, which provides the right to a healthy environment,[233] and the Advisory Opinion of the IACtHR, 'The Environment and Human Rights'. The Inter-American Court stressed that states have certain positive obligations in this regard, including preventing significant environmental damage, cooperating in good faith, ensuring the right of access to information and ensuring access to justice.[234]

The European Court referred to Indigenous Communities of the Lhaka Honhat Association (Our Land) case, in which the IACtHR held Argentina responsible for violating indigenous communities' human rights through its failure to recognise and protect their lands. In that case, the Court examined the rights to a healthy environment, adequate food, water and cultural identity autonomously.[235] The ECtHR case law frequently refers to the IACtHR's jurisprudence in judgments dedicated to relevant international human rights law.[236] Such references may seem 'mandatory' honourable mentions; however, they contribute greatly to legal argumentation and influence the ECtHR's jurisprudence in a wider and evident scope. When referring to the IACtHR case law, the European Court mostly stops at the 'relevant international law' section and refrains from such quotations when making its conclusions. This creates an impression of indirect influence, which contributes to the development

230 *Heliodoro Portugal v. Panama*, 12 August 12, 2008. Series C No. 186; *Varnava and Others v. Turkey* § 98.

231 E.g. ECtHR Judgment *Aslakhanova and Others v. Russia*, 18 December 2012, Application nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, § 64.

232 ECtHR Judgment *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 9 April 2024, Application no. 53600/20, § 223–228.

233 Ibid., § 223.

234 IACtHR Advisory Opinion, The Environment and Human Rights, 15 November 2017, OC-23/17, § 242; *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, § 225.

235 IACtHR Judgment Indigenous Communities of the *Lhaka Honhat Association (Our Land) v. Argentina*, 6 February 2020, Series C No. 400; *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, § 226.

236 See e.g. ECtHR Judgment *Öcalan v. Turkey*, 12 May 2005, Application no. 46221/99, § 60; ECtHR Judgment *Merabishvili v. Georgia*, 28 November 2017, Application no. 72508/13, §157–160; ECtHR Judgment *Hanan v. Germany*, 16 February 2021, Application no. 4871/16, § 89; ECtHR Judgment *Savickis and Others v. Latvia*, 9 June 2022, Application no. 49270/11, § 74–76.

of the Court's overall standard regarding Convention rights. Despite its partial and 'indirect' character, the influence of the IACtHR's jurisprudence on ECtHR case law is evident and should not be underestimated. Similarly, the jurisprudence of the Inter-American Court may be raised in dissenting or concurring opinions of ECtHR judges,[237] which contribute to wider interpretation of Convention rights.

5. Conclusions

The European and American human rights protection systems influence each other greatly. At the time of the adoption of the ACHR, the ECHR was already in place and set an example of a regional human rights treaty. *Nolens volens*, the drafters of the American Convention had to take account of the ECHR. However, there are more interactions between both systems than just the influence of the ECHR on the ACHR's drafting process.

Despite a similar scope of material rights and freedoms in both treaties, there are numerous differences between them, including the regional context and socio-political situation in which both systems operate. These led to the difference in the evolution of both systems and their jurisprudence, both institutionally and procedurally. The most significant change was the adoption of Protocol No. 11 to the ECHR, which 'opened' the ECtHR for individual applications. All the subsequent reforms simply addressed the results of the changes introduced by the Protocol.

Further differences were derived from the formulation of rights and freedoms under the ACHR and ECHR. These discrepancies stemmed from interpretation of rights, socio-political context, necessities, legal traditions in both regions and the intentions of the drafters. The same reasons impact the difference in approach by both Courts in their jurisprudence. A brief examination of the material scope of right enshrined in both texts leads to the conclusion that the scope of ACHR is wider. There are numerous rights (protection of rights of the child, protection of second generation rights, etc.), which the ECHR does not recognise in its core text. However, the ECHR enables a wide interpretation of the Convention rights by the ECtHR and numerous judgments given by the Court grant the possibility to examine a broader scope of a particular right or freedom. In fact, both systems are valuable and serve their purpose in their respective regions.

Both human rights systems interact with each other. This is particularly visible in the similar interpretation of certain provisions or scope of certain guarantees, (e.g., similar approach to the freedom of expression). Such interactions are further noticeable in the case law of both Courts. Due to the wide scope and quantity of the ECtHR's jurisprudence, its influence on the IACtHR is more visible. Hence, the IACtHR does not blindly follow the European jurisprudence and carefully chooses the doctrines

237 E.g. ECtHR Judgment *De Souza Ribeiro v. France*, 13 December 2012, Application no. 22689/07, Concurring Opinion of Judge Pinto de Albuquerque Joined by Judge Vučinić.

and case law that it intends to include in its practice. However, the impact of the IACtHR on ECtHR jurisprudence is less visible; nonetheless, it should not be omitted. The European Court refers to the case law of its American counterpart frequently in the 'comparative' section of judgments and, to some degree, includes its findings in its judgments. In Velásquez Rodríguez, the IACtHR developed the concept of positive obligations, (both material and procedural), which influenced the ECtHR case-law. The Strasbourg Court took note of San José Court regarding enforced disappearances. Hence, the mutual influence of both Courts will be further developed, as they continue to interact.

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