DEMOCRACY AND HUMAN RIGHTS IN INTERNATIONAL LAW: REGIONAL PERSPECTIVES ON UNIVERSAL IDEAS

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ABSTRACT

This thesis investigates the development of democracy as a principle of international law, primarily from the view of human rights law, with the purpose of developing a basis for an international law of democracy. It begins with the proposition that the international legal argument prevents current international human rights law, and a future international law of democracy, from being effective for the individual, for whom the law is supposed to benefit. Under the present arrangement human values do not have a great impact upon the law as individuals are excluded from the law making process which remains an affair exclusive to states and governments. Furthering democracy as a legal principle will assist in making the law more effective as individuals are able to participate in the decisions impacting their lives.

At the global level the development of democracy as a legal idea has remained primarily as rhetoric expressed in a number of diverse texts covering a wide range of international activity. The nature of democracy as an contested topic is demonstrated at the global level as the lack of agreement on its meaning and application have prevented the creation of substantive legal principles. At the regional level in Europe, the Americas and to a lesser degree Africa, existent intergovernmental organisations with a concern for human rights have made great strides in developing an international law of democracy for their specific region. Efforts in support of democracy globally and regionally are transforming international law in way that is more responsive to the needs and desires of individuals. Numerous obstacles hinder this progress but the large amount of rhetoric expressed in support of democracy and human rights provide individuals with the tools necessary to ensure the law does not remain only rhetoric.

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ABBREVIATIONS

ALR	Australian Law Reports
ASIL	American Society of International Law
Ch	Chancery Law Reports
CLR	Commonwealth Law Reports
DLR	Dominion Law Reports
ECR	European Court Reports
ETS	European Treaty Series
F.2d	Federal Reporter
HRC	UN Human Rights Committee
ICJ	International Court of Justice
ILM	International Legal Materials
ILR	International Law Reports
Key Resolutions	Key Resolutions of the United Nations General Assembly, 1946-1996. (Cambridge: Cambridge University Press, 1997).
PCIJ	Permanent Court of International Justice
QB	Queen's Bench Reports
UNCIO	United Nations Conference on International Organisations.
UNTS	United Nations Treaty Series
US	United States Reports
WLR	Weekly Law Reports

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INTRODUCTION

I. DEMOCRACY AND THE INTERNATIONAL SYSTEM

The 1990s have experienced the growth of democracy as a topic of international law and relations. The end of the communist regime of the Soviet Union and its client states has been described as the international victory of democracy.[1] This 'victory' of democracy across the world has in turn led to the belief that there now exists a right to democracy in international human rights law, as well as the existence of democracy as a principle of general international law.[2]

These developments are welcomed as a benefit to the international system in the long-term, however, an unquestionable acceptance of the existence of democratic principles as part of international law creates numerous difficulties. The most obvious is the lack of investigation or discussion as to what this idea of democracy does or could contain, and the basis upon which any action in its name may be claimed. Prior to the collapse of the communist regimes in Europe most states in the world claimed to be democratic in one way or another, even though there were drastic and noticeable differences between the various forms of democracy. Due to differences in practice and that 'one word passed as common currency in several different languages', democracy was not an idea taken seriously at the international level except in the context of ideological struggles.[3] Now, it is claimed, the situation has changed and everyone is speaking the same democratic language allowing for a single notion of democracy to be seen as part of international relations.[4] It is undeniable that there has been a shift towards democracy in the international system, yet what it means to be democratic or how democracy is manifested in law and practice is an area not adequately investigated by international lawyers.[5] The difference between unquestioned assumptions of the victory of democracy in the world and the real and actual events in the

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[1] See F. Fukuyama. *The End of History and the Last Man*. (London: Hamilton, 1992).
[2] T. Frank. 'The Emerging Right to Democratic Governance.' 86 *American Journal of International Law* (1992) p. 46; A-M. Slaughter. 'International Law in a World of Liberal States.' 6 *European Journal of International Law* (1995) p. 503.
[3] See S. Marks. 'The End of History? Reflections on Some International Legal Theses.' 3 *European Journal of International Law* (1997) p. 449.
[4] Introduction. *John Locke: Political Writings*. D. Wotton, ed. (London: Penguin, 1993) p. 9.
[5] D. Held. *Models of Democracy*, 2nd ed. (Oxford: Polity, 1996) p. 291.

day-to-day lives of many individuals often means that 'the New World Order appears more like a boot in the face than a triumph of democracy and the rule of law.'[6]

The existence of democracy as a principle of international law is primarily seen in the form of a human right, an entitlement to democracy. Textual evidence of democracy as a concern of the international system and for the protection and promotion of human rights can be seen with the adoption of the Universal Declaration of Human Rights (UDHR).[7] Article 21 of the UDHR declares a right to participate in government and that the will of the people will be the basis of authority. The International Covenant on Civil and Political Rights (ICCPR)[8] followed with an expression of self-determination in Article 1 and includes Article 25 on the right to take part in government and to participate in elections. Subsequent human rights instruments have also contained aspects of a right to democracy through participation and voting.[9] Democracy has been used in the international legal context as a justification for the use of force,[10] a condition for recognition of states,[11] a criteria for membership in international organisations,[12] and as a factor in international development.[13] Due to the wide use of democracy it is suggested that instead of discussing democracy exclusively as a human right, it would be more constructive to deal with what could be termed 'an international law of democracy'.

II. Democratisation as a Basis for an International Law of Democracy

The recent global process of democratisation[14] is responsible for the growth of democracy as a topic of international law.[15] The current global spread of democratic ideas

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[6] D. Spitz. 'Solidarity and Disaggregated Property Rights: Roberto Unger's Recasting of Democracy.' 23 *Columbia Human Rights Law Review* (1991/2) p. 47.

[7] G.A. Resolution 217A (III), G.A.O.R., 3rd Sess., Part 1, Resolutions, p. 71.

[8] 999 UNTS 171.

[9] Articles 1-3, Convention on the Political Rights of Women (1953) 193 UNTS 135; Article 5 (c), International Convention on the Elimination of All Forms of Racial Discrimination (1966) 660 UNTS 195; Article 7, Convention on the Elimination of All Forms of Discrimination against Women (1979) 1249 UNTS 13; Article 3, First Protocol to the European Convention on Human Rights (1954) ETS No. 9; Article XX, American Declaration of the Rights and Duties of Man (1948) reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); Article 23, American Convention on Human Rights (1969) OAS Treaty Series No. 36; 1144 UNTS 123; Article 13, African Charter on Human and Peoples' Rights (1981) OAU Doc. CAB/LEG/67/3 rev. 5.

[10] See Chapter 5 concerning the relevant provisions of the OAS Charter.

[11] 'E.C. Guidelines on the Recognition of the New States in Eastern Europe and in the Soviet Union.' (16 December 1991) reprinted in 31 ILM (1992) p. 1486.

[12] Article 9, OAS Charter (1948) OAS Treaty Series No. 1-E, OEA/Ser.A/2, Rev.5; Article 3, Statute of the Council of Europe (1949) ETS No. 1.

[13] See Chapter 3.

[14] Democratisation is defined as 'a highly complex process involving successive stages of transition, endurance, and consolidation. This process ultimately leads to both institutionalisation and consolidation of structures and conditions conducive to structural transformation and regime change from authoritarian rule.' M. Monshipouri. *Democratization, Liberalization and Human Rights in the Third World*. (Boulder: Lynne Rienner, 1995) p. 16.

and practice is not an unique event as the international system has seen similar developments in the past.[16]

At present the world is said to be experiencing a 'Third Wave' of democratisation with the demise of communism and authoritarian regimes around the world.[17] The current trend is differentiated from past developments in the extent to which there are 'political changes moving in a democratic direction' at all levels of society; locally, nationally, regionally, and globally.[18] The impact of democracy in the international system is widespread as international institutions are reforming to become more democratic and to require democracy of their members.[19] At the local level, individuals and groups are calling for greater participation in the processes that impact their lives.[20] The efforts of these actors include establishing the institutional features necessary for democracy, the promotion of programmes and action that focuses at the grass-roots level and place concern on fostering education about a democratic society.[21] Concerns about good governance based on democracy are taking a prominent place in the global economy, development, trade issues, aid packages and in the general conduct of inter-state relations.[22] NGOs have proliferated in the new resurgence of democracy and have a large role to play in the furthering of the protection and promotion of democracy and human rights.[23]

The present growth of democracy is also placing greater scrutiny upon established democracies in determining to what extent democracy is being effectively maintained.[24] Democracy is a dynamic process and not a one-off event that automatically provides

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[15] See 'Democratization and International Law: Building the Institutions of Civil Society.' 88 *ASIL Proceedings* (1994) p. 197.

[16] S. Huntington. *The Third Wave: Democratization in the Late Twentieth Century*. (Norman: Oklahoma University Press, 1991) pp. 15-26; D. Rustow. 'Democracy: A Global Revolution?' 69 *Foreign Affairs* (1990) p. 75-76.

[17] See generally Huntington (1991).

[18] D. Potter. 'Explaining Democratization.' in Potter et al, eds. *Democratiztion*. (Cambridge: Polity, 1996) p. 3.

[19] See Chapters 4-6. In Europe, the democratic transitions in Spain, Greece and Portugal had as much to do with membership in the European Union as with other factors normally associated with the downfall of authoritarian regimes, see G. Sørenson. *Democracy and Democratization: Process and Prospects in a Changing World*. (Boulder: Westview, 1993) p. 32.

[20] D. Held. Cosmopolitan Democracy and the Global Order: Reflections on the 200th Anniversary of Kant's "Perpetual Peace".' 20 *Alternatives* (1995) p. 427. Groups involved in the promotion of democracy at the global are sometimes backed by initiatives from national governments, like the US Information Agency, meaning specific programmes which match a certain political agenda will be forwarded. This creates the problem of spreading ideology, which in the long-term, could prove dangerous for the maintenance of democracy, see L. Diamond. *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives*. (Report to the Carnegie Commission, New York, 1995) p. 29.

[21] See Diamond (1995) pp. 15, 19.

[22] But this emphasis on good governance is not without its problems, see K. Tomaševski. *Between Sanctions and Elections: Aid Donors and their Human Rights Performance*. (London: Pinter, 1997)

[23] Monshipouri (1995) p. 66.

[24] A trend of greater centralisation of powers has been identified in many of the western industrialised democracies. See generally the contributors to 'The Western Allies 50 Years Later.' 6 *Journal of Democracy* (1995) p. 3. Also G. Parry and M. Moran, eds. *Democracy and Democratization*. London: Routledge, 1994) p. 11

guarantees in perpetuity. There is the need to ensure that any international principle of democracy would have to be of universal application and of continual necessity. There is at present an uneven process, as established democracies feel immune to any criticisms of non-democratic character. This places a selective emphasis on newer democracies, states in transition to democracy or states that are not allies. This selective reliance upon a global acceptance of democracy, differing in degree and substance depending upon the states involved, may be overcome by a more coherent international law of democracy which helps to ensure that the common language of democracy is backed up by a common understanding and meaning. If the third wave of democratisation brings a world based on democratic ideas then it will be necessary to establish an accepted international standard of democracy that applies to all regardless of their stage of political development.

The present process of democratisation is unique for its breadth and depth but there remain important points to keep in mind when making any claim of a victory for democracy. Many of the recent transitions to democracy are returns to democracy, not the acceptance and creation of democratic structures where none previously existed but attempts to regain former democratic structures and practices.[25] There has also been an identifiable reactionary trend against democracy with the third wave.[26] A number of societies in the process of transitions to democracy are struggling to cope with the impact of an authoritarian past as in Latin America, central and eastern Europe and in Africa, notably South Africa.[27] These factors provide anomalies or exceptions to the victory of democracy and give rise to the necessity of continually engaging in examinations of the content, source and practice of democracy as part of the international system.

The widespread use of democratic language in the world today shows less of a global acceptance of a legal principle of democracy but more of a global rhetoric of democracy.[28] This rhetoric is the product of the increased emphasis being placed on the existence of democracy along with human rights in the international system with an emphasis upon the issue of legitimacy of governments and institutions.[29] The lack of investigation into what constitutes democracy means the global rhetoric has produced numerous and often conflicting interpretations as to how democracy fits into international law and relations. The multifarious definitions or claims to democracy allow for 'the propaganda advantages of

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[25] See Sørenson (1993) pp. 31-32.
[26] See Chapter 7.
[27] Sørenson (1993) pp. 29-30.
[28] Even at the level of rhetoric the acceptance of democracy is not assured, Parry and Moran (1994) p. 11.

democracy without incurring its political risks'.[30] Investigating what is meant and understood by democracy, both in thought and practice, is crucial for its development as a principle of international law. It is necessary to demonstrate that the democracy spoken of by governments corresponds to a reality being experienced by individuals. This alone underlines the necessity for investigations into the content of an international law of democracy. It is important that political leaders and individuals have the same understanding of democracy, its concepts, the way in which is it institutionalised, or put into practice.[31] As Machiavelli expressed - power can easily take a name, but a name cannot give power.[32] To declare the existence of democracy as part of international law without ensuring that it actually exists or that it may be exercised in an effective manner is not a victory as it will only lead to disillusionment and disempowerment.

III. Dilemmas of Definition and Measurement

Democracy has been described as a term with no 'determinate content',[33] a definitional difficulty which has not been overcome with the recent resurgence in support for democracy. Human rights also suffer from definitional controversies in terms of applicability and content.[34] Due to the lack of agreed content to either democracy or human rights there exists a 'credibility gap' where there is a stark difference 'between the standards [that] governments proclaim, or accept, or at least pay lip-service to, and the reality of their practice'.[35] Whether it involves content, mode of implementation, obligations assumed or the way in which violations are addressed, the international system allows for multiple definitions in both theory and practice to be accepted as valid. In discussions of democracy and human rights there may exist a common rhetoric but there is not a common understanding. The difficulty with both democracy and human rights is that the ideas and conceptions involved are at their most coherent when the theory is in isolation from practice.

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[29] See Tomaševski (1997) pp. 7-14.

[30] J. Kirkpatrick. 'Democratic Elections and Democratic Government.' 147 *World Affairs* (1984) p. 61.

[31] In Canada, where the government is considered a serious adherent to international human rights principles, the government and human rights NGOs are engaged in a similar rhetoric of human rights but there exists 'sharp differences in practice and perception' between them. See L. Pal. 'Competing Paradigms in Policy Discourse: The Case of International Human Rights.' 28 *Policy Sciences* (1995) p. 185.

[32] N. Machiavelli. *The Discourses*. Book I, Chapter XXXIV.

[33] Kirkpatrick (1984) p. 61.

[34] On the issues of measuring democracy and human rights see, R. Claude and T. Jabine, eds. 'Symposium: Statistical Issues in the Field of Human Rights.' 8 *Human Rights Quarterly* (1986) pp. 551-699; K. Vasak, ed. 'Enseignement des droits de l'homme dans les Universites.' 6 *Revue des droits de l'homme* (1973) pp. 4-192; A. Inkeles, ed. *On Measuring Democracy: Its Consequences and Concomitants*. (New Brunswick: Transaction, 1991); D. Beetham, ed. *Defining and Measuring Democracy*. (London: Sage, 1994).

[35] N. MacDermot. 'The Credibility Gap in Human Rights.' 3 *Dalhousie Law Journal* (1976) p. 262.

With both democracy and human rights there is a great deal of 'abuse of language' commonly based on ideological belief, resulting in competing or conflicting claims of legitimacy.[36] An example of this can be seen in a statement by an US delegate at a human rights conference prior to the end of communism where it was said: '[w]e talk about human [i.e., political and civil] rights and they [the Soviets] talk about unemployment and racism.'[37] The problem of language and meaning is exacerbated by the tendency of scholars and academics to assume that conceptual terms are clearly understood and that meanings will eventually work themselves out.[38] Both democracy and human rights are emotionally charged topics making agreement on meaning almost an impossible task. At the same time this should not preclude establishing working definitions of what is being discussed.[39] An even more daunting task is providing objective proof based on empirical data concerning the existence of democracy or the nature of human rights abuses. A great deal of study has been instituted in order to determine degrees of democracy in existence or what factors contribute or help prevent human rights abuses. Numerous approaches have been used but all face the same obstacle of dependence upon uncertain judgements about the value of the ideas in question.[40] For any study, there needs to be decisions made as to what factors or phenomena will be measured, how to go about obtaining the data and how to be sure it is analysed in an impartial manner.[41] The existence of competing world views makes the acceptance of ideas of democracy and human rights difficult to achieve, but not impossible if there is wide-based, open and active participation in the discussion and formulation of meanings and application.

Related to the abuse of language spoken of above is the inclination of commentators and politicians to use democracy and human rights as interchangeable terms that mutually define each other. Democracy and human rights are not one in the same in either theory or practice and should not be utilised as such. One author has made the automatic connection between democracy and human rights by correlating the definitional development of human rights to include a right to peace as creating a right to democracy, '[t]hus, by definition, peace as well

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[36] J. Marie. 'Une methodologie pour une science des droits de l'homme.' 6 *Revue des droits de l'homme* (1973) p. 105.
[37] Quoted in R. Goldstein. 'The Limitations of Using Quantitative Data in Studying Human Rights Abuses.' 8 *Human Rights Quarterly* (1986) p. 609-610.
[38] R. Barsh. 'Measuring Human Rights: Problems of Methodology and Purpose.' 15 *Human Rights Quarterly* (1993) p. 92.
[39] K. Bollen. 'Political Rights and Political Liberties in Nations: An Evaluation of Human Rights Measures.' 8 *Human Rights Quarterly* (1986) p. 568.
[40] A. Ritter. 'Comparative Assessments of Freedom.' 6 *Connecticut Journal of International Law* (1991) pp. 561-562.

as democracy become part of human rights and the promotion of one … promotes the whole.'[42] The problem with using the two terms as one are several as the language of democracy is often flagrantly used to cover up actual abuses of human rights and the promotion of democracy elsewhere is used by individual states to cover-up poor human rights records at home.[43]

The greatest oversight in using the two terms as one is that adherence to human rights may exist where there is no democracy and violations of human rights continue in a democratic society.[44] Human rights rely heavily upon the existence of democratic systems if they are to be effective. This is natural considering that human rights are about the individual's existence and democracy entails individuals being able to be part of the processes impacting their lives. However, the extent to which a government may be said to be adhering to international human rights standards is not dependent upon whether or not they properly represent a society but is judged by the extent to which they meet the terms of an international treaty. The domestic system within which rights adherence is achieved is not a concern for the instrument's enforcement body so long as the conditions of the treaty are met.[45] It is most likely that respect for any human rights provisions by an authoritarian regime is either for its own self-serving interest or to appease outside pressure.[46] Either way the treaty supervision body will have to recognise that specific legal obligations are being met. Equally so, democracy may exist and there continues to be violations of human rights. The existence of democracy in no way guarantees adherence to human rights. Democracy

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[41] L. Bernt. 'Measuring Freedom? The UNDP Human Freedom Index.' 13 *Michigan Journal of International Law* (1992) p. 721.

[42] N. Gleditsch. 'Democracy and Peace: Good News for Human Rights Advocates.' in D. Gomien, ed. *Broadening the Frontiers of Human Rights: Essays in Honour of Asbjørn Eide*. (Oslo: Scandinavian University, 1993) pp. 287-288. The connection between democracy and peace has attracted a great deal of academic debate but has yet to conclusively prove that democratic states are more peaceful in their international relations, for a review of the literature see S. Chan. 'In Search of Democratic Peace: Problems and Promise.' 41 *Mershon International Studies Review* (1997) pp. 59-91.

[43] See statements by H. Burkhalter 88 *ASIL Proceedings* (1994) pp. 203-206; T. Carothers. 'Democracy and Human Rights: Policy Allies or Rivals?' 17 *Washington Quarterly* (1994) pp. 109-120.

[44] Point raised by Burkhalter (1994) pp. 203-204, see also her comments on p. 207 concerning human rights adherence in the absence of democracy.

[45] For example, the comments of the Committee on Economic, Social and Cultural Rights concerning Algeria (UN Doc E/C.12/1995/17) acknowledge the lack of democracy (paragraph 12) but credit is given for meeting obligations related to trade union rights, education and housing (paragraphs 6-11). Shue notes that the ability of a non-democratic government to protect certain rights is a possibility, even though one that is not widely supported by practice, see H. Shue. *Basic Rights, Subsistence, Affluence and U.S. Foreign Policy*. (Princeton: Princeton University Press, 1980) pp. 86-87.

[46] The government of Malaysia has demonstrated the possibility of using authoritarian practices to ensure its power base while at the same time allowing for relatively open and competitive elections to which they need to respond to the expressed wishes of the electorate. See H. Crouch. 'Neither Authoritarian or Democratic.' in K. Hewison, ed. *Southeast Asia in the 1990s: Authoritarianism, Democracy and Capitalism*. (St. Leonards: Allen and Unwin, 1993) pp. 136-140.

will allow for rights to be a larger part of society and allow for individuals to demand their rights and to seek recourse for violations, but it will not end violations of rights or ensure the effectiveness of rights. Democracy is a process by which individuals are part of the processes that impact their lives. Human rights are part of the process by providing some of the essential tools to allow democracy to work properly, in a way that all benefit.[47] While the two are closely related and mutually supporting they remain distinct entities.

IV. Democracy, Human Rights and International Law

Looking at the extent to which democracy has become part of international law, key issues emerge which will underpin the framework of this study. The existence of democratic principles in the international system implies the existence of processes of inclusion, participation, openness and accountability that is beneficial to the individual and society. Human rights have the same purpose of acting as a tool of protection and empowerment for the individual's benefit. As will be shown in Chapter 1, human rights has an established rhetorical existence in the international system, but to date its ability to move beyond the rhetoric to providing substantive protection for the individual has been limited. International human rights law is a process that is exclusive to states, who in turn exclude the participation of other entities and do not necessarily act with any degree of openness or accountability either domestically or internationally with regard to the legal process. The result is that the system of international human rights law is based more on the needs and interests of states rather than individuals, the supposed purpose of the law. It is necessary to emphasise this major flaw in considering an international law of democracy. How is it possible to create principles that potentially allow individuals to be part of the decision-making processes that exist in their lives if they are excluded from the original norm creating process in the first place? Chapter 1 extends this inquiry to ask how international human rights law and the future development of democracy are to be beneficial for the individual when the law is more concerned with the maintenance of state interests and needs. If the 'new world order', or even the present world order, is to be based on respect for rights and the practice of democracy then it becomes necessary to ensure the systems of lawn are conducive to those who have the most at stake in the application of the law - individuals.

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[47] Idea inspired by J. Müller. 'Fundamental Rights in Democracy.' 4 *Human Rights Law Journal* (1983) pp. 131-3.

A further theme that underpins this work concerns the applicability of democracy and human rights as effective tools of empowerment for individuals. Presently in international human rights law the legal regime consists of universal action manifested in the activities of the UN and the existence of three regional human rights systems. The activities of the UN have demonstrated a rhetorical commitment at the global level to create a system for human rights protection based on the belief that there are universal core elements of human existence which are deserving of legal protection. The development of the regional systems of human rights protection share this belief but with the understanding that the protection of rights is enhanced through institutions of smaller scope and greater homogeneity. These two developments should not be seen as contradictory but as a means of improving the protection and promotion of democracy and human rights.

This raises the debate as to whether common standards applicable to all may be achieved or if there must be different standards for different situations and experiences. The relativist/universalist debate has heavily influenced the development human rights by bringing into question whether democracy and human rights can mean the same thing all over the world. The most practical way of approaching the issue is through recognition of both the universal and relative benefits of democracy and human rights. The sociological facts constitutive of a society, ethical judgements, prevailing evaluations of community, and specific world views of existence that differ among individuals and communities necessarily dictate that democracy and human rights will be interpreted and practised differently.[48] However, the inherent diversity of society does not automatically preclude any sort of universal attribute common to all individuals and groups.[49] Democracy and human rights are flexible concepts allowing for the accommodation of diversity. This flexibility is often abused and taken to the extreme as an apology for abhorrent acts or practices justified by difference. Instead of seeing diversity as a threat to the overall systems of protection, diversity should be recognised as something working for the good of all individuals and not just an excuse for the promotion of selfish interests.[50]

This work is to examine the extent to which democracy has developed as a principle of international law both globally and regionally. It begins in Chapter 1 with a discussion of the problems inherent in international human rights law which weaken its effectiveness and

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[48] P. Baehr. *The Role of Human Rights in Foreign Policy*. (Basingstoke: Macmillan, 1994) pp. 21-22.
[49] C. Nino. *The Ethics of Human Rights*. (Oxford: Clarendon Press, 1993) p. 103.
[50] I. Nguema. 'Human Rights Perspectives in Africa: The Roots of Constant Challenge.' 11 *Human Rights Law Journal* (1990) p. 270.

which will prevent the effective development of an international law of democracy. Chapter 2 provides a definitional framework of democracy inclusive of both normative and institutional aspects necessary for an international law of democracy. Chapter 3 will examine the extent to which the ideas and practices of democracy as discussed in Chapter 2 are part of global international law. From the global perspective of Chapter 3 the focus of Chapters 4-6 narrows to examine how the three established regional human rights systems of Africa, Europe and the Western Hemisphere have developed or dealt with the issue of democracy based on the regional peculiarities each one faces. Chapter 7 returns to the debate on the applicability of democracy and human rights based on the universalist/relativist argument and an examination of the absence of regional systems for the protection and promotion of democracy and human rights in other parts of the world.

Throughout, emphasis is placed upon the extent to which individuals are able to participate in the decisions and processes of decision making surrounding lives and are able to access and utilise international legal rules and principles.[51] International law has developed into an important aspect of the day to day lives of individuals with areas such as international human rights law becoming integral to social ordering and governance. After World War II, E.H. Carr stated that:

> The freedom and equality which the makers of the coming peace must seek to establish is not a freedom and equality of nations but a freedom and equality which will express itself in the daily lives of men and women.[52]

If international law is to be credible and relevant in the eyes of individuals it must consider and act upon the needs and desires of individuals, instead of only speaking of those needs and desires and acting for other interests deemed more essential.[53] International law is and can be an effective tool for the development of the individual. At the same time the state centred nature of the international legal process directs the law away from the concerns of the individual even though the legal texts and public rhetoric attempt to create an opposite

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[51] For a similar perspective concerning the ability of individuals to participate in the international legal process of environmental law see P. Sharma. 'Restoring Participatory Democracy: Why the US should Listen to Citizen Voices while Engaging in International Environmental Law-Making. 12 *Emory International Law Review* (1998) p. 1215.
[52] Quoted in R. Vincent. 'Groutis, Human Rights and Intervention.' in H. Bull et al, eds. *Hugo Groutis and International Relations*. (Oxford: Claredon Press, 1982) p. 242.
[53] P. Allott. *Eunomia: A New Order for a New World*. (Oxford: Oxford University Press, 1990) p. 115.

picture.[54] Therefore it becomes essential to

> expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.[55]

This work will attempt to reveal the sham and inequities that exist in international law as it attempts to address issues of democracy and human rights. It will not condemn the law to useless rhetoric as it does provide a wealth of potential for the development of human goods. To uncover those potentialities the law needs to move in a direction that is open and inclusive, where more powerful voices will not drown out weaker, but no less significant voices. Only by allowing for all the relevant entities of the law to be heard can international law prove to be effective.[56]

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[54] International human rights law has been described as at once empowering, but cruelly deceiving, decisive, but irrelevant, critical of state behaviour, but apologist for abuses of power, see S. Marks. 'Nightmare and Noble Dream: The 1993 World Conference on Human Rights.' 53 *Cambridge Law Journal* (1994) p. 62

[55] E. Thompson. *Whigs and Hunters: Origins of the Black Act.* (London: Penguin, 1975, 1990 edition) p. 266

[56] E. Root. *The Effect of Democracy on International Law.* (Pamphlet No. 30. Carneige Endowment for International Peace. Washington, 1917) p. 3.

CHAPTER 1

IN PURSUIT OF AN EFFECTIVE INTERNATIONAL HUMAN RIGHTS LAW

Perusing the list of parties to the major human rights treaties, any alert observer must wonder how many of these States have decided to join this great enterprise more for symbolic reasons than motivated by the desire to conform their domestic laws and practices to internationally agreed upon human rights standards and to subject themselves to international scrutiny.[1]

I. INTRODUCTION

International human rights law and democracy are distinct areas of consideration. However, they do share common theoretical formulations in international law that in turn impacts their practical application in the international system. This enquiry into an international law of democracy is to begin with an investigation of international human rights law for two reasons. The first is that the present development of democracy as a legal principle in the international system is occurring primarily (but not exclusively) in the area of international human rights law. The second reason relates to the fact that democracy, properly understood, is about participation and inclusiveness - a system which allows individuals to be part of the forces and processes which impact their lives. International human rights law supposes a similar purpose in creating an environment conducive to the development of the individual and society. Both human rights and democracy occupy a unique place in international law for they bring into question the position of the state whose values and interests have come to dominate the international system. Investigating the effectiveness of international human rights law provides insight as to how international law will react to democracy as a legal construct.

The purpose of this chapter is to examine the obstacles which currently prevent international human rights law from being effective, as regards to the position of the individual, and how this may impact an international law of democracy. It will look beyond the rhetorical level of what the international instruments say in favour of human rights and investigate the valid legal techniques available to states allowing them to preserve their own interests and position. The reason for this investigation is to uncover the difficulties faced in the development of international human rights law and to see the extent to which an international law of democracy will be accommodated into the international system –

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[1] B. Simma. 'Reservations to Human Rights Treaties - Some Recent Developments.' in G. Hafner, ed. *Liber Amicorium Professor Ignaz Seidl-Hohanveldern*. (The Hague: Kluwer, 1998) p. 659.

an international law of democracy that is concerned with the individual, not one concerned with the ideological or self-interested pursuits of states. The investigation brings into question the effectiveness of international human rights law but does not take the position that it has no use in curbing the arbitrary use and abuse of power. International human rights law has inherent problems in its effectiveness but it also possess a great deal of potential, as

> [t]he rhetoric and rules of a society are something a great deal more than a sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions.[2]

International human rights law is able to act as a limit on power through its rhetorical force. The rhetorical force of the law is important, as the language of international human rights law is very much in favour of the values and interests of the individual. States[3] may be able to utilise the international legal system to their benefit, overriding concerns for the individual, but this does not erase what has been publicly agreed to. This chapter will begin by establishing the context of the international legal system in which human rights law operates. It will show through an application of the work of Martti Koskenniemi[4] how this quest for effectiveness is severely constrained by the structure of the international legal argument demonstrating that state values and interests expressed through the idea of sovereignty conflict with the rhetoric and substance of international human rights. The focus will be with developments at the global level with the UN. Regional developments will be discussed in later chapters where a similar situation exists concerning the effectiveness of human rights instruments.

II. Human Rights and the International System

Since the end of World War II there has been a widespread proliferation of international legal instruments, at both the global and regional level, designed to develop and advance the international system for the protection of human rights.[5] The present system of international

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[2] E. Thompson. *Whigs and Hunters: The Origin of the Black Act.* (London: Penguin, 1975, 1990 ed.) p. 265.

[3] 'By states, read: government in power.' See A. Rosas. 'International Legitimacy of Governments.' in G. Alfredsson and P. Macalister-Smith, eds. *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of Other Vulnerable Groups*. (Kehl: Engel, 1996) p. 205.

[4] M. Koskenniemi. *From Apology to Utopia: The Structure of the International Legal Argument*. (Helsinki: Finnish Lawyers Publishing, 1989) hereinafter *Apology to Utopia*.

[5] The proliferation of international human rights instruments may be viewed as either an attempt to create concrete principles and protection or as an illusionary process of churning out instruments in the hope that something happens but with no real conviction as to results, see R. Bilder. 'Rethinking International Human Rights: Some Basic Questions.' *Wisconsin Law Review* (1969) p. 175; T. Meron. 'Norm Making and Supervision in International Human Rights: Reflections on Institutional Order.' 76 *American Journal of International Law* (1982) p. 754.

human rights law has its beginnings with the formation of the United Nations (UN).[6] The UN was conceived for a number of purposes, including the desire 'to save succeeding generations from the scourge of war' and 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'.[7] The UN quickly adopted the Universal Declaration of Human Rights (UDHR)[8] which recognises 'the inherent dignity' and the 'equal and inalienable rights of all members of the human family' as 'the foundation of freedom, justice and peace in the world'.[9] The UDHR expresses the idea that 'it is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.[10] To achieve this, it is necessary to protect the individual against the abuse of power, ensure the preservation of human dignity and 'to promote social progress and better standards of life in larger freedom'.[11]

The development of international human rights standards by the UN and regional organisations has created a wide array of legal instruments for the protection and promotion of human rights. In turn this has led to claims of a monumental shift in the international system from one based solely on the needs and interests of states toward one where the values and interests of individual human beings are a direct concern for the international system.[12] These claims are valid and a shift in priorities is discernible. However, these claims have to be approached with caution. A close examination of the structure and process of international human rights law shows that attempts to place human values as a genuine concern for the

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[6] The primary focus of this work is conventional international law as expressed through international treaties. The role and importance of customary international law for the protection and promotion of human rights is beyond the scope of the work. The effectiveness of customary international law for the protection and promotion of human rights faces many of the same obstacles as treaty law that will be discussed below. Furthermore, the creation of custom remains a process exclusive to states (see A. Cassese. *International Law in a Divided World*. (Oxford: Clarendon, 1986) p. 169) and the ability of individuals to rely upon norms of customary international law to redress violations of rights remains highly indeterminate as recently demonstrated in *R v Bow Street Magistrates, ex parte Pinochet (No. 3)*. [1999] 2 WLR 827 (hereinafter *Pinochet*). In the UK it was expressed that customary international law was automatically part of the domestic legal system through the common law *Trendtex Trading Corp v Central Bank of Nigeria* 1977] QB 529, per Lord Denning. But the very same judge had stated earlier that international law only applied to the UK when Parliament allowed it to be so, *Blackburn v Attorney General* [1971] 1 WLR 1307. It has been recently argued that in the US customary international law is only applicable after action taken by the government, see C. Bradley and J. Goldsmith. 'Customary International Law as Federal Common Law: A Critique of the Modern Position.' 110 *Harvard Law Review* (1997) p. 816. On the difficulties of utilising customary international law as a source of obligation see *Apology to Utopia*, pp. 417; C. de Visscher. *Theory and Reality in Public International Law*, trans. P. Corbett (Princeton: Princeton University Press, 1968) pp. 161-162; W. Friedmann. *The Changing Structure of International Law*. (London: Stevens, 1964) pp. 121-123; M. Hunt. *Using Human Rights Law in English Courts*. (Oxford: Hart, 1997) pp. 29-31; T. Meron. *Human Rights and Humanitarian Norms as Customary Law*. (Oxford: Clarendon, 1998) pp. 114-135.

[7] UN Charter, Preamble, paragraphs 1-2.

[8] G.A. Resolution 217A (III), G.A.O.R., 3rd Sess., Part 1, Resolutions, p. 71.

[9] UDHR, Preamble, paragraph 1.

[10] UDHR, Preamble, paragraph 3.

[11] UN Charter, Preamble, paragraph 4.

[12] L. Henkin. 'Law and Politics in International Relations: states and Human Values.' 44 *Journal of International Affairs* (1990) p. 184

international system and international law uncovers numerous obstacles which prevent the individual from truly enjoying the positive benefits expressed by the law.[13] There is a tendency to overlook these obstacles, preferring to triumph the successful side of international human rights law as providing an adequate system of protection for the individual.[14] The ability of international human rights law to maintain this 'double gesture' of appearing successful but riddled with difficulties is grounded in the structure of the international legal argument.[15] The international legal argument allows for proclamations of the importance and effectiveness of international human rights law (as well as democracy), at the same time ensuring that there is only a minimal shift in the priorities and practice of the international system towards a recognition of human values as an integral concern.[16] Any shift in the defining of priorities for the international system has been primarily rhetorical and not necessarily substantive.[17]

The wide array of international human rights instruments which have been established with the goal of safeguarding the individual, have all been drafted from the point of view of the prevailing interests of states. Even though it is claimed that the concept and protection of human rights has moved from being confined to the exclusive jurisdiction of individual states to a concern for the international community,[18] this has not allowed international human rights law to escape manipulation by states in preserving their own interests. The present condition of international human rights law has been described by Judge Piza in his comments on the Inter-American human rights system;

> I have come to the conclusion that unfortunately the system of the Convention appears to make it [the protection of human rights] impossible because the American states in drafting it [the Convention] did not wish to accept the

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[13] I. Shivji. *The Concept of Human Rights in Africa*. (1989) pp. 82-83.

[14] See A. Fields and W-D. Narr. 'Human Rights as a Holistic Concept.' 14 *Human Rights Quarterly* (1992) p. 1, where they observe '[t]he problem is that all of the momentum toward human rights remains at the level of ideology.' Murphy states that there is a tendency of commentators to overlook the lack of substantive agreement concerning human rights meaning '[t]heory and reality grow further apart as academics work zealously for the implementation of human rights *as the understand them*.' (emphasis in original) C. Murphy. 'Objections to Western Conceptions of Human Rights.' 9 *Hofstra Law Review* (1981) pp. 434-435.

[15] M. Heiberg, ed. *Subduing Sovereignty: Sovereignty and the Right to Intervene.* (London: Pinter, 1994) p. 15.

[16] See the statement by Falk, in the context of the intervention to restore democracy in Haiti, that the US is genuinely committed to encouraging human rights and democracy around the world 'at least to the extent that such encouragement is not too costly and does not come into conflict with strategic concerns relating to trade and influence.' R. Falk. 'The Haiti Intervention: A Dangerous World Order Precedent for the United Nations.' 36 *Harvard International Law Journal* (1995) p. 351.

[17] The Convention on the Rights of the Child (CRC) (UN Doc. A/RES/44/25) demonstrates this double gesture as 191 states have become parties to the treaty, but 75 of them have entered a variety of reservations and understandings, many of which nullify the impact of the convention. *Multilateral Treaties Deposited with the Secretary-General Status as at 31 December 1997* UN Doc. ST/LEG/SER.E/16 (hereinafter *Multilateral Treaties, 1997*).

[18] See M. Reisman. 'Sovereignty and Human Rights in Contemporary International Law.' 84 *American Journal of International Law* (1990) p. 869.

> establishment of a swift and effective juridical system but rather they hobbled it ... by establishing a veritable obstacle course that is almost insurmountable, on the long and arduous road that the basic rights of the individual are forced to travel.[19]

The ability of states to determine the creation and application of international human rights law raises conceptual difficulties as the law is supposed to have the purpose of limiting the arbitrary behaviour of governments in relation to the individual. It is not surprising that in creating limits upon themselves states and governments have found ways to manipulate the system so that it appears that human values and interests are important when in reality the values and interests of states and governments are maintained.

III. The Pursuit of Effectiveness

International human rights law has the purpose of protecting individuals from the arbitrary use and abuse of power that has been entrusted to others as a matter of social ordering. The UDHR recognises that human dignity and equal rights for all individuals are 'the foundation of freedom, justice and peace in the world'.[20] It sees human rights as those rights and freedoms an individual requires in order to ensure physical survival and the maintenance of their human dignity. The specific content of rights will vary over time and space and it is not possible to establish any precise list of absolute rights, or a hierarchy of rights, as the specific content will differ between communities and individuals in the same community. The final goal of human rights will, however, be constant over time and space - the protection and preservation of the individual in body and spirit.[21]

By describing international human rights law as 'ineffective' it is being held that the body of law in question does not achieve its purported goal of protecting the dignity and survival of human beings. Effectiveness is related to the real, the actual, and the existing, '[a] situation is effective if it is solidly implanted in real life'.[22] Any instrument established for the purpose of

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[19] Inter-American Court of Human Rights. *In the matter of Viviana Gallardo et al.* (13 November 1981) Advisory Opinion No. G 101/81, Inter-Am.Ct.H.R. (Ser.A) (1984) Explanation of Judge Piza, paragraph 11. Buergenthal provides an equally applicable comment placing the onus upon states - 'It is one thing to establish institutions on the international plane to promote and protect human rights, it is quite another to give them the authority and tools they need to achieve their objective.' T. Buergenthal. 'The Normative and Institutional Evolution of International Human Rights.' 19 *Human Rights Quarterly* (1997) pp. 712-713.

[20] Preamble, paragraph 1.

[21] Fein describes 'the right to exist and to be free from bodily invasion and terror of being caught, held and disappeared is a basic desideratum among humans which transcends cultures and ages.' H. Fein 'More Murder in the Middle: Life Integrity Violations and Democracy in the World.' 17 *Human Rights Quarterly* (1995) p. 171. For various lists of core rights see J. Donnelly. *Universal Human Rights in Theory and Practice.* (Ithaca: Cornell University Press, 1989) pp. 37-41.

[22] Cassese (1986) p. 26.

addressing issues of human rights must be accessible, effective and credible in the view of those is most closely impacts.[23] To determine effectiveness it is necessary to examine how the law works within the society which it exists. This entails looking at factors including, but not limited to, implementation, enforcement, impact and compliance in order to determine whether or not the law matters. Effectiveness depends upon the law having an impact on political, social and economic areas of society and not just merely rhetoric that is void of substance.[24] Mere proclamations or declarations are not enough, there must also exist real and actual guarantees accessible to the individual.[25]

The effectiveness of international human rights law lies in its ability to correspond to, and when necessary, react to the needs and desires of those it proclaims to protect - individuals.[26] In examining the effectiveness of any international human rights instrument it is necessary to determine to what extent their provisions accurately reflect the reality faced by an individual or if they exist only for symbolic purposes to create a myth that legality is observed. Thompson writes '[t]he essential precondition for the effectiveness of law, ... is that it shall display an independence from gross manipulation and shall seem to be just.'[27] It is one thing to declare the existence of rights but if those rights are of no use to the individual as states manipulate the system of protection in favour of their own interests how can the law be effective?

In the creation and implementation of international human rights law there is a conflict between the values and interests of states and the values and interests of individuals. To speak of human or individual values means concern for human welfare, human rights, the ability of individuals to participate in or have an impact upon the decision-making processes that impact and shape their lives and society. State values/interests include concepts such as state autonomy, independence, the impermeability and definition of the national interest and

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[23] M. Gomez. 'Social Economic Rights and Human Rights Commissions.' 17 *Human Rights Quarterly* (1995) p. 155.
[24] F. Snyder. 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques.' 56 *Modern Law Review* (1993) p. 19; G. Christie. *Law, Norms and Authority*. (London: Duckworth, 1982) pp. 11-12.
[25] H. Shue. *Basic Rights, Subsistence, Affluence and U.S. Foreign Policy*. (Princeton: Princeton University Press, 1980) p. 16.
[26] See Watson who feels that since violations of human rights exist then an international system of protection does not exist, J.S. Watson. 'Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law.' 79 *University of Illinois Law Forum* (1979) p. 611.
[27] Thompson (1975) p. 263.

determination of the development of the individual within the state.[28] Henkin describes egoism and selfishness on behalf of the state as the hallmark of the international system.[29]

International law, being the law of the international system, takes state values/interests as its primary concern. It serves the purpose of regulating international relations and allows states to retain their exclusive position in the law-making process and to legitimise this position, allowing states to define effectiveness in the international system.[30] The creation and development of international human rights law, being a process dominated by states, takes into consideration what is necessary to ensure and protect state values with considerations concerning human welfare being less influential.[31] Henkin has expressed the position that even when states have expressed concerns based on human welfare this action was not based on the genuine concern for individuals but was an expression of state interests concerning independence and autonomy.[32]

International law accepts the state as a rational actor whose self-interest cannot be brought into question. The consequence is that the state, or the government that controls the state, is seen to be wholly representative of and acting in a manner consistent with the needs and desires of the domestic society. The reality of this situation runs contrary to the views of many as to what the legitimate purpose of the state is. Rousseau saw the state as an artificial creation that consists of nothing but its members and needs to have a moving and compelling reason to dispose of any of its parts in a manner beneficial to the common good.[33] Madison felt that the character of a government lies in the foundations upon which it was established and is dependent upon this foundation for the source of its powers and the way in which these powers are to be carried out.[34] But, as Chomsky observes, the state has acquired the power to enforce a certain concept of what is legal, but this power does not imply justice. This is reflected by the use of the law to maintain existing power structures that define themselves as states against

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[28] L. Henkin. *International Law: Politics and Values*. (Dordrecht: Martinus Nijhoff, 1995) pp. 100-1, 105. The situation has also been described thus: 'There are two streams in [international] society: emotions of conscience and the state system. The first is prevented by the second.' See R. Kent. 'Humanitarian Assistance and Inter-Agency Co-ordination and Co-operation: Constraints and Prospects in an African Context.' Special Issue *International Journal of Refugee Law* (1995) p. 244.

[29] Henkin (1995) pp. 106-107. Henkin also feels that international organisations, in general, serve a similar purpose in that they act with the primary purpose of facilitating co-operation among states for the benefit of states. But as we will see below international organisations have been able to overcome state dominance in varying degrees.

[30] Henkin (1995) p. 99.

[31] Henkin (1995) p. 168.

[32] See Henkin (1995) pp. 169-173.

[33] J-J. Rousseau. *The Social Contract*. trans. M. Cranston. (London: Penguin, 1968) Book II, Chapter 4.

[34] J. Madison, A. Hamilton and J. Jay. *The Federalist Papers*. I. Kramnick, ed. (London: Penguin, 1987), Federalist No. 39, p. 256.

the interests of masses of people who happen to be in opposition to states.[35] International law clearly provides for the legitimacy of this situation making it necessary, as Paine noted, to '[l]ay then the axe to the root, and teach governments humanity. It is their sanguinary punishments which corrupt mankind.'[36]

Any introduction of values/interests contrary to those of states will be met with resistance, as reflected in the law-making process.[37] Ideas such as democracy, human rights, concern for the environment, etc., all have the effect of impeding upon the exclusive position of states in the international system. In the formulation of international law in areas where concern for the welfare of individuals is expressed as paramount, greater concentration is placed upon preserving the interests of states rather than furthering the welfare of individuals. While international law continues to take the interests of states as its defining dynamic, it is increasingly being forced to recognise that the interests of individuals are part of the international system. Oppenheim made the early observation:

> The importance of individuals to the Law of Nations is just as great as that of territory, for individuals are the personal basis of every State. Just as a State cannot exist without a territory, so it cannot exist without a multitude of individuals who are its subjects and who, as a body, form the people or the nation ... . The Law of Nations is therefore compelled to provide certain rules regarding individuals.[38]

The creation of international human rights law is one area where international law has been 'compelled to provide certain rules regarding individuals'.[39] In doing so what is perhaps the greatest paradox of international law has also been created - those who create the international legal rules concerning human rights are, at the same time, the greatest violators of those rules.[40] The unquestioned role of the state in the conducting of international relations has become well established in international law with commentators accepting the situation as the most

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[35] See his debate with Foucault in *Reflexive Water: The Basic Concerns of Mankind*, F. Elder, ed. (London: Souvenir Press, 1974) pp. 176-179.

[36] In T. Paine. *Rights of Man, Common Sense and Other Political Writings*. M. Philip, ed. (Oxford: Oxford University Press, 1995) p. 108

[37] The recent Rome Conference to create an International Criminal Court has been described as an exercise of '[n]aked, cynical self-interest...' as efforts were made 'to get as broad a consensus as possible by shielding the largest number of states from provisions they find uncomfortable.' 'Self-Interest brings Court into Contempt.' *The Guardian* (15 July 1998) p. 17.

[38] I. Oppenheim. *International Law: A Treatise*. Part 1. (London: Longmans 1905) p. 341. Also A. Cassese. *Human Rights in a Changing World*. (Cambridge: Polity Press, 1990) p. 168

[39] Cassese (1986) pp. 99-100.

[40] Unfortunately, measurements of the effectiveness of international human rights law is embedded in this paradox, see Meron (1998) p. 80.

beneficial way to represent a society's interests at the international level.[41] There does exist a substantial body of international human rights standards and obligations that states are required to abide by, but it is left to states themselves to develop the content and the extent of these obligations in actual practice.[42] In its final product international human rights law does not create a system which takes as its primary concern its proposed object - individuals. Instead greater concern and effort has been placed upon ensuring that the position and interests of states are not compromised or brought into question to any large degree.[43] This has worked to create a process that excludes the ability of the individual to access and utilise international human rights instruments, devaluing the substance and purpose of those instruments with regard to the day to day lives of individuals. One author has commented that the current state based international system has little to offer it largest constituency - individuals and the communities that they create - as the concerns of individuals cannot be adequately expressed and are not readily accommodated. The author concludes that if individuals really did matter, then international institutional developments that claim to act in the interest of individuals would provide effective means for allowing individuals and groups to exercise their rights.[44] As it stands the ability of international human rights law to be effective is dependent upon the will of states and in any clash of interests it is the priorities of states that prevail. It is necessary to always remember that a state is made up of individuals, maintained by individuals, it is individuals who make the decisions, and feel the impact of the law. Therefore it is impossible to eliminate human values from the international scene.[45] Theories of international law fail to realise the importance of this as international legitimacy is currently defined in terms of a

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[41] P. Reuter. *Introduction to the law of Treaties*. (Geneva: Institute of International Studies, 1995) p. 5. Also the review provided by E. Benvensiti. 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts.' 4 *European Journal of International Law* (1993) pp. 160-161.

[42] The US Supreme Court in the *Head Money Cases* 112 U.S. 580 (1884) expressed that 'so far as a treaty made by the United States ... can become the subject of judicial cognisance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or appeal.' In *Polites v The Commonwealth and Another* (High Court of Australia) [1945] 70 CLR 60, Latham CJ recognised the place of international law but felt 'courts are bound by the statute law of their country, even if that law should violate the rule of international law' at pp. 68-69. In *National Corn Growers Association v Canada* (Canada Import Tribunal Federal Court of Appeal [1988] 58 DLR (4th) 642, the court stated '[i]t should be remembered that treaties in the Canadian context require implementing legislation to have any force and effect under Canadian law'. See above the remarks of Lord Denning in *Blackburn v Attorney General*, note 6.

[43] Sea C. Schreuer. 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' 4 *European Journal of International Law* (1993) p. 448.

[44] C. Hamelink. *The Politics of World Communication*. (London: Sage, 1994) pp. 1-2.

[45] P. Allott. 'State Responsibility and the Unmaking of International Law.' 29 *Harvard International Law Journal* (1988) p. 13. Ironically it is individuals who have developed the doctrine and practice of international law resulting in the present situation.

state's ability to control individuals and not dependent upon whether they truly represent their needs.[46]

For international human rights law to be effective there is the need to reconceive the state as a more practical unit which represents and acts for its population in an appropriate and realistic fashion as defined by that population.[47] This would have a major impact upon the construction and application of international law making it more responsive to the needs and desires of individuals beyond the rhetoric presently expressed by states. The development of international human rights law has provided numerous possibilities for change. However, 'the essential point of such activity must be to influence and transform the domestic context'.[48] The ability of international human rights law to effectively transform the domestic context by being based more on the needs of individuals has been severely limited. In ideal circumstances law could be seen as a vehicle for change but with international law the emphasis has been on the needs and interests of states causing it to remain rigid and to become stagnant.[49] This provides an impetus and justification for developing an international law of democracy to create a more open and dynamic process.

IV. The Structure of the International Legal Argument

International human rights law provides a clear example of the 'double gesture' of two opposing, but equally valid positions, that characterises the international legal argument. At one end it is possible to identify numerous international instruments which proclaim the rights individuals possess and obligations upon governments to conform to certain standards of behaviour. At the opposing end, any attempt by individuals to access and utilise international human rights instruments ranges from the impossible to the very difficult. Furthermore, in situations where individuals are able to access and utilise international human rights instruments, there is no guarantee they will be able to make effective use of them. The ability of individuals to have access to and utilise international human rights instruments is wholly dependent upon the actions and attitudes of states as expressed through the international law-

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[46] Contrary to the purpose of the state, see Chapter 2 and F. Teśon. 'Kantian Theory of International Law.' 92 *Columbia Law Review* (1992) pp. 53-54.

[47] For a similar view see S. Murumba. 'Grappling with a Groatian Movement: Sovereignty and the Quest for a Normative World Order.' 19 *Brooklyn Journal of International Law* (1993) p. 566.

[48] J. Oloka-Onyango. 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa.' 26 *California Western International Law Journal* (1995) P. 60.

[49] D. Verna. 'Rethinking About New International Law-Making Process.' 29 *Indian Journal of International Law* (1989) p. 40.

making process.[50] The result is the illusion that governments have agreed to adhere to certain obligations and that individuals are able to benefit from the protection of international human rights instruments, when in reality individuals find that numerous obstacles are placed between them and the effective use of international human rights law. This illusion of effectiveness has existed since the laying of the foundations for an international system for the promotion and protection of human rights. There is a tendency among human rights advocates to overlook the obstacle course individuals face in relation to international human rights law and substitute a textual illusion for reality.[51] It is essential to look beyond the illusion of the textual existence of international human rights instruments to examine how states are able to manipulate the law-making process allowing them to proclaim the importance of human rights but prevent the individual from benefiting from the international human rights instruments. Recent events, such as those in the former-Yugoslavia, demonstrate that the textual existence of international human rights instruments often gives way to other priorities, as determined by states, to the detriment of individuals.[52]

The illusion of effectiveness of international human rights law is a direct result of the legal argument as determined by the theoretical structure of public international law.[53] The international system takes the state as its primary, constituent entity.[54] International law, being the law of the international system, serves the interests and values of its constituent element - states.[55] As the international system has developed the values/interests of other entities have become a concern, but supremacy of state interests in the formulation of international law has not been substantially weakened. Through the application of a study produced by Koskenniemi in his work *From Apology to Utopia: The Nature of the International Legal Argument*, it is possible to discover how the illusion of effectiveness of international human rights law is maintained. Koskenniemi shows how through the international legal argument the paradox, or 'double gesture', of international human rights law is sustained through

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[50] This includes customary international law obligations as well, see generally the views expressed in *Pinochet*, where the existence and force of custom is recognised but the ability to prosecute the crime of torture in the domestic courts relies upon a state having accepted specific treaty obligations.

[51] A primary example is the significance of the UDHR which is undoubtedly a document of great importance for international human rights law but with minimal actual legal significance, see below.

[52] See N. Milicevic. 'The Role and Relationship of the Constitutional and Non-Constitutional Domestic Human Rights Enforcement Mechanisms.' in M. O'Flaherty and G. Gisvold, eds. *Post-War Protection of Human Rights in Bosnia and Hezegovina*. (The Hague: Martinus Nijhoff, 1998) pp. 15-16.

[53] Watson (1979) feels that international human rights law constitutes a separate body of law from international law.

[54] Bull describes the state as the 'starting point for international relations'. A state possesses a government and asserts sovereignty internally and externally meaning full supremacy over the internal workings of the territory and independence from the competence of outside authorities. H. Bull. *The Anarchical Society*. (London Macmillan, 1977) p. 8.

continual movement between extreme poles of possibility, which he terms apology and utopia. By maintaining continual motion in the formulation and application of legal arguments international law is able to maintain an illusion of effectiveness through its own indeterminate nature.[56] In international human rights law this movement occurs between ideas of community and justice which includes protection of the individual on the one side, and the self-interest of states and the preservation of state sovereignty and international order on the other.[57] Koskenniemi himself does not address the structure of international human rights law but his study provides a fitting framework for an investigation into the difficulties facing international human rights law and an international law of democracy. It shows how arguments proclaiming protection of the individual, as well as ideas of community values and justice, are easily seen as too utopian causing them to be diluted with arguments from the apologist side of international law which heralds the dominance of state interests. This allows for states to engage in rhetorical support for human values without jeopardising their own interests.

International law, as with any system of law, is determined by the social environment in which it exists.[58] For international law this means that any examination must take as a starting point the ideas of liberalism that have been transformed from theories about the individual and applied directly to the international system, with individual states being substituted for individual human beings.[59] It is worth noting that liberalism's conception of the individual at the domestic level is fraught with difficulties for it fails to address the larger existence of the

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[55] Oppenhiem (1905) pp. 342-345. The PCIJ remarked that in the absence of explicit legal rules, states have 'a wide discretion' in their actions, *The Lotus Case* (France v Turkey, 1927) PCIJ Series A, No. 10, p. 19. If states are the only legitimate makers of the law then there may be little impetus on their behalf to narrow this area of discretion.

[56] The issue of indeterminacy looms large in any critical view of the law with assumptions that if the law is proven to be indeterminate it is naturally ineffective. Kress believes that this view is sometimes over stated and that before going to the extremes and claiming radical indeterminacy exists as a detriment to the entire system it is necessary to engage in a contextual sensitive inquiry for the reasons of the indeterminacy. K. Kress. 'Legal Indeterminacy.' 77 *California Law Review* (1989) p. 337. The approach here is to demonstrate the detrimental impact upon the individual due to the indeterminacy of international human rights law. It is not concluded that the entire system is unworkable or has no future.

[57] One author has used the terms the 'nightmare' and the 'noble dream' of international human rights law. The nightmare is that 'the law and institutions which are supposed to protect human rights are powerless to constrain the excesses of governments and their lackeys.' The noble dream is the belief that human rights can transform the lives of individuals by providing protection and empowerment, see S. Marks. 'Nightmare and Noble Dream: The 1993 World Conference on Human Rights.' 53 *Cambridge Law Journal* (1994) p. 54.

[58] *Apology to Utopia*, pp. 188-191. Also M. Koskenniemi. 'International Law in a Post-Realist Era.' 16 *Australian Yearbook of International Law* (1995) p. 3.

[59] N. Purvis. 'Critical Legal Studies and International Law.' 32 *Harvard International Law Journal* (1991) p. 93; N. Berman. 'Sovereignty in Abeyance: Self-Determination and International Law.' 7 *Wisconsin International Law Journal* (1988) p. 53; A. Rosas. 'State Sovereignty and Human Rights: Towards a Global Constitutional Project.' in D. Beetham, ed. *Politics and Human Rights*. (Oxford: Blackwells, 1995) pp. 63-4; D. Nincic. *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*. (The Hague: Martinus Nijhoff, 1970) p. 37. But see S. Hoffmann. 'The Crisis of Liberal Internationalism.' 98 *Foreign Policy* (1995) pp. 160-161, who feels that the creation of an international system based on liberalism was not merely a transferring of the domestic to the global, but a creation in itself against illegitimate violence, tyranny and wars of aggression.

individual's place in society.[60] Liberal thought at the individual level fails to see that individuals do not exist in a vacuum making it necessary to incorporate other factors involved with the individual's existence. The same holds true for the international system in that international law has not recognised as valid other interests and values outside of those attributed to or created by states.[61] The recognition of human rights has weakened this position but it remains that action undertaken in the international system by entities other than states is described in terms of the state thereby preserving the status quo. International law generally associates individuals with membership to a particular state with their needs and desires being defined by that state inhibiting any consciousness of a common link of humanity beyond state borders.[62] The end result is that the ability of international human rights law to solve the problems it attempts to address is severely limited.[63]

The international legal process is conceptualised in terms of state interest, will or behaviour. Ideas based on concern for human interest are only considered legitimate to the extent in which they are able to correspond to the goals of the international system as defined by states. In the wake of international events this century protection of the individual, the environment and other community interests have emerged as concerns of the international system. While these communal concerns have attracted perfunctory agreement over time, their nature and content and how they are to be pursued remain an area of disagreement. It is accepted that states need to show respect for certain values and interests deemed important for the international system before they are accepted as principles for behaviour. This poses a dilemma for states for they are required to respect legal instruments that may limit their behaviour and the pursuit of goals deemed to be more important. International law attempts to solve this dilemma by trying to be simultaneously normative and concrete in the formulation of rules and principles.[64] In trying to be normative there is the continual attempt to create a basis for obligation outside the action of states. Simultaneously, international law strives for concreteness in satisfying the need to show that the law is not based on an unidentifiable logic but can be demonstrated by observing the actual actions of states. This combination of

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[60] See further Chapter 2.

[61] C. Beitz. *Political Theory and International Relations*. (Princeton: Princeton University Press, 1979) p. 76.

[62] For a discussion concerning the conflict between the interests of the individual as a member of the universal human race and as a citizen of a specific state, see A. Linklater. *Men and Citizens in International Relations*, 2nd ed. (Basingstoke: Macmillan, 1990) pp. 17-37, also D. Otto. 'Nongovernmental Organisations in the United Nations System: The Emerging Role of International Civil Society.' 18 *Human Rights Quarterly* (1996) p. 129.

[63] S. Sathirathi. 'An Understanding of the Relationship Between International Legal Discourse and Third World Countries.' 25 *Harvard International Law Journal* (1984) p. 394.

[64] See P. Trimble. 'International Law, World Order and Critical Legal Studies.' 42 *Stanford Law Review* (1990) p. 811, who feels international law's fundamental connection to the state means that '[i]nternational law is thus a powerful inhibition against creative thinking', a necessary element for an effective international human rights law.

normativity and concreteness create what is considered the 'objectivity of international law'.[65] International law is seen as being objective, able to provide solutions to problems, because the law is verifiable in its existence through an examination of state behaviour but the basis for the law is not exclusively dependant upon the behaviour of states. Normativity and concreteness are in direct opposition to one another and the integration of the two into a single coherent concept proves impossible.[66] By being concrete, international law is able to provide a factually strong but uncritical doctrine, and by being normative it provides a desirable basis for obligation but one often distant from the realities of the international system.

The international legal argument attempts to deal with this conflict between concreteness and normativity through ascending and descending patterns of justification in the formulation of rules and principles.[67] The descending patterns of justification deal with the normative side of international law, moving towards ideas such as human rights, justice and the common interests of the world community. This pattern of justification believes in the possibility of state behaviour being guided by normative ideas outside of self-interest and is criticised as a view towards utopia. The ascending pattern is associated with the apologist's view of international law whereby the foundations of international law are based upon what states actually do. In the apologist's pattern concrete state behaviour determines what the law is and the concept of state sovereignty is paramount. Both patterns are equally open to criticisms as being overly subjective and not indicative of how the law truly works, as Koskenniemi explains:

> From the ascending perspective, the descending model falls into subjectivism as it cannot demonstrate the content of its aprioristic norms in a reliable manner (i.e. it is vulnerable to the objection of utopianism). From the descending perspective, the ascending model seems subjective as it privileges State will or interest over objectively binding norms (i.e. it is vulnerable to the charge of apologism).[68]

The international legal argument, in its quest to accommodate these conflicting patterns, proves to be structurally indeterminate by not being able to exclusively base itself in either extreme, rather it must rely on constant movement between the two to create an illusion of effectiveness.

Koskenniemi provides a number of examples of this movement of international law as it attempts to establish and maintain effectiveness from the doctrine of international law and

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[65] *Apology to Utopia*, pp. 2-8.
[66] *Apology to Utopia*, pp. 9-40.
[67] *Apology to Utopia*, pp. 40-42.
[68] *Apology to Utopia*, pp. 41-2, references omitted.

decisions of the International Court of Justice (ICJ).[69] A more recent case before the ICJ has also demonstrated the movement of international law between apology and utopia and the tensions between human and state values, with state values remaining the dominant consideration. In the *Case Concerning East Timor* (Portugal v Australia),[70] the ICJ was faced with the question as to which state is the legitimate administering power of the territory of East Timor, which in turn would affect the ability of Australia to enter into treaty relations with regards to the natural resources of the area. Portugal claimed that it was the administering power of the territory based on resolutions of the UN General Assembly (GA) and the Security Council (SC) stating that Indonesia's control over East Timor occurred through illegal means and that it remained the legitimate power.[71] Australia responded that it had the right to enter into a treaty for the exploitation of its natural resources and the only logical entity with whom to enter into treaty arrangements was Indonesia since it was the *de facto* power in control of East Timor. For Australia, how Indonesia obtained that control was not an issue, its only concern was who was in a position to negotiate in relation to the resources surrounding the territory. The welfare of the individuals and society of East Timor was inconsequential with the determining factor being the right of a state to pursue its own interests.

Portugal's arguments relied upon the textual decisions of the UN that declared Indonesia's occupation as illegal, affirmed Portugal's position as the administrating authority and confirmed the East Timor's right to self-determination.[72] Australia's arguments were based on the need to accept *de facto* situations and its own right to be able to exploit its natural resources.[73] The ICJ's final decision was that it did not have the jurisdiction to hear the case since it directly involved the interests of Indonesia who was not a party before the ICJ in this particular case.[74] In its conclusion the ICJ declared that the opposing positions of Portugal and

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[69] See Koskenniemi's discussion of the *Southwest Africa Case* (ICJ Reports (1966) p. 18) *Apology to Utopia*, pp. 407-410.

[70] I.C.J. Reports (1995) p. 90, hereinafter *Case Concerning East Timor*. The final opinion delivered by the ICJ in *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports (1996) p. 226, hereinafter *Legality of Nuclear Weapons*) also demonstrates the indeterminate nature of the international legal argument. For an analysis of the ICJ's opinion see D. Akande. 'Nuclear Weapons, Unclear Law? Deciphering the *Nuclear Weapons* Advisory Opinion of the International Court.' 68 *British Yearbook of International Law* (1997) p. 165; D. Warner. 'The Nuclear Weapons Decision and the ICJ: Locating the *Raison* behind *Raison d'Etat*. 27 *Millennium* (1998) p. 299.

[71] For a review of the relevant resolutions see *Case Concerning East Timor*, pp. 95-97.

[72] *Case Concerning East Timor*, pp. 95-97.

[73] *Case Concerning East Timor*, pp. 97-98.

[74] *Case Concerning East Timor*, p. 105. This is another area where the Court was faced with two opposing but equal legal arguments. Their reasons for not exercising jurisdiction due to Indonesia's non-appearance was based on the accepted *Monetary Gold* doctrine (*Monetary Gold Removed from Rome in 1943* (Italy v France, United Kingdom and United States, 1953) ICJ Reports (1954) p. 19) see pp. 102-103. The Court also noted that it is possible to adjudicate when a third party is not present before the Court, pp. 104-105. The essential difference in coming to their situation is whether or not the interests of the third-party are 'affected' or are the 'subject matter', a vague and dubious legal distinction indeed. See I. Scobbie and C. Drew. 'Self-Determination Undetermined: The Case of East Timor.' 9 *Leiden Journal of International Law* (1996) p. 185; N. Sybesma-Knol. 'The Indispensable Parties Rules in the East

Australia were both correct. It held in two separate paragraphs that 'East Timor remains a non-self governing territory and its people has the right to self-determination.'[75] It based this affirmation on GA activities lending support to Portugal's position. If East Timor remains a non-self governing territory, then under UN practice there must exist an administering power which will work with the territory until a different status is obtained.[76] In a contradictory fashion, the ICJ felt that the resolutions from the GA could not be taken as authoritative for determining Portugal as the exclusive administrating power of East Timor and that the *de facto* position of Indonesia had to be recognised as state practice has confirmed.[77]

In its reasoning (or significant lack of) the ICJ responded to utopian arguments by declaring East Timor still maintained a right to self-determination as a non-self governing territory. The ICJ also followed a practical view that to triumph the right of self-determination for the society of East Timor over the hard facts of state practice would not be conducive to the international system. Therefore it was necessary to recognise *de facto* situations so that other states, like Australia, are able to go about their own business regardless of past illegalities which may be an issue. No consideration was given to the situation which exists in East Timor from the initial illegal use of force and continual repression which has followed, nor to the suffering experienced by the population through the denial of self-determination. The acceptance of *de facto* situations so that states are able to go about their business was held to be more important despite the claims that self-determination is possessed of obligations *erga omnes*.[78] The ICJ's dismissal of the *erga omnes* character of self-determination demonstrates that no matter how forcefully one might claim the existence of a human right as an essential element of the international system if that right clashes with the interests of states it will be the right, not state interest, which will be sacrificed regardless of the evidence which exists in support of the existence of the right.[79]

The ICJ demonstrated that a legal position firmly rooted in either the ascending or descending argument is easily criticised from the opposing view as being either too utopian or apologetic and not representative of the true situation in the international system.[80] To counteract criticisms it is necessary to move from the original pattern of justification to the

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Timor Case.' in E. Denters and N. Schrijver, eds. *Reflections on International Law from the Low Countries: in Honour of Paul de Waart*. (The Hague: Martinus Nijhoff, 1998) p. 442.

[75] *Case Concerning East Timor*, pp. 103, 105.

[76] UN Charter, Article 73.

[77] *Case Concerning East Timor*, p. 104.

[78] *Case Concerning East Timor*, p. 102.

[79] For a study of self-determination as a peremptory norm in the context of the conflict in the former-Yugoslavia, see A. Weisburd. 'The Emptiness of the Concept of *Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina.' 17 *Michigan Journal of International Law* (1995) p. 1.

opposing pole so as to not appear subjectively biased to either position.[81] There appears to be no easy resolution to this indeterminacy as those who use the rules and principles of international law will be able to find plenty of evidence to support their position, but only in relation to the opposing position. International law is able to maintain an illusion of effectiveness through the continual movement from apologist to utopian, subjective to objective, community to particular, all in an attempt to appear as a coherent set of legal rules and principles.

In the *Case Concerning East Timor* a wide spectrum of legal rules surrounding the status of East Timor were covered, backing was given to both human interests and states interests, but in the end it was the state interest which prevailed. In terms of international human rights law, the ascending and descending patterns of justification help to perpetuate the situation whereby state values are considered superior to human values, but at the same time provides states with the ability to declare a concern for human welfare and to create the illusion of progress in this area.[82] To triumph human values over state values as a legitimate concern for the international system is easily criticised as being too utopian, ignoring the realities involved in the international system. A position where human values have no role and only state values and interests are determining factors for the international system is equally susceptible to criticism for being too apologist in scope.[83] International law calls upon governments to adhere to certain forms of behaviour, it also allows for governments to manipulate the law to minimise any unwanted impact of its principles.[84] Therefore, states utilise the international legal argument to rhetorically demonstrate concern for human values without placing any real limitations upon their own values or interest. The movement of international human rights law from apology to utopia is clearest in the conflict between the two defining concepts of international human rights law - state sovereignty and concern for the individual.[85]

V. INTERNATIONAL HUMAN RIGHTS LAW FROM APOLOGY TO UTOPIA

A. Sovereign Apology

The primary obstacle to the development of human values and priorities in the international system is the concept and practice of state sovereignty which legitimises the

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[80] The ICJ's opinion in the *Legality of Nuclear Weapons* came to the same conclusion, see Akande (1998) p. 217.

[81] *Apology to Utopia*, pp. 42-45.

[82] Koskenniemi (1995) describes the international system as being more inclined to the concrete aspects of international law as opposed to the normative, pp. 1-5.

[83] The House of Lords addressed both of these issues in *Pinohet*, see the discussion of Lord Hutton, p. 887. Also I. Brownlie. 'Reality and Efficacy of International Law.' 52 *British Yearbook of International Law* (1981) p. 8.

[84] J. Quigley. 'The International Covenant on Civil and Political Rights and the Supremacy Clause.' 42 *DePaul Law Review* (1993) p. 1287.

[85] For Marks (1994) this uneasy co-existence between opposing reflects the reality of human rights, p. 62.

actions of states and the supremacy of state values and interests.[86] Sovereignty has been defined as;

> [t]he supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the political independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; ... .
>
> The power to do everything in a state without accountability, to make laws, to execute and to apply them ... .[87]

International law enshrines the concept of state sovereignty as the basis of the international system creating conflict with the development and existence of ideas such as human rights and democracy.[88] The conflict of sovereignty with human values creates a situation whereby 'state sovereignty emerges victorious; individuals disappear from the international scene, and the violations they have suffered remain unexposed'.[89] Sovereignty confirms state values by granting an exclusive jurisdiction over territory and population, creating a duty of non-intervention in the domestic affairs of other states, and obligations only by consent,[90] allowing a state 'to define for itself those of its interests that it holds vital'.[91]

The position of state sovereignty in the theory and process of international law is most likely outdated for today's world, however this does not overcome the continuance of sovereignty in the formulation of international law, making it the primary issue to be addressed.[92] The continuance of sovereignty as a concept of the international system and as a

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[86] See Murumba (1993) pp. 829-849.

[87] *Black's Law Dictionary*. 6th ed. (St.Paul: West Publishing, 1990) p. 1396. Also A-M. Burley. 'Toward an Age of Liberal Nations.' 33 *Harvard International Law Journal* (1992) p. 395.

[88] Because of sovereignty '[i]nternal differences of political and economic ideology have been regarded as irrelevant and unmentionable', A-M. Burley. 'Law among Liberal States: Liberal Internationalism and the Act of State Doctrine.' 92 *Columbia Law Review* (1992) p. 1926.

[89] Cassese (1990) p. 57. Also P. Jessup. *The International Problem of Governing Mankind*. (Claremont: Claremont College, 1947) p. 2 who expressed: 'National sovereignty is the root of the evil-the freedom of states to enforce their will by the use of power.' Delbrueck concludes that sovereignty and human rights are incompatible both in theory and practice, see J. Delbrueck. 'International Protection of Human Rights and State Sovereignty.' 57 *Indiana Law Journal* (1981/2) pp. 567-8.

[90] I. Brownlie. *Principles of Public International Law*, 4th ed. (Oxford: Oxford University Press: 1990) 287; Rosas in Beetham (1995) p. 63; Nincic (1970) p. 193.

[91] de Visscher (1968) p. 102.

[92] Reisman (1990) claims that the traditional sovereignty of the state has been removed and replaced by the sovereignty of the people based on democracy, p. 869. The position and character of sovereingty in international law remains contested, see Koskenniemi, *Apology to Utopia*, pp. 201-212; Schreuer (1993) pp. 448-449; Henkin (1995) pp. 8-10. Perhaps the most accurate view comes from Foucault who has expressed the idea that two centuries after the European revolutions which overthrew absolute monarchs we have yet to cut off the king's head. M. Foucault. *The History of Sexuality*, vol. 1. trans. R. Hurley (Harmondsworth: Penguin, 1981) pp. 88-89.

tool for interpreting legal rules, allows states to maintain control of the law-making process by legitimising their position as the exclusive formulator of international legal rules. Sovereignty allows for the creating and defining of the space of 'domestic jurisdiction' where the application of international human rights primarily occurs. Koskenniemi points out that the creation of international norms which limit sovereignty occurs only by reverting back to the original authority that sovereignty preserves - the state.[93] In international human rights law this is demonstrated by the fact that obligations exist concerning the behaviour of states in relation to their conduct *vis-à-vis* individuals. However, the way in which these obligations are created and applied is based on the sovereign prerogative of states. The sovereign prerogative allows states to decide whether or not to create a human rights instrument, the form and content of the instrument, whether or not to sign and ratify an instrument thereby actually creating legal obligations, and how those obligations will be applied in actual practice within the domestic jurisdiction of the state.[94] Through sovereignty states are able to construct a body of law that is more in tune with their interests, needs and desires, rather than those of individuals, for whom the law supposedly benefits.

The ability of states to legitimately utilise the international legal argument through the principle of sovereignty to create obstacles for individuals in accessing or utilising international human rights instruments is displayed in the context of 'domestic jurisdiction'. International human rights law is based on the idea that by signing a treaty a state is agreeing to the obligations set forth and will make efforts to incorporate those obligations into the domestic legal system. There is no rule in international law requiring international human rights norms to be recognised at the domestic level allowing states the exclusive position in determining the reach of international human rights standards.[95] In the process of signing and ratifying a treaty the state may issue reservations or declarations which determine what aspects of the treaty will fall within their domestic competence and to what degree.[96] States are able to determine the exact terms and conditions under which an international instrument will be part of the domestic legal system and accessible to the individual and at times the final result may not bear any

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[93] Koskenniemi (1989) p. 193.

[94] Therefore even though certain actions may be prohibited by international law, the domestic state must still take action to ensure its applicability under domestic procedures, see *Pinochet*, per Lord Browne-Wilkinson, pp. 832-833. Also Delbrueck (1981/2) pp. 574-75.

[95] Rosas in Beetham (1995) pp. 64-65.

[96] The debate over the validity of certain reservations which are against 'the object and purpose' of the instrument in question is only a question of international law and will not necessarily impact the way in which the instrument is incorporated into a domestic system, L. Lijnzaad. *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Dordrecht: Martinus Nijhoff, 1995) pp. 3-4.

resemblance to the original international instrument.[97] By relying on states to institute, apply, and enforce international human rights standards through domestic arrangements the effectiveness of the law is brought into question.[98] Dinstien points out the extreme paradox of this situation in that no matter how impartial a domestic judicial system of a particular state may be, it is still an instrument of the state and its absolute impartiality may not always be relied upon.[99] Umozurike claims this to be a problem endemic to the structure and process of international law as domestic courts will most likely apply domestic laws even if they run contrary to international obligations.[100]

The incorporation and application of the Refugee Convention[101] into domestic legal systems illustrates the ability of states to take advantage of the indeterminate nature of international law through applying different perceptions of what constitutes a refugee. There is a tendency, especially in western states, to implement restrictive definitions of what constitutes a refugee or discard the term altogether in order to minimise obligations regarding certain individuals under international law.[102] If an individual who appears to constitute a refugee under international law does not meet the strict criteria laid down in the domestic law of a state then they are not afforded the protection provided by international instruments regardless of

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[97] As demonstrated by the US and the ICCPR, see L. Henkin. 'US Ratifications of Human Rights Conventions: The Ghost of Senator Bricker.' 89 *American Journal of International Law* (1995) p. 341 where he describes the US reservations as 'specious, meretricious, and hypocritical.' The UK's reservation to ICERD creates its own definition of discrimination as 'the United Kingdom does not regard the Commonwealth Immigrants Acts, 1962 and 1968, or their application, as involving any racial discrimination within the meaning of paragraph 1 of article 1, or any other provisions of the Convention, and fully reserves it right to continue to apply those Acts.' *Multilateral Treaties (1997)* p. 101. Also see B. Schlüter. 'The Domestic Status of the Human Rights Clauses of the United Nations Charter.' 61 *California Law Review* (1973) pp. 115-116.

[98] Donnelly (1989) pp. 266-268.

[99] Y. Dinstien. 'Human Rights: Implementation through the United Nations System.' 89 *ASIL Proceedings* (1995) p. 234. Also Benvenisti (1993) and the examples therein. The doctrine of the UK legal system of Parliamentary supremacy reinforces the idea that the courts cannot be truly independent. As expressed in *Manuel v Attorney-General* [1983] Ch 77, at p. 86 'The duty of the court is to obey and apply every Act of Parliament'. Also N. Moller. 'The World Bank: Human Rights, Democracy and Governance.' 15 *Netherlands Quarterly of Human Rights* (1997) p, 33 who in assessing domestic monitoring arrangements for international obligations feels '[i]f the government is checking itself for violations of human rights abuses then I do not think that any would be found. The institution would have to be completely independent and free from government influence for it to have any real value.' But see H. Jarmul. 'Effects of Decisions of Regional Human Rights Tribunals on National Courts.' in T. Franck and G. Fox, eds. *International Law Decisions in National Courts*. (Irvington: Transnational, 1996) at p. 247 where he expresses that 'national courts are the institutions best situated to protect those rights'.

[100] U. Umozurike. *The African Charter on Human and Peoples' Rights*. (The Hague: Martinus Nijhoff, 1997) p. 109. Commentators have expressed that a similar situation holds true for international tribunals who rely on states their creation as well as their budgets, administrative support and enforcement. D. Shelton. 'The Independence of International Tribunals.' in A. Cancado Trindade. *The Modern World of Human Rights: Essays in Honour of Thomas Buergenthal*. (San Jose: Inter-American Institute of Human Rights, 1996) pp. 300-1. Also A. Cassese. 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law.' 9 *European Journal of International Law* (1998) p. 2, concerning the reluctance of states to support the International Criminal Tribunal for the former-Yugoslavia.

[101] Convention Relating to the Status of Refugees (1951) 189 UNTS 137.

[102] G. Goodwin-Gill. *The Refugee in International Law*, 2nd ed. (Oxford: Clarendon, 1996) pp. 3-4.

their circumstances.[103] The ability of the individual to challenge strict domestic criteria will be first addressed through the domestic courts and administrative procedures, with no guarantee that international standards will be applied, making it difficult to determine if a violation of an international obligation has occurred since the state has been able to define the content and applicability of a right.[104] As a final note, since an individual as a refugee has left their country of citizenship they are unable to participate in the political process thereby having no influence upon the system they are subjected to.[105] Regardless of the existent international framework for the protection of refugees and the opinions of commentators, the plight of an individual will depend wholly upon the terms established by a state that may or may not correspond with the international position. Protests concerning the treatment of an individual may be raised by other states or international institutions but it will be primarily political considerations and not regard for legal obligations that will ultimately impact the individual's fate.

The present system of international human rights protection has its roots in the Enlightenment period when monarchs were able to create a theory of sovereignty that spoke of justice, rights, freedoms, liberty, etc. The reality was that it created a space in which the monarch was able to exercise a greater degree of control over society and individuals.[106] International human rights law remains firmly in touch with sovereignty as an integral characteristic of the international system despite changes and developments that have worked to undermine the dominant position of sovereignty.[107] In the creation and implementation of international human rights law there continues to be a focus on the rights, power, and limitations of the sovereign instead of focusing on the needs and desires of the individual.[108] Governments are still able to exercise control while speaking of justice, rights and freedom by excluding the individual from the process of determining the meaning of human rights texts as legitimised by international law.[109] The result is a system which appears to protect the individual, but it is a system of 'a double gesture - it speaks of *individual* freedom, while

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[103] See generally, J. Hughes and F. Liebaut, eds. *Detention of Asylum Seekers in Europe: Analysis and Perspectives*. (Dordrecht: Martinus Nijhoff 1998).

[104] M. Stohl et al. 'State Violations of Human Rights: Issues of Problems and Measurement.' 8 *Human Rights Quarterly* (1986) p. 594-596. A further example arises with the issue of torture where in the US it has been held that customary international law prohibited acts of torture and that it may be utilised before the domestic courts, *Filartiga v Peña-Irala* 630 F. 2d 876 (2d Cir. 1980). But in the opinion expressed in *Forti v Suarez Mason* 672 F. Supp. 1531 (1987) it was held that there existed no customary rule against torture since there was no clear definition of what constituted torture.

[105] G. Noll. 'The Democratic Legitimacy of Refugee Law.' 66 *Nordic Journal of International Law* (1997) p. 429.

[106] See R. Gaete. *Human Rights and the Limits of Critical Reason*. (Aldershot: Dartmouth, 1993) p. 41.

[107] Donnelly (1986) p. 233. On the history of sovereignty see J. Bartelson. *A Genealogy of Sovereignty*. (Cambridge: Cambridge University Press, 1995).

[108] M. Foucault. 'Two Lectures.' in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*. C. Gordon, ed. (New York: Harvester, 1980) pp. 94-95.

[109] Gaete (1993) pp. 31, 70-71.

legitimising the exercise of *state* power.'[110] In the final analysis international law confirms much more power and authority to states than it denies.[111] The ability to identify the textual existence of legal standards that appear to place limits on the actions of governments clouds the issue and allows for the reality to be overlooked. For the future of international human rights law it is necessary to realise that the existence of legal instruments does not automatically produce a favourable result. The effectiveness of those instruments depends upon the degree to which the individual is able to access and utilise them.

B. International Human Rights Law - Moving from Apology to Utopia

From its inception, international human rights law has expressed the goal of safeguarding the individual from the arbitrary use and abuse of power without actually jeopardising the exclusive position of states. The result is a legal system which legitimises forms of state control over the individual.[112] The creation of an international system for the protection of human rights gained full force in the wake of the events of WW II. The primary concern then was the creation of stable international system, of which protection of human rights was only one aspect. Governments recognised the implications raised by a system of international human rights protection as one of the strongest public supporters of international human rights, Franklin Roosevelt, spoke with caution concerning an international system for human rights protection. Roosevelt famously declared the need to recognise the Four Freedoms[113] as a definite possibility in the international sphere, but was reluctant to apply these ideas at home or to empower an international organisation with the power to scrutinise US law and practice.[114]

The drafting of the UN Charter, and subsequent international human rights instruments, demonstrate the reluctance of governments to place limitations on their own behaviour and the ability to utilise the international legal argument for safeguarding their own interests while proclaiming a commitment to human interests and creating the illusion of progress through law. The UN Charter begins with 'We the Peoples' and carries on to profess a determination to

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[110] D. Litowitz. 'Foucualt on Law: Modernity as Negative Utopia.' 21 *Queen's Law Journal* (1995) p. 15.

[111] Trimble (1990) p. 833. In the US context, Lillich points to issues such as standing, sovereign immunity, act of state, and the political question doctrine as obstacles to anyone wanting to invoke international human rights standards at the domestic level, see R. Lillich. 'Invoking International Human Rights Law in Domestic Courts.' 54 *Cincinnati Law Review* (1985) p. 413. Also M. Small. 'Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers.' 74 *Georgetown Law Journal* (1985) p. 183.

[112] Litowitz (1995) p. 15.

[113] *Public Papers and Addresses of F.D. Roosevelt*, vol. 10. S. Rosenman, ed. (New York: Russell and Russell, 1950) p. 65. A similar attitude was held by Churchill with regard to the Atlantic Declaration which proclaimed a universal respect for human values such as self-determination. After the Declaration was pronounced Churchill made it clear it was only applicable to the territories impacted by Nazi aggression, see A. Cassese. *Self-Determination of Peoples: A Legal Reapprasial.* (Cambridge: Cambridge University Press, 1995) p. 37.

[114] Cassese (1986) p. 294.

reaffirm faith in human rights, to establish conditions of justice and to promote social progress and a better standard of life all within a larger freedom.[115] The Charter and the human rights documents that have evolved from the framework of the UN are the result of collaboration and agreement among individual states whose legitimacy, in many cases, as the proper representative of the various people of the globe can easily be brought into question.[116] At its inception there existed a belief that the UN was an institution to bring together all the peoples of the world through their appropriate representatives. This came with the understanding that a government with a seat in the UN must in one way or another represent the population of the territory from which it came.[117] As the organisation grew it became clear that membership in the UN did not mean that the government concerned legitimately represented the population of a state, a situation which continues today.[118] It is clear that the opening statement of the UN Charter did not refer to the collectively of individuals populating the globe at the time.[119] The statement seems better fit as describing the government delegations of the various states gathered at San Francisco, rather than the societies of those states.[120]

The aspirational statements of the Preamble appear to express the rationale of the UN to be based on human values and interests. The fact that they appear in the Preamble creates two possible, and opposable, conclusions concerning their legal significance. It is generally understood that the preamble of an international instrument is considered part of the text and may be used in the interpretation of the instrument, especially in defining the object and purpose of the instrument.[121] However in the case of the UN Charter, the preamble does not create any legal obligations for members[122] and has been used little in interpreting the

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[115] UN Charter, Preamble.

[116] Van Boven comments that for the UN 'We the People', meaning governments represent their society, is 'more a fiction than a fact', T. van Boven. 'The Role of NGOs in International Human Rights Standard Setting; Non-Governmental Participation a Prerequisite of Democracy?' in A. Castermans, ed. *The Role of NGOs in the Promotion and Protection of Human Rights*. (Leiden: Stichting-NJCM, 1991) p. 66.

[117] See Berman (1988) p. 53. Also Higgins on how this belief was based mainly on rhetoric and not action, R. Higgins. *The Development of International Law through the Political Organs of the United Nations*. (London: Oxford University Press, 1963) pp. 21, 24.

[118] R. Higgins. *Problems and Process: International Law and How we Use It.* (Oxford: Clarendon, 1994) p. 43. Also Chapter 3, below.

[119] For an opposing perspective see A. Berle. 'The Peace of Peoples.' 77 *Recueil des Cours* (1950/1) pp. 8-9 and J. Perkins. 'The Changing Foundations of International Law: From State Consent to State Responsibility.' 15 *Boston University Journal of International Law* (1997) p. 474.

[120] This was the perceived understanding as to how the opening phrase fit into the overall document, see F. Jhabvala. 'The Drafting of the Human Rights Provisions of the UN Charter.' 44 *Netherlands International Law Review* (1997) pp. 7-8. For a discussion concerning this opening phrase of the Charter and how it does not imply the idea of popular sovereignty or legitimacy of government, see H. Kelsen. *The Law of the United Nations*. (London: Stevens, 1959) pp. 5-9.

[121] Vienna Convention on the Law of Treaties. 1155 UNTS 331, Article 31.

[122] Kelsen (1964) p. 29.

Charter.[123] The Preamble may be seen as expressing values which should guide the actions of member states but it is not possible to ground any binding obligations concerning human rights. To do so would be subject to criticism as an utopian aspiration detached from the practical realities of the world.

Beyond the Preamble the legal position of human rights in the Charter is a contested topic.[124] Henkin claims that we wish to, therefore we exaggerate, the impact of the Charter on international human rights, but in the Charter it is state values that prevail.[125] This appears to be the most accurate description of the human rights provisions of the Charter even though there exists two other opposing interpretations of their significance. Kelsen posits that the Charter itself does not impose an obligation upon members to ensure the various rights and freedoms which are mentioned in the Preamble and text.[126] Humphrey takes the opposite position in that Articles 55 and 56 of the Charter combine to form clear legal obligations concerning human rights. He further establishes that any reference of an obligation to respect the purposes of the Charter does by association include an obligation to respect human rights.[127] Kelsen's view appears to be the most accurate in actual practice with Humphrey's position being the more desirable. The Charter is undoubtedly an important document for the development of international human rights law for it did bring the issue of human rights onto the international agenda.[128] What the Charter did not do is herald the beginning of human values and interests as an integral aspect of the international legal system.[129]

The purpose of the UN Charter is the maintenance of the peaceful relations of states and international co-operation. Promotion and respect for human rights is one of a number of ways towards these goals, often one of secondary concern.[130] The inclusion of Article 2 (7) in the Charter ensures states a legitimate legal argument through which they are able to place human interests secondary. It reads:

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[123] L. Goodrich, E. Hambro and A. Simmons. *Charter of the United Nations: Commentary and Documents*, 3rd ed. (New York: Columbia University Press, 1969) p. 21.
[124] See the discussion in Nincic (1970) pp. 193-259.
[125] Henkin (1995) pp. 174-5.
[126] Kelsen (1964) p. 29. Also E. Daes. *Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels*. (New York: United Nations, 1992) p. 5. But see Schlüter (1973) pp. 118-127, who refutes Kelsen's view.
[127] J. Humphrey. 'The UN Charter and the Universal Declaration of Human Rights.' in E. Luard, ed. *The International Protection of Human Rights*. (London: Thames and Hudson, 1967) p. 46. But see T. Beurgenthal. 'International Human Rights Law and Institutions: Accomplishments and Prospects.' 63 *Washington Law Review* (1988) p. 4, pointing out that Article 56 only pledges states to promote the purposes of Article 55.
[128] Article 13 gives the GA the responsibility of initiating studies of making recommendations on human rights among other issues, an activity it has engaged in regularly. This brings the rhetoric of international human rights law into a more public fora but does not automatically give rise to obligations.
[129] But see Berle (1950/1) as to how the UN is an institution for individuals, protecting their interests and desires, pp. 38-46.
[130] UN Charter, Article 1 (3), Article 55 (c).

> Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require members to submit such matters to settlement under the present Charter ... .

By appealing to Article 2 (7) states are able to rely upon an accepted legal rule which helps them to avoid international obligations concerning human rights by claiming a situation is within their own self-defined domestic jurisdiction.[131] The inclusion of the dominance of sovereignty means that the ideals of human rights as expressed in the Charter may be legitimately denied to individuals.[132]

Interpretations of the human rights obligations of the Charter demonstrate, as Henkin observes, the tendency of human rights supporters to overemphasise its impact. Schlüter declares that the human rights obligations in the Charter are binding at the national level and that national courts may not 'reject any direct application of the human rights provisions on the grounds that the provisions are not obligatory'.[133] This is a utopian argument based on the idea that there exists objective criteria for human rights norms in the Charter construed from the character, language, content and context of the provisions.[134] Schlüter finds he must move to the apologist argument by concluding that states are legitimately able to classify obligations in the Charter as political agreements based on sovereignty and the domestic jurisdiction clauses of the Charter.[135] This provides a more realistic assessment of state practice for it recognises that states are able to bar invocation of possible Charter obligations from impacting domestic legal action concerning human rights.

The Universal Declaration of Human Rights (UDHR) was adopted in 1948 to provide an interpretation of the human rights references in the Charter. The UDHR was accepted by members of the UN as a non-binding resolution,[136] which proclaims high ideals and provides a

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[131] T. Farer and F. Gaer. 'The UN and Human Rights: At the End of the Beginning.' in A. Roberts and B. Kingsbury, eds. *United Nations, Divided World*, 2nd ed. (Oxford: Clarendon, 1993) p. 246.

[132] Daes (1992) p. 3. Also Watson (1979) p. 610 who feels that the existence of Article 2 (7) completely precludes the inclusion of human rights into international law.

[133] Schlüter (1973) p. 127. Also M. Freeman. 'The Philosophical Foundations of Human Rights. 16 *Human Rights Quarterly* (1994) p. 494.

[134] Schlüter (1973) p. 116. He demonstrates the application of the domestic impact of the Charter through six national cases, three from Canada, two from US and one from India, pp. 125-126.

[135] Schlüter (1973) pp. 133-134. In the US, in *Diggs v Shultz* 470 F.2d 461 (D.C. Cir) regarding the UN Charter it was expressed that 'Congress can denounce treaties if it sees fit to do so'. It would be difficult for any state to denounce the UN Charter but there exists no expressed prohibition against it, as Indonesia demonstrated in its withdrawal from the UN in 1965, see *Multilateral Treaties (1997)* p. 9, note 15.

[136] On the legal force of United Nations Resolutions in general see B. Sloane. *UN General Assembly Resolutions in Our Changing World*. (Ardsley: Transnational, 1991).

great deal of moral support, but offers little in concrete legal terms.[137] The actual legal status of the UDHR remains a contested issue.[138] The acceptance of the UDHR and its subsequent development in international law exemplifies the high degree of rhetoric involved in international human rights law, rhetoric that attempts to gloss over inaction. Any attempt to legally apply the standards of the UDHR concerning a violation of human rights will show that while the UDHR is an aspirational ideal of considerable moral import, it is not something concrete that individuals are able to access and utilise beyond its moral rhetoric.[139]

The nature of the international legal argument, the prominence of state sovereignty and the conflict between the interests of states and individuals, all seriously undermine the effectiveness of international human rights instruments.[140] The lack of effectiveness is attributable to the process of international law as one controlled by states and reflecting their interests. An international legal instrument for the protection and promotion of human rights cannot come into existence unless states agree to create one. The language and provisions contained therein determining the extent to which an individual is able to access and utilise the instrument must receive final approval by states. Once created, states are left with the option whether or not to sign the instrument, whether or not to ratify it and the terms of incorporation into the domestic legal system.[141] The process of ratification allows a state to express its interests as legal facts through reservations, understandings and declarations that may be made

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[137] See Cassese (1986) p. 299. The United States Supreme Court declared in *Diggs v Richardson* 555 F.2d 848 'that even assuming there is an international obligation that is binding on the United States-...-the United Nations Resolution underlying that obligation does not confer rights on the citizens of the United States that are enforceable in court in the absence of implementing legislation.' This comment was in regards to the binding impact of Security Council resolutions that are normally seen as having greater legal impact than GA resolutions.

[138] See D. Donoho. 'The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique.' 14 *Michigan Journal of International Law* (1993) p. 837; Reisman (1990) p. 867; Schlüter (1973) pp. 144-145. Regardless of the opinion held by scholars this does not change the fact that the UDHR is not a directly enforceable legal document.

[139] The standing of the UDHR in domestic courts varies. In Italy, in *Ministry of Home Affairs v Kemali* 40 ILR (1962) p. 195 it was expressed that the UDHR was more than a declaration being 'a general principal of law which must be held to have become part of our law.' However, in this case the legal force of the UDHR came from the incorporation of the European Convention on Human Rights into Italian law, not by its own measure. In Belgium, in *DeMeyer v État Belge, Ministre de la Famille* (Belgium Conseil d'État) 47 ILR (1966) p. 197, the Court felt the UDHR was a declaration of principle 'which does not, as such, engender any legal effect and consequently cannot serve as the legal basis for an application'. In Ireland, in *The States (Duggan) v Tapley* (Eire Supreme Court) 18 ILR (1950) 336, the Court held the UDHR to be of great importance and significance but 'not a guide to discover the existing principles of international law.' A middle of the road approach was viewed in Israel, in *American European Beth-El Mission v Minister of Social Welfare* (Israel Supreme Court sitting as the High Court of Justice) 47 ILR (1967) p. 205, referring to the UDHR as 'morally if not judicially' important to the Court. In *Huynh Thi Anh v Levi* (United States Supreme Court) 586 F2d 625, the Court stated that the language used in the UDHR prevented its use before the Court and that it did not create private rights or duties enforceable in domestic courts.

[140] See O. Osterud 'Sovereign Statehood and National Self-Determination: a World Order Dilemma.' in Heiberg (1994) pp. 26-30.

[141] There is no legal obligation upon states to sign any treaty, or to ratify it once signed. See Meron (1982) who shows that if states are not willing to ratify a treaty that establishes high standards a less ambitious document with lower substantive standards will be prepared, p. 733. It is worth remembering also that while international institutions are

with regard to the instrument. Finally, states are not bound forever by any international instrument as they may withdraw their agreement at any time.[142] The general reluctance of states to develop international instruments effective for the individual is shown by the International Covenants which were open for signature in 1966 but did not enter into force for ten years even though they only required 35 ratifications.[143] The considerable delay has been explained as the obstinacy of states to ratify a treaty limiting their freedom of action, as under the ICCPR states are required to bring their domestic law in line with the provisions of the treaty, action they will not obligingly agree to.[144]

The content of international human rights instruments is often biased to the interests of states through the use of broad and often indeterminate language allowing for multiple valid interpretations of the content and application of a right. To a certain degree less rigid language is necessary as different societies will express the content of a right in a different fashion. There cannot be one strict model of a human rights provision that is applied without exception (see below Chapters 4-6). However, the need for flexibility cannot be used to override effectiveness, as Donoho has commented:

> Perhaps the most fundamental weakness in the present human rights normative framework is its continuing textual and interpretative indeterminacy. To varying degrees depending upon the right, the catalogue of rights consists of extremely vague, generally stated principles.[145]

The use of vague and indeterminate language occurs throughout international law and is seen as necessary for ensuring states will sign up to the instruments. Accommodation clauses are added to allow for rights to be limited based on subjective conditions as determined by the state, such as 'to protect national security, public order, public health or morals', or dependant upon self-defined criteria as with 'progressive achievement'.[146] The vague and indeterminate

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effective in creating effective protection and promotion of human rights they are also possible violators of rights, Schreuer (1993) pp. 465-466.

[142] On 23 October 1997 Jamaica withdrew from the Optional Protocol to the ICCPR. See *Multilateral Treaties (1997)* p. 164, note 1. There is a possible exception with the two Covenants which do not provide for withdrawal. Nowak states that is would be impossible to do so concerning the ICCPR, see M. Nowak. *United Nations Covenant on Civil and Political Rights: CCPR Commentary*. (Kehl am Rhein: Engel, 1993) p. xxvii.

[143] International Covenant on Economic, Social and Cultural Rights (1996) 993 UNTS 3 (ICESCR); International Covenant on Civil and Political Rights (1966) 999 UNTS 171 (ICCPR).

[144] See V. Pechota. 'The Development of the Covenant on Civil and Political Rights.' in L. Henkin, ed. *The International Bill of Rights: The Covenant on Civil and Political Rights*. (New York: Columbia University Press, 1981) p. 65.

[145] Donoho (1993) p. 839 (footnote omitted).

[146] See Articles 12, 14, 18, 19, 21, 22 of the ICCPR, Article 8 of the ICESCR. Other provisions which allow for a state to disregard obligations concerning rights exist in the ICESCR, Article 2 says the rights in that Covenant should be implemented based on maximum available resources through progressive achievement mainly through legislative means. The same article also allows Third World countries (not defined) to determine to what extent they can allow for the rights for non-nationals. Article 4 of the ICESCR allows for the limitation of rights as 'determined by law only

language of rights combined with accommodation clauses allow the state to limit rights in a legally acceptable fashion.[147] Some human rights instruments also contain derogation articles allowing for an outright suspension of certain rights in emergency situations.[148] The definition of the emergency and its extent are part of the domestic jurisdiction of the state with regards to the terms of the instrument in question. Treaty monitoring bodies are able to scrutinise emergency situations and enter into a dialogue with a state concerning the protection of rights during an emergency.[149] The ability of treaty bodies to engage in dialogue with a government during an emergency is a useful and effective tool but it does not overcome the problem of the state's exclusive position in having the final say concerning the existence and extent of an emergency situation.[150] The totality of indeterminate language, accommodation clauses and other legal measures all result in excluding individuals from the process of international human rights law.[151]

Enforcement of international human rights obligations entails various methods as included in the different instruments. Treaties will create or endow a body with the responsibility of ensuring obligations are met through procedures for inter-state complaints, individual complaints, and for reporting obligations.[152] In general, states show a certain degree of hostility to, or reluctant acceptance of, the work of bodies who exist to ensure human rights obligations are being met.[153] It is ironic that the majority of international human rights instruments provide for inter-state complaint procedures, allowing states to complain about the

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in so far as they may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.' Roberston describes the term 'maximum' as 'the sword of human rights rhetoric' and 'available' as 'the wiggle room for the state', R. Robertson. 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights.' 16 *Human Rights Quarterly* (1994) p. 694.

[147] Donoho (1993) pp. 841-2.

[148] ICCPR, Article 4. Also Gaete (1993) p. 86.

[149] Generally see J. Fitzpatrick. *Human Rights in Crisis: The International System for Protecting Human Rights During States of Emergency*. (Philadelphia: University of Pennsylvania Press, 1994).

[150] See S. Marks 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights.' 15 *Oxford Journal of Legal Studies* (1995) pp. 91-93. France's reservation with regards to the derogation clause of the ICCPR in that the constitution will define what measures will apply and to what extent. *Multilateral Treaties (1997)* p. 124. For the role of the HRC see D. McGoldrick. *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon, 1991) pp. 301-327. Israel has had a declared state of emergency since 1948 (*Multilateral Treaties (1997)* p. 144) with the HRC continually expressing its concern over its existence, UN Doc. CCPR/C/79/Add.93 (18 August 1998) paragraph 11.

[151] See Gaete (1993) pp. 51-91.

[152] At the global level, provisions for reporting procedures are Article 40 (1), ICCPR; Article 16 (1), ICESCR; Article 18 (1), Convention on the Elimination of All Forms of Discrimination Against Women; Article 19, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 44, Convention on the Rights of the Child; Article 73, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Efforts to create further enforcement procedures are troubled with political squabbles over finances and other resources, see L. Leblanc. *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights*. (Lincoln: University of Nebraska Press, 1995) pp. 210-226.

behaviour of other states concerning human rights practices, which are rarely used.[154] At the same time individuals, for whom the instruments are supposed to benefit, are not always given the ability to seek redress of any form.[155]

The common method used to deny the access of individuals to international instruments is demonstrated by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[156] Articles 11-12 establish an inter-state complaint mechanism that is automatically agreed to through ratification of the treaty. Article 14 allows states to make a separate declaration allowing individuals to petition the Committee on Racial Discrimination in relation concerning alleged violations of the Convention, which may be withdrawn by the state at any time.[157] Of the 150 states parties to ICERD, only 24 have made the declaration allowing individuals to lodge complaints but all 150 are able to utilise the inter-state complaint procedures.[158] Under the ICCPR there exists a mechanism for inter-state complaints[159] but nothing for individual complaints which is only possible through the state accepting another treaty which is subject to all the above legal manoeuvres to limit its effectiveness.[160] The reporting procedures created by the treaties are often an effective method for the promotion and protection of human rights (see below) but they are also dependant upon co-operation from states to actively participate, something they have shown a clear reluctance to do.[161]

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[153] See the statement by an Australian Senator who declared that the HRC should not be 'interfering in disputes between individual Australians', reprinted in T. Tenbensel. 'International Human Rights Conventions and Australian Political Debates: Issues Raised by the *Toonen* Case.' 31 *Australian Journal of Political Science* (1996) p. 17.

[154] Article 40 of the ICCPR has never been used, D. Harris. *Cases and Materials on International Law*, 5th ed. (London: Sweet and Maxwell, 1998) p. 649. Under the African Charter the inter-state complaint has only been used once, see Umozurike (1997) p. 75. The European Convention on Human Rights has seen its inter-state complaint procedure used on a few occasions but primarily for political reasons, see D. Harris, M. O'Boyle and C. Warbrick. *The Law of the European Convention on Human Rights*. (London: Sweet and Maxwell, 1995) p. 587.

[155] This is demonstrated by the US and UK who are the only two states under the Convention against Torture to have accepted the inter-state complaint procedure under Article 21 of the Convention but not the individual complaint procedure under Article 22, *Multilateral Treaties (1997)* p. 199. Instruments possessing an individual petition procedure include the Torture Convention, Article 22; Optional Protocol to the ICCPR, Article 1; Convention on the Elimination of Racial Discrimination, Article 14; Convention on the Protection of Migrant Workers, Article 77. An Optional Protocol to CEDAW has just been adopted by Commission on the Status of Women UN Doc. E/CN.6/1999/WG/L.2. A similar idea is being considered for the ICESCR, see Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a Draft Optional Protocol for the Consideration of Commitments concerning Non-Compliance with the ICESCR, reprinted in 5 IHRR (1998) p. 527.

[156] (1966) 660 UNTS 195.

[157] ICERD, Article 14 (3).

[158] *Multilateral Treaties (1997)* pp. 105-107.

[159] Articles 41-42.

[160] Optional Protocol to the ICCPR (1966) 999 UNTS 171.

[161] As of February 1998 138 states were overdue to submit reports under the ICCPR, 134 under the ICESCR, 100 under the Convention Against Torture, 421 under the Convention on the Elimination of Racial Discriminaiton, 206 under the Covention on the Elimination of Discrimination Agaianst Women and 135 under the Convention on the Rights of the Child. *Status of the International Human Rights Instruments and the General Situation of Overdue Reports*. UN Doc. HRI/MC/1998/2 (17 February 1998). One author feels that the failure to submit a report is a clear violation of the treaty concerned, see V. Dimitrijevic. 'The Monitoring of Human Rights and the Prevention of Human Rights Violations through Reporting Procedures.' in A. Bloed et al, eds. *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms*. (Dordrecht: Martinus Nijhoff, 1993) p. 16. The lack of reports

Further measures open to states to exclude individuals from international human rights instruments include making reservations, declarations or interpretative statements of understanding when signing or ratifying an international instrument.[162] The purpose of these manoeuvres is to allow a state to make official statements as to what it believes the meaning of a treaty provision to be. It has been observed that these legal manoeuvres 'restrict the potential domestic effect of a human rights treaty'.[163] The ability of states to make reservations to international treaties is established through Articles 19-23 of the Vienna Convention on the Law of Treaties (VCLT). The underlying rule concerning the validity of a reservation is that it should not be 'incompatible with the object and purpose of the treaty.'[164] The Human Rights Committee (HRC) adds that all reservations must be 'specific and transparent'[165] and reservations to the ICCPR and its Protocols cannot include reservations that offend peremptory norms. Therefore a state must no remove those measures that give domestic effect to the provisions or remove the framework of guarantees for securing rights under the treaties.[166]

There exists a number of reservations to the ICCPR which do not conform to the HRC's requirements. Algeria has reserved that it interprets Article 23 (4) (rights in marriage) 'as in no way impairing the essential foundations of the Algerian legal system'.[167] Similar reservations have been expressed by Ireland, Israel and Kuwait.[168] The Congo has declared that is does not consider itself bound by Article 11 (not to be imprisoned for failing a contractual obligation) because it is incompatible with domestic provisions.[169] India has declared it will apply Article

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concerns all states and not just the poorer ones which suggests a deeper reason exists. Of the six UN human rights treaties, over 1, 155 reports overdue, see Annual Meeting of Chairpersons of the Human Rights Treaty Bodies. 'Status of the International Human Rights Instruments and the General Situation of Overdue Reports.' (30 April 1999) UN Doc. HRI/MC/1999/2.

[162] P. Imbert. 'Reservations and Human Rights Conventions.' 6 *Human Rights Review* (1981) p. 28; Lijnzaad (1995); C. Redgwell. 'Reservations to Treaties and Human Rights Committee General Comment No. 24 (52).' 46 *International and Comparative Law Quarterly* (1997) p. 390; W. Schabas. 'Reservations to Human Rights Treaties: Time for Innovation and Reform.' 32 *Canadian Yearbook of International Law* (1994) p. 39; D. Shelton. 'State Practice on Reservations to Human Rights Treaties.' 1 *Canadian Yearbook on Human Rights* (1983) p. 205; and generally Gardner (1997).

[163] Lijnzaad (1995) p. 3; Schabas (1994) p. 41. But see M. Schmidt. 'Reservations to United Nations Human Rights Treaties - the Case of the Two Covenants.' in Garnder (1997) p. 20.

[164] VCLT, Article 19 (c). The legal regime concerning the validity of reservations to human rights treaties is considered 'inconsistent' and 'unclear', Human Rights Committee (HRC). General Comment No. 24 (52). UN Doc. CCPR/C/21/Rev.1/Add.6, paragraph 17. Also C. Redgewell. 'The Law of Reservations in Respect to Multilateral Conventions.' in Gardner (1997) p. 9.

[165] Kuper observes that '... sweeping reservations couched in vague terms and covering the treaty as a whole pose enormous problems in terms of monitoring State compliance with human rights treaties ...' J. Kuper. 'Reservations, Declarations and Objections to the 1989 Convention on the Rights of the Child.' in Gardner (1997) p. 113.

[166] General Comment No. 24, paragraphs. 8-10, 19. The HRC understands 'peremptory norms' as those rights which are part of customary international law. The US, UK, and France have all expressed doubts over this position, see R. Higgins. 'Introduction.' in Gardner (1997) p. xxviii.

[167] *Multilateral Treaties (1997)* p. 111.

[168] *Multilateral Treaties (1997)* pp. 125-6.

[169] *Multilateral Treaties (1997)* p. 124.

9 (right to liberty and security of person) only in consonance with the domestic constitution.[170] Malta has lodged a reservation to Article 14 (2) (right to be presumed innocent until proven guilty) in a way which negates the right altogether.[171] The US has lodged a reservation with a similar purpose concerning Article 6 (2) (application of the death penalty) which reserves its right to apply the death penalty on its own terms. The reservation of France concerning the protection afforded by the derogation clause of Article 4 of the ICCPR is strictly on its own terms and is mirrored by a similar reservation of Trinidad and Tobago.[172]

Reservations to human rights treaties demonstrate a reluctance of states to concern themselves with the welfare of individuals, being more interested in signing a human rights treaty for symbolic effect.[173] The Convention on the Rights of the Child (CRC) demonstrates the emptiness of states' intentions in signing the treaty with over half making reservations of one form or another. A number of the reservations are in direct contrast to the purpose of the instrument. For example, the reservation of Indonesia reads that

> ratification [of the Convention by Indonesia] does not imply the acceptance of obligations going beyond the Constitutional limits nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution.[174]

The reservation of Malaysia goes one step further in saying that the government accepts the provisions of the CRC so long as 'they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.[175] The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[176] shares a similar disregard from states as a considerable number have reserved the right not to apply entire lists of rights contained within.[177] The UK currently has reservations in effect with regards to four different provisions of CEDAW where it will apply domestic law over the international obligation, the list was previously more extensive.[178]

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[170] *Multilateral Treaties (1997)* p. 113.

[171] The reservation reads that Malta '... interprets paragraph 2 of article 14 of the Covenant in the sense that it does not preclude any particular law from imposing upon any person charged under such law the burden of proving particular facts;' *Multilateral Treaties (1997)* p. 126

[172] See *Multilateral Treaties (1997)* p. 124 (France) and pp. 129-130 (Trinidad and Tobago).

[173] S. Hossain. 'Equality in the Home: Womens' Rights and Personal Laws in South Korea.' In R. Cook. *Human Rights of Women: National and International Perspectives*. (Philadelphia: University of Pennsylvania Press, 1994) p. 470.

[174] *Multilateral Treaties (1997)* p. 214. The reservation of Singapore uses similar wording, p. 217.

[175] *Multilateral Treaties (1997)* p. 215. Thailand further subjects its obligations to 'national practices'. p. 218.

[176] 1249 UNTS 13.

[177] See B. Clark. 'The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women.' 85 *American Journal of International Law* (1991) p. 317; C. Chinkin. 'Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination against Women.' in Gardner (1997) p. 65

[178] *Multilateral Treaties (1997)* pp. 178-179, also pp. 189-190.

As with the indeterminate language of human rights treaties, it is argued that reservations serve a useful purpose in allowing states to sign-on to an international instrument without the pressure of having to accept unconditionally all obligations in an immediate fashion.[179] The example of the UK's action of progressively withdrawing reservations to CEDAW demonstrates this point. The idea that not all human rights obligations can be met immediately is accepted in international human rights law.[180] The UDHR states that the document is a common standard to be strived for, the ICESCR obligates states to undertake the provisions of the Covenant through progressive achievement.[181] The HRC recognises that the meeting of human rights obligations is a progressive process,[182] and the Vienna World Conference called it 'a dynamic and evolving process'.[183] The realisation of human rights is a continual and development process but to see reservations as a means for a state to join up to an agreement without demanding full compliance immediately is only giving in to the apologist position of state sovereignty.[184] Schmidt points out that with the ICESCR it is those rights which lend themselves most easily to 'immediate implementation' that have the most reservations.[185] States do engage in the progressive withdrawal of reservations but this is far from the common trend and does not get around the fact that it will be states themselves who decide how long a reservation is applicable.[186] The argument of McBride that reservations reflect the lack of material capabilities to comply with a treaty does not explain reservations such as France's to non-discrimination clauses in human rights treaties which are claimed to be inapplicable based on domestic provisions which contradict the purpose of the clauses.[187] The problem lies in who is to determine whether the content or duration of a reservation is valid to which the HRC

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[179] In Gardner (1997) see M. Schmidt. 'Reservations to the United Nations Human Rights Treaties - The Case of the Two Covenants.' p. 20; Schabas (1994) pp. 40-41.

[180] See Redgewell who discusses progressive obligations to international treaties, including the European Social Charter, in Gardner (1997) pp. 16-18.

[181] Article 2.

[182] General Comment No. 24 (52), paragraph. 4.

[183] Vienna Declaration and Programme of Action. UN Doc. A/CONF.157/23 (12 July 1993) paragraph 26.

[184] McBride presents a convincing case for the beneficial aspects of reservations since it is difficult for states to adhere to obligations for a variety of reasons but his reasoning cannot detach itself from the ultimate conclusion that states themselves will decide under what terms and conditions they will adhere to obligations, in Gardner (1997) pp. 120-184

[185] In Gardner (1997) p. 32.

[186] When Chile signed CEDAW in 1980 it declared it was 'mindful of the important step which this document represents' but was '... obliged to state, however, that some of the provisions of the Convention are not entirely compatible with current Chilean legislation.' and that it had established a commission to examine the issue. Eighteen years later the reservation remains in place. *Multilateral Treaties (1997)* p. 172.

[187] France's reservation to the ICCPR reads '... in light of article 2 of the Constitution ... article 27 [of the ICCPR] is not applicable so far as the Republic is concerned.' *Multilateral Treaties (1997)* p. 124. Article 27 of the ICCPR holds that minorities will not be denied the right 'to enjoy their own culture, to profess and practice their own religion, or to use their own language.' Article 2 of the Constitution of France reads in part 'The language of the Republic shall be French.'

has proposed some suggestions.[188] These proposals for regulating the issues of reservations do provide guidance, but it is up to states themselves to decide whether or not to follow the suggestions and turn them into binding law .[189]

The use of reservations is an explicit legal tool available to states to publicly announce they are not bound by certain obligations, whatever the reason. The fact that a state has not made a reservation does not automatically lead to the conclusion that obligations are being met. As Marks observes with relation to the African Charter on Human and Peoples' Rights, 'a small number of reservations does not necessarily correlate with a high level of compliance with a treaty's substantive norms.'[190] Legal manoeuvres such as signature, ratification, reservations, declarations, withdrawal clauses, self-execution issues,[191] federal issues[192] all allow for states to set the terms of their obligations under international human rights law. For individuals in the UK an international human rights instrument cannot be seen as a source of legally enforceable rights until Parliament 'has blessed it with legitimacy and truly "legal" pedigree'.[193] The same holds true in the US where Article 7 of the Constitution says treaties make up part of the 'supreme Law of the Land' and judges are to be bound by them. However, the signature of a human rights treaty by the US is accompanied by a statement that the rights in the treaty are 'non-self executing' meaning individuals will not have access to the international instrument until the government allows it on its own terms through the ratification process.[194] In light of these and similar practices by states, one author has commented that the use of international human rights standards is not a negation or weakening of the sovereignty of the state but rather an application of it.[195]

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[188] General Comment No. 24 (52) paragraphs 18-20. For the inadequacy of the VCLT concerning reservations for human rights treaties, see Clark (1991) pp. 281-321.

[189] With regard to the complication over reservations to human rights treaties Redgewell concludes '[u]ltimately the question is one for States to resolve, ...' in Gardner (1997) p. 19. McBride also concedes the point that states 'advance reservations which ... do not appear to set themselves effective targets for overcoming the obstacles to full implementation.' p. 183. Schabas (1994) p. 79, who also points out how monitoring bodies have been reluctant to push the issue of reservations for fear that a state may denounce the treaty, p. 44.

[190] S. Marks. 'Three Regional Human Rights Treaties and Their Experience of Reservations.' in Gardner (1997) p. 61. Also Imbert (1981) pp. 46-47.

[191] Quigley (1993) p. 1297.

[192] See E. Landry. 'States as International Law-Breakers: Discrimination against Immigrants and Welfare Reform.' 71 *Washington Law Review* (1996) p. 1095, as to how the US Federal Government is leaving it up to individual states to pass legislation concerning welfare benefits for immigrants, and how the discrimination which occurs brings into question whether the US is meeting international obligations, even though it is not the Federal government passing the legislation.

[193] Hunt (1997) pp. 8-9.

[194] Buergenthal comments that the US has gone from being 'international law-friendly' to putting 'increasing obstacles in the way of giving domestic effect to its international legal obligations.' T. Buergenthal. 'Modern Constitutions and Human Rights Treaties.' in J. Charney et al, eds. *Politics Values and Functions: International Law in the 21st Century.* (The Hague: Martinus Nijhoff, 1997) p. 198.

[195] M. Kirby. 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution."' 25 Western Australia Law Review (1995) pp. 42-3.

The application of sovereignty to restrict the domestic effect of an international human rights instrument is demonstrated with regards to the Convention of the Rights of the Child in Australia in the case of *Teoh*.[196] In the Federal Court, Lee J, speaking of the role of the CRC, which had been ratified by Australia but not incorporated into domestic law, stated

> ratification of the Convention by the executive was a statement to the national and international community that the Commonwealth recognised and accepted the principles of the Convention, That statement provided parents and children, whose interests could be affected by action of the Commonwealth which concerned children, with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the Convention.[197]

Through the international legal argument Lee J's statement that individuals in Australia are able to utilise the signed CRC for the protection of their rights, based on legitimate expectations, is utopian in nature. In terms of practical realities this position cannot be sustained for it would mean that states are bound by human rights instruments just by signing the documents and individuals would be able to invoke the obligations contained therein. Furthermore, if signature gives rise to expectations, those expectations will have to be defined based on the stated goals of the instrument in question that would allow for valid arguments that favour the individual to a large degree. Lee J, quickly qualified his utopian position by appealing to the apologist argument.

> After executive ratification of the Convention persons exercising delegated administrative powers to make decisions which concerned children were expected to apply the broad principles of the Convention in so far as it was consonant with the national interest and not contrary to statutory provisions to do so.[198]

Any expectations an individual may have in relation to an international human rights instrument are now subject to the national interest and domestic laws, all of which will be defined by the government of a state. Lee J travelled the full route from utopia to apology and concluded his journey at the apologist end. The journey from utopia to apology was a smooth

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[196] *Teoh v Minister of Immigration, Local Government, and Ethnic Affairs* (Federal Court of Australia) [1994] 121 ALR 436. Another example of the application of sovereignty to resist international human rights is currently underway in the US where there are attempts in Congress to nullify current legislation that commits the US to respect and implement obligations under international human rights treaties. See T. Franck. 'Notes from the President.' *ASIL Newsletter* (January 1999) pp. 1, 4.

[197] *Teoh*, at p. 449.

[198] *Teoh*, at p. 450.

one for Lee J but it creates numerous obstacles for the individual to overcome in order to have access to and utilise international human rights instruments effectively.

C. The Position Today - Illusions of Utopia

The purpose of the discussion so far has been to show that international human rights law proclaims the individual as its purpose but in application deals more with the concerns of states. This is not to say that international human rights law has not had any impact or is completely ineffective.[199] Instead it has tried to demonstrate how the desire to believe that the existence of international human rights instruments has resulted in a more humane world overlooks the actual realities involved when an individual attempts to access and utilise international human rights instruments. It is naturally in the interests of proponents of international human rights law to proclaim the victory of human rights in limiting state behaviour. While this utopian view is favoured it is necessary to keep in mind the realities that correspond more closely to the actual impact of international human rights law upon the day to day lives of individuals.[200]

Recent work by Thomas Franck demonstrates the desire to proclaim the existence of a better world through the development of international human rights law without stopping to examine the actual implications of the law. Franck's study of the growth of the limits and possibilities of personal freedom[201] proclaims progress for the individual based on the development of human rights as evidenced by the textual existence of international human rights instruments. He takes the existence of these documents to declare the emergence of a new form of self-determination for the individual in the international system based on 'a world in which each individual will freely chose a personal identity constructed out of a broad array of building blocks'.[202] He feels the world has entered 'an era of freely imagined identities, one in which personal choice is no longer circumscribed by accidents or manipulations of genetics, class, place or history.'[203] The ability of the individual to express and define the self has been expanded through the creation of greater space for personal freedom as individuals 'are being freed to design their own identities.'[204] This freedom is a direct result of the existence and

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[199] See Buergenthal in Charney et al (1997) pp. 197-208. Also Tenbensel (1996) p. 7; J. Claydon. 'The Application of International Human Rights Law by Canadian Courts.' 30 *Buffalo Law Review* (1981) p. 727; R. Lillich. 'Invoking International Human Rights Law in Domestic Courts.' 54 *Cincinnati Law Review* (1985) p. 367.

[200] As demonstrated by *Pinochet.*

[201] These works include 'Is Personal Freedom a Western Value?' 91 *American Journal of International Law* (1997) p. 593, hereinafter *Personal Freedom*; 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice.' 90 *Americana Journal of International Law* (1996) p. 359, hereinafter *Clan and Superclan*.

[202] *Personal Freedom*, p. 359.

[203] *Personal Freedom*, p. 383.

[204] *Personal Freedom*, p. 383.

development of international human rights instruments that Franck believes are effective in limiting the capacity of governments to interfere with the individuals ability to determine the self.

In this sense, Frank's ideas are misguided. The emergence of a world as he describes is fully desired but it would be difficult to claim that it has been achieved. Franck himself notes serious limitations to the development he describes. He explains that 'a formal accommodation by the state to personal individuation has achieved near-global normative recognition, even if it is not invariably evident in state practice.'[205] It appears difficult to claim that there exists a greater degree of personal freedom if there is no practical evidence to support it. However, the structure of the international legal argument allows for Frank to put forth such claims as valid, for he is appealing to the normative side of law, to utopian arguments of how things should be. To the contrary, the apologist is able to point to the very lack of state practice of being demonstrative of the situation where human rights have not achieved 'near-global normative recognition'. Franck points to the ICCPR as the fundamental instrument for greater personal freedom since it 'has been formally ratified as binding by almost all states and establishes in law most of the essential elements of personal autonomy.'[206] What then of the individuals who live in states that have not ratified, or have not moved beyond 'formal ratification' to actual domestic implementation? What of the reservations to the ICCPR lodged by states, the US in particular, or the restrictions placed on the exercise of certain rights by states or the derogation of the ICCPR declared by 22 different parties, some of which are still in force?[207] How can the ICCPR stand as an essential element of individual personal autonomy if a large proportion of individuals do not have access to its provisions?[208]

With international human rights law there remains a fundamental problem with effectiveness due to a 'gap between its public rhetoric and its private realities.'[209] The public rhetoric is demonstrated through the existence of numerous international legal instruments and the surrounding discourse. The private reality lies in the inability of the individual to access and utilise legal instruments that were created for the purpose of protection for the individual. Allot has commented that the final effect of this situation is the creation of a world system that

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[205] *Clan and Superclan*, p. 593.
[206] *Personal Freedom*, p. 594.
[207] For a complete listing see *Multilateral Treaties (1997)* pp. 139-158.
[208] Of the 140 states parties to the ICCPR, 93 have also ratified the Optional Protocol for individual complaints, two notable exceptions being the UK and US, *Multilateral Treaties (1997)* p. 161. Franck admits a second limitation to his own thesis related to the question of access as the developing trend of increased personal self-determination may only be exercised by professional, commercial or intellectual elites who are 'small in number but wielding disproportionate influence on how society and identity are structured and defined', *Personal Freedom*, p. 382.
[209] Phrase from D. Coates. *Running the Country*, 2nd ed. (Bath: Hodder and Stoughton, 1995) p. 136.

has resulted in the oppression of the individual and a denial of human dignity.[210] To ensure a more effective international human rights law the public rhetoric must be utilised to bring about improvement to the private realities individuals face. Franck relies solely on the textual existence of international human rights instruments as evidence of substantive progress. What he overlooks is that the effectiveness of human rights for the individual remains confined to the text as states are able to retain exclusive control over the substance and meaning of the text. It becomes necessary to remove this exclusive control over the text so that its significance and meaning may be shared by all, not least those whom it impacts the most.

VI. The Continuing Path to Utopia - The Democratic Route

Despite the obstacles discussed above, international human rights law has been able to overcome, albeit with limited success, the issue of state sovereignty to bring benefits to individuals. These meagre gains are significant for they provide a beginning for more effective action and demonstrate that issues such as sovereignty and domestic jurisdiction are not absolute but are relative and historically conditioned.[211] The PCIJ has stated that the question of domestic jurisdiction, which allows for the manipulation of international human rights law, is an essentially relative question dependent upon the development of international relations.[212] International human rights instruments, including the UN Charter, keep state sovereignty intact, often with detrimental results for the individual. On the other hand, claims of sovereignty and domestic jurisdiction are being overridden more and more by monitoring bodies and courts and ignored by others who are actively pursuing an international human rights law based on the needs and desires of individuals, not states.

The influence and ability of international human rights instruments to be effective has occurred in those situations where the text and process of international human rights law is taken out of the exclusive domain of states. For improvements to be made in the international system of human rights protection the dominating conception of the state must be reconsidered to take into account and increase the involvement of other participants in the international system.[213] The involvement of monitoring bodies, intergovernmental institutions (IGOs), NGOs and other non-state entities has worked to further the effectiveness of international

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[210] P. Allott. *International Law and International Revolution: Reconceiving the World*. (Hull: University of Hull Press, 1989) p. 3.

[211] Nincic (1970) p. 136.

[212] *Nationality Decrees Issued in Tunisia and Morocco (French Zone) on November 8, 1921* Advisory Opinion No. 4 (7 February 1923). PCIJ Reports, Series. B No. 4 (1923) pp. 23-24.

[213] For a discussion on participants other than states and the influence they exert on international law see Higgins (1994) pp. 39-55.

human rights law. The involvement and impact of non-state entities in the process of international human rights law remains limited but opens spaces of possibility for a more effective system of law increases as the needs and desires of all those who are affected may be articulated.

Monitoring bodies which have the responsibility for overseeing international human rights instruments are either able to accept petitions concerning violations or are entrusted with supervising a reporting procedure whereby states provide information in relation to the specific treaty obligations.[214] Reporting procedures are a relatively weak form of ensuring compliance with human rights obligations as states are not bound by any reporting procedure, except by choice, and a great many who are under an obligation do not fulfil this obligation or do so in the most superficial manner.[215] What the reporting procedure is able to do, when it does operate, is to bring the discussion of human rights and related issues into a larger forum out of the exclusive control of the state.[216] Under the various reporting procedures states are required to disclose practices and mechanisms of protection in relation to agreed upon standards. These reports are scrutinised by the treaty monitoring bodies who are able to question a state's representative, ask for more information and provide conclusions as to how well a state is meeting its obligations along with recommendations for future action.[217] The conclusions and recommendations are not binding but the resultant dialogue does remove human rights from the exclusive control of the state.[218]

Combined with the efforts of monitoring bodies created by international instruments, the UN GA has also created mandates for a number of special rapporteurs and working groups who either deal with the human rights situation in a certain country or a certain topic.[219] At

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[214] See above and M. O'Flaherty. *Human Rights and the UN: Practice before Treaty Bodies*. (London: Sweet and Maxwell, 1996).

[215] For the problems faced by the HRC, see O. Prounis. 'The Human Rights Committee: Toward Resolving the Paradox of Human Rights Law.' 17 *Columbia Human Rights Law Review* (1985) pp. 103-119. There is the added difficulty that as a state signs up to more international instruments it may not be able to meet all of its reporting obligations, M. Nowak. 'Future Strategies for the International Protection and Realization of Human Rights.' in A. Eide and J. Helgesen, eds. *The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address: Essays in Honour of Torkel Opsahl*. (Oslo: Norwegian University Press, 1991) p. 71. The supervision bodies provide details on how the reports should be drafted and offer states assistance in doing so.

[216] The examination of state reports is usually conducted over a number of meetings and held in public see Rules of Procedure of the Human Rights Committee. UN Doc. CCPR/C/3/Rev.3, Rules 66-71. Similar exist under the ICESCR, see UN Doc.E/C.12/1990/4/Rev.1, Rules 28 and 62 and ICERD, see UN Doc. CERD/C/65/Rev. 3, Rules 63-68.

[217] Lijnzaad (1995) observes that questions are not always answered but addressed on a 'pick-and-choose' basis, p. 414.

[218] The Human Rights Committee under the ICCPR has furthered this role by expanding its reporting procedures by requesting further information from states during emergency situations and providing concluding observations which provide the HRC's assessment as to how well a state is meeting their obligations, see I. Boefefijn. 'Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure under Article 40 of the Covenant on Civil and Political Rights.' 17 *Human Rights Quarterly* (1995) p. 766.

[219] See J. Flood. *The Effectiveness of UN Human Rights Institutions*. (Westport: Praeger, 1997).

present there are 36 mandates covering specific countries and topics all reporting to the UN Human Rights Commission.[220] The activities of these bodies have not been as proactive as desired due to a number of other considerations, however their existence does open up the international human rights process beyond the exclusive control of states.[221]

The participation of NGOs, social movements and other non-state actors in the process of international human rights law has also had a significant impact on furthering effectiveness.[222] These bodies are often able to operate beyond the constraints of the state, placing human rights in a wider public fora. NGOs and social movements emanate from individuals who are demanding certain standards of behaviour from those in power based on the existing human rights rhetoric. Their demands work on the understanding that if rights are said to exist then they should be adhered to in reality. NGOs are able to criticise and make public violations that have occurred, to further information and education about rights, and in general empower individuals in relation to human rights. Due to the nature of NGOs as voluntary associations whose interests will often conflict with that of the state in human rights matters, their ability to function tells a great deal about the development of democracy and human rights in a given area.[223] The impact of NGOs is, however, limited as states may use domestic law to silence and hinder their activities. Also, in the newly democratised states governments are hostile to any efforts that continue to claim that human rights violations occur.[224] It is possible to over stress the role of NGOs for even though they increase the participation process they are not the absolute solution to ensuring human rights protection. On the whole NGOs are limited in the scope of rights they deal with, the geographical application of their activities and with regards to the fact that the organisations themselves have their own interests and agendas which they wish to pursue.[225]

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[220] For further information see the internet site of the UN High Commissioner for Human Rights [http://www.unhchr.ch/html/menu2/xtraconv.htm].

[221] Amnesty International has been critical of the Commission on Human Rights for being reluctant to take action due to considerations of cultural, political, trade or economic sensitivities, see Amnesty International. *Annual Report 1996.* (London: AI Publications, 1996) pp. 60-61. On the positive side the Committee on Economic, Social and Cultural Rights holds a 'general discussion' day during its sessions 'to encourage inputs into its work from all interested parties.' O'Flaherty (1996) pp. 79-80. See Lijnzaad (1995) with respect to the reluctance of monitoring bodies to question reservations to human rights treaties. The author goes on to explain how a more active and productive role could be achieved by removing the authority of reservations from the control of states, pp. 412-420.

[222] O'Flaherty (1996) places NGO's as essential to the ability of monitoring bodies to carry out their tasks effectively, pp. xi, 1-15. Also J. Smith et al. 'Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s.' 20 *Human Rights Quarterly* (1998) p. 379.

[223] COE. *The Challenges of a Greater Europe: the Council of Europe and Democratic Security*. (Strasbourg: COE, 1996) p. 121. Kooijmans sees NGOs as a natural opponent to governments when it comes to human rights issues, P. Kooijmans. 'The Non-Governmental Organisations and the Monitoring Activities of the United Nations in the Field of Human Rights.' in Castermans (1991) p. 15.

[224] L. Wisenberg. 'Human Rights NGOs.' in Castermans (1991) pp. 35-36.

[225] Kooijmans feels that the motives behind the activities of NGOs is irrelevant so long as human rights violations are being exposed, in Castermans (1991) p. 19. For surveys of the effectiveness of NGOs see M. Edwards and D. Hulme,

IGOs face limitations in removing human rights from the exclusive domain of states in that they are constituted by states who dictate the scope of powers and abilities.[226] They have, however, been able with varying success to create wider more inclusive spaces for the process of international human rights law. IGOs cannot make new international law or demand certain standards of behaviour from states unless properly mandated by states to do so. They can only encourage states to engage in different sorts of behaviour. Chapters 4-6 will show how development of IGOs has resulted in a certain degree of independent existence with regards to issues of human rights and democracy. Their ability to further the effectiveness of human rights protection has occurred through pressures being placed directly on the state by virtue of conditions of membership or through a bypassing of the state as the IGO becomes to be seen as a legitimate protector of human rights in the eyes of individuals.

VII. Conclusion

While the process of international human rights law continues to favour the interests of states, the above developments have all worked to weaken that control.[227] Efforts which open up the human rights process to a wider inclusive audience, including individuals, demonstrates that the law is part of who it affects and not some abstract notion that may give hope, but has very little to offer in real situations.[228] These efforts all show that if international human rights is not limited to the actions and desires of states, it has the potential to become a much more effective system. Without being able to participate in a process which has a direct impact upon their lives individuals are susceptible to the use and abuse of power which justifies efforts to make the process more inclusive.[229] The creation of international human rights law as a more inclusive process recognising and responding to the needs and desires of individuals will be assisted through the furtherance of democracy in the international system, so that states, IGOs,

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eds. *Non-Governmental Organisations, Performance and Accountability: Beyond the Magic Bullet.* (London: Earthscan, 1995); A. Clayton, ed. *Governance, Democracy and Conditionality: What Roles of NGOs.* (Oxford: INTRAC, 1994).

[226] States have been reluctant to provide IGOs with much power concerning the scrutiny of government behaviour, see D. Caron. 'Governance and Collective Legitimation in the New World Order.' 6 *Hague Yearbook of International Law* (1993) p. 32.

[227] This has been demonstrated in the case of *Unity Dow v Attorney General of Botswana*, unreported Civil Appeal No. 4/91, Misca No. 124/'90 (3 July 1992) and appeal to the Constitutional Court, unreported, where a challenge to the citizenship laws of Botswana on the basis that they were discriminatory against women was upheld. The courts looked to international human rights instruments to establish prohibition against arbitrary discrimination, see E. Quansah. '*Unity Dow v Attorney General of Botswana* – One more Relic of a Women's Servitude Removed.' 4 *RADIC* (1992) p. 195; E. Quansah. '*Unity Dow v Attorney General of Botswana* – The Sequel.' 5 *RADIC* (1993) p. 189. It is worth noting that after the initial decision the government of Botswana kept the disputed law in force and spoke of incorporating legal discrimination against women into the constitution, see A-B. Preis. 'Human Rights as Cultural Practice: An Anthropological Critique.' 18 *Human Rights Quarterly* (1996) p. 304.

[228] Trimble (1990) p. 835.

[229] See Landry (1996) who discusses immigration and welfare reform in the US and points out how immigrants are without a voice in the political process and therefore vulnerable to decisions that impact their interests, p. 1126.

NGOs, and most importantly individuals can all participate in a process where all have interests at stake.

It is held that opening up the process of international human rights law to non-state entities will enhance its effectiveness and provide greater possibilities for democracy. Opening up the process will allow the needs and desires of the individual to be articulated and properly considered. There exists the need to bring decision-making processes closer to those who depend upon them in order to avoid totalising procedures.[230] In international human rights law it is the individual, not the state, who is most dependent upon the law, but the decisions surrounding the law are made by states to the exclusion of the individual.[231] This question of 'decisional distance' is becoming a serious concern which international law must address. As the exercise of power over the lives of individuals is not exercised solely by the traditional government machinery, it is necessary to bring the individual closer to the decision making process so that the individual has some form of say as to what is done and that the ultimate decisions made are intelligible and applicable.[232] It is recognised that for any law to be accepted as valid it must be seen as being legitimate.[233] For law to possess legitimacy its constituent elements must be identifiable to those the law addresses. This includes the processes by which it was made, its connections with general norms or mythologies within a society.[234] Decisions need to reflect a form of consensus so that all participants are able to recognise part of themselves in the decisions made and the underlying values.[235] The application of international human rights law revolves around struggles for the appropriation of the meaning of rights[236] and states occupy a privileged position in this struggle allowing them the final authoritative decision. Donnelly has taken the view that in trying to decide issues of compliance and ultimately, the meaning of rights, '[t]he only plausible candidates are the people whose rights are at stake.'[237]

Creating wider and more active participation in the international system will not necessarily immediately overcome the obstacles created by the state-based system. The

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[230] L Kristzman, ed. Mic*hael Foucault: Politics, Philosophy, Culture: Interviews and Other Writings*. (London: Routledge, 1988) p. 165.

[231] Slaughter feels that if international law fails to take regard of individuals and groups it will become increasingly irrelevant to state behaviour. A-M. Slaughter. 'International Law in a World of Liberal States.' 6 *European Journal of International Law* (1995) p. 504.

[232] From Foucault's debate with Chomsky in Elder (1974) pp. 168-169. The closing of the decisional distance is essential based on Jennings' observation that '[n]owadays, treaty law affects the everyday life of people', R. Jennings. 'Universal International Law in a Multicultural World.' in M. Bos and I. Brownlie, eds. *Liber Amicorum for the Rt. Hon. Lord Wilberfocrce*. (Oxford: Clarendon, 1987) p. 39

[233] See generally T. Franck. *The Power of Legitimacy among Nations*. (Oxford: Oxford University Press, 1990).

[234] Trimble (1990) pp. 840-842

[235] Kristzman (1988) p. 174.

[236] Gaete (1993) p. 168; Thompson (1975) p. 261.

structure of the international legal argument will undoubtedly remain in its present form but within this structure the language of the law provides the opportunity for change. International human rights law has a public rhetoric that does not necessarily correspond to the private realities as to how the law works in practice. There exists within the language and rhetoric of international human rights law the possibility to remove the exclusive control exercised by states. Thompson accurately determines the power of rhetoric:

> ... the rulers were, in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric; they played the games of power according to rules which suited them, but they could not break those rules or the whole game would be thrown away. And, finally, so far from the ruled shrugging off this rhetoric of hypocrisy, some part of at least was taken over as part of the rhetoric of the plebeian crowd, ...[238]

International human rights law speaks of the rights of the individual and the need to limit the power of the state. The structure of international law allows states to find ways around this, but this does not nullify the existence of the legal rules and the message they convey. Governments cannot continually espouse adherence to human rights and democratic credentials without expecting demands for substantive action based on the expressed rhetoric. The individual may be excluded from accessing and utilising the actual machinery of an international human rights instrument, but they cannot be excluded from the language used. In turn individuals can make full use of this language demanding governments to honour in reality the obligations they have undertaken and it is here where the power of international human rights lies. International human rights law does not at present provide an effective voice for the individual but it does provide a language an individual may utilise for pursuing greater empowerment.[239] 'The law may be rhetoric, but it need not be empty rhetoric.'[240]

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[237] J. Donnelly. 'International Human Rights: A Regime Analysis.' 40 *International Organisation* (1986) p. 617.
[238] Thompson (1975) pp. 263-264.
[239] S. Chesterman. 'Human Rights as Subjectivity: The Age of Rights and the Politics of Culture.' 27 *Millennium* (1998) p. 118.
[240] Thompson (1975) p. 263.

CHAPTER 2

DEMOCRACY: WHAT IS IT? AND FOR WHOM?

> ... one of the most striking changes during this century has been the virtual disappearance of an outright denial of the legitimacy of popular participation in government. Only a handful of countries have failed to grant at least a ritualistic vote to their citizens and to hold at least nominal elections; even the most repressive dictators usually pay some lip service today to the legitimate right of the people to participate in the government ...[1]

I. INTRODUCTION

The development of democracy as a legal principle of the international system is welcomed. It means, however, that before there can be claims concerning the victory, or even existence of democracy as part of international law there must be continual examination of what democracy is or means, both in normative terms and institutional/procedural terms. The wealth of literature on democracy demonstrates that a comprehensive definition of universal applicability is impossible. This chapter will only be able to provide the briefest examination of the ideas and practices which will inform an international law of democracy. The structural and institutional aspects of democracy will vary considerably making a specific model for all to follow impossible. Regardless of the specific structural and institutional set-up of a democratic society, it must be based on a normative framework with a specific purpose. The basis for democracy is expressed in the UDHR 'the will of the people shall be the basis of the authority of government'.[2] This is accomplished through participation and autonomy allowing the individual and society to continually engage in the process of self-determination. The examination below will stress these points as necessary elements for the development of democracy as a principle of international law.

In the general literature of democracy, and the relevant works of international legal literature, there is a tendency to take a limited view of democracy confined to procedural aspects, most notably voting.[3] The favouring of this procedural view of democracy is attributable to the work of Joseph Schumpeter and has had a considerable influence on the bulk of subsequent writing on democracy.[4] A procedural view of what democracy is or should be is perhaps the easiest approach to the subject. When discussions of democracy deal with normative issues concerning ends and ideals numerous complications arise when the theory presented contrasts with the reality in practice. Schumpeter and others have overcome this

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[1] R. Dahl. *Polyarchy: Participation and Opposition*. (New Haven: Yale University Press, 1971) p. 5.
[2] UDHR, Article 21 (3).
[3] See Chapter 3.

'embarrassing situation' by limiting democracy to a verifiable event - elections.[5] Schumpeter's approach to democracy, with some modifications, is perhaps the *easiest* way to define democracy,[6] as well as being the barest minimum agreement possible in determining the existence of democracy.[7] By limiting democracy to a procedure, an understanding of what democracy is or should be not only becomes limited but also allows for claims that democracy exists when in reality the will of the people has no impact as individuals are not part of the processes surrounding their lives. In those situations a rhetorical form of democracy may exist but this does not mean that it is effective for the protection and development of the individual.[8] As with international human rights law, democracy is caught in the tension between apology and utopia. If any theory of democracy 'seems intolerably remote from reality, it may be charged with utopianism'[9] which explains the emphasis on elections. Conversely, as will be shown below, maintaining Schumpeter's idea of democracy only being the vote is easily criticised as an apology for exclusionary government power, as it creates legitimate obstacles preventing individuals and groups from effectively pursuing self-determination.[10]

II. Theory and Reality of Democracy

Democracy is 'one of those concepts which is hard to define with precision but which most people claim to be able to recognise in practice when they see it.'[11] Any definition of democracy depends upon who is providing the definition and the context, in which they are speaking, making democracy an 'essentially contested concept'.[12] Even though democracy in both meaning and practice is essentially elastic in nature allowing for numerous forms, this does not preclude efforts at establishing foundations for an effective democracy.[13]

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[4] For the influence of Schumpter on democratic theory see D. Ricci. 'Democracy Attenuated: Schumpeter, the Process Theory, and American Democratic Thought.' 32 *Journal of Politics* (1970), pp. 239-240; C. Macpherson. *The Life and Times of Liberal Democracy*. (Oxford: Oxford University Press, 1977) pp. 77-78.

[5] Ricci (1970) p. 255.

[6] See Ricci (1970) pp. 262-263.

[7] See P. Dunleavy. 'States, Votes and Other Conundrums.' *New Statesman 1998 Political Studies Guide*. p. 3.

[8] F. Zakaria. 'Doubts about Democracy.' *Newsweek* (29 December 1997) p. 26.

[9] G. Duncan and S. Lukes. 'The New Democracy.' 11 *Political Studies* (1963) p. 165.

[10] This piece is taking the position that individuals means all individuals of society. It is recognised that women face different obstacles in the pursuit of human rights and democracy but discussion of the these obstacles is beyond the present scope. For a treatment of the place of women in the present state of democracy in international law see D. Otto. 'Challenging the 'New World Order': International Law, Global Democracy and the Possibilities for Women.' 3 *Transnational Law and Contemporary Problems* (1993) p. 371.

[11] F. von Prondzynski. *Law, Sovereignty, and Democracy*. (Hull: University of Hull Press, 1992) p. 2.

[12] T. Ball and R. Dagger. *Political Ideologies and the Democratic Ideal*. (New York: Harper Collins, 1991) pp. 22-23. Also Bollen who observes that providing a definition of democracy that everyone finds acceptable is impossible, K. Bollen. 'Political Democracy: Conceptual and Measurement Traps.' in D. Beetham. *Defining and Measuring Democracy*. (London: Sage, 1994) p. 5.

[13] R. Harrison. *Democracy*. (London: Routledge, 1993), p. 134.

Despite the differing definitions of democracy, democracy is almost universally thought to be of value today.[14] The majority of today's definitions of democracy concentrate on institutional frameworks and procedural undertakings which have come to be identified as democratic without investigating the wider implications of these frameworks in relation to society. It is essential to view democracy as existing beyond political acts and seeing it as integral to the social, economic, and cultural spheres of society. Democracy cannot be merely a set of political practices but must consist of the ability of individuals to fully participate in society and governance and provide for the necessary protection of human dignity.[15] At the UN World Conference in 1993, the Vienna Declaration defined democracy as being 'based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.[16] The inclusion of full participation in all aspects of life shows that democracy is more than a political system or a method designed for choosing leaders but a set of practices and values based on the respect of human dignity.[17]

Differing, and often conflicting, definitions of democracy continue to inform the surrounding discourse contributing to its nature as a vague concept in the realm of international law. Much of the vagueness is a result of its extensive usage and rhetorical abuse of the term in the history of international relations. Almost every government in the world claims or has claimed to be some sort of democracy. Yet democracy is not as widespread as it appears. One author has remarked that '[d]emocratic reality is certainly pretty thin on the ground.'[18] The differences of democracy on the ground leading to debate as to what constitutes 'true' democracy is exacerbated by the differences in democratic theory. Dahl has stated that there is no one democratic theory, only democratic theories.[19] This piece will not attempt to fit perfectly with any established democratic theory, nor does it try to create a new theory of democracy. Instead it will attempt to draw out various elements from existing democratic theories and practices. In determining the content of an international law of democracy it will be necessary to have a concept of democracy that in practice will protect the individual from the arbitrary use and abuse of power, whatever the source. Democracy exists to allow

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[14] Harrison (1993) p. 132.
[15] von Prondzynski (1992) p. 4. In Morocco the monarchy has instituted a wide range of supposed democratic reforms, however the king keeps control over the government, the constitution and the legal system, see 'The King's Gift to His Country.' *Economist* (21 March 1998) pp. 80-82.
[16] Vienna Declaration and Programme of Action (12 July 1993). UN Doc. A/CONF.157/23, paragraph 8.
[17] L. Diamond. *The Democratic Revolution: Struggles for Freedom and Pluralism in the Developing World.* (New York: Freedom House, 1992) p. xiii.
[18] J. Dunn. *Western Political Theory in the Face of the Future.* (Cambridge: Cambridge University Press, 1979) p. 2.

individuals to be part of the decisions and processes which affect their lives, it helps to create a better thinking about others in society, and provides non-violent means to settle differences in society. As with international human rights law, democracy contains many internal contradictions. The primary paradox is that democracy presents itself as inclusive, allowing all to participate regardless of position or status,[20] but it also allows for the legitimate domination of a group over the larger society. An effective democracy needs to strike a balance between individual aspirations and collective responsibilities to ensure the development of the individual and society.[21]

III. Historical Development of Democracy

A. Ancient Democrats

Throughout the development of democratic thought and practice there are common trends which may be used as the basis for an international law of democracy. These common trends are the product of debates and conflicts over what democracy ought to be, what ideas or values should underpin it, what basic practices are needed to articulate these ideas and values, and the problems faced carrying these ideas into practice. These basic trends include - authority being based on the will of the people (however defined), the ways in which that authority will be determined and expressed, the relationship between the individual and society, and the practical need to create a working system of government. The origins of democracy are commonly attributed to the Ancient Greeks,[22] but the precedents of democracy are not exclusive to the European world and its descendants, as early societies outside of Europe possessed limited ideas and practices resembling different levels of democracy.[23] As with Europe, ideas of democracy were mixed with other forms of governing and social ordering such as monarchy or oligarchy.[24] The development of the Sumerian city-states (c.3000 B.C.) provides evidence of primitive forms of democracy, but the political and social institutions that

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[19] R. Dahl. *A Preface to Democratic Theory*. (Chicago: University of Chicago Press, 1956) p. 1.
[20] The idea of all inclusive equality is certainly democracy in the ideal theoretical sense, something which has rarely corresponded with practice, see D. Held. *Models of Democracy*, 2nd ed. (Cambridge: Polity Press, 1996) pp. 2-3.
[21] Council of Europe. *The Challenges of a Greater Europe: The Council of Europe and Democratic Society*. (Strasbourg: Council of Europe, 1996) p. 168.
[22] Held (1996) puts forth the city of Chios as having the first democratic polity (c. 500 BC) and from here the idea of democracy spread throughout the Greek civilization, p. 14. Harrison claims that democracy was invented by the Greeks, being a Greek word and idea. Harrison (1993) p. 15. Generally see M. Finley. *Democracy: Ancient and Modern*, rev ed. (New Brunswick: Rutgers University Press, 1988).
[23] D. Treadgold. *Freedom: A History*. (New York: New York University Press, 1990) pp. 10-12.
[24] See J. Plamenatz. *Man and Society: Political and Social Theories from Machiavelli to Marx*. Vol. 1. (London: Longman, 1992) pp. 86-87.

would be recognised as democratic did not develop.[25] In the ancient Middle East, the Jewish version of freedom (predating later Christian traditions) came from the belief that no man could possess absolute rule since that was the position of God. The covenant of society was between God and the entire people, not to a certain secular authority, which allowed for a relatively democratic framework in the context of the era and area.[26]

The democratic ideas and practices of the Ancient Greeks, and their later revival during the Roman Republic mark an acceptable starting point for studying democracy.[27] The Greeks and Romans had a limited conception of the extent of democracy as those entitled to be part of the polity was narrowly defined to those who were citizens. Even though these groups were exclusionary in relation to the overall society it was within these narrowly defined bodies that democracy was said to exist.[28] Within the defined polity there was direct participation for citizens in the legislative and judicial functions with an assembly that possessed most of the power encompassing the common affairs of the society. Decisions were taken after consultations with the wider group of citizens giving a greater degree of legitimacy to these decisions as the citizens felt they had the ability to be part of the decision-making process.[29] Popular jury courts dealt with the majority of legal matters[30] and the rule of law became a significant factor in the settlement of disputes for both government and society with violence no longer accepted as a satisfactory regulator of human relations.[31] The Roman Republic possessed a greater inclusiveness of individuals in the decision making process,[32] a slight separation of powers in government with a system of checks and balances, and the existence of the rule of law for both the community and government which affirmed the rights of citizens.[33]

The democracy of Ancient Greece and the Roman Republic held the idea of community in prominence with emphasis on the participation of the individual for the benefit of the community.[34] The belief was that the private life of the individual was subordinate to public affairs and the common good as the good life for the individual was only obtainable through the wider society. Active participation of the individual in the community was an essential

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[25] Treadgold (1990) pp. 13-15.
[26] Treadgold (1990) pp. 32-33, 75-76.
[27] For a comparison of the democracy in Greece and Rome see M. Finley. *Politics in the Ancient World*. (Cambridge: Cambridge University Press, 1983).
[28] For the extent of exclusion inherent in Athenian democracy see R. Dahl. *Democracy and Its Critics*. (New Haven: Yale University Press, 1989) pp. 21-22.
[29] See Held (1996) p. 18, who sees this as an early expression of the rule of law.
[30] Sinclair (1988) pp. 19-20.
[31] Treadgold (1990) p. 46; Ober (1989) p. 4.
[32] Treadgold (1990) p. 64.
[33] Treadgold (1990) p. 55.
[34] Held (1996) pp. 34-35.

element of this idea. It was believed individuals would best improve themselves by improving their surroundings. Citizens were required to be active and eager to exercise their liberty and to protect it, in turn creating a sense of personal development within the communal framework.[35] This ancient ideal is necessary for present societies and is crucial for the smooth functioning of democracy. Within the *res publica* of Rome, the individual was recognised as possessing certain civil rights, but equally important to these rights were the corresponding duties, the over arching duty being respect for others in the community. As Ancient Greece, Rome and subsequent empires since have demonstrated, the actual application of the law for the maintenance of the civic virtue or communal good was often not democratic and easily abused in an authoritarian manner.[36]

In these early democracies there developed a tendency identifiable today where certain individuals took on the leading roles in the process of governance. In the assemblies of Greece and Rome it was in the form of specific speakers who dominated the assemblies and were able to get others to follow their ideas.[37] The practice of democracy became a more exclusive affair within the defined group of participants as there developed concentrations of power where certain individuals emerged as leaders. In the words of Cicero:

> The commonwealth is the people's affair; and the people is not every group of men, associated in any manner, but is the coming together of a considerable number of men who are united by a common agreement about law and rights and by the desire to participate in mutual advantage.[38]

The practices of ancient Greece and Rome present numerous difficulties with democracy that are still debated. This dilemma of democracy – speaking of inclusiveness while practising limited participation remains a difficult issue today for democratic theory and practice. They also provided ideas and practices such as freedom and liberty for individuals, equality and participation which continue to influence democracy today.[39] From this early existence core

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[35] Ball and Dagger (1991) p. 28; Treadgold (1990) p. 73. Finley (1983) describes the importance in Roman society of the wide-scale participation of the citizens in formal and informal settings. Formal in the sense of participating in the bodies of government, informal through the high degree of public discussion and debate which occurred outside of the assemblies, p. 70.

[36] See C. Wirszubski. *Libertas as a Political Idea of Rome during the Late Republic and Early Principate*. (Cambridge: Cambridge University Press, 1950); J. Kelly. *A Short History of Western Legal Theory*. (Oxford: Clarendon, 1992) pp. 22-26; Dahl (1989) pp. 14-18.

[37] Harrison (1993) p. 19. Also the speech of Pericles in Thucydides. *The Pelopennesian War*. Book II, paragraph 37.

[38] Cicero. *De Republica*. Part I, paragraph 25. But see Sabine and Thorson who interpret this statement as describing an all inclusive society of citizens, G. Sabine and T. Thorson. *A History of Political Theory*, 4th ed. (Hinsdale: Dryden Press, 1973) p. 163.

[39] See Sinclair (1988) p. 21.

elements of democratic thought and practice emerge - a sovereign people entitled to govern itself through its own resources and institutions.[40]

In general, throughout the period leading up to the early 18th century, democracy was not seen as a desirable form for organising society.[41] There is evidence of continuing Roman institutions and judicial habits related to democracy but for the most part the authority of secular leaders became absolute. Kelly identifies the brief emergence of democratic practices in the early Germanic tribes in Europe based on the belief that power rested with the people and leaders were in turn expected to act for benefit of the community. This never developed further than rudimentary actions and was soon overtaken by competing conceptions of governance.[42]

In Europe the Christian Church and man's existence relative to God dictated the prevailing world-view and the form of government and society.[43] Christian belief, as with earlier Hebrew notions, theoretically did not allow for absolute secular rule, as the position of God was absolute in the heavens and upon earth. Aquinas put forth the position that the secular monarch was not absolute since it was bound by natural laws that derived from God.[44] The Church could over rule a monarch and the dominance of religious thought lead to certain democratic ideas as to the equality of individuals.[45] While spiritual belief held that all individuals were equal in God's eyes and writers like Aquinas held that the masses could reject a monarch who violated the natural law[46] there was no support for the wider participation of individuals in the way society was ordered or governed. In fact, in common with Schumpeter's view of democracy today, wider participation for all individuals was vehemently opposed. Aquinas described democracy as 'a form of popular power in which the common people, by sheer force of numbers, oppress the rich, with the result that the whole populace becomes a kind of tyrant',[47] a recurring argument against democracy.

Even though the Christian doctrine professed the belief of moral equality among individuals authority in governance was not democratic. The general will of the community was determined by specific individuals in consultation with the monarch with no system of

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[40] Dahl (1989) p. 13.
[41] For writers who did advocate democracy see Kelly (1992) pp. 128-131.
[42] Kelly (1992) pp. 91-95.
[43] Held (1996) pp. 37-39.
[44] On Aquinas' view of popular sovereignty, see A. D'Entréves. *The Medieval Contribution to Political Thought.* (London: Oxford University Press, 1939) p. 32.
[45] Kelly (1992) pp. 104-105.
[46] Plamenatz (1992) p. 25.
[47] Quoted by Q. Skinner 'The Italian City-Republics.' in J. Dunn, ed. *Democracy: The Unfinished Journey, 508 BC to 1993.* (Oxford: Oxford University Press, 1992) p. 60.

accountability or wider participation.[48] Furthermore the Church as an institution proved to be an authoritarian administrative body which promoted hereditary rule with a divine sanction. In response to the authoritarian tendencies of the Christian church, the early Italian City-republics[49] developed their own political institutions which rejected the concept of hereditary rule as well as that of divine sanction, instead seeing the body politic as the source of legitimate authority. As with the Greeks, the composition of the body politic which was to be involved in the decision making process did not attempt to include the majority of members of society.[50] Within this narrow inclusion there existed a firm belief in the validity of choice in determining who governs and participation in society so that individuals may feel part of the decision making process.

A supporter of the Italian City-republics and strong opponent of the all-embracing authority of the Church was Marsilius of Padua who formulated ideas of popular sovereignty and legitimate government in his work *Defensor Pacis* (1324).[51] For Marsilius there was no question that government had to be based on the will of the people to be considered legitimate, as the people were the 'primary and proper efficient cause of the law'.[52] Marsilius favoured a form of government where the people make the laws, the ruler is elected by the people and the ruler governs according to the laws as passed by the people's representatives If the laws are not followed the people are entitled to dispose of the ruler.[53] Marsilius placed great importance in the people being the source of the law for if the law emanates from a single individual or small group it will be based on their own narrow personal interests rather than the community interests. If the people are the source of law then 'each would seem to have set the law upon himself, and hence would have no protest against it, but would rather tolerate it with equanimity'.[54] Marsilius had placed the authority to govern with the people since he believed that the will of the people was with the common good of the community and proved to be the most efficient form of governance for society.[55]

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[48] Plamenatz (1992) pp. 24-25; Treadgold (1990) p. 78.
[49] On the Italian city-state see Skinner in Dunn (1992) pp. 57-70.
[50] See Plamenatz (1992) pp. 24-25; Skinner in Dunn (1992) p. 60.
[51] A. Gewirth. *Marsilius of Padua: The Defender of Peace*. vol. 1. Marsilius of Padua and Medieval Political Philosophy (hereinafter Gewirth, *Marsilius*). vol. 2. The Defensor Pacis (hereinafter Marsilius, *Defensor Pacis*). (New York: Columbia University Press, 1951).
[52] Gewirth, *Marsilius*. p. 167, 172-3. Marsilius, *Defonsor Pacis*, p. 28; D'Entréves (1939) p. 55.
[53] Gewirth, *Marsilius*. p. 237. As with previous writers 'the people' were a narrowly defined group, see Marsilius, *Defensor Pacis*, pp. 45-46; Gewirth, *Marsilius*, pp. 176-9.
[54] Marsilius, *Defensor Pacis*. p. 47. Also Skinner in Dunn (1992) pp. 61-62
[55] Gewirth, *Marsilius*, p. 316.

For Marsilius the overall goal of government is the attainment of peace as an ideal and as a condition to a well ordered society.[56] The purpose of government lies not in maintaining a spiritual belief but in running the state and society in the most efficient way.[57] The measure of efficiency for government is providing for the common benefit which is defined as - ensuring the minimal conditions for the attainment of a sufficient life, the will which controls political authority comes from the whole people, and that the dynamic of the whole process is the desire for sufficient life and freedom.[58] The common benefit is to be reflected in the decision making process of government. The body of participants called the Legislator who possess the real power of government for they make the law and the law is only for the benefit of society. In this Legislator, Marsilius called for quantitative majorities but also emphasised a need for qualitative factors in the decision making process as not all individuals are to be considered equal.[59] Marsilius' notion of qualitative factors demonstrates a continual belief in democratic thought that there is the need for certain individuals to be at the forefront of governing but that the authority to govern remains with the wider society.[60]

Niccolo Machiavelli was another writer of the Italian city-state era and is most famous for his work *The Prince*, which is interpreted as a guide for authoritarian rule.[61] He also wrote of more democratic ideas such as having a system of elections for rulers,[62] that rulers should act in the public interest and not in their own self interest,[63] equality before the law,[64] the necessity that even those who govern conform to the law and recourse to repressive means of control should not be tolerated.[65] Machiavelli was a firm non-believer in the ability of the people to rule themselves, coming to the conclusion that the only way to ensure stability and forward progress is to have a strong individual or small group leading the people.[66] Machiavelli admits this conclusion is a personal one as his investigations show that the best way of safeguarding liberty is to leave the task of government to the people. It is the people who are the best suited for the task since they only desire the enjoyment of liberty and therefore will take better care of it by not taking it away from themselves or letting others take it away. His personal view was

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[56] D'Entréves (1939) pp. 50-1.
[57] Gewirth, *Marsilius*. pp. 171-2.
[58] Gewirth, *Marsilius*. p. 310.
[59] D'Entréves (1939) pp. 55-6; Gewirth, *Marsilius*, pp. 190-2.
[60] J. McClelland. *A History of Western Political Thought*. (London: Routledge, 1996) pp. 142-143.
[61] For a study of Machiavelli and democracy see M. Hullung. *Citizen Machiavelli*. (Princeton: Princeton University Press, 1983).
[62] *The Discourses*, Book 1, Chapter 20, pp. 174-75.
[63] *The Discourses*, Book 1, Chapter 9, pp. 138-39.
[64] *The Discourses*, Book 1, Chapter 24, p. 181.
[65] *The Discourses*, Book 1, Chapter 45, pp. 229-230 and Book 3, Chapter 19, pp. 470-471.
[66] *The Discourses*, Book 1, Chapter 2, pp. 110-117.

that the nobles should hold the power for their position will make them more suited for the task and the 'restless spirit' of the masses, which is apt to cause problems, is eliminated.[67] Machiavelli, pre-empting Schumpeter, felt the people are much too susceptible to being misled by elusive goods leading to their eventual ruin. Strong central leadership will ensure that this does not occur.[68] Even though Machiavelli felt that an individual or small group was best suited for the government he stressed that individuals need to remain active participants in the affairs of society. It was felt that even if the citizens themselves are not able to rule themselves they could not become lazy and indifferent to affairs around them for then a tyrant would be able to take control of society.[69]

B. Enlightened Democrats

The impact of the thinkers from the Italian city-states and the resultant practice was minimal as the democratic practice of many of them soon eroded into authoritarian forms of government. The Reformation of the Sixteenth century brought the weakening of religious and spiritual control over society. The Enlightenment, which followed, began the questioning of where authority rests in society and how it is to be exercised.[70] The actual practice of democracy remained the exception[71] but greater efforts were now being placed on developing practices and institutions that ensured limitations upon power and allowed for development of the individual in a particular fashion. Debates on democracy became less concerned with determining what best develops the virtue of citizens and the strengthening of community to creating specific spaces and institutions of politics concerned with the role and actions of the individual in relation to the government.[72] Attempts were made to formulate ideas of governance whereby the source of authority was based with the individuals in a society and exercised through a certain form government. Previous ideas which fostered equality and liberty of and among individuals did so with the idea that this was the best way to strengthen or acquire glory and greatness for the entire community.[73] Now the focus featured the individual first and then moved on to decide which is the best form of social ordering for the

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[67] *The Discourses*, Book 1, Chapter 5, pp. 121-22.
[68] *The Discourses*, Book 1, Chapter 53, 246-252. The idea of a strong central power was common in this period, even with writers who spoke of individual freedoms and popular participation, see P. King. *The Ideology of Order: A Comparative Analysis of Jean Bodin and Thomas Hobbes*. (London: Allen and Unwin, 1974) pp. 29-30.
[69] See Ball and Dagger (1991) pp. 31-32.
[70] Held (1996) pp. 72-73.
[71] See R. Williams. *Keywords: A Vocabulary of Culture and Society*, Rev. ed. (London: Fontana, 1983) p. 94. also C. Macpherson. *The Real World of Democracy*. (Oxford: Clarendon, 1966) p. 1.
[72] Held (1996) pp. 56, 69.
[73] Skinner in Dunn (1992) p. 65.

individual, not what is the best form of individual behaviour for the benefit of the community.[74]

In describing the position of the individual in society Thomas Hobbes developed a concept of the state of nature where the individual was paramount and all behaviour was based on self-interest - making life solitary, poor, nasty, brutish and short.[75] Government for Hobbes was an exclusive position not based on the needs and desires of the individuals of society. Instead, a government's only concern was the survival of the state through any means and the pursuit of self-interested goals. Hobbes rejected previous beliefs of the individual being part of a larger spiritual world or of the individual having a responsibility or duty to a larger community as a pre-existing form.[76] For Hobbes, the only way in which individuals may obtain security is to enter into a contract with each other through which all submit themselves to a higher power whose authority is absolute, supreme and above the law and rules which govern society.[77] Hobbes did not believe that the sovereign owed any obligation to the individuals in society, as it had the right to act of its own accord and there was nothing individuals could do to change the sovereign.[78] The political theory of Hobbes is far from democratic but commentators have noted that the overall authority of the Leviathan could be seen as being representative of those it rules, and since all have contracted to give up their rights, there is at least a democratic agreement to be ruled by a monarch.[79] Hobbes held a similar view of the democratic process for it mirrored the existence of the monarch in that eventually responsibility is given up to representatives and the individual has no personal control over events, with majority rule prevailing.[80] The idea of the Leviathan being democratic must be rejected as there is no opportunity for the individual to participate in governance and there exists no safeguards against the abuse of power.

John Locke[81] developed an idea of the state of nature contrary to Hobbes as he saw it not based on individual self-interest but on the existence of basic laws requiring individuals to treat each other with respect. Individual rights existed in the state of nature to ensure peaceful

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[74] Harrison (1993) pp. 37-38.
[75] See T. Hobbes. *Leviathan*. Part I, Chapter 15. This view has been transplanted as an explanation of the international system, see R. Walker. *Inside/Outside: International Relations and Political Theory*. (Cambridge: Cambridge University Press, 1993) pp. 110-112.
[76] Hobbes. *De Cive*. Chapter I, paragraphs II-III.
[77] M. Goldsmith. *Hobbes' Science of Politics*. (New York: Columbia University Press, 1966) pp. 195-196. For an interpretation of Hobbes that stresses the liberal values of his work see G. Kavka. *Hobbessian Moral and Political Theory*. (Princeton: Princeton University Press, 1986).
[78] *Leviathan*, Part II, Chapter XVIII. Also Goldsmith (1966) pp. 178-185.
[79] See H. Schneider, ed. *Thomas Hobbes Leviathan*. (NY, 1958) introduction by editor, p. xii.
[80] *Leviathan*, Part II, Chapter XVII; Harrison (1993) p. 41-43.

coexistence. These rights were then transferred to the government for functional reasons but the source of rights remains with individuals.[82] These inalienable rights could not be given up or taken away, even with the creation of society.[83] Locke saw individuals coming together first to create a society then to create a government which remains based on the needs and desires of the individuals responsible for its formation.[84] For Locke the contract between government and individuals was based on trust and that individuals maintained final control over their rights and may take control back if they feel the government is not acting appropriately for the interests of society. The idea that individuals continually remain in possession of their inalienable rights acts as a foundation for democracy by giving it a moral legitimacy that may be transferred to actual practice.[85]

To maintain the concept of trust between individuals and the government Locke stated that government should be based on the will of society and include a separation of powers to ensure that the law is not abused.[86] Any government whose legitimacy is self-defined and is responsible only to itself will not act as a independent arbiter in its relations with individuals in society, for

> it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the community, contrary to the end of society and government.[87]

For Locke government cannot be an end in itself, empowered to pursue its own goals and interests, only a government that consults and gains the agreement of society and remains bound by the rules of society is legitimate.[88] The importance of consent stressed by Locke seems to be lost once society is established. Locke saw the active consent of individuals only necessary in the creation of the state, after that it comes through decisions carried out by representatives who remain bound by the original contract but there exists no need for

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[81] Writings of Locke relevant to the discussion here may be found in John Locke. *Political Writings*. D. Wootton, ed. (London: Penguin, 1993).
[82] *Second Treatise*, Chapter 7, paragraphs 87-89.
[83] *Second Treatise*, Chapter 4, paragraph 23.
[84] Locke. *Second Treatise on Government*, (hereinafter *Second Treatise*) Chapter 8, paragraphs 96-97.
[85] Harrison (1993) p. 48.
[86] *Second Treatise*, Chapter 12, paragraphs 143-148.
[87] *Second Treatise*, Chapter 12, paragraph 143.
[88] Harrison (1993) p. 47. Held (1996) p. 80.

obtaining continual consent.[89] As with the Romans and Machiavelli, Locke stressed that vigilance and participation on the part of citizens within society was the best way of protecting rights. Participation was seen as a safeguard to the arbitrary use and abuse of power as it allows individuals to develop their personal qualities and to exercise some control over their lives.[90] The problem with Locke is that his ideas of participation and vigilance do not fit well with the lack of continual consent needed to legitimise the government.

The idea of active participation was taken on by Jean-Jacques Rousseau. He saw individuals originally coming together into a society in order to overcome the difficulties of the state of nature. Rousseau described the original social contract for society being based on the idea that each individual has an equal contribution to make to society and that co-operation among individuals was the best way of ordering their common relations.[91] Once individuals have entered into society, the state and government that is created has the single purpose of maintaining what is best for the society, or as Rousseau termed it - the general will.[92] Rousseau felt that there needed to be a great deal of participation by individuals in the process of governance so that needs and desires are adequately expressed. Participation also gives the individual a sense of greater freedom because it allows the individual to exercise a degree of control over the events that shape their life and environment. Participation leads to a greater acceptance of collective decisions and greater feeling of belonging in the community.[93] Participation has a protective by possessing a psychological aspect 'ensuring that there is a continuing interrelationship between the working of institutions and the psychological qualities and attitudes of individuals interacting within them.'[94]

In the process of participation Rousseau viewed individuals as being equal, a fundamental aspect of society which allows each person to enjoy the same rights.[95] By equality Rousseau meant more than equal political rights guaranteed by law for he felt that such a condition is useless in the face of grave economic inequalities.[96] The only acceptable economic policy in society was one that places the benefits and burdens equally among the population.[97] While

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[89] See *Second Treatise*, Chapter 9, paragraphs 114-122. Also J. Dunn. *Political Obligation in its Historical Context: Essays in Political Theory*. (Cambridge: Cambridge University Press, 1980) pp. 36-37.
[90] Duncan and Lukes (1963) p. 174
[91] J-J. Rousseau. *The Social Contract*. trans. M. Cranston. (London: Penguin, 1968) Book 1, Chp. 6. (hereinafter *Social Contract*).
[92] *Social Contract*, Book 2 Chapter 1, p. 69. On the general will see Book 2, Chapter 3, p. 72
[93] C. Pateman. *Participation and Democratic Theory*. (Cambridge: Cambridge University Press, 1970) pp. 26-27.
[94] Pateman, 1970, p. 22
[95] *Social Contract*, pp. 46, 76; .Pateman (1970) pp. 22-23.
[96] *Social Contract*, p. 96; J-J. Rousseau. *A Discourse on Inequality* (1755), trans. M. Cranston (London: Penguin, 1984) pp. 130-134.
[97] *Social Contract*, p. 76.

Rousseau advocated equality among individuals and government based on the authority of society his idea of the general will could be used to implement authoritarian practices justified by virtue of the necessity to implement and uphold the general will.[98]

The democratic ideas of the Enlightenment moved from philosophical discussions to actual practice as the United States and France established democratic forms of government at the end of the eighteenth century. These large-scale experiments with democracy provided evidence of the practical possibilities of democracy for those battling against the existence of authoritarian rule. At this time a loud critic of any form of authoritarian rule was Thomas Paine[99] who saw any form of governance that was self-legitimising as a threat to both domestic and international peace. Paine spoke of equal rights for individuals, a degree of economic equality and combining representation with direct democracy to create a system of governance capable of embracing all the various interests of a society.[100] The true purpose of a government is to provide freedom and security to the individual within society.[101] He explained that '[g]overnment on the old system (monarch), is an assumption of power, for the aggrandisement of itself; on the new, a delegation of power, for the common benefit of society.'[102] Paine insisted that the government be for the benefit of society, it must be created by society and retains its legitimacy through a continual process of change and reassessment.[103] Paine's idea of continual consent is a step above Locke and was based on the belief that society is dynamic and must continually adapt to changes in the needs and desires of the individuals that constitute it.

Paine believed that within society 'every individual is born equal in rights with his contemporary'. The equality of rights is the fundamental basis of human existence and integral to society as individuals do not enter into a society to be worse off or to loose their rights.[104] Along with equal rights Paine saw a certain degree of economic justice being necessary. He recognised that the creation of society will lead to inequalities among individuals. These inequalities may not have existed in the state of nature and since individuals enter into society for improvement it is necessary to compensate for the negative

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[98] See McClelland (1996) pp. 251-274; Kelly (1992) pp. 257-258.

[99] The writings of Thomas Paine relevant for this work may be found in a single edition, M. Philip. *Thomas Paine: Rights of Man, Common Sense and Other Political Writings*. (Oxford: Oxford University Press, 1995) All references will be to the page numbers of this edition.

[100] *Rights of Man*, p. 202.

[101] *Common Sense*, pp. 31-2; *Rights of Man*, pp. 195-6.

[102] *Rights of Man*, p. 223.

[103] 'Every age and generation must be as free to act for itself, in all cases, as the ages and generations which preceded it.' *Rights of Man*, p. 92.

[104] Paine sees this as the oldest doctrine on record, *Rights of Man*, pp. 117-9.

effects.[105] Paine also provided a practical reason for economic equality since economic inequality through unequal taxation has the impact of placing large parts of society into poverty which in turn creates unrest.[106] It is then necessary for governments to take an active role in ensuring some degree of equality, both civil and economic as the purpose of government is to ensure the best possible society for individuals.

Paine's writings were influenced by events in the United States that also produced discussions concerning the policy and practice of democracy in the new country through the *Federalist Papers*.[107] The Federalists dealt with the best ways of making the new country into 'a republic' which spanned a large area and would allow the people to assemble and administer government through representatives and agents,[108] as '[i]t is essential to such a government that it be derived from the great body of society, not from an inconsiderable proportion of a favoured class of it.'[109]

The structure of government depended upon a separation of the three main institutions, the legislature, the executive and judiciary. For the Federalists this separation was essential as the accumulation of all three areas of powers into a single person or group was 'the very definition of tyranny'.[110] The Federalists took the philosophical stance on the separation of powers from the writers discussed above and combined it with the practical view of Montesquieu.[111] The belief was that if power is decentralised and diffused then there will be support for the decision making process as it will be closer to the individuals it impacts and will also prevent any abuse of power by the government as a whole or from a particular branch.[112] The framework created by a separation of powers consisted of a legislature which is the direct representative of the will of the people, an executive to provide national leadership, and the judiciary which acts as an intermediary between the legislature and the executive and the people, with the purpose of keeping the government within the bounds of its assigned authority. This did not make the judicial superior in any way since the will of the people remains the final authority for all the

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[105] *Agrarian Justice* pp. 420-1.
[106] *Rights of Man*, p. 217.
[107] J. Madison, A. Hamilton and J. Jay. *The Federalist Papers*. I. Kramnick, ed. (London: Penguin, 1987).
[108] Federalist No. 24, p. 141.
[109] Federalist No. 39, 255.
[110] Federalist No. 47. p. 303.
[111] Baron de Montesquieu. *The Spirit of the Laws* (1748), trans. T. Nugent. (New York: Hafner, 1949). For the influence of Montesquieu on the Federalists see A. Cohler. *Montesquieu's Comparative Politics and the Spirit of American Constitutionalism*. (Lawrence: University of Kansas Press, 1988).
[112] Federalist No. 48, pp. 309-312.

branches.[113] This led to an immediate difficulty of how the common will of the people is to be expressed and how best ensure its virtuous side prevailed.[114]

It was believed that in the context of a large society it was not possible to give individuals political equality and expect that no animosity would exist, for political equality would not automatically solve the problems created by differences in possessions and opinions.[115] For Madison this made direct forms of democracy and participation in government impractical. He felt the common interest could best be discerned through the use of representatives and agents engaging in a 'filtering process' that would distil the various public views. For Madison the filtering process would

> refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.[116]

The Federalists' version of government based on the filtering process faced numerous problems with how to ensure the will of the people is properly expressed, how minorities and their interests are to be accommodated and how to ensure that representatives carry out the purposes for which they were chosen. Elected representatives were considered to be the most qualified and appropriate persons to represent the interests of society as a whole and to undertake the functions of governance while still being directly responsible to the whole of society.[117] The role of representatives, their nature and function remains an issue for all democracies.

John Stuart Mill[118] wrestled with the problem of representation as he investigated how to order a large society in a way that allows for individual development as well as furthering the common good for society. Mill looked for an approach which would balance the individual and society, or at least make the interests and needs of the two compatible. The sanctity of the individual was paramount for Mill but he also believed that individuals owed a duty to society

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[113] Federalist No. 46, p. 297. This point was firmly stated in Federalist No. 22 'The fabric of the American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately form that pure, original foundation of all legitimate authority', (capitals in original) p. 184.

[114] Harrison (1993) p. 82.

[115] Federalist No. 10, p. 124.

[116] Federalist No. 10, p. 126.

[117] Federalist No. 39, p. 255 and Federalist No. 10, p. 126. See the study by Gamble demonstrating the benefits of the filtering process over direct democracy in the area of civil rights and liberties, B. Gamble. 'Putting Civil Rights to a Vote.' 41 *American Journal of Political Science* (1997) pp. 245-269.

[118] References to Mill's work are from John Stuart Mill. *Utilitarianism, On Liberty, Considerations on Representative Government*. G. Williams, ed. (London: Everyman, 1993).

that was in turn responsible for their development.[119] Mill felt that in a democratic society individual actions were propelled less by self-interest and more by recognition of the existence of others living together in the larger society. Therefore, behaviour such as the act of voting would move beyond being merely personal expressions but a true reflection of the opinion of the public good.[120] Authoritarian forms of government which limit participation deny the individual their 'potential voice in their own destiny', undermining their human dignity. The denial of participation threatens social justice, denies the ability of individuals discover their own needs and desires, to develop intellectual, moral and political excellence and in general to enjoy life to the best possible extent.[121]

For Mill the criteria for good government was based on its ability to helps individuals develop their personal attributes through active participation in society.[122] Mill advocated a high degree of participation by individuals in the process of governance as essential to their personal development and the development of society. Participation would create a direct interest in the way society is governed and act to develop an informed polity.[123] Mill's version of government was a representative system along with certain rights and freedoms that would prevent the abuse of power by government and allow for individuals and minorities to develop within society. There would be checks on the central government through the creation of a parliament to protect liberty and be a centre for debate. To enhance participation government was seen not just as a power structure but as an instrument for education. For Mill, representative democracy provided the best type of education since the purpose of such a government was to promote a certain kind of individual character and to do so it has to possess the necessary institutions.[124]

To effectively create an informed polity participation begins in those areas with the most direct effect upon the individual's life. The educative process of participation begins at the local level as

> [a] political act, to be done only once in a few years, and for which nothing in the daily habits of the citizen has prepared him, leaves his intellect and his moral dispositions very much as it found them.[125]

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[119] For Mill's views on the individual, see his work *On Liberty*.
[120] Harrison (1993) p. 109.
[121] *Considerations*, 300-301.
[122] *Considerations*, pp. 211-212. Also Macpherson (1977) p. 47-48; Harrison (1993) p. 105.
[123] *Consideration*, pp. 207-208.
[124] Harrison (1993) p. 106; Pateman (1970) p. 29.
[125] Quoted in Pateman (1970) p. 30.

Mill saw no sense in having universal suffrage and participation in elections for national government every few years if there did not exist the opportunity for participation at local or sub-state levels where decisions occur closer to the individual. His belief was that it is more important for a person to be actively involved in the processes that most closely affect the individual's day to day life.[126] This would also provide means for minorities to have an effective voice for '[i]n a really equal democracy every or any section would be represented, not disproportionately, but proportionately.'[127] For the working classes this would mean greater participation in the community and workplace, for the more educated elite, there would be participation on a wider scale.[128]

Based on this formulation Mill's theory begins to weaken as it losses its idea of equality among individuals. The electoral process would find the individuals who posses the leadership qualities best suited for society.[129] This creates a contradiction in his views for he believed, like Marsilius, that only the qualified elite should be the ones who govern, with the majority of individuals never being able to reach such a high role. His discriminatory attitude also comes through in his opinion on suffrage, for he had the idea that the vote should not be totally equal, with those individuals with advanced knowledge and talent getting more votes than others.[130] Mill's version of democracy resembles an elitist version (discussed below) with certain specific individuals being entrusted with the workings of government. The difference lies in the fact that for Mill individuals are able to be involved in the decision making process by being able to participate at all levels of society and more so at those closest to them.[131] Mill recognised the need for representatives but did not see this as resulting in the total exclusion of individuals from the process of governance as individuals need to be actively involved in governance for their own personal development and to benefit the long-term considerations of society.

IV. DEMOCRACY BY THE FEW VERSUS DEMOCRACY FOR ALL

The issue of representation has come to dominate democratic thinking since the Enlightenment and lies at the core of democracy today. It is accepted that representation is a

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[126] See Pateman (1970) p. 31.
[127] *Considerations*, p. 278, see Chapter 7 of *Considerations* for Mill's discussion on minority groups under a representative government, pp. 277-298.
[128] Mill's way to greater participation through the increased franchise and change in work relations did not have the intended effect of creating a more participatory society, see Macpherson, 1977, p. 101.
[129] *Considerations*, pp. 258-260.
[130] *Considerations*, pp. 308-312; Macpherson (1977) 56-60.

social and political fact of domestic society and for the international system. Representation does not mean that individuals are automatically limited in their ability to participate in the process of governance.[132] It does, however, mean that those chosen to be representatives must be able to reflect individual needs and desires as well as act as effective agents for the good of society while undertaking their tasks of the body to which they belong. Representation is a functional necessity and should not be used to limit the possibilities of wide-based active participation by individuals in the process of governance. An effective democratic system needs to combine the practical necessities of representation with the possibilities of active participation by individuals.

A. Representation and Democracy[133]

James Mill, summed up the problem facing democracy and the need for representation.

> The people, as a body, cannot perform the business of Government for themselves. If the powers of Government are entrusted to one man, or a few men, and a Monarchy, or governing Aristocracy, is formed, the results are fatal: And it appears that a combination of the simple forms is impossible.[134]

James Mill, like his son, struggled to formulate an acceptable form of representation but if contemporary observers are an accurate indication, there remain numerous problems in finding an acceptable form. By their very nature representation and democracy are opposable concepts, even though current thought has brought the two together as compatible or as one in the same.[135] Democracy is about individuals being able to be part of the decisions impacting their lives, representation entails individuals passing over this ability and responsibility for others to exercise.[136] It is problematic for developing a theory and practice of democracy that includes representation as participation, equality and autonomy are brought into question. At

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[131] See A. Ryan. 'Mill and Rousseau: Utility and Rights.' in G. Duncan, ed. *Democratic Theory and Practice*. (Cambridge: Cambridge University Press, 1983) p. 41.

[132] See B. Barber. *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press, 1984) p. 145.

[133] On representation see A. Birch. *Representation*. (London: Pall Mall, 1971); H. Pitkin. *The Concept of Representation*. (Berkeley: University of California Press, 1967); J. Pennock and J. Chapman, eds. *Representation*. (New York: Atherton,1968); H. Eulau and J. Whalton, eds. *The Politics of Representation: Continuities in Theory and Research*. (Beverly Hills: Sage, 1978).

[134] J. Mill. 'Essay on Government.' Part VI, in J. Livey and J. Rees, eds. *Utilitarian Logic and Politics: James Mill's 'Essay on Government', Macauly's Critique and the Ensuing Debate*. (Oxford: Clarendon, 1978) p. 72.

[135] For a historical treatment of political representation, see Birch (1971) pp. 30-49; Pennock and Chapman (1968) pp. 55-94.

[136] M. Hamilton. 'Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation.' 69 *New York University Law Review* (1994) p. 479. The origins of undemocratic practices of representation can be seen in the histories of England and Sweden where the monarchs called together hand picked

that same time it is necessary to come up with a system of governance that possesses functional capabilities at all levels.

Representation has been defined as 'one of the core concepts of politics, but elusive because it is used with incompatible meanings'.[137] Further '[i]t is still not wholly clear what representation consists in, or what conditions determine its just and efficient functioning'.[138] This has been attributed to the fact that 'the idea of representation is associated with persistent theoretical controversies and incompatible definitions.'[139] Eulau has concluded that 'our contemporary real-life problems are such that none of the traditional formulations of representation are relevant to the solution of the representation problems the modern polity faces.'[140] In dealing with democracy there is the dilemma that representation '[a]s a theory of political obligation it is inadequate, but as a fact it is effective.'[141]

Any society depends upon some form of representation at the various levels in which it operates.[142] The idea behind political representation is that representatives are elected by those who are governed and do not obtain their authority to act from any other source. The representatives are not necessarily tied to the wishes of those they represent but are expected to act upon the needs and desires as expressed by those represented. The governed have an active role in choosing their representatives on a regular basis and by voicing their opinions to their representatives.[143] Representatives are in a double position of having an obligation to those they represent but also an obligation to the body of which they are a member and which has been entrusted with a specific degree of responsibility. The functions of representatives consist of ensuring popular control over the government, some form leadership and responsibility in decision making and contributing to the maintenance and functioning of the society.[144] Representation is finding out what is wanted and then being able to carry out those policies.[145]

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assemblies to legitimise their rule. An early form of the 'double gesture' concerning democracy, see Dahl (1989) pp. 28-29.

[137] I. Mclean, ed. *The Concise Oxford Dictionary of Politics*. (Oxford: Oxford University Press, 1996) p. 427.

[138] R. Scraton. *A Dictionary of Political Thought*, 2nd ed. (Basingstoke: Macmillan, 1996) p. 473.

[139] D. Miller, ed. *The Blackwell Encyclopaedia of Political Thought*. (Oxford: Blackwell, 1987) p. 432 'any exploration of the concept of representation must start by acknowledging that the concept is far from simple.' Also Birch (1971) p. 13; Pitkin (1967) pp. 5-12.

[140] H. Eulau. 'Changing View of Representation.' in Eulau and Whalton, eds. (1978) p. 36.

[141] J. Lucas. *Democracy and Participation*. (London: Penguin, 1976) p. 177.

[142] Rao has categorised three forms of representation - juristic representation where the representative acts for others on the basis of a contract or mandate; sociological representation where the representative represents a group due to personal characteristics or attributes, and; political representation which includes elements of the previous two forms with the added procedural function of the representative accepting responsibility for the interests of a specified group. N. Rao. 'Representation in Local Politics: A Reconsideration of some New Evidence.' 46 *Political Studies* (1998) p. 19. Also Birch (1971) pp. 72-105; Pitkin (1967) pp. 60-143.

[143] B. Manin. 'The Metamorphoses of Representative Government.' 23 *Economy and Society* (1994) pp. 139-146.

[144] Birch (1971) p. 107.

[145] Lucas (1976) p. 175.

The problem posed by representation for democratic thought and practice lies in the connection between the representatives and those they represent. Regardless of the function they serve representatives need to be accountable and responsive to those who have chosen them. Rousseau observed that the representatives to the English Parliament were not able to vote based on the popular opinion of the electorate of their constituency instead having to adhere to a strict party line. The led to his conclusion that even though the English had elections there was no democracy the rest of the time since society had no control over their representatives.[146] Hobbes saw the Leviathan as a proper representative of society since all individuals had turned over their rights to it. It could speak and act on their behalf even though there was no way for individuals to question or participate in any way.[147] One author concludes that political representation has never been a form of self-government rather it has been an undemocratic form of organising a political system in various ways.[148] Representation then raises the issue as to who decides what is best for society.

From Plato to today, it is understood that when democracy is based on majority rule there is the strong possibility that the rights and liberties of minorities will be limited - the tyranny of the majority is legitimised.[149] It has been shown that the negative impacts of the majority can be lessened through elected representatives, which in turn proves beneficial for society in the long term.[150] This does not solve the problem of who or what is to be represented at the different levels of government and calls for special forms of representation for distinct groups raise even greater difficulties.[151] Barber denies the possibility of representation working in a democracy since '[t]he representative principle steals from individuals the ultimate responsibility for their values, beliefs and actions.' He feel that if direct responsibility does not exist then there is no freedom, making representation incompatible with social justice since it prevents individual autonomy and self-sufficiency.[152] Barber's view of 'strong democracy', the need for participation and responsibility, is welcomed but such an extreme view of dismissing the possibility of any form of representation is not helpful. Representation at some level, in some form is going to exist, a point even conceded by Marx in his ideas of direct democracy (see below). It is necessary to ensure that representative bodies do not become

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[146] *Social Contract*, p. 141. Commentators today still view this as an issue, see von Prondzynski (1992).
[147] For a discussion of Hobbes' view of representation see Pitkin (1967) pp. 14-37.
[148] Manin (1994) p. 138; Pitkin (1967) p. 2.
[149] See Gamble (1997).
[150] Gamble (1997) p. 262.
[151] See A. Phillips. 'Dealing with Difference: A Politics of Ideas or a Politics of Presence?' 1 *Constellations* (1994) p. 74.
[152] Barber (1984) pp. 145-147.

entities in and among themselves for they must retain the link to individuals, not just procedurally but substantively.[153] Furthermore, it is inadequate to confine discussions of representation to issues related to political representation as individuals may have stronger concerns and interests in other areas of society where the issue of representation is equally applicable.[154]

In concert with democracy and human rights, theories of representation are fraught with flaws in thinking and contradictory supporting evidence preventing the discovery of the 'true nature of representation'.[155] Pitkin describes the quest for a proper theoretical model as being caught between the ideal and the actual achievement in establishing proper representation. This tension should not lead to the abandonment of reconciling representation with democracy but should be seen as a continual challenge

> to construct institutions and train individuals in such a way that they engage in the pursuit of the public interest, the genuine representation of the public; and, at the same time, to remain critical of those institutions and that training, so that they are always open to further interpretation and reform.[156]

Representatives are necessary for the functioning of society but the existence and actions of the representative must be susceptible to measures of control in order to prevent the arbitrary use and possible abuse of power inherent in the position. Numerous measures exist to ensure the accountability of representatives and enhance participation. These include - regular elections, open legislative meetings, access to legislative documents, voting records and debates, the ability of mass media to cover the legislative process, freedom to voice opinions, the ability to engage in discussion and correspondence with legislators, and systems for recall and removal.[157] If effective, representation serves a number of purposes; it ensures responsiveness to the interests and opinions of society, it allows for the peaceful change of government, it is responsible for organising the long term national interests as well as immediate pressures within society, it provides a form of consent for policies, it gives stability to the political

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[153] See Hamilton's (1994) theory of an 'Attorneyship Model of Representation' where the representatives have independent judgement in acting in the best interests of those they represent and are under an obligation to maintain continual communication with the represented, pp. 523-558.

[154] Phillips (1994) p. 88; J. Pennock. 'Political Representation: An Overview.' in Pennock and Chapman, eds. (1968) pp. 26-7. For representation as a process see M. Sobolewski. 'Electors and Representatives: A Contribution to the Theory of Representation.' in Pennock and Chapman (1968) pp. 106-107.

[155] See Birch (1971) pp. 103-5, who feels it is not necessary to come up with such a theory, as opposed to Pitkin (1967) pp. 124-125.

[156] Pitkin (1967) p. 240.

[157] On control over representatives see Birch (1971) pp. 109-114; E. Rekosh. 'Parliamentary Transparency: An Essential Element of Democratic Legitimacy and the Rule of Law.' 4 *ODIHR Bulletin* (1995/6) p. 17.

system, and contributes to decisional effectiveness.[158] How representation is able to achieve these goals is a highly contentious issue and solutions will be particular to individual societies but will only be effective if representation is in line with underlying ideas of participation and autonomy.

B. Representation in the Twentieth Century - Elites and the Masses

Ultimately, the role and purpose of representatives will depend upon the way in which a society chooses to organise itself. Two dominant forms of representation have developed this century which have served as the ideological battleground for the claim to real democracy. The Marxist idea claimed by communist states and the Schumpeterian view of procedural democracy and elite rule as practised in one form or another in the majority of western states.[159] These two forms in no way encompass all versions of democratic thought or practice but do contain the dominant themes of the literature and the opposing poles of ideological thought and state practice in the international system this century.

The idea of direct democracy as developed by Karl Marx[160] was put into practice with the Russian Revolution of 1917 and the establishment of the communist government of the USSR. Since then, the now former-USSR and subsequent communist regimes have claimed the mantle of being true people's democracy, with western writers preferring to classify them as authoritarian regimes.[161] The ideas of Marx (and Frederiech Engels) were manipulated by Soviet-era leaders resulting in the practice of authoritarian regimes.[162] However the basis of the beliefs held by Marx provides a substantial contribution to discussions of democracy due to the emphasis placed on the necessity of equality within society and the relation between the free development of the individual and the free development of society.[163]

Marx's political thought looked to create a society allowing for the free development of all members through the ending of all exploitation, creating economic and social equality alongside political equality. It is only through the establishment of this true equality that the

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[158] Birch (1971) pp. 107-8; E. Nordlinger. 'Representation, Governmental Stability, and Decisional Effectiveness.' in Pennock and Chapman (1968) p. 108.
[159] Macpherson (1977) p. 22.
[160] In discussing Marx in a short space problems arise as to the depth and breadth of his work and its subsequent interpretations. For studies concerning Marx and democracy see D. Doveton. 'Marx and Engels on Democracy.' 15 *History of Political Thought* (1994) p. 555; C. Pierson. *Marxist Theory and Democratic Politics*. (Cambridge: Polity, 1986).
[161] See P. Corbett. *Law and Society in the Relations of States*. (New York: Harcourt, 1951) pp. 260-261 and D. Moynihan. *On the Law of Nations*. (Cambridge: Harvard University Press, 1990) pp. 126-127.
[162] See R. Müllerson. 'Socialism and Human Rights.' in A. Eide and J. Helgesen, eds. *The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address: Essays in Honour of Torkel Opsahl*. (Oslo: Norwegian University Press, 1991) p. 9.

potential of all individuals may be realised.[164] Marx rejected the idea of the independent individual as championed by liberal thought since the Enlightenment. Instead he saw human beings living in concert with one another, whose relations were determined by interactions forming the individual as a socially and historically conditioned product.[165] Marx felt that democracy did not exist in a capitalist state since it was unable to represent the population as it only worked for the interests of the dominant capitalist class while oppressing the working class.[166] Marx saw capitalist society as being a contradiction where there existed supposed political equality but massive social and economic inequalities preventing the individual from achieving any real social purpose.[167] Democracy could not occur under these circumstances since the needs and desires of the lower classes were not a consideration in the ordering and governance of society, barring the possibility of true equality.[168] The contradiction of capitalist democracy manifested itself in the belief that one possessed the right to dispose of one's property as they desired, which Marx showed to be of limited use if one did not have anything of which to dispose.[169]

Marx's conception of democracy was broad in scope concentrating on the participation of the whole of society at multiple levels. A capitalist system could not claim the title of democracy since not all sectors of society would be adequately accounted for due to unrepresentative voting systems, limited electorates and the use of repression against certain classes.[170] Due to the unequal situation caused by the capitalist system, large proportions of the population must devote the majority of their time to work in order sustain their physical existence. This in turn does not allow them to obtain an appropriate degree of education or to have the necessary time to participate in politics, therefore democracy is controlled by the elite. Marx emphasised the need to establish conditions where all individuals in society are able to become political citizens and able to participate in society on an equal basis.[171]

Participation figures heavily for Marx since he believed that individuals can and do attempt to master their environment, as 'creativity and control of one's circumstances are thus

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[163] For Marx's contribution to Western legal systems, see Morrison (1997) pp. 271-273.
[164] K. Marx and F. Engels. *The Communist Manifesto*. D. McCellan, ed. (Oxford: Oxford University Press, 1992) p. 127.
[165] Held (1996) p. 122.
[166] Morrison (1997) pp. 264-267. See also Doveton (1994) pp. 559-60 and examples provided at pp. 566-572.
[167] Held (1996) pp. 264-5. Marx realised that capitalism allowed for the productive forces necessary for the revolution, see A. Callinicos. *The Revenge of History: Marxism and the East European Revolutions*. (Cambridge: Polity, 1991) p. 102.
[168] Held (1996) p. 137. Marx held a wide view of what class meant, a view which would incorporate a large section of society, see Graham (1993) p. 237; Pierson (1986) pp. 9-11.
[169] Morrison (1997) p. 267; Barber (1984) p. 98.
[170] Doveton (1994) p. 558.

an intrinsic part of what it is to be "human".'[172] The system he envisaged which would allow individuals to participate on an equal basis resembles a pyramid shape where each level of the society would elect their own representatives to make decisions at that particular level and delegates to represent them at the next level in the system.[173] The pyramidal structure of democracy would offer direct and indirect forms of participation with direct occurring at the lower levels of the community and moving on to some form of representation at each succeeding level as needs dictated. The representatives at each level would have to be chosen by election and be accountable to the level below therefore acting for the good of society and not certain sectional interests. [174] Beyond this Marx did not develop to any specific programmes to ensure the expression of the whole of society, instead he felt that each society would develop under its own circumstances.[175]

Marx's original view of full participation by individuals was perverted by communist regimes who under the guise of the pyramid system described by Marx, established authoritarian forms of elite rule with no accountability and no system for the protection of rights.[176] Interpretations of Marxism, as demonstrated in the USSR, consisted of leaders believed that it was necessary to have a professional leadership to lead the revolution which justified the authoritarian governments which resulted.[177] The form of authoritarian rule that developed in the USSR was characterised by 'hierarchically organised control of all aspects of social life, political, economic and cultural, by a narrow oligarchy seat at the apex of the party and state'.[178] The centralisation of power in the communist regimes demonstrated Montesquieu's belief of the detrimental effects of unrestrained power.[179] The application and practice of the 'people's democracies' show the necessity of procedures and institutions which allow for discussion and debate on differences of opinion and the existence of effective rights and law protecting individual autonomy.

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[171] See Doveton (1994) p. 558.
[172] Held (1996) p. 137.
[173] Held (1996) pp. 145-146.
[174] Pierson (1986) p. 15; Held (1996) p. 141.
[175] Marx and Engels, *Communist Manifesto*, p. 25.
[176] See Macpherson (1977) pp. 112-114.
[177] Callinicos (1991) makes the claim that Marxist thought does not call for the 'dictatorship of the proletariat' with only those claiming to represent the workers being legitimate, p. 115.
[178] Quote in Kelly (1992) p. 402. Further see Callinicos (1991) pp. 15-20.
[179] Kelly (1992) pp. 401-402.

The leaders of the communist regimes instituted authoritarian forms of elite rule while expressing the rhetoric that authority remained with the people.[180] The idea of elite rule has a large following in democratic theory with an element of accountability added to justify the structure of the system and the lack of participation within it.[181] In the practice of governance the communist and democratic forms of elite rule do not differ greatly. The essential difference lies in the actual existence and practice of rights, accountability and the rule of law in the democratic forms. However, as Barber points out, the existence of accountability and guarantees against the arbitrary use of power does not necessarily define democracy as the ability of individuals to participate in the decision making process. Elite rule comes with the idea of limited participation for individuals bringing its democratic credentials into question. Democracy depends on wide-based and active participation for the development of individuals and society. Elite rule with limited participation is not conducive to these ideas but at the same time has proven to be the preferred and dominant method of governance.[182]

C. The Marketplace of Elite Democracy

As a criticism of Marx, Schumpeter formulated a 'realistic' conception democracy - defined as a system where elites compete for the vote. Schumpeter began with the presumption that democracy is a political system guaranteeing certain civil rights to all citizens, maintaining a stable balance of social and economic forces, enjoying moderate cleavages of opinion, and, above all, employing competitive electoral and other political procedures.[183] He felt that by defining democracy as the process of voting for elites, who will control the process of governance, the above conditions would all be met. For Schumpeter the modern state and society is diverse, complex and technically complicated thereby preventing the possibility of wide based participation and agreement on common goals in society. To avoid getting bogged down in the pursuit of normative values or common goals which were unattainable Schumpeter felt it necessary to confine democracy to an observable method or act: 'the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the

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[180] Held (1996) notes that communist rule in practice eliminates 'a place for systematically encouraging and tolerating disagreement and debate on public matters.', p. 153. But see Callinicos (1992) who refutes this view in theory but does not provide evidence of practice, pp. 128-132.

[181] See Barber (1984) p. xiv.

[182] R. Bellamy. 'Schumpeter and the Transformation of Capitalism, Liberalism and Democracy.' 26 *Government and Opposition* (1991) pp. 500-501.

[183] Ricci (1970) p. 240.

people's vote.'[184] Schumpeter's reason for confining democracy to a singular process was that it is the easiest way to determine the existence of democracy and that it would overcome the difficulty of reconciling democratic practice and individual freedom.[185] For Schumpeter true democracy could only be seen as

> a political *method*, that is to say, a certain type of institutional arrangement for arriving at political - legislative and administrative - decisions and hence incapable of being an end in itself, irrespective of what decisions it will produce under given historical conditions.[186]

Limiting the process of governance to a single act is seen as the most effective way of governing as it reduces complexity and diversity allowing for the decision making process to operate smoothly and achieve consensus on issues.[187] Schumpeter recognised that his democratic method is easily susceptible to criticism as being authoritarian so he added that there must be 'free competition among would-be leaders for the vote of the electorate.'[188] This competition among elites ensures that the process of governance is not fixed to a certain group and the competition for votes equates to the ability of the society to choose and change the government, keeping any excesses of power in check and ensuring that the resultant government will be responsible to society.[189] Elections are seen as the method for choosing the elite decision-makers but they also serve to legitimise their ability to rule and the effectiveness of the entire system. Schumpeter saw it as inevitable and necessary that authority in society comes from above rather than originate from below.[190] He held that his view as to how society should be ordered was rightly called democracy even though there existed no safeguards upon the use of power beyond the procedural act of voting every few years and that there were no mechanisms for society to have an impact upon the decision-makers on a regular basis.[191]

Schumpeter's view of democracy, regardless of its attractions of simplicity and verifiable nature,[192] has considerable shortcomings and cannot adequately inform the development of an

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[184] J. Schumpeter. *Capitalism, Socialism and Democracy*. (London: Allen and Unwin, 1943) p. 269.
[185] Schumpeter (1943) pp. 269-270.
[186] Schumpeter (1943) p. 242.
[187] On the impossibility of a common will see Schumpeter (1943) pp. 250-264;
[188] Schumpeter (1943) pp. 284-285.
[189] Bellamy (1991) p. 509, see pp. 511-2 as to how this may be manipulated by political parties in presenting candidates and information in a selective fashion. Also Santoro (1993) pp. 127-128, 141.
[190] Schumpeter (1943) pp. 270-272.
[191] Bellamy (1991) p. 512, who also provides the example of Thatcher's government in the UK to illustrate his point, pp. 515-6. See also Pitkin (1967) pp. 43-44.
[192] See Huntington who feels that the problems of ambiguity and imprecision which come from trying to define democracy through source or purpose leads one to conclude that procedural definitions are the only adequate way

international law of democracy.[193] The primary difficulty of this view is its exclusion of the possibilities of individuals being actively part of the process of governance. It cannot be accepted that 'the electoral mass is incapable of action other than a stampede'.[194] Schumpeter's own theory on this point is contradictory as he precludes the possibility of individuals understanding the issues involved with governance but are still capable of choosing leaders and decision-makers. Schumpeter conveniently answered this criticism by explaining that individuals had a limited capacity for rationalisation that could extend to the choosing of leaders but not beyond. Schumpeter further justified excluding individuals from the decision making process with the claim that individuals too easily yield to irrational prejudice and impulse, that they make decisions too much under the influence of personal experiences, and that 'without the initiative that comes from immediate responsibility, ignorance will persist in the face of masses of information however complete and correct.'[195] In Schumpeter's view the inability of individuals to be capable of effective participation in governance is endemic.

> The reduced sense of responsibility and the absence of effective volition in turn explain the ordinary citizen's ignorance and lack of judgement in matters of domestic and foreign policy which are if anything more shocking in the case of educated people and of people who are successfully active in non-political walks of life that it is with uneducated people in humble stations.[196]

The practice of individuals participating in decision making processes has been acknowledged as a beneficial attribute for democracy as well as a way of increasing a sense of responsibility in society.[197] By limiting participation, the reduced sense of responsibility Schumpeter puts forth as the reason why individuals are unable to achieve the necessary competence to be involved in governance is naturally increased. Schumpeter's claim that the art of governing is too complicated for the average individual cannot be a reason for limiting democracy as it is based on a very narrow view of the political and dismisses the idea that decisions and participation outside the political issues is of any great importance. It also fails

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forward, S. Huntington. *The Third Wave: Democratization in the Late Twentieth Century*. (Norman: Oklahoma University Press, 1991) pp. 6-7

[193] On the narrowness of Schumpter's view of democracy see J. Hyland. *Democratic Theory: The Philosophical Foundations*. (Manchester: Manchester University Press, 1995) pp. 162-164.

[194] Schumpeter (1943) p. 283.

[195] Schumpeter (1943) pp. 262-263.

[196] Schumpeter (1943) p. 261.

[197] See generally above, particularly Mill. Also Barber (1984) and A. Tocqueville quoted in Birch (1971) p. 65.

to see how individual experiences and diversity are able to contribute and enrich the democratic process.[198]

Schumpeter felt that wide based participation would be dangerous to the stability of the state.[199] This threat to stability is due to the character of modern society possessing numerous competing priorities and claims upon the government as individuals express their needs and desires.[200] This threat to stability is the reason why democracy is to be limited to a process or method whereby the numerous competing demands are channelled into manageable policies.[201] Whether or not wide based and active participation does threaten the stability of government and society is a disputed point with evidence supporting both views.[202] The position here is that democracy must consist of the active participation of individuals in all aspects of governance which surround their lives, there can be no justification for exclusion. As one author has concluded '[r]educing the legitimacy of the government to elections is not a way to restrict democracy, but a way to abolish democracy.'[203]

Schumpeter's limited view of democracy conceptualises the democratic system as a market - where the voters are consumers and politicians the entrepreneurs. This in turn appears to explain how the political system works and justifies the system itself and the behaviour within it.[204] In this market of democracy voters have choices in the form of policies supplied by the politicians with the market mechanism causing competition between policies in the pursuit of votes. Writers as early as Jeremy Bentham and James Mill felt that the only way to ensure that individual liberty is maximised is through participation in market mechanisms with the minimal intervention of the state in society.[205] The market-based view has become dominant in the 1980s and 1990s especially in western states and has had an influence on how democracy is understood at the international level. The belief in the market mechanism as a way of ordering society sees the market able to allow for individual freedom and reconcile the conflicting issues of the individual and common good. Supporters of the

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[198] See A. Winkler. 'Expressive Voting.' 68 *New York University Law Review* (1993) p. 330.
[199] Idea inspired by C. Schmitt. *The Crisis of Parliamentary Democracy*. trans. E. Kennedy. (Cambridge: MIT Press, 1985). See Hamilton (1994) pp. 484-492; R. Bellamy and P. Baehr. 'Carl Schmitt and the Contradictions of Liberal Democracy. 23 *European Journal of Political Research* (1993) pp. 170-171.
[200] Bellamy and Baehr (1993) pp. 171-172.
[201] Schumpeter (1943) pp. 267-269. See Bellamy (1993) for the example of how in the transitions to democracy in Central and Eastern Europe there is a desire for a strong group to lead as too many democratic demands are causing problems, p. 117.
[202] Bellamy (1991) p. 516.
[203] V. Pusic. 'Dictatorships with Democratic Legitimacy: Democracy versus Nation.' 8 *East European Politics and Societies* (1994) p. 397.
[204] Macpherson (1977) p. 79; Held (1996) p. 95.
[205] See Macphearson (1966) pp. 6-11.

market claim it is superior to other forms of social ordering in being more democratic and allowing full sovereignty for the individual and responsiveness to choice.[206]

The marketplace of democracy sees individuals, in the absence of a common will, as competing for their own interests according to economic competition and free exchange. It is supposed that the market allows for the unfettered freedom of individuals allowing for more choice and the ability to express more diverse opinions.[207] It is believed that the market not only leads to the maximum benefit for individuals but is also the best way to achieve common goods for it provides an efficient way of allocating the scarce resources of society in the face of multiple competing interests and desires.[208] The achievement of common goods through the market is preferred on the belief that actions by a government in pursuit of those goods leads to the possible abuse of power and limitations to individual freedom.[209] It is believed the market will produce outputs which are seen to be in line with the common good, which the government is then able to act upon. A market-based system is seen to disperse political power, create flexibility in governance and encourage grassroots participation.[210] Its proponents see it as dynamic, innovative and responsive, meaning that its deficiencies are far outweighed by its advantages and benefits.[211]

The idea that the market mechanism is the best method of democracy is based on the assumption that there exists a perfect market - where all participants are on an equal footing with equal access to the marketplace. The idea of a marketplace of democracy overlooks the fact that no market is ever perfect and society does not provide full equality or access.[212] The market may allow choice, but one needs purchasing power to be part of the market, be it money, information or even access.[213] A lack of market power reflects one's influence on the overall system - one may be free to buy whatever they choose but it is necessary to have the

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[206] D. Beetham. 'Four Theorems about the Market and Democracy.' 23 *European Journal of Political Research* (1993) pp. 187-201.
[207] Beetham (1993) pp. 195-196.
[208] Held (1996) p. 96; K. Klare. 'Legal Theory and Democratic Reconstruction: Reflections on 1989.' 25 *University of British Columbia Law Review* (1991) p. 75; Bellamy and Baehr (1993) pp. 165-6; Macpherson, (1977) p. 80.
[209] Held (1996) pp. 256-60.
[210] Klare (1991) pp. 75-76.
[211] See Held (1996) p. 260.
[212] Held (1996) pp. 282-283; C. Nino. *The Ethics of Human Rights*. (Oxford: Clarendon, 1991) pp. 242-243; Macpherson (1977) pp. 87-89
[213] O. Fiss. 'Capitalism and Democracy.' 13 *Michigan Journal of International Law* (1992) p. 915-916. Access to information is an essential element to democracy and for the market mechanism. In the marketplace of democracy available information is also shaped by market forces meaning that it is open to manipulation by those who have market power.

means to make the purchase.[214] Market ideas are ineffective for democracy as the market responds to demand and not needs making it unresponsive to the needs of society unless they are expressed within the market mechanism, where not all are able to access or express demands equally.[215] Proponents of the marketplace of democracy overcome the inequality issue by believing that the interests of the strongest actors, those who are able to control the market, are representative of the common good. A Schumpeterian view found to be invalid.[216] Instead of creating equality the market sustains and furthers the inequalities of society and does not encourage participation but provides reasons for non-participation.[217] Recent years have seen the idea of market extended to more aspects of society with a lessening role for the state undoubtedly related to the belief that the victory of democracy has also meant a victory for free markets.[218] The lack of normative content to the market mechanism overlooks that individuals suffer because of inequalities in society which directly influence the functioning of the market mechanism.[219] If one is without food, shelter, is this because they are not worthy participants of the market or that the market is ineffective? Either way the desire to participate and feel part of the process will diminish, as the rhetoric of market benefits will not be played out in reality.[220]

V. Democracy - Participation and Autonomy

The lack of normative content in the marketplace of democracy and Schumpeter's 'democracy as a method' leaves them lacking as effective and useful explanations of democracy. It is necessary for a 'realistic' concept of democracy to be informed by a normative basis that will enable it to achieve its desired purpose without being manipulated by rhetorical support for democracy that is void of actual content. The purpose of democracy is to provide a system where the individual is able to achieve personal self-determination while at the same time fostering communal development within society.[221] These two purposes are

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[214] Callinicos (1991) p. 104. The lack of market power will also mean one's civil and political rights are limited, see C. Pateman. 'Democracy Freedom and Special Rights.' John C. Rees Memorial Lecture, Swansea, University of Wales (30 January 1995).
[215] Bellamy (1991) p. 516
[216] Klare (1991) pp. 81-82.
[217] Macpherson (1977) pp. 86-91; Bentham (1993) p. 192; On non-participation see Fiss (1992) pp. 913-914. On exclusion see K. Remmer. 'Exclusionary Democracy.' 20 *Studies in Comparative International Development* (1985/6) pp. 73-74.
[218] Held (1996) p. 253
[219] Macpherson (1977) p. 80.
[220] Klare (1991) refers to the need to ensure that promises are backed up with real results as unfulfilled promises will give rise to cynicism and a lack of respect for the law and rights, p. 92.
[221] For a historical account of this point see I. Berlin. *Four Essays on Liberty*. (Oxford: Oxford University Press, 1969) p. 118.

often seen as contradictory but there exists the possibility that they can be accommodated into a single conception of democracy.[222] This accommodation is achieved through two foundational elements - participation and autonomy - which have been identified as common ground in democratic theories.[223] Participation is necessary for it allows individuals to be part of the processes impacting their lives. It is not confined to political acts but includes actions occurring in all aspects of society that are important to the individual. Participation allows for the pursuit of self-determination and ultimately fosters a greater sense of community. Autonomy is necessary to respect the individual, not in the extreme liberal sense but as a way of allowing participation, the expression of diversity and development of the self. Autonomy recognises the importance of the individual but also the necessity of respect among the needs and desires of individuals within a society.[224]

A. Democracy as Participation

From as early as Aquinas and up through Schumpeter it has been espoused that wide based active participation in the democratic process creates instability in society.[225] In the development of democracy there has been a greater concern placed on what form of democratic governance will give the greatest degree of stability, not necessarily the form that will allow for the widest degree of participation beneficial to the individual. Barber points out that the democracies of this century have relied on 'distant representation' to create stability and efficiency but with the effect of minimising participation.[226] Wide based and active participation is often discouraged but at the same time there are criticisms of the extent of apathy in society. Participation in the working of the state and society is to be welcomed since it leads to autonomous structures whereby individuals and groups find levels of organisation appropriate to effective participation.[227] Even in large and diverse populations, if there exists a greater opportunity for participation in the decision making process this will lead to greater

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[222] This is possible by combining elements related to Marxism and liberalism that provide positive contributions to ideas of the individual and the community without taking on the extreme outcomes of either position. Similar to the approaches of Held (1996) and Fine (1984).

[223] Held (1996) p. 300.

[224] Howard expresses the position that a highly individualised society is an indication that not all human rights are being respected, R. Howard. 'Cultural Absolutism and Nostalgia for Community.' 15 *Human Rights Quarterly* (1993) p. 333.

[225] Dahl (1989) notes a 'countercurrent' favouring wide-based and active participation, p. 225.

[226] Barber (1984) pp. xiv-xv, 140-4.

[227] P. Thornberry, 'The Democratic or Internal Aspect of Self-Determination and some Remarks on Federalism' in C. Tomuschat, ed. *The Modern Law of Self-Determination*. (Dordrecht: Martinus Nijhoff, 1993) p. 134; Klare (1991) p. 71.

attention being given to the problems facing society as a whole.[228] Participation encourages the active role of individuals in the decision making process resulting in a greater sense of political efficacy, concern for collective problems and the formation of a knowledgeable citizenry with sustained interest in government.[229]

In modern democratic theories it is believed that voting alone constitutes adequate participation and that individuals must distance themselves from politics through a barrier of individual liberties.[230] The idea of participation as a means of securing liberty, as supported in the Italian City-republics and by Locke, provides a good lesson for today since the average citizen for the most part feels unable to exert any influence upon the political will of a state. This in turn makes it easy for governments to act without regard for the rights or will of the individuals of society. The lesson to be learnt from the Italians city-republics, and proven throughout history, is that if the process of governing is left to the rulers exclusively they will act in their own interests not necessarily in the interest of the community.[231] Low levels of participation have been linked with inequality so, at the very least, increased participation will assist in achieving greater equality in society.[232] Participation ensures the maximum input into society so that there exists outputs of just policies leading to the development of the social and political capacities of individual and society.[233]

Participation relies upon and will precipitate a change in the consciousness of individuals to view their actions not as only self-serving but beneficial to the larger community.[234] Barber advocates active participation as a necessary element of strong democracy;

> where conflict is resolved in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable of transforming dependent, private individuals into free citizens and partial and private interests into public goods.'[235]

Enhancing participation does not mean subjecting the individual to the demands of the community since the two work in concert and rely on each other for a fulfilling existence.[236]

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[228] N. Kittrie. 'Democracy: An Institution Whose Time Has Come.' 8 *American University Journal of International Law and Policy* (1993) p. 386.
[229] Held (1996) p. 262; Pateman (1970) p. 105; Barber (1984) p. 147.
[230] See Schumpeter (1943).
[231] Skinner in Dunn (1992) pp. 68-69.
[232] Macpherson (1977) p. 94.
[233] Pateman (1970) p. 43.
[234] See Macpherson (1977) pp. 99-100.
[235] Barber (1984) p. 132.
[236] Barber (1984) pp. 152-5.

Participation develops a common responsibility among individuals through deliberation, decision making and action in determining their common lives.[237]

Participation allows individuals to be part of the forces surrounding their lives and assists in lessening the 'decisional distance' discussed in Chapter 1. Democracy needs to be inclusionary allowing individuals to be part of those processes in society that they hold important. Democracy becomes an exclusionary process if participation is prevented or discouraged or is merely ignored as unimportant. Voting in elections and running for government office are obvious forms of participation but there must also be the possibilities of participation in community bodies, school boards, workplaces, health care, etc. Participation may also take the form of interest groups or causes. These are all areas of concern for the individual as decisions affecting society do not always arise directly from the centralised structures of government or its institutions.[238] Participation in areas of life outside of the political should not be dismissed as trivial or of less importance as concentration on these areas will create a greater understanding of the needs and desires of individuals.[239] If individuals are given the opportunity to participate they will feel part of the system and be more active with decisions taking on greater relevance. If excluded, the only development will be the harbouring of negative feelings.[240]

B. Democracy as Autonomy

Participation must occur within a specific framework so that the ability and right of an individual to participate does not infringe the rights of others and to prevent abuse of the participatory process through claims of a duty to participate.[241] It is known that strict personal autonomy - the ultimate and unfettered ability of the individual to exercise personal rights with no regards to others - is an unworkable concept.[242] The converse holds equally true in that the individual cannot be made subject to the will of the community with arbitrary limits on personal autonomy. The existence of rights and the rule of law is needed to ensure that all can participate equally with the understanding that individual rights are not supreme but carry

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[237] Barber (1984) pp. 145-6.

[238] See Pateman (1970) p. 38. Studies from the Third World demonstrate that elections alone do not ensure a government acts for the benefit of society as many states have the appearance of political democracy but individuals are not able to improve their lives or be part of the factors impacting them, see A. Seidman and R. Seidman. 'Beyond Contested Elections: The Process of Bill Creation and the Fulfilment of Democracy's Promises to the Third World.' 34 *Harvard Journal of Legislation* (1997) p. 1.

[239] Pateman (1970) chapters 2, 6.

[240] Held (1996) p. 268. Transitions to democracy in the former-Yugoslavia demonstrate the need to have participation from all members of society in order to avoid arbitrary treatment and the abuse of rights, see Pusic (1994) p. 383.

[241] Held (1996) p. 303.

equal obligations of respect.[243] To ensure the ability of participation and to secure against the excesses of power Held has formulated a principle of autonomy stating that

> persons should enjoy equal rights and, accordingly, equal obligations in the specification of the political framework which generates and limits the opportunities available to them; that is, they should be free and equal in the determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others.[244]

The idea of autonomy is central to many of the diverse theories of democracy and demonstrates a set of common aspirations each approach possesses. The aspirations include; an environment where the individual is able to develop and express their own individuality, protection from the arbitrary use and abuse of power, involvement of individuals in determining how society is ordered, and the ability to maximise the resources of society.[245] Held's idea of autonomy provides protection for the individual allowing for the pursuit of self-determination without allowing the unimpeded triumph of individual rights over all other considerations. There is the need to balance individual and communal considerations in formulating autonomy to reflect the reality of society, for 'the individual generally has no absolute or unfettered right in any matter and ... the welfare of the individual as a member of a collective society lies in a happy compromise between his rights as an individual and the interests of the society'.[246]

Institutional and structural arrangements are necessary to the realisation of the principle autonomy as they will provide rules and stability when agreed forms and methods are used in the process of governance instead of arbitrary behaviour. The purpose of these arrangements will be to promote discussion and debate among the divergent views of the society. Active participation will occur within an accepted framework that protects and nurtures the principle of autonomy.[247] Stability depends upon the effective protection of human rights, maintenance of the rule of law, the ability to carry out effective social and economic policies and other areas of governance.[248] Human rights alone cannot create democracy but they can assist in ensuring

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[242] Harrison (1993) p. 171.
[243] Held (1996) p. 318.
[244] Held (1996) p. 301.
[245] Held (1996) p. 300.
[246] L. Loucaides. 'Restrictions or Limitations on the Rights Guaranteed by the ECHR.' 4 *Finnish Yearbook of International Law* (1993) p. 335.
[247] Held (1996) pp. 280-281.
[248] L. Diamond. *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives*. (Report to the Carnegie Commission, New York, 1995) p. 41.

the effective exercise of democracy by allowing for individuals to be active participants in society.

For both autonomy and participation it is necessary to address all spaces in society where power, resources, agents, institutions, etc., have an impact upon the individual.[249] By moving democracy from a confined place (politics) in the ordering of society it takes on a greater degree of social importance where the individual is no longer seen as an abstract entity in either political or economic terms. An expanded understanding of the applicability of democracy allows for a greater awareness of the needs and desires individuals possess and how they may best be achieved in the overall context of society.

VI. A Democracy for International Law

The development of an international law of democracy will need to distinguish between formal and substantive manifestations of democracy, between democracy of paper and words and democracy on the ground. Otherwise democracy will remain tied to ideological ramblings with no substantive content resulting in an embarrassment for international law as '[n]ormative creativity, without effective implementation, promotes contempt for law and its institutions.'[250] Formal democracy is marked by the appearance of rules, institutions and procedures one normally attaches to the workings of democracy. This includes, but is not limited to, elections, the structure of government, a written constitution with the existence of rights, the rule of law, etc. The existence of these practices and institutions may mark an effective democratic system or they may only exist on paper or through rhetoric for public consumption. Formal democracy must be backed up with substantive democracy which involves the continual process of individuals being part of the decision-making processes and the placing of real limits upon the exercise of power so that society is able to maximise their opportunities.[251] Democracy must consist of structures and institutions that are effective means individuals rely upon and utilise. Holding elections for pre-selected candidates, or only at limited levels, having government offices formally separate but under the control of a single individual, or the existence of a constitution with rights guarantees no one knows of, or adheres to, cannot be considered as democratic.

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[249] See Held (1996) pp. 309-10.
[250] T. Franck and G. Fox. 'Introduction: Transnational Judicial Synergy.' in T. Franck and Fox, eds. *International Law Decisions in National Courts*. (Irvington: Transnational, 1996) p. 3.
[251] See M. Kaldor and I. Vejvoda. 'Democratisation in Central and Eastern Countries.' 73 *International Affairs* (1997) pp. 62-63.

An international law of democracy will have to take into account three broad areas that will define the existence of democracy - structures, institutions, and substance. All three areas need to be present to declare the existence of democracy. Participation and autonomy for individual and communal self-development are the substance of any democratic system. The structures of democracy are the ways in which the government is organised. This includes the government of the state as well as the sub-state levels of governance.[252] The institutions of democracy will be primarily the conducting of elections, how they are organised and conducted. Institutions will also include how the relation between the elected and the electors is maintained and how accountability and openness of government are ensured, primarily through the existence of rights and the rule of law. Structures and institutions will be the clearest determinations for identifying democracy, they will be the facts on the ground that the law will begin with, but democracy does not stop there and the law does have a role beyond.[253] Democracy in practice will differ between societies allowing many variations to be possible, the legitimacy of these variations will depend upon their substance and the reality faced by the individual.

The structure of a government is important for democracy for the design of government and how it works will be determinative of the extent of participation and autonomy in society. Of the writers discussed above there is agreement that democracy cannot exist if the power of government is vested in one person or small group of persons. Montesquieu found it was necessary to disperse the powers of government into an arrangement that ensures checks upon the exercise of power, otherwise power would be abused impacting the functioning and security of society.[254] When power is centralised, autonomy and participation are threatened as an authoritarian system

> paralyses human behaviour, fear also paralyses certain social behaviours, particularly those apt to put into action the due process of law when what is at stake is the relation between the rulers and the ruled, the might and the mean, the haves and the have-nots, the Establishment and the dissenter.[255]

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[252] It is important to keep in mind the growth of supra-state institutions and their impact on society giving rise to the need for democratic structures at this level, see the discussion of the EU in Chapter 4.

[253] See Klare (1991) pp. 73-74.

[254] Montesquieu, *Spirit*, Chapter 11, section 4. Also M. Richter. *The Political Theory of Montesquieu*. (Cambridge: Cambridge University Press, 1977) p. 57 and R. Bellamy. 'The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy.' 44 *Political Studies* (1996) p. 436.

[255] S. Lozada. 'The Successful Appeal from Ballots to Bullets: The Herculean Hardships of Judicializing Politics in Latin America.' 25 *New York University Journal of International Law and Politics* (1992) p. 123. One author comments how under long periods of authoritarianism things such as torture become to feel routine. M. Urquidi.

If the power to judge the legitimacy of the functions of the structures of government is not separate then the life and liberty of citizens is subject to arbitrary power.[256]

The general belief for separation of powers is that the separation of the legislature and executive allows for the government to work freely, creating space for discussion and disagreement in the creation of policy.[257] The separation of the judiciary from the other two branches is seen as a check on the possible arbitrary exercise of power of the legislature and/or executive as well as protection for the individual in relation to the activities of the other two branches.[258] The role of the judiciary in a democracy is problematic in that it is commonly appointed rather than elected in order to ensure a degree of independence and impartiality, creating a decision making body detached from the democratic principles of society.[259] This is a problem that is most likely to plague all democracies as it will be up to a society to determine how best to select the various branches of governments and the specific functions with which they have been entrusted. The underlying necessity will be to ensure the structures uphold the substantive principles of democracy.

Institutionally, elections are the leading indicator of democracy as the most fundamental, visible and accessible measure of democracy for elections represent 'the pressure point at which the political body's pulse most readily can be taken.'[260] Elections are evidence of the continual process of self-determination for society and the individual as they determine and allow for the continuation of democracy. In regarding elections as evidence of democracy it is necessary to look beyond the act itself in order to determine if there exists a real choice for the electorate and that there are no constraints upon individuals limiting the exercise of their vote.[261] If elections are to be considered as an adequate indicator of democracy they must be free and fair in real terms and extend to all applicable areas of power. Elections are important not just as a means of pursuing political ends by making a specific choice on policy or for a personality, but they can also be a way of communicating ideas that individuals possess and as a way to exert and shape their own personal identity. In this sense voting and elections extend

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'Under the Volcano: Human Rights, Official Torture and the Future of Mexican Democracy.' 54 *The Humanist* (1994), p. 27.

[256] Montesquieu, *Spirit*, Chapter 11, sec. 6. The work of Hobbes demonstrates the problems of power vested into a single body, see Goldsmith (1966) pp. 202-205.

[257] Generally, M. Vile. *Constitutionalism and the Separation of Powers*. (Oxford: Clarendon, 1967).

[258] See L. Péter. 'Monstesqueiu's Paradox on Freedom and Hungary's Constitutions, 1790-1990.' 16 *History of Political Thought* (1995) p. 79.

[259] S. Croley. 'The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law.' 62 *University of Chicago Law Review* (1995) p. 689.

[260] T. Franck. 'United Nations Based Prospects For a New Global Order.' 22 *New York University Journal of International Law & Politics* (1990) p. 633.

[261] Doveton (1994) p. 575.

beyond choices for politicians to be a meaningful form of social participation in shaping the individual's identity and giving a sense of attachment to the community.[262]

Respect for the rule of law by all sectors of society and the existence of rights guarantees are also essential to democracy. The rule of law and rights will stand as indicators of the continual legitimacy of democracy in between elections as they ensure the proper functioning of democracy on a day to day basis.[263] Issues such as participation, free speech, access to information and a free press, allow the actions of the government to be monitored and the opinions of the people to be heard.[264] If rights are not respected and the exercise of power is not kept in check, resulting in individuals not being able to express their needs and desires, then those who are elected will face serious legitimacy problems and undermine the democratic advances of a society. The rule of law informs the ways in which a society organises its government and institutions of society and the how the interaction between these institutions is conducted. The existence of the rule of law ensures that the government is not above the law and is accountable to society. It further provides for the independence of the branches of government allowing them to avoid being subjected to executive control. Finally, the existence the rule of law recognises the inherent dignity of the individual and equal entitlement to rights as well as providing remedies to ensure rights are accessible.[265]

VII. Conclusion

The development of an international law of democracy is no easy task as the actual forms of democracy and human rights will vary between societies in the international system. There can be no single model of democracy, as the existence of diverse democratic states has proven. Democracy cannot be reduced to a structure of government or an act of society (elections) as it goes further to include the social, economic and cultural environments in which individuals exist. The interaction between society and the democratic structures and institutions it has created is important since the two work together.[266] A society will work to determine its democracy through institutions and structures that in turn will also react to the evolution of

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[262] See Winkler (1993) pp. 330, 363-364.
[263] Pusic (1994) pp. 396-397.
[264] See the work by D'Souza who relates the existence of rights and the rule of law as a way of preventing famine in non-democratic states. F. D'Souza. 'Democracy as a Cure for Famine.' 31 *Journal of Peace Research* (1994) p. 369.
[265] N. MacDermot. 'The Credibility Gap in Human Rights.' 3 *Dalhousie Law Journal* (1976) p. 264.
[266] See J. Anaya. 'A Contemporary Definition of the International Norm of Self-Determination.' 3 *Transnational Law and Contemporary Problems* (1993) p. 143.

society.[267] This interaction means that the democratic structures and institutions of a society must uphold the underlying beliefs of the purposes of democracy. All democracies will have the same purpose 'to provide conditions for the full and free development of the essential human capacities of all members of the society.'[268] Democracy is a dynamic process that carries on through thought, practice, experiences and reflection. It is not natural, spontaneous, or inherent in human nature or society. It is a product of history, sustained though effort dependant upon all involved participants having a shared capacity to discover its benefits and meanings on a continual and equal basis. Democracy is much more than appearance as '[a] democratic culture should mean more than simply periodically giving the people the chance "to kick the rascals out" - however efficiently this is engineered. The wider issues need to be addressed urgently.'[269] Addressing the wider issues means ensuring that the structures and institutions of democracy are constantly connected with the substantive normative issues, a task international law has not actively pursued beyond the rhetoric of support for democracy and human rights.[270] However as will be examined in the next chapter the rhetoric does exist and provides opportunities and possibilities to ensure 'the real and effective participation of the people in the decision-making processes'.[271]

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[267] A-M. Rieu. 'Introduction.' in Rieu and G. Duprat, eds. *European Democratic Culture*. (London: Routledge, 1993) p. 10.
[268] Macpherson (1966) pp. 36-37.
[269] J. Morison and S. Livingstone. *Reshaping Public Power: Northern Ireland and the English Constitutional Crises*. (London: Sweet & Maxwell, 1995) p. 50.
[270] S. Marks. 'The "Emerging Norm": Conceptualizing "Democratic Governance".' 91 *Proceedings of the American Society of International Law* (1997) pp. 372-376.
[271] Vienna Declaration Part II, paragraph 67.

CHAPTER 3

AN INTERNATIONAL LAW OF DEMOCRACY

International law presently does not recognise or incorporate any concept of representing the needs and desires of individuals at the international level, therefore the only voices which are heard are those of governments and these voices to not always speak for the societies they claim to represent.[1]

I. INTRODUCTION

Democracy, as a concern for the international system, has noticeably been popularised in recent years in the discourses surrounding international law.[2] It is interesting to note that a section of this recent scholarship makes claims concerning the existence of a right to democracy dating back 50 years.[3] Primarily the scholarship chooses to selectively look to recent events in the international system, as evidence of the existence of democracy as a principle of international law. The lack of clear substantive evidence of the acceptance and actual practice of democracy by states at all levels of society does prevent the unquestioned existence of a concrete legal principle of democracy in the international system. Instead there exists a global rhetoric of democracy that provides a starting point for the international scrutiny of domestic governance and international efforts in support of democracy.[4] As with international human rights law, the rhetoric often clouds over the actual reality that is being experienced by individuals.

The starting point for much of the recent discussion of democracy and international law is the end of communism in Europe with most states, not all, in that particular region adopting democratic forms of governance. Other, less substantive, developments towards democracy are also identified in parts of Asia and Africa. The foremost indicator used for determining the existence of democracy in states in these areas is the conducting of elections. The increase in electoral activity in areas where none previously existed does demonstrate the acceptance, albeit limited, of the democratic process. What these events do not create is a universal acceptance of

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[1] P. Allott. *Eunomia A New Order for a New World*. (Oxford: Oxford University Press, 1990) p. 303.
[2] Further demonstration comes from its inclusion in the Vienna Declaration (1993) Part I, paragraph 8.
[3] The bulk of the writing on democracy and international law dates from 1990. For the existence of a right to democracy since 1948 see C. Cerna. 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?' 27 *New York University Journal of International Law and Politics* (1995) p. 290; M. Reisman. 'Sovereignty and Human Rights in Contemporary International Law.' 84 *American Journal of International Law* (1990) p. 868
[4] L. Diamond. *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives*. (Report to the Carnegie Commission, New York, 1995) p. 38.

democracy.[5] Greater use of elections has been observed but this has not meant a reciprocal increase of the ability of individuals to participate in the decision making process of society.[6]

The existence of rhetoric in support of democracy, combined with the existence of procedural practices connected to democracy, has allowed scholars to express claims of an international system based on liberal democracy[7] and the existence of a 'democratic entitlement' in international law.[8] With regard to the recent attention given to democracy in connection with international law Schachter has observed that 'popular sovereignty can be considered the prevailing myth' in the international system today.[9] Teśon has recently remarked;

> [e]ver since Thomas Franck published his famous article, international lawyers ... have been particularly excited about the fact that state practice increasingly seems to support the proposition that all persons and groups have an individual and collective right to elect their governments ...'[10]

The unquestioned belief of democracy as a guiding principle of the international system was expressed most forcefully by Fukuyama.[11] Others, notably Slaughter, have expressed the idea that the increase in democratic states has transformed international law into a law based on liberal democratic ideas, moving away from its traditional manifestation based on state sovereignty.[12] Another group, led by Franck, offers the idea that there is a firm right or entitlement to democracy in international law. An important issue common to all of these streams of thought is that they express the need to re-consider the position of the individual in international law and relations in light of recent developments related to democracy and human

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[5] The limited impact of regional developments creating the existence of a global standard of acceptance is explained by the Brazilian representative to the OAS concerning the obligation to democracy in the OAS 'It is not, ... a principle of international law. It cannot be invoked or defended as a principle in any context other than that of the present Charter'. Quoted in V. Vaky. *The Future of the Organization of American States*. (New York: Twentieth Century Fund, 1993) p. 30.

[6] Elections have recently been held in Qatar which, in the eyes of some, would contribute to the growth of democracy in the world. However these elections were only for the purpose of choosing a non-binding advisory body in the area of food safety. This is not to say the concerns over food are not important, but a single event with little substantive impact cannot herald the existence of democracy. A US government observer in Qatar disagrees saying that the opportunity to have these limited elections means democracy exists in Qatar. 'Qatar Holds Rare Democratic Elections.' (8 March 1999) Available on CNN's internet site [http://www.cnn.com/world/meast/9903/08/ qatar.elex/index.htm].

[7] A-M. Slaugther. 'Toward an Age of Liberal Nations.' 33 *Harvard International Law Journal* (1992) p. 394 and 'International Law in a World of Liberal States.' 6 *European Journal of International Law* (1995) pp. 514-515.

[8] T. Franck. 'The Emerging Right to Democratic Governance.' 86 *American Journal of International Law* (1992) p. 46.

[9] O. Schachter. 'The Decline of the Nation-State and its Implications for International Law.' in J. Charney et al, eds., *Politics, Values and Functions: International Law in the 21st Century, Essays in Honour of Louis Henkin*. (The Hague: Martinus Nijhoff, 1997) p. 25.

[10] F. Teśon. 'Two Mistakes about Democracy.' 92 *ASIL Proceedings* (1998) p. 127.

[11] F. Fukuyama. *The End of History and the Last Man*. (London: Hamilton, 1992). On the impact of Fukuyama see S. Marks. 'The End of History? Reflections on Some International Legal Theses.' 8 *European Journal of International Law* (1997) pp. 449-460.

rights.[13] However, the culmination of these thoughts and ideas and the distance that exists between their conclusions and the actual practice on the ground globally concerning democracy lead to the 'myth' spoken of by Schachter.

The work here will examine the idea of democracy in international law from the perspective of the individual. It will expand beyond a 'right to democracy' to elaborate upon an international law of democracy. This international law of democracy will be constructed from the position of the individual addressing the issues as to how international law can be effective for the individual, not just in terms of inter-state relations.[14] It will look at existing possibilities within international law that contribute to the positive nature of democracy as a means of individual and communal self-determination that extends to all aspects of society. While democracy promises much, and usually offers little, it remains a desired aspiration throughout the world, and on that basis alone it becomes a necessary issue for international law to address.

II. The Democratic Entitlement - A Critique

As stated, Franck has been at the forefront of claims to the existence of a right to democracy, or the democratic entitlement.[15] Franck's position is grounded in democratic thought and practice as defined by western industrialised nations, not least of all the US. He marks the beginnings of the democratic entitlement in international law with the US Declaration of Independence (1776). From there he formulates statements which describe the development of western industrialised nations and the democracy they created as a 'hard-won tradition that most of the world now seeks to emulate' and that 'people almost everywhere now demand that government be validated by western-style parliamentary, multi-party democratic process.'[16]

Self-determination is put forth as the oldest aspect of the democratic entitlement acting as the matrix of the entitlement.[17] For Franck, '[s]elf-determination postulates the right of a people organised in an established territory to determine its collective political destiny in a democratic

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[12] The underlying belief is that peace and prosperity is 'a domain of representative governments' who internally have liberal laws and use the same at the international level, Slaughter (1995) p. 538.
[13] Slaughter (1995) p. 516. B. Fitzgerald. 'An Emerging Liberal Theory of International Law and the Non-Enforcement of Foreign Public Laws.' 16 *Australian Yearbook of International Law* (1995) p. 311.
[14] Since the perspective of this work focuses on the individual less concern will be given to the liberal internationalist agenda of creating an international law between states based on democratic principles.
[15] Franck (1992). His work on the democratic entitlement is also to be found in 'Democracy as a Human Right.' in L. Henkin and J. Hargrove, eds. *Human Rights: An Agenda for the Next Century*. (Washington: ASIL, 1994) p. 73 and *Fairness in International Law and Institutions*. (Oxford: Clarendon, 1995) p. 83.
[16] Franck (1992) pp. 48-49.
[17] Franck (1994) pp. 91 and (1992) p. 52.

fashion and is therefore at the core of the democratic entitlement.'[18] Franck attempts to trace a historical development of self-determination highlighting the involvement of the League of Nations in post-WW I elections and plebiscites in Europe.[19] The practice of self-determination as the basis for the democratic entitlement increased in the post WW II era with the advent of the UN who 'implemented zealously' the idea of self-determination.[20] The exercise of self-determination which proliferated under the UN encompassed primarily former colonial territories, but for Franck it potentially became 'both universalized and internationalized, for it could now be said to portend a duty owed by all governments to their peoples and by each government to all members of the international community.'[21] The UN's application of self-determination to non-self-governing territories and former colonial possessions through Chapters 12-14 of the Charter is viewed by Franck as being based on firm democratic principles whereby individuals were able to participate in the decision making process. He concludes from his historical survey of self-determination that it is 'a remarkable saga that tells of a rule that gradually augments its compliance pull, overcomes resistance and ultimately brings about an incontestable, historic transformation.'[22]

Franck defines self-determination as 'the right of a people organised in an established territory to determine its collective political destiny in a democratic fashion.'[23] To a certain degree this is an accurate description of how self-determination has been exercised - primarily through the use of a single vote to determine the political status of a territorially defined unit in relation to its previous status under the control of another state. The holding of a single vote did determine the status of a territory but there was no guarantee of the continual exercise of self-determination or an ongoing right of a people to continually determine their destiny. The limited number of plebiscites and referendums sponsored by the League of Nations were rarely if ever followed by regular elections or other forms of participation by individuals in their collective destiny. The same holds true in the practice of the UN as many of the former colonial territories soon saw authoritarian regimes in place with a full-scale denial of self-determination. It is difficult to sustain self-determination as exemplifying or acting as a basis for a democratic

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[18] Franck (1992) p. 52.
[19] Franck (1992) p. 54. M. Nowak. *United Nations Covenant on Civil and Political Rights: CCPR Commentary*. (Kehl am Rhein: Engel, 1993) p. 6 states that before 1921 self-determination was only exercised on five occasions as stipulated by the Paris Peace Treaties. Orentlicher feels that in the inter-war period self-determination was only applied to specific cases with states limiting its impact, D. Orentlicher. 'Separation Anxiety: International Responses to Ethno-Separatist Claims.' 23 *Yale Journal of International Law* (1998) pp. 4, 22.
[20] Franck (1992) p. 57.
[21] Franck (1992) p. 54.
[22] Franck (1992, p. 55.

entitlement since its actual application only provided for an isolated instance of territorial determination.

A. Self-Determination in International Law

Franck's position on self-determination as exemplifying democracy is based on the belief that there exists state practice which he feels emulates the ideals of the right, and 'a large and precise textual canon' in the international system.[24] This position contradicts the majority of work and practice on the subject.[25]

The forerunner to the UN Charter, the Atlantic Charter included ideas of self-determination as a governing standard for territorial changes and domestic society.[26] However, Winston Churchill stated that the ideas of the Atlantic Charter did not apply to the colonies of the UK, being limited to those states affected by Nazi occupation.[27] From its earliest elaboration, self-determination has been limited by states. The signing of the UN Charter marked the first multilateral expression of a principle of self-determination but with the attitude of Churchill towards self-determination proving to be the prevailing one.[28] In the drafting of the Charter, the idea of self-determination was heavily contested with arguments that it was against the statist nature of the international system or that it would allow for secession.[29] Others argued that self-determination, as a principle, had universal application and must contain the essential element that there is the genuine and free expression of the will of the people.[30] Cassese shows how this final point was not the intention of the drafters as the idea of genuine and free expression was not seen as an absolute requirement, but only a guideline for those situations where people were actually given the opportunity to express their views.[31]

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[23] Franck (1992) p. 52.
[24] Franck (1992) p. 57.
[25] N. Berman. 'Sovereignty in Abeyance: Self-determination and International Law.' 7 *Wisconsin International Law Journal* (1988) p. 54; A. Cassese. *Self-Determination of Peoples: A Legal Reappraisal*. (Cambridge: Cambridge University Press, 1995) p. 1; M. Koskenniemi. 'National Self-Determination Today: Problems of Legal Theory and Practice.' 43 *International and Comparative Law Quarterly* (1994) p. 241; G. Simpson. 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age.' 32 *Stanford Journal of International Law* (1996) p. 256.
[26] 144 *British and Foreign State Papers* (1940-1942) p. 683.
[27] See Cassese (1995) p. 37
[28] See I. Brownlie. 'An Essay in the History of the Principle of the Right of Self-Determination.' *Grotian Society Papers, 1968*. (The Hague: Martinus Nijhoff, 1970) p. 97. But see Franck (1992) p. 54.
[29] See Cassese (1995) for a review of the various positions, pp. 38-40.
[30] A. Cristescu. *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*. (New York: United Nations, 1981) p. 2.
[31] Cassese (1995) pp. 39-41.

The Charter makes two direct references to self-determination as a condition for 'friendly relations among states'.[32] There is no elaboration of the meaning or application of the right. There are two further provisions regarding non-self-governing territories and trustee territories which imply self-determination without explicitly declaring the necessary existence of the right.[33] Simpson attributes very little significance to the idea of self-determination in the Charter due to the scant reference to the idea demonstrating the lack of importance attached to it by the drafters. He further feels that in relation to Chapters XI and XII, which make the process of self-determination for non-self-governing and trust territories dependent upon the colonial administrators, the whole scheme is 'an exercise in legitimised colonial paternalism.'[34] Higgins takes the view that self-determination in the Charter has been understood as more than it really is. She points out that Chapters XI and XII do not utilise the phrase self-determination and the remainder of the Charter does not provide for a right of self-determination.[35] Conversely to the dominant view, Thornberry follows Franck's position and sees self-determination as a key element of the Charter with its explicit mention and that it is linked to the democratic principles in Chapters XI and XII.[36]

Self-determination in the UN framework developed from the Charter through two General Assembly (GA) resolutions; the 1960 Declaration on Decolonisation,[37] and the 1970 Declaration on Principles of International law Concerning Friendly Relations.[38] The combination of both declarations created within the Charter context the 'potential for a development towards more genuine requirements of a democratic order'.[39] The Declaration on Decolonisation includes a statement similar to the common Article 1 of the International Covenants providing for a right of self-determination (see below). However, the decolonisation process has shown that self-determination in this context has only meant allowing for colonies to obtain independence and nothing further.[40] The Declaration on Friendly Relations marks a significant point in the rhetoric of self-determination by containing reference to the character of a government. It implies that if a state has exercised the right to self-determination then it will possess 'a government representing the whole people belonging to the territory without

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[32] Articles 1 (2) and 55.
[33] Articles 73 and 76.
[34] Simpson (1996) p. 266.
[35] R. Higgins. *Problems and Process: International Law and How we Use It*. (Oxford: Clarendon., 1994) p. 111-112.
[36] P. Thornberry. 'The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism.' in C. Tomuschat. *Modern Law of Self-Determination*. (Dordrecht: Martinus Nijhoff, 1993) pp. 107-109.
[37] GA Res. 1514 (XV) (14 December 1960). G.AOR 15th Sess., Supp. 16, p. 66.
[38] GA Res. 2625 (XXV) (24 October 1979). GAOR 25th Sess., Supp. 28, p. 121.
[39] A. Rosas. 'Internal Self-Determination.' in Tomuschat (1993) p. 238.

distinction as to race, creed or colour'.[41] There exists little evidence of this aspect of the Declaration being consistently applied in practice in a way reflecting an ongoing requirement of democracy.[42]

Further textual support of a right to self-determination exists with common Article 1 of the International Covenants, whereby '[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Franck sees common Article 1 as entitling 'peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state', and specifically the ICCPR 'clearly intends to make the right of self-determination applicable to the citizens of all nations.'[43] During the drafting of the Covenants common Article 1 was purposely left vague for 'it was thought that any numeration of the components of the right of self-determination was likely to be incomplete. A statement of the right in an abstract form ... was thought to be more preferable.'[44]

In its comment on Article 1 of the ICCPR the Human Rights Committee (HRC) does not provide any specifics on the right's content. They further observe that few states have provided information concerning Article 1 in their reporting obligations and 'that many of them completely ignore Article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws.'[45] The only indication from states concerning the meaning and scope of the common Article 1 has arisen from India's reservation that the right to self-determination 'appl[ies] only to peoples under foreign domination and that these words do not apply to sovereign and independent States or to a section of a people or nation'.[46] In response, France lodged an objection that the reservation attaches conditions not contained in

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[40] See Simpson (1996) 270.
[41] GA Res. 2625 (XXV) Section entitled 'The Principle of equal rights and self-determination of peoples.'
[42] Salmon sees the reference to human rights in GA Res. 1514 (XV) as 'too distant to mean anything precise', J. Salmon. 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?' in Tomuschat, ed (1993) p. 257.
[43] Franck (1992) pp. 57-59. The belief that common Article 1 is customary international law is supported by Rosas in Tomuschat (1993) p. 247. But See Cassese (1995) who argues against the idea that it represents custom due to its indeterminate nature and lack of evidence of state practice beyond moral backing given in principle, pp. 102-103.
[44] M. Bossuyt. *Guide to the "Travaux preparatoires" of the International Covenant on Civil and Political Rights*. (Dordrecht : Nijhoff, 1987) p. 34.
[45] HRC General Comment 12 (1984). GAOR 39th Sess., Supp. 40 p. 142. A petition concerning a violation of Article 1 has been brought before the HRC, *Lubicon Lake Band v Canada* (26 March 1990) GAOR 45th Sess., Supp. 40, vol. 2, p. 27, which was declared inadmissible since groups or 'peoples' are not able to utilise the petition procedures under the Optional Protocol to the ICCPR. Also M. Turpel. 'Indigenous Peoples' Rights of Political Participation and Self-determination: Recent International Legal Developments and the Continuing Struggle for Recognition.' 25 *Cornell International Law Journal* (1992) p. 579.
[46] *Multilateral Treaties Deposited with the Secretary-General Status as at 31 December 1997* UN Doc. ST/LEG/SER.E/16 (hereinafter *Multilateral Treaties, 1997*) p. 113.

the UN Charter.[47] Germany and the Netherlands also responded on the basis that all peoples have the right to self-determination and any attempt to limit the scope or add conditions to self-determination weakens the right.[48] These positions, and the actions of states toward Article 1, demonstrate the lack of agreement or clarity of the idea of self-determination. It would be difficult to establish a clear textual canon surrounding self-determination as it would be to claim there is clear and consistent international practice.[49]

The right to self-determination does have an inherent democratic nature, a point that has yet to reach fruition in the international system. In the development of the right in the past fifty years the ideology and foreign policy goals of states appear to be the only guiding factors for the application of the right. Post WW II, socialist states saw self-determination containing external and internal demands with the external allowing for the creation of a state, while the internal was limited to the right of a people to chose a socialist government only. Former colonial territories used self-determination to limit the presence of colonial powers and to end the various forms of colonial domination. Western states have used the idea of self-determination as a way of promoting their own ideology of liberal democracy.[50] The only clear use of self-determination has been as a self-interested ideological tool, which has had the net result of draining self-determination of its true worth and value.

Ultimately, Franck's position that self-determination is the matrix for a democratic entitlement in international law must be rejected. For self-determination to be the matrix for an entitlement to democracy there must be less indeterminacy and ambiguity as to its meaning along with wider effective application.[51] The development of self-determination in international law has been confined to a singular determination of territorial status and has not been able to deal with denials of internal democratic aspirations or disenfranchised groups within a state.[52] Self-determination stands as another example of the ability of the international legal argument to maintain two opposing positions as it

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[47] *Multilateral Treaties (1997)* p. 116.
[48] *Multilateral Treaties (1997)* p. 117.
[49] Cassese (1995) pp. 48-49. The UK spoke out in favour for self-determination but was staunchly opposed to any provisions concerning self-determination that would compromise their colonial possessions. The US was in favour of the bulk of common Article 1 but refused to back the inclusion of natural resources. On the whole, Cassese (1995) points out, Western states must be seen as being opposed to the development of the idea of self-determination which makes it difficult to classify the right as part of custom, pp. 50-51
[50] See Cassese (1995) pp. 44-46.
[51] Orentlicher (1998) feels that self-determination as a principle to be included in international instruments is not challenged, however, its actual meaning and application are seriously contested, p. 39.
[52] Simpson (1996) pp. 271-274.

> reflects the cyclical oscillation between positivism and natural law, between an emphasis on consent, that is, voluntarism, and an emphasis on binding 'objective' legal principles, between a 'statist' and a communitarian vision of world order.[53]

Self-determination remains confined within the realm of state values and not for the benefit of the individual for development of the self or society.[54]

B. Further Claims to the Democratic Entitlement

Writers along the same vein of Franck do not offer any compelling evidence contributing to an acceptance of an unassailable right to democracy in international law. Fox,[55] writing at the same time of Franck, claims that any indeterminacy regarding democracy that may have existed in the past are no longer an issue.[56] To show the concreteness of a right to democracy he provides evidence from human rights treaties, UN election monitoring, and decisions of the UN and regional monitoring bodies. He states '[q]uestions concerning the boundaries of participatory rights no longer require resolution of ideological debates about the proper function of government, but involve treaty interpretation.'[57] In conclusion he feels that the '[r]eceipt of an electoral mandate bestows legitimacy upon governments'.[58]

Cerna[59] follows a similar line to that of Fox relying upon statements from Franck and the former US Ambassador to the UN, Jean Kirkpatrick, as evidence to describe the democratic entitlement as 'rich in implications'.[60] She claims the existence of a right to democracy since 1948 with the adoption of the UDHR, but that the right has been honoured more in breach than observance.[61] For Cerna, the end of the Cold War and the reunification of Europe has moved democracy from western ideas to the 'currency of universal values' resulting in its global recognition as an international legal right.[62] She gathers evidence from the activities of regional systems, statements by the UN SG and the belief that the UDHR and ICCPR create a direct

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[53] Cassese (1995) p. 1.
[54] Koskenniemi (1994) p. 250.
[55] G. Fox. 'The Right to Political Participation in International Law.' 17 *Yale Journal of International Law* (1992) p. 539.
[56] H. Steiner. 'Political Participation as a Human Right.' 1 *Harvard Human Rights Yearbook* (1988) p. 77.
[57] Fox (1992) p. 607.
[58] He also adds the further requirements of political parties, freedom of media, and elements which contribute to fair elections, which 'seem to flow inevitably from treaties announcing a commitment to representative government.' Fox (1992) p. 606.
[59] Cerna (1995) p. 289. Also see the argument in R. Ezetah. 'The Right to Democracy: A Qualitative Inquiry.' 22 *Brooklyn Journal of International Law* (1997) p. 495
[60] Cerna (1995) p. 289.
[61] Cerna (1995) p. 290; Reisman (1990) p. 868.
[62] Cerna (1995) pp. 290-291.

obligation of democracy as it is 'the only permissible form of political organisation enshrined in these instruments because it is the only form of government which provides for the respect and protection of human rights.'[63]

The views expressed by these authors are admirable in terms of the goals they wish to achieve. They are inaccurate as descriptions of the present condition of democracy in international law and their approaches are unhelpful for the future development of democracy as an accepted international principle. Democracy in practice cannot be limited to elections or textual statements. It must go further to have a real impact upon the lives of individuals. The existence of democracy cannot be deduced from the aspirational statements within treaties in the absence of actual practice on the ground. Finally, democracy is not exclusive to any particular region of the world. The democratic forms of North America or parts of Europe are not desired *in toto* by others in the world. Democracy is very much about the ability of individuals and society to engage in determinations of the self. As individuals and societies throughout the world differ, so too will the practice of democracy.

III. Democracy and International Law

Previous waves of global democratisation did not have any significant impact upon international law[64] and even today international law is slow in coming to terms with democracy. The reluctance of international law to incorporate democracy is not surprising since it is the governments of states that have been and continue to be the one group of the international system averse to an acceptance of democracy.[65] International law presently does not recognise or incorporate any concept of representation, therefore the only voices which are heard are those of governments and these voices to not always speak for the societies they claim to represent.[66] There exists the argument that international law could not endorse a specific form of government since the law itself is ideologically neutral.[67] As any legal system is characterised by the social setting in which it exists, arguments for the ideologically neutral content are

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[63] Cerna (1995) p. 327.
[64] J. Crawford. *Democracy in International Law*. (Cambridge: Cambridge University Press, 1994) p. 7.
[65] Hobsbawm describes how in the period of 1870-1920 governments introduced democratic reforms 'without enthusiasm' only giving in to demands for change based on the rhetoric of democracy that existed at the time. E. Hobsbawm. *The Age of Empire, 1875-1914*. (London: Widenfeld and Nicolson, 1987) pp. 86-87.
[66] Allot (1990) p. 303. Also J. Pennock. 'Political Representation: An Overview.' in Pennock and J. Chapman, eds. *Representation*. (New York: Atherton Press, 1968) p. 7; Chapter 2 (above).
[67] E. Binavince. 'Canadian Practice in Matters of Recognition.' in R. St.J Macdonald et al, eds. *Canadian Perspectives on International Law and Organization*. (Toronto: University of Toronto Press, 1974) pp. 168-169; H. Blix. 'Contemporary Aspects of Recognition.' 130 *Recueil des Cours* (1970-2) p. 643; B. Sen. *A Diplomat's Handbook of International Law and Practice*, 3rd ed. (Dordrecht: Martinus Nijhoff, 1988) pp. 123-4.

implausible.[68] From the Treaty of Westphalia to today the international system and its legal framework have seen numerous changes in ideology and conceptions of legitimacy.[69] The end of the Cold War has led to changes in the ideology of international law once again, this time towards democracy and human rights as wider concerns for the international system.

A. International Democracy and the United Nations

The growing attention being given to democracy in the international system has been reflected in the work of the UN, as has the reluctance of states and international law to embrace democracy. Overall the UN has been slow in responding to the growth of democracy with the response often being contradictory and half-hearted at best. In 1988, the then Secretary-General (SG) Pérez de Cueller, in relation to the issue of election observation stated that the UN 'could send observers to referendums or elections relating to the exercise of the right of colonial peoples to self-determination, that sort of thing, but it does not take part in political elections.'[70] This attitude changed in 1992 with his successor, SG Boutros Boutros-Ghali, presenting his *Agenda for Peace*[71] where it was stated that '[r]espect for democratic principles at all levels of social existence is crucial: in communities, within States and within the community of States.'[72] He pledged the role of the UN in providing assistance in the transformation and strengthening of democratic institutions at all levels as a way of securing peace in world.[73]

Boutros-Ghali further expressed support for democracy in his *Agenda for Development*[74] and *Agenda for Democratization*.[75] These reports emphasised that peace, development and democracy are inextricably linked and that the UN has a major role to play by assisting states

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[68] The ideological differences which exist have prevented the pursuit of common goals in the international system, see J. Quigley. 'Law for a World Community.' 16 *Syracuse Journal of International Law and Commerce* (1989) p. 1.
[69] For the changes in ideology in the international system see J. Bartelson. *A Genealogy of Sovereignty*. (Cambridge: Cambridge University Press, 1995) pp. 88-248; A. Cassese. *International Law in a Divided World*. (Oxford: Clarendon, 1986) pp. 34-73.
[70] Press Conference of the Secretary-General (5 July 1988). U.N. Doc SG/SM/4158/Rev.1 (1988), cited in D. Stoetling. 'The Challenge of UN-Monitored Elections in Independent Nations.' 28 *Stanford Journal of International Law* (1992) p. 372, note 1.
[71] *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*. UN Doc. A/47/277-S/24111, hereinafter *Agenda for Peace*.
[72] *Agenda for Peace*, paragraphs 19, 82.
[73] *Agenda for Peace*, paragraph 59. Which relies upon a social setting for productive growth and where people can readily express their will through strong domestic institutions, paragraph 81.
[74] *An Agenda for Development*. UN Doc. A/48/935 (1993). Also D. Forsythe. 'The United Nations, Human Rights and Development.' 19 *Human Rights Quarterly* (1997) pp. 337-338.
[75] The SG set out his ideas in three reports entitled 'Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies.' UN Docs. A/50/332 and Corr.1 (7 August 1995), A/51/512 and A/51/761 (20 December 1996). The final report contains the *Agenda for Democratization*.

involved with the democratisation process.[76] He believed that the ideas of self-determination and human rights as contained in the Charter provide a basis for democracy, and that the Charter is flexible and capable of incorporating change, such as an inclusion of democracy.[77] He saw the role of the UN as assisting in creating a 'culture of democracy' allowing for the participation of all individuals in the decision-making process on issues which affect their lives.[78] He stressed that any action by the UN in support of democracy can only come at the request of the parties concerned[79] based on the concept of individual state sovereignty as articulated in Article 2 (7) of the Charter[80] and in the belief that the UN does not endorse or promote any specific form of government.[81] The views of the SG reflect the nature of the international legal argument as he expresses full support for democracy as a principle for the international system but only to the extent states will allow its development.

The present SG, Kofi Annan, has followed the ideas of his predecessor in supporting the merits of democracy expressing the belief that the will of the people is the basis for governmental authority and that good governance is necessary to give citizens 'a real and lasting stake in the future of their societies–politically, economically and socially'.[82] His definition of democracy and good governance includes 'the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights and the meaningful participation of all citizens in the political processes of their countries and in decisions affecting their lives.'[83] He has stated that human security depends upon sustainable development and democratic governance, along with human rights, equal opportunity and social justice, to provide the best defence against the ills facing the world.[84] He also makes the connection between democracy and development by seeing competent, accountable and responsive state institutions as part of achieving prosperity and stability.[85]

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[76] *Agenda for Democratization*, paragraphs 118, 126.
[77] *Agenda for Democratization*, paragraphs 26-35. Also B. Boutros-Ghali. 'The United Nations at Fifty.' 20 *Melbourne University Law Review* (1995) pp. 112-113.
[78] *Agenda for Democratization*. paragraph 24. He stressed that the development of democracy depends heavily upon the individual circumstances of a society, parargraphs 21-22.
[79] *Agenda for Democratization*. paragraph 43.
[80] *Agenda for Democratization*. paragraph 75.
[81] *Agenda for Democratization*, paragraph 10.
[82] Address to the International Conference on Governance for Sustainable Growth and Equity, New York. (28 July 1997) UN Doc. SG/SM/6291. Also see his statements in 3 (4) *UN Chronicle* (1997) p. 3.
[83] *Report of the Secretary General on the Work of the Organization*. GAOR 52nd Session Supp. No. 1 (A/52/1) (hereinafter *Report of the SG* 52nd Session) paragraph 22.
[84] 'Best Defence Against 'New Global Ills' Is Society Based On Equal Opportunity, Social Justice, Human Rights, Democracy.' Address to the Academy of Social Sciences and Institute of International Relations in Shanghai, China. UN Doc. SG/SM/6234. Also *Report of SG* 52nd Session, paragraph 15.
[85] As well as a conducive and supportive economic environment, *Report of SG* 52nd Session, paragraph 42.

The positions of the respective SGs demonstrates a belief at the Secretariat level that 'the practice of democracy is increasingly regarded as essential to progress on a wide range of human concerns and to the protection of human rights.'[86] Unfortunately for the development of democracy, the views of the SG do not reflect those of the organisation as a whole. The GA has given its backing to the process of democratisation generally[87] and in relation to individual countries[88] and regions,[89] and on issues such as elections, peace[90] and education.[91] The GA's involvement with democracy is based on its interpretation of the role given to self-determination and human rights in the Charter and human rights instruments. It is exercised through the residual role of the GA in preserving international peace and security and its broad mandate to promote peace, human development and human rights.[92]

Support for democracy expressed by the GA is conditioned on respect for state sovereignty and the right of a state to determine its own social and political system,[93] which makes the organisation's support for democracy specious at best.[94] The UN's reluctance to whole-heartedly support democracy has been expressed by the Presidents of the GA. The President of 50th Assembly (1995), Diego Freitas Aramal, expressing his own support for democracy, felt the UN has made a significant contribution 'to consolidating and concretising the process of internal democratization on which many countries have embarked' and which must be stressed and welcomed.[95] The opinion of a more recent GA President, Razali Ismail (52nd Session, 1997), differs substantially as he expressed the belief that there has been a politicalization of liberal global values such as human rights, democracy and free markets which are being promoted as the answer to all of humankind's problems. In his view the UN was an inappropriate forum for

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[86] *Agenda for Democratization*, paragraph 3.
[87] 'Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies.' GA Res. 52/18 GAOR 52nd Sess., Supp. 49, p. 19.
[88] 'The situation of democracy and human rights in Haiti.' GA Res. 52/174 (13 February 1997). GAOR 52nd Sess., Supp. 49, p. 68. 'Situation of human rights in Chile.' GA Res. 44/166 (15 December 1989) GAOR 44th Sess., Supp. 48, p. 10.
[89] 'The situation in Central America: procedures for the establishment of a firm and lasting peace and progress in fashioning a region of peace, freedom, democracy and development.' GA Res. 52/176 GAOR 52nd Sess., Supp. 49, p. 70.
[90] 'Culture of peace.' GA Res. 51/101 (3 March 1997) GAOR 51st Sess., Supp. 48, p. 247.
[91] 'Human Rights Education Decade.' GA Res. 48/127 (20 December 1993). GAOR 48th Sess., Supp. 50, p. 120.
[92] D. Donoho. 'Evolution or Expediency: The United Nations Response to the Disruption of Democracy.' 29 *Cornell International Law Journal* (1996) pp. 337-338; M. Hodgson. 'When to Accept, When to Abstain: A Framework for U.N. Election Monitoring.' 25 *New York University Journal of International Law and Politics* (1992) pp. 139-145.
[93] See GA Res 52/18 which explicitly provides that UN support for democracy is based on the UN Charter and/or the specific request of an individual state.
[94] Forsythe (1997) describes the UN's approach to democracy as 'schizophrenic', p. 335.
[95] 2 (4) *UN Chronicle* (1995) p. 67.

the development of democracy as the prominent notion that exists within the organisation is not widely accepted in Asia and in a great number of other states in the world.[96]

In 1988 the GA adopted its first resolution dealing with the issue of democratic elections (outside of the Trusteeship System) which supported the idea that government is to be representative and accountable.[97] The GA's support for elections is seen as emanating from existing human rights instruments such as the ICCPR and UDHR. These resolutions stress that 'periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed' and that 'the rights of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms'.[98] Within these resolutions, the GA voices the contradictory position that all states have the sovereign right to choose and develop their own political, social and economic systems whether or not they conform to the preference of other states, that no single political system or electoral method is equally suited to all nations, and that decisions concerning the choice and development of electoral institutions must be respected. The GA has also found it necessary to counteract any resolution in support of democracy by adopting a separate resolution in support of state sovereignty and non-interference in internal affairs.[99] The GA has further limited the ability of the UN to become involved in elections by stating there is no universal need for election involvement and that such activities are to be limited to exceptional circumstances.[100] The ability for the GA to deal with issues of democracy does exist but the actual support given by member states to institutional efforts has been weak.

The GA has recently expressed more explicit support of democracy in recognising that the UN has an important role to play in the process of democratisation and that the SG should continue to improve the ability of the UN to support democracy.[101] Included in the resolution is not a statement that there shall be respect for sovereignty and the internal affairs of states but

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[96] 4 (3) *UN Chronicle* (1997) p. 13.
[97] 'Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.' GA Res 43/157 (8 December 1988) GAOR 43rd Sess., Supp. 49 p. 226. From 1990 the GA has authorised the SG to act on behalf of the organisation in the area of electoral support, see GA Res 45/150, but within the existing resources of an already impoverished organisation which demonstrates a lack of true commitment to election involvement.
[98] GA Res 43/157. For a review of the resolutions see See Y. Beigbeder. *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy*. (Dordrecht: Martinus Nijhoff, 1994) pp. 100-104.
[99] See 'Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes.' GA Res 46/130 (17 December 1991). GAOR 46th Sess., Supp. 49, p. 202.
[100] GA Res. 46/130.
[101] 'Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies.' GA Res. 53/31 (5 January 1999) paragraphs 7, 9.

only that the work of the UN must be in accordance with the Charter.[102] Unfortunately this does not offer as much progress as could be hoped since the Charter is based on respect for state sovereignty and non-intervention in domestic affairs.[103] The position of the GA towards democracy demonstrates the growth of the rhetoric of democracy in the international system. It also provides evidence of the growth of the favourable nature of democracy. At the same time, the rhetoric and evidence is countered by equal stances against issues of democracy and deferring to the control of states over the international legal process in developing an international law of democracy.

B. States and Governments - Recognition

With the exception of international human rights provisions there is no effort by international law to examine the relationship between the government and the individuals within a state. Examination of this relationship along with discussions of the overall role and purpose of the state are traditionally more of a concern with political theorists[104] with few international legal scholars in the post WW II period addressing the issue.[105] For international law states are not abstract entities but existing units necessary for organisation and representation in the international system. It is difficult to sustain any denial of the physical existence of a state for this will contradict a legal fact.[106] A state in the international system is a territorially defined unit that will continually be associated with a specific identity.[107] Governments, on the other hand, are not constant and are susceptible to various forms of change.[108] Dugard, citing Oppenheim,

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[102] GA Res. 53/31, pargraph 8.
[103] UN Charter, Article 2.
[104] Even political theory has not properly addressed the changes made to the international system by democracy, preferring to concentrate on domestic structures and mechanisms, keeping everything neatly tucked into defined borders, see D. Held. Cosmopolitan Democracy and the Global Order: Reflections on the 200th Anniversary of Kant's "Perpetual Peace"'. 20 *Alternatives* (1995) p. 420.
[105] An exception is F. Teśon. *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed. (Irvington: Transnational, 1997) pp. 81-99.
[106] Brown (1950) pp. 630-633. Also M. Peterson. 'Recognition of Governments Should not be Abolished.' 77 *American Journal of International Law* (1983) p. 41, note 31.
[107] M. Shaw. *International Law*, 4th ed. (Cambridge: Grotius, 1997) p. 305. For discussion and examples see P. Brown. 'The Legal Effects of Recognition.' 44 *American Journal of International Law* (1950) pp. 628-632; D. Devine. 'The Requirements of Statehood Re-examined.' 34 *Modern Law Review* (1971) pp. 411-412. Even this aspect is changing as recent years have seen the dissolution of states and the break-up of single states into separate independent units.
[108] Menon observes that states are perpetual and that they withstand the most radical change of government. P. Menon. *The Law of Recognition in International Law*. (Lewiston: Lampeter, 1994) p. 61. For the most part this remains true but there does exist the emerging phenomenon of collapsed states, see Chapter 6.

explains how over time conditions change and governments can be considered as losing their legitimacy based on their inability to adhere to certain principles of international law.[109]

Traditionally the only concern for international law is the determination of the existence of an entity that may be duly regarded as a state based on generally accepted legal definitions.[110] The starting point for such a determination comes from the Montevideo Convention on Rights and Duties of States,[111] which established the following criteria for statehood - a permanent population, defined territory, a government and a capacity to enter into relations with other states. These criteria are not definitive and have been subject to varying interpretations.[112]

In establishing the criteria for statehood the Montevideo Convention includes that the government must possess 'effective control' over the territory in question with no clear meaning as to what constitutes 'effective'.[113] International law has tended to not deal with how effective control is established or maintained (for some this is not a matter for international law[114]) so long as international obligations and relations may be undertaken.[115] Dugard points out, rather apologetically, that at the time of the Montevideo Convention ideas such as democracy, human rights and self-determination did not have a place in international law, so they were not considerations with regards to the meaning of effective.[116] Crawford observes that international law has never required effective to mean that governments are to be democratically elected or based on popular support.[117]

Effectiveness for international law is linked to the ability of a controlling force to exercise physical and administrative control over a population so that it is able to engage in international relations. Effectiveness has been, and remains, the predominant principle in determining whether a government meets the requirements for recognition. The means through which

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[109] Oppenhiem states that '[r]ecognition is a declaration, on the part of the recognising State, that a foreign community or authority is in possession of the necessary qualifications of states... . These qualifications are not necessarily enduring for all time. A State may lose its independence; a government may cease to be effective ... in all these cases withdrawal of recognition is both permitted and indicated.' quoted in J. Dugard. *Recognition and the United Nations*. (Cambridge: Grotius, 1987) p. 129.

[110] Higgins (1994) p. 43.

[111] 165 LNTS 19.

[112] See I. Brownlie. *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) pp. 72-79. Blix (1970) pp. 632-635

[113] Shaw (1997) pp. 304-305. Blix (1970) adds the requirement of a measure of stability, p. 622.

[114] Brownlie (1990) p. 73. During the decolonisation period once a state was established considerations concerning the effectiveness of government were not addressed by international law, see Higgins (1994) pp. 40, 43.

[115] P. Jessup. *The International Problem of Governing Mankind*. (Claremont: Claremont College, 1947) p. 57; Sen (1988) p. 519. Peterson (1983) points out that within the limits of effectiveness there is the possibility for other criteria to be established, but effectiveness remains the key, p. 37.

[116] Dugard (1987) p. 127.

effectiveness is achieved with regards to the internal makeup of a state do not matter. Any other criteria beyond effective cannot be determinative and may only assist in verifying whether or not a government is effective.[118] The principle of effectiveness for recognising governments has a long history in international law as demonstrated by the remarks of Pufendorf:

> He who actually holds the supreme sovereignty should, despite the fact that he seized it by base methods, be held for the time by the citizens as a lawful prince, so long as there is none who can lay a better claim to the sovereignty. (...) These conclusions are all the more to the point with respect to foreigners, who have no concern in examining the title whereby a man secures sovereignty, but merely follow along with the possession ... .[119]

Pufendorf's point that outsiders do not have a concern as to how effectiveness has been maintained continues to dominate debates surrounding the ability to utilise democratic criteria in determining the legitimacy of a government for the purpose of recognition.[120]

For determining whether or not effectiveness has been achieved, basic standards guiding the recognition process do exist, but these remain heavily indeterminate with little in the way of concrete agreement either in practice or principle.[121] This indeterminacy is partly due to the fluctuating practice of whether the question at hand involves the recognition of states or the recognition of governments. Some commentators feel there is no difference with state practice showing cases where they are treated as the same.[122] The practice of recognising governments has come under heavy criticism from a legal perspective since the process is deemed to be political, resulting in indeterminate situations which did not correspond with reality.[123] One commentator has even gone further to describe recognition of governments, by relying upon

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[117] Crawford (1994) p. 7; Also Binavince in St.J Macdonald (1974) p. 168; G. Joffe. 'Sovereignty and Intervention: The Perspective from the Developing World.' M. Heiberg, ed. *Subduing Sovereignty: Sovereignty and the Right to Intervene*. (London: Pinter, 1994) p. 82. But see J. Fawcett. *The Law of Nations*. (London: Penguin, 1968) pp. 38-39.

[118] Lauterpacht, 1947, 115; A. Bundu. 'Recognition of Revolutionary Authorities: Law and Practice of States.' 27 *International and Comparative Law Quarterly* (1978) p. 40.

[119] Quote from H. Lauterpacht. *Recognition in International Law*. (Cambridge: Cambridge University Press, 1947) pp. 99-100, see also 100-102 for the views of early scholars.

[120] See Lauterpacht (1947) pp. 91-92.

[121] Much of the indeterminacy focuses on the purpose of recognition as either a declaratory act or a constitutive act. On the debate between declaratory and constitutive recognition, see Lauterpacht (1947) pp. 38-66; Chen (1951) pp. 13-29. Lauterpacht feels the debate over the declarative or constitutive effects of recognition is not relevant to the question of recognition of governments, see H. Lauterpacht. *International Law: Being the Collected Papers of Hersch Lauterpacht*, vol. 1. E. Lauterpacht, ed. (London: Cambridge University Press, 1970) p. 323.

[122] Chen (1951) pp. 102-104; H. Kelsen. 'Recognition in International Law: Theoretical Observations.' 35 *American Journal of International Law* (1941) pp. 614-615; R. Higgins. *The Development of International Law through the Political Organs of the United Nations*. (London: Oxford University Press, 1963) p. 134.

character and policy, causes more difficulties than it is worth.[124] In current international practice there is a tendency not to engage in the practice of recognising governments and limiting recognition to a state entity based on the accepted criteria for statehood, which keeps the principle of effectiveness firmly in place. This has been the predominant practice of a number of states,[125] which allows for recognising the existence of a state for the purposes of international relations but with no judgment being made as to the legality or preference of the government in power.[126] Through this policy it is possible to bypass the difficult choices that come with recognising governments, preferring instead to accept a situation as a legal fact regardless of the circumstances. If a government is unfavourable all that remains is the choice as to what level of relations will be established with the government in question.[127]

State practice in the recognition of governments has seen a number of ideological shifts reflecting changes in the international system. Legitimacy of a government at one time meant that only monarchs achieving power through the proper hereditary process were recognised as legitimate rulers.[128] This practice set the precedent for a later position that a government was legitimate if it held its power through the terms of the internal laws of a state whether they were democratic or not.[129] In either case, if another power attempted to become the government through means outside the accepted internal law or customs it was considered illegitimate.[130] Following the French Revolution, the UK utilised democratic criteria for recognising governments in a number of situations where domestic constitutions called for the democratic process.[131] The belief at the time was 'to acknowledge the constitutional doctrine that the people of every country have the right to choose their own sovereign without any foreign interference'.[132] This was followed by developments in the Western Hemisphere such as the Tobar Doctrine and subsequent agreements which established that democratic criteria was to be

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[123] Lauterpacht (1947) expressed that once we get beyond the accepted criteria of statehood for recognition 'the clear path of law is abandoned and the door is wide open to arbitrariness, to attempts at extortion, and to intervention at the very threshold of statehood', p. 31.

[124] Peterson (1983) p. 31.

[125] Shaw (1997) p. 307. 'US practice has been to de-emphasise and avoid the use of recognition in cases of changes of governments and to concern ourselves with the question of whether we wish to have diplomatic relations with the new government...' (US Dept of State Bulletin 1977). See C. Warbrick. 'The New British Policy on Recognition of Governments.' 30 *International and Comparative Law Quarterly* (1980) p. 568.

[126] Higgins (1994) p. 44.

[127] Brown (1950) p. 632. Also Kelsen (1941) 'A state is, however, free to enter or refuse to enter into political and other relations with a government, that is, it may grant or refuse to the government political, but never legal, recognition.' p. 615

[128] Jessup (1947) p. 38

[129] See Binavince in St.J Macdonald (1974) p. 166.

[130] Chen (1951) p. 105.

[131] See Sen (1988) pp. 523-524.

[132] Lord Malmesbury quoted in Sen (1988) p. 524.

used for determining if a government was legitimate.[133] Through Woodrow Wilson and his efforts in the League of Nations, the idea of democracy legitimising government was forwarded to the international arena post WW I..[134] Wilson saw the goal of the international system as creating 'the reign of law, based upon the consent of the governed and sustained by the organised opinion of mankind.'[135] Wilson's hopes and aspirations were soon overcome by events in the world as governments came to power through extra-constitutional non-democratic means, and remained in power, constitutional legitimacy based on democratic ideals was no longer considered a factor for recognition.[136] The idea of effectiveness returned based on practical considerations from the perspective of the international system for it brought perceived stability and facilitated international relations.[137]

The concept of effectiveness for determining the legitimacy of government depends upon the position from which effectiveness is defined. In the practice of international law there has been a failure of adequately addressing the question 'in whose interest and for what legal purpose is government 'effective'?'[138] From the point of view of the individual, authoritarian rule is seldom effective, but for the international system it is often a practical means of ensuring stability.[139] It is recognised that in situations of authoritarian rule society is often paralysed by a fear that prevents any active opposition. Furthermore, when faced with an environment of fear, individuals are hesitant to act, so long as the basic needs for life continue to exist. International law measures the effectiveness of a government internally by the extent to which there exists the acquiescence of a society to those who are ruling. Acquiescence may be publicly expressed through various means, such as regular elections, or the functioning of a group capable of being the government with no sustained or substantial public challenges to its authority.[140] However, history has also shown that governments which control a population through force and the

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[133] See C. Cochran. 'The Development of an Inter-American Policy for the Recognition of De Facto Governments.' 62 *American Journal of International Law* (1968) pp. 462-464. For the Tobar Doctrine and related agreements such as the 1923 Treaty of Peace and Amity, see 1 *Hackworth* 186.

[134] Shaw (1997) p. 306.

[135] Address at Mount Vernon (4 July 1918) reprinted in A. Link, ed. *The Papers of Woodrow Wislon*, vol. 48. (Princeton: Princeton University Press, 1985) p. 514.

[136] See generally Lauterpacht (1947) pp. 115-140.

[137] Sen (1988) p. 525.

[138] Brownlie (1990) p. 73. Lauterpaucht (1947) points to the need for internal stability to be present otherwise the state is 'deprived of a representative and effective government, it will be lacking a vital condition of statehood', p. 28. Also see Fawcett (1968) pp. 38-39.

[139] Lauterpacht (1947) p. 137.

[140] Bundu (1978) p. 39.

widespread denial of rights usually do not hold power for long with the end result of a great deal of instability both domestically and internationally.[141]

Despite the detrimental impact of authoritarian forms of rule upon the individual and eventually to the international system, the way in which a society is ordered and the government operates have been for international law 'domestic concerns' and not necessarily a matter for legal regulation. International human rights law has begun the process of scrutinising the behaviour of governments when their action constitutes a denial of recognised rights but this scrutiny is limited to responding after the event, after the detrimental impact has been felt. The larger issue of trying to prevent abuses, through addressing the legitimacy of the government to represent and govern a society, is not addressed. Recent activity whereby governments are required to be constituted on a democratic basis has not been based on overarching concerns for the individual but as a necessary measure for the preservation of international peace and security.[142]

The idea of effectiveness remains the leading factor in recognising governments for it provides a practical means of dealing with changes in the international system and avoiding ideological differences. In response to the changes occurring in the international system international law must adjust to changes and redefine effectiveness. Roth concludes that while there may be movement beyond the traditional understanding of effective control there has not been established the requirement of democratic legitimacy for recognition.[143] An effective government must be recognised as one that adequately represents and is accountable to the society which occupies the territory it represents. There can no longer be the minimal requirement of having control over the society and territory through any possible means. Attempts to adopt any criteria beyond effectiveness in determining the legitimacy of a government may be criticised for creating more confusion than already exists in this area of international practice. It is also feared that any criteria beyond effectiveness becomes too subjective and will mean that recognition will be accorded purely on the basis of political preferences and not objective legal criteria. These claims cannot stand-up as barriers to the development of an international law of democracy requiring governments to be more than just 'effective'. If the law is to remain confined to the exclusive domain as states as a repressive tool

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[141] Chen (1951) forwards this idea in support of basing recognition on principles of legitimacy, p. 111.
[142] Requirements for democratic governance with respect to peace and security were applied in the cases of Haiti (Security Council Resolutions S/RES/1007 (1995) and S/RES/1048 (1996)) and with Yugoslavia (General Framework Agreement for Peace in Bosnia and Herzegovina, 35 *International Legal Materials* (1996) p. 75).
[143] Roth (1997) p. 364.

for control then perhaps effectiveness is all that is necessary. However, the law claims to have moved beyond this, movement which now must be followed up with substantive development.

C. Election Involvement

In Chapter 2 it was emphasised that elections alone are not indicative of the existence of democracy. At the same time elections do provide an indicator of democracy in practice if those elections are conducted on a free and fair basis and extend to all levels of society and governance. The UN has been involved in elections through the process of decolonisation and with the Trusteeship System, but this action has always been 'premised on and limited by an overriding deference to state sovereignty.'[144] From 1956 to 1990 the UN had a part in thirty elections, plebiscites, or referenda which occurred in territories covered by the Trusteeship system.[145] The objective of the system was the 'progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned'.[146] It is questionable to what extent this objective was achieved in light of the subsequent development of many of the territories involved, but once a territory attained independence the continuation of democracy was not a matter for the UN. Cassese views the practice of organising and observing elections during this period as an attempt by the UN to live up to its expressed principles but he questions to what extent the states concerned felt legally bound to have the UN involved.[147]

More recently governments have requested UN involvement in elections but the UN has not agreed to become involved in all requests. When Romania requested the UN to participate in its first elections since the overthrow of communist rule the SG declined saying the UN did not become involved in 'internal elections.'[148] The involvement of the UN in elections is based on its own internal rules and not any international legal obligations. In the case of the Trusteeship system the UN provided the basic legal structure for the process making its involvement inevitable.[149] In the case of any other state, involvement must have the invitation of the state authorities involved.[150] For the UN to become involved in national elections after an invitation

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[144] Donoho (1996) p. 340.
[145] 'Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.' GA Res. 46/137, GAOR 46th Sess., Supp. 49, p. 365.
[146] UN Charter, Article 76 (b). Paragraph c includes respect for human rights and fundamental freedoms.
[147] Cassese (1995) pp. 78-79.
[148] Hodgson (1992) pp. 170-1.
[149] UN Charter, Articles 83 and 85.
[150] See A. Rigo Sureda. *The Evolution of the Right of Self-Determination: A Study of United Nations Practice.* (Leiden: Sijthoff, 1973) p. 313.

has been accepted certain criteria are to be met - there must be an international dimension, the UN is to be involved in the entire electoral process, and all the major political groups involved must agree to UN participation.[151] These criteria do not appear to be stringent and depend upon the situation as exceptions were made with Haiti demonstrating the flexibility of the term 'international dimension'.[152] Involvement of the UN in elections has also become part of peacekeeping operations as authorised by the Security Council, as with Angola, Namibia and Cambodia.[153] This overcomes the invitation issue as it involves directly mandated action authorised by the SC which in turn expresses support for democracy but based on primary considerations of peace and security.[154]

The involvement of the UN in elections has been limited because of resource issues[155] and due to the tensions which arise between the implicit show of support for democracy that election involvement entails and the opposing principle of state sovereignty with the belief that each state is free to decide its own domestic structure.[156] Despite the UN's effort not to directly support the idea or practice of democracy while engaging in electoral activities, governments have still criticised the UN's involvement in this area. China, Cuba and Mexico have all declared that electoral systems and the conducting of elections are internal affairs established in accordance with internal legislation based on the character and history of the individual state. They have stressed that the UN does not have the mandate or authority to intervene in internal matters including electoral matters.[157] This position fails to realise that the present level of UN involvement in elections has only occurred through the invitation of a government or through Security Council action, both of which are deemed legitimate in international law and do not bring into question violations of sovereignty or intervention into domestic affairs.[158] In attempting to promote democracy through election support the UN has generated some general agreement on the issue but in the end, actual action and belief in its legitimacy is left up to states which in turn will determine the future of the UN's support for democracy.[159]

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[151] For a full discussion of this criteria see Stoelting (1992) pp. 386-393.
[152] Stoelting (1992) pp. 388-9.
[153] N. White. *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security.* (Manchester: Manchester University Press, 1997) pp. 196-199.
[154] But see Stoelting (1992) p. 388 concerning the acceptance of this point.
[155] White (1997) p. 273.
[156] J. Ebersole. 'The United Nations' Response to Requests for Assistance in Electoral Matters.' 33 *Virginia Journal of International Law* (1992) p. 97.
[157] See Beigbeder (1994) p. 101.
[158] Hodgson (1992) p. 148; Beigbeder (1994) p. 36.
[159] See the ICJ statements in *Military and Paramilitary Activities in and Against Nicaragua.* (Nicaragua v United States of America) Judgment, I.C.J. Reports 1986, pp. 121-122. The UN's position on elections depends upon the organisation defining its goals as to whether it will explicitly support the democratic process, see M. Evans and D.

D. COERCIVE MEASURES AND DEMOCRACY

Due to the state-centric nature of international law support for democracy through recognition and election monitoring attract criticism for being violations of the principle of non-intervention in domestic affairs.[160] Further forms of intervention include the use of force and sanctions with are direct forms of intervention in support of democracy.[161] International law has witnessed various levels of unilateral or loosely collective measures through public condemnations, economic sanctions and the threat and actual use of force in support democracy. The recent use of coercive measures with regards to Iraq and Haiti has led to claims that there now exists a justification for the use of coercive measures to enforce democracy.[162] It has also spurred debate over whether the use of coercive measures, especially the use of force, in the absence of any form of agreed institutional framework is justified, even if it has the purpose of enhancing democracy or human rights.[163]

The opinion of scholars on this issue varies. Reisman favours the use of force, even unilaterally, in situations to restore or preserve democracy based on the idea that such measures are acceptable when they entail allowing for the exercise of human rights or self-determination.[164] Teśon has strongly defended the position that the use of force is permissible to alleviate human suffering but he draws a line at the preservation of democracy for he feels that the use of force to restore democracy is disproportionate to the problem involved.[165] Schachter points out that the unilateral use of force in support of democracy is often based on policy decisions, meaning it will not work in practice since there exists a great deal of disagreement over meanings allowing policy inspired action to be abused under the guise of law.[166]

Olidge. 'What Can the Past Teach the Future? Lessons from Internationally Supervised Self-Determination Elections, 1920-1990.' 24 *New York University Journal of International Law and Politics* (1992) pp. 1752-55.

[160] See generally, K. Asante. 'Election Monitoring's Impact on the Law: Can it be Reconciled with Sovereignty and Non-intervention?' 26 *New York University Journal of International Law and Politics* (1994) p. 235.

[161] D. Acevedo. 'The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy.' in L. Damrosch, ed. *Enforcing Restraint: Collective Intervention in Internal Conflicts.* (New York: Council on Foreign Relations, 1993) p. 120.

[162] See L. Fielding. 'Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy.' 5 *Duke Journal of Comparative. and International Law* (1995) p. 329.

[163] Higgins (1994) pp. 251-253.

[164] See M. Reisman. 'Article 2 (4) The Use of Force in Contemporary International Law.' 78 *Proceedings of the ASIL* (1984) pp. 74-87 and 'Coercion and Self-Determination: Construing Charter Article 2 (4).' 78 *American Journal of International Law* (1984) pp. 642-645.

[165] Tesón (1997) pp. 305-308.

[166] See O. Schachter. 'The Legality of Pro-Democratic Invasion.'' 78 *American Journal of International Law* (1984) pp. 645-650 and 'In Defense of International Rules on the Use of Force.' 53 *University of Chicago Law Review* (1986) pp. 143-146.

The use of force is generally prohibited in the international system by Article 2 (4) of the UN Charter with possible exceptions involving cases of self-defence and involvement in collective security exercises authorised by the UN Security Council.[167] The prohibition of the unilateral use of force is considered a 'primary rule of the international system' that cannot be disregarded by other concerns.[168] Collective measures for the use of force have gained legitimacy through the UN in situations considered to be 'threats to the peace'.[169] Determination as to what constitutes a threat to the peace has not been consistent due to political considerations but has rarely included considerations of democracy and human rights (see below).[170] As Higgins notes the Charter does not allow for the use of force in situations of human rights violations unless the effect of the violations are seen as a threat to the peace.[171] The inability of the UN to act in this sphere has perhaps created more difficulties than it has tried to avoid for as Schachter has recognised; 'The weakness and politicisation of collective institutions enhance the danger that ideological confrontation will turn into clashes of military force.'[172]

Events in Haiti stand as an example of the institutional use of force based on considerations of democracy and human rights.[173] However, in authorising the use of force, the SC made it clear that human rights and democracy were not the primary consideration for action, only a residual issue.[174] There does exist the emerging acknowledgement of human suffering as constituting a threat to the peace but this has been a selective process with limited application and initiative on behalf of the SC demonstrating that state interests remain the primary concern for the international system.[175] The lack of sustained practice beyond Haiti demonstrates the

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[167] Generally, H. McCoubrey and N. White. *International Law and Armed Conflict*. (Dartmouth: Aldershot, 1992).
[168] McCoubrey and White (1992) p. 116, save for the situations where another peremptory rule of international law is violated, pp. 116-123.
[169] UN Charter, Article 39.
[170] McCoubrey and White (1992) p. 130; White (1997) p. 47.
[171] Higgins (1994) pp. 254-257. As was the case in Haiti, see R. Cryer. 'The Security Council and Article 39: A Threat to Coherence.' 1 *Journal of Armed Conflict Law* (1996) pp. 180-181.
[172] Schachter (1986) p. 144.
[173] See SC Res/1007 (1995) and SC Res/1048 (1996). Democracy was also a consideration for the SC with regards to events in Burundi, SC Res/1040 (1996), but it was two years before any action was taken, see White (1997) p. 172.
[174] Donoho (1996) comments that the action of the SC in Haiti appears to be a strong commitment to democracy but in reality only 'created a legally and politically ambiguous precedent for future UN efforts to preserve or restore democratic governance.' p. 331. Falk's opinion on Haiti is that it only provides an indeterminate precedent for democracy in international law, see R. Falk. 'The Haiti Intervention: A Dangerous World Order Precedent for the UN.' 36 *Harvard International Law Journal* (1995) pp. 353-355. But see Fielding (1995) who uses Haiti as a 'good model for intervention', p. 363 and Pierce (1996) who says that the SC statement does not matter as the action taken has established a precedent, p. 506.
[175] It is recognised that the SC did make a move toward human values by declaring support and action for human rights and democracy, White (1997) p. 58. But this has been considered a limited anomaly, see M. O'Connell. 'Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy.' in Charney (1997) pp. 443-444.

acceptance of the collective use of force, even if sanctioned by the UN, for the preservation of democracy appears to be an unlikely development in the near future.[176]

The US has been the primary unilateral actor in using justifications of democracy and human rights regarding the use of force.[177] The position of the US corresponds with those favouring the liberal internationalist position that the international system is determined by liberal laws which in turn allows for action to be taken when those laws are violated.[178] The idea of the unilateral use of force in the name of democracy, which is understood as a community value, is not favourable as it depends upon an individual state defining which community values are to be protected, how they are to be protected and under what circumstances. Concerning the actions of the US in Nicaragua, the ICJ declared that even if a state has entered into treaty arrangements calling for an obligation to democracy, it is up to the institution to ensure implementation, not individual members.[179]

Another form of coercive measure used to 'enforce' democracy and/or human rights is the implementation of sanctions.[180] The use of sanctions as an international enforcement measure has gained greater popularity recently as sanctions have been termed the 'liberal alternative to war'.[181] The effectiveness of sanctions depends on being able to target those who are actually responsible for the act giving rise to the imposition of sanctions.[182] As with the use of force in support of democracy, the use of sanctions is equally indeterminate in both theory and practice with no firm evidence to support that sanctions are effective or even acceptable.[183] The use of sanctions raises further complication as it is often difficult to get states to participate collectively

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[176] For a discussion on the role of the UN in supporting democracy through deterrence, see J. Moore. 'Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security and War Avoidance.' 37 *Virginia Journal of International Law* (1997) p. 811.

[177] B. Roth. 'Governmental Illegitimacy Revisited: 'Pro-Democratic' Armed Intervention in the Post-Bipolar World.' 3 *Transnational Law and Contemporary Problems* (1993) p. 481.

[178] K. Smits. 'International Identity Construction and the Liberal Peace.' 7 *Pacifica Review* (1995) p. 53. But see Roth (1997) who feels '[m]ischief frequently results' when interference for democracy occurs, p. 367.

[179] Nicaragua case, ICJ Reports (1986) p. 122.

[180] On the use of sanctions see O. Elagab. *The Legality of Non-forcible Countermeasures in International* Law. (Oxford: Clarendon, 1988); G. Hufbauer, J. Schott, and K. Elliott. *Economic Sanctions Reconsidered*, 2nd ed. History and Current Policy and Supplemental Case Histories. (Washington, DC: Institute for International Economics, 1990).

[181] R. Pape. 'Why Economic Sanctions Do Not Work.' 22 *International Security* (1997) p. 90; G. Lopez and D. Cortright. 'Economic Sanctions and Human Rights: Part of the Problem or Part of the Solution?' 1 (2) *International Journal of Human Rights* (1997) p. 1

[182] Lopez and Cortright (1997) p. 6. They create a 'smart sanctions theory' where sanctions target weakness of problem and minimise humanitarian impact, pp. 9-22. Also see the criteria established by M. Doxey. 'International Sanctions: A Framework for Analysis with Special Reference to the United Nations and Southern Rhodesia.' 26 *International Organization* (1972) pp. 532-533.

[183] M. Krinsky and D. Golove, eds. *United States Economic Measures Against Cuba: Proceedings in the United Nations and International Law Issues*. (Northampton: Aletheia, 1993) pp. 135-163, on the subjective nature of unilateral sanctions as enforcement see the comparison with US action against Cuba and China,

to achieve a common goal.[184] International organisations can call on member states to impose actions but there is little preventing a state from ignoring the implementation of sanctions as events in South Africa and Haiti have proven.[185] In the final analysis there is no guarantee sanctions will provide a solution or the achievement of a desired goal. Sanctions upon Iraq through the UN, and unilaterally upon Cuba by the US, have been in place for a considerable length of time and there appears to be no progress made, while at the same time support for the sanctions is deteriorating.[186] Pape believes that sanctions are an ineffective tool for forcing compliance due to the structure of the international system and the modern state making the impact of sanctions upon the targeted transgressor minimal at best.[187]

The use of sanctions in support of democracy and the impact they have creates a paradox for international law as sanctions are used to force compliance by a government who is seen to be violating legal or moral standards. In turn, the imposition of sanctions often results in the rights of individuals in the targeted state to be violated, as their basic needs cannot be met as a direct result of sanctions.[188] It is argued that sanctions have the effect of levelling the playing field between an oppressive regime and its opposition allowing the opposition to exert pressure for changes.[189] More commonly, the imposition of sanctions has the negative result of causing greater harm to the population who is not responsible for the transgression, sometimes actually strengthening the position of the targeted government.[190] The imposition of sanctions is primarily a political decision, with their impact being a non-justiciable matter. This leaves the individuals who are adversely affected with no recourse to the law for the protection of their rights creating the contradictory situation of disregarding the rights of individuals in order to gain compliance from a government.[191] This contradiction is intensified when sanctions are seen as a failure and force is then used to gain compliance, as in Iraq and Haiti.[192] The use of

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[184] In 1982, the EC imposed sanctions on Turkey when the military took control of the government, suppressing both democracy and human rights. The EC based their decision on the necessity of democracy evolving in Turkey, which the take-over did not do. The US on the other hand supported the generals for being able to bring law and order to the country. See Hufbauer et al (1990) Supplemental Case Histories, pp. 532-536.

[185] Hufbauer et al (1990) Supplemental Case Histories, p. 226 for South Africa, p. 598 for Haiti.

[186] B. Bourtros-Ghali. 'Supplement To An Agenda For Peace: Position Paper Of The Secretary-General On The Occasion Of The Fiftieth Anniversary Of The United Nations.' UN Doc.S/1995/1, paragraph 68.

[187] Pape (1997) pp. 106-108. See also K. Elliot. 'The Sanctions Glass: Half Full or Half Empty?' 23 *International Security* (1998) pp. 59-60.

[188] See K. Tomaševski. *Between Sanctions and Elections: Aid Donors and their Human Rights Performance*. (London: Pinter, 1997) pp. 215-225 and pp. 218-219 where she points out that sanctions do not differentiate between the rulers and the ruled.

[189] Lopez and Cortright (1997) p. 1-3. See Pape (1997) who argues how authoritarian rulers are more able to turn the blame for sanctions around on to the opposition, p. 107.

[190] Damrosch in Damrosch, ed, pp. 274-5. Also Boutros-Ghali 'Supplement to An Agenda For Peace' paragraph 70.

[191] Tomaševski (1997) pp. 218, 223.

[192] See Hufbauer et al (1990) Supplemental Case Histories, pp. 573-577. Also Pape (1997) p. 110.

sanctions against Iraq and Haiti show that the liberal's 'alternative to war' is not humane and is difficult to justify due to the human costs involved.[193]

E. GOOD GOVERNANCE[194]

The concept of good governance is significant for the development of an international law of democracy for it recognises that the political, socio-economic and cultural spheres of society are interrelated.[195] Good governance is understood in a broad sense to include the form of the political authority in a state, how that authority is exercised in all areas of society and that it is done so efficiently, effectively, and equitably.[196] Good governance moves beyond traditional understandings of the functions and purpose of political power to ensure the creation and implementation of policies which reflect the needs and desires of a society through democratic decision making and wide based participation in all areas of governance.[197] It looks to develop economic and social planning with rights and obligations in society for both individuals and the government so that society is able to build and sustain its own institutions and structures which reflect and preserve those values and norms accepted as legitimate.[198] The inclusion of issues of good governance in international legal agreements has been described as 'essential, and one of the most sensitive elements of the permanent sovereignty of states.' [199]

The UN first approached good governance through SG Bhoutros-Ghali's report *An Agenda for Development* where he expressed the importance of democracy in the process of development;

> because democracy provides the only long-term basis for managing competing ethnic, religious, and cultural interests in a way that minimizes the risk of violent internal conflict. They are linked because democracy is inherently attached to the

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[193] Elliot (1998) p. 50. Even if sanctions are lacking in bringing about real results they do have a symbolic effect of demonstrating support for human rights or democracy which does contribute to the rhetoric of democracy, see Lopez and Cortright (1997) p. 5.

[194] Generally, K. Ginther, et al., eds. *Sustainable Development and Good Governance*. (Dordrecht: Martinus Nijhoff, 1995); F. Weiss, et al., eds. *International Economic Law with a Human Face*. (The Hague: Kluwer, 1998).

[195] A similar idea underlies the concept of the right to development, see 'Declaration on the Right to Development' (4 December 1986). GA Res. 41/128, GAOR 41st Sess., Supp. 53, p. 186, Articles 1 and 2.

[196] World Bank. *Development and Governance*. 1992, pp. 3-6. The Bank states that the first element, the form of authority, is outside its mandate, p. 58; Concerning the Bank's mandate and democracy and human rights see the relevant works in I. Shihata. *The World Bank in a Changing World: Selected Essays*, vols. 1 & 2. (Dordrecht: Martinus Nijhoff: 1991, 1995).

[197] A. Tolentino. 'Good Governance through Popular Participation in Sustainable Development.'in Ginther (1995) who calls it 'a people centred approach', pp. 137-149. Also *Agenda for Development*, paragraph 59.

[198] H. Okoth-Ogendo. 'Governance and Sustainable Development in Africa.' in Ginther (1995) pp. 107-108.

[199] P. van Themaat. 'Ten Years after the ILA Declaration of Seoul.' in E. Denters and N. Schrijver, eds. *Reflections on International Law from the Low Countries, in Honour of Paul de Waart*. (The Hague: Martinus Nijhoff, 1998) p. 23.

> question of governance, which has an impact on all aspects of development efforts. They are linked because democracy is a fundamental human right, the advancement of which is itself an important measure of development. They are linked because people's participation in the decision-making processes which affect their lives is a basic tenet of development.[200]

He also described how democracy and development are to be viewed as a continual process and in the absence of democracy 'development will remain fragile and be perpetually at risk'.[201]

The ideas in the *Agenda for Development* have been put into motion on a global scale by the UNDP[202] who views good governance as an essential element for society. Its importance lies in its efforts to create 'a conducive environment for people, individually and collectively, to develop their full potential and to have a reasonable chance of leading productive and creative lives in accord with their needs and interests.'[203] To achieve this goal it is necessary to ensure that '[p]olitical, social and economic priorities are based on a broad consensus in society and that the voice of the poorest and most vulnerable are heard in the decision-making over allocation of development resources'.[204] The UNDP's view of good governance and the development process takes a broad view incorporating areas of health, education, standards of living, political freedoms, human rights and self-respect.[205]

International economic organisations, such as the World Bank and the IMF, have begun adopting measures of good governance into their workings. The World Bank has been at the forefront of developments in this field directly addressing the issue in 1989 with a report on sub-Saharan Africa and a 1991 report entitled *Governance and Development*. Through these reports the Bank's position on democracy and good governance are set out establishing the important point that the Bank's concern with good governance extends only to those areas conducive to economic development and the Bank's goals. In line with the Bank's Articles of Agreement

> [t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the

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[200] *Agenda for Development*, paragraph 120.
[201] *Agenda for Development*, paragraphs 119, 122.
[202] The UNDP has produced a great deal of practice and information in this area, see their internet site [http://www.undp.org/toppages/govern/govframe.htm].
[203] UNDP. *Human Development Report (1990)*. (Oxford: Oxford University Press, 1990) p. 1.
[204] F. Weiss and P. de Waart. 'International Economic Law with a Human Face: An Introductory View.' in Weiss (1998) p. 9.
[205] *Human Development Report (1990)* p. 1.

> member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighted impartially ... .[206]

The Bank recognises that a strict interpretation of what constitutes the economic sphere is not viable, which explains its concern with good governance, but it must be remembered that governance has not become the Bank's primary purpose.[207] The Managing Director of the IMF has equally expressed support for issues of good governance, but as with the Bank, only to the extent to which good governance is related to strategies for sustained growth and development and allow for a state to carry out agreed adjustment programmes.[208]

There is nothing in the practice of either the IMF or World Bank precluding either organisation from taking into account issues related to human rights and democracy. They cannot, however, be expected to make these issues their overriding concerns as their principles and purposes are not based upon them.[209] In carrying out their specific functions they should take into account concerns for human rights and democracy since these are integral to social and economic development and the lack of respect for human rights and democracy will prove detrimental to development programmes.[210] The problem these organisations face in trying to utilise criteria based on respect for democracy and human rights is that those states which rely most heavily on the support of the Bank or IMF are usually states which have poor records for respecting democracy and human rights. By placing requirements of democracy and human rights upon states as a condition for assistance many may be disqualified from receiving support, a move likely to have a detrimental impact on long-term development and respect for democracy and human rights.[211] It would be difficult from an economic perspective to rely upon stringent criteria of democracy and human rights in determining whether or not a state is eligible for financial assistance. At the same time it is necessary to have institutional structures in place and functioning appropriately to allow for the successful implementation of economic programmes. Undoubtedly, the ability of economic restructuring programmes and support to be successful in the long-term depends upon the relevant institutions working within a framework that looks to achieve respect for democracy and human rights even if that is not the purpose of

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[206] Article 3. Articles of Agreement (as amended 16 February 1989). International Bank of Reconstruction and Development. (Washington: The Bank, 1993).
[207] N. Moller. 'The World Bank: Human Rights, Democracy and Governance.' 15 *Netherlands Quarterly of Human Rights* (1997) pp. 22-23, 27-28.
[208] J. Gold. *Interpretation: The IMF and International Law*. (London: Kluwer Law International, 1996) pp. 503-504.
[209] An exception is European Bank for Reconstruction and Development, see their *Annual Report 1997*, p. 3.
[210] E. Denters. *Law and Policy of the IMF Conditionality*. (The Hague: Kluwer, 1996) pp. 175-176.
[211] See Denters (1996) 176-177; Moller (1997) pp. 44-45.

the institutions themselves.[212] As it stands, the activities of these institutions are directly related to human rights concerns, democratic participation and the overall structure of a government but within a certain economic context that has priority.[213]

Ideas of good governance have also been included in the development of global environmental agreements and social programmes. The 1992 Rio Declaration[214] on the environment includes measures for good governance through recognising that '[d]evelopment is a comprehensive economic, social, cultural and political process, which aims at the constant improvement and well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation'.[215] Principle 10 of the Declaration expresses that environmental issues are best handled with participation of all concerned at all levels which includes wide access to information, the opportunity to participate in decision making, effective judicial and administrative proceedings provided. Principle 22 makes explicit that these practices are to be applied to indigenous people and other local communities to ensure their active participation.[216]

The Copenhagen Declaration on Social Development[217] expresses a commitment to social development based on human dignity, human rights and democracy. In the Framework for Action, principle f calls on governments to '[p]romote democracy, human dignity, social justice and solidarity at the national, regional and international levels; ensure tolerance, non-violence, pluralism and non-discrimination, with full respect for diversity within and among societies.' The Framework also stresses the need for 'transparent and accountable governance' in all areas of society[218] to which the signatories declare their commitment and promise to implement these practices into their societies.[219]

Due to the relatively recent emergence of good governance as a guiding principle of international activity adherence to its principles remain primarily at the rhetorical level. Emphasis on good governance has been criticised as a new form of imperialism as all

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[212] Shihata (vol. 2, 1995) p. 54

[213] See Shihata (vol. 1, 1991) who sees areas such as the civil service, the legal system, and public spending as direct concerns for the Bank's mandate, pp. 85-93, and human rights such as development, freedom from poverty, health, education, women, and refugees as directly part of the mandate, pp. 97-134.

[214] Reprinted in 31 ILM (1992) 818.

[215] Preamble.

[216] On the importance of wide based participation in environment issues B. Boer. 'Implementation of international Sustainability Imperatives at a National Level.' in Ginther (1995) pp. 124-125. M. Pinto. 'The Legal Context: Concepts, Principles, Standards and Institutions.' in Weiss (1998) p.15.

[217] UN Doc. A/CONF./66/9, reprinted in 2 IHRR (1995) p. 736.

[218] Paragraph n.

[219] Commitment 1.

encompassing theories and singular practices are applied without taking into account the individual circumstances of societies.[220] In some cases this criticism is well levied and evidenced by the use of sanctions and conditionality in relation to development aid as states and organisations impose punishments on receivers for not meeting certain criteria.[221] Instead of good governance being used to further common concerns, it is may also be used to impose specific forms of behaviour on a government and society without full consideration being given to the individual circumstances those states and societies face.[222] Shihata warns of the negative impact often caused by 'external experts syndrome', as organisations will try to apply ideas and practice from outside upon a society.[223] He further stresses the need to incorporate, as far as possible, local knowledge and participation in projects and programmes.[224] The UNDP rightly notes that when it comes to development '[d]emocracy is a native plant - it may wilt under foreign pressure.'[225]

Ensuring that those who are most affected by development projects are able to participate will help to alleviate criticisms of imperialism as well as be beneficial in the long term.[226] The SG has observed that a single model will not work

> but, broadly speaking, and making due allowance for cultural differences, good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the meaningful participation of all citizens in the political processes of their countries and in decisions affecting their lives.[227]

Effective and sustainable development relies upon a political system that allows for proper decision making and the inclusion of society.[228] The World Bank's report on sub-Saharan Africa in 1989 identified the problem clearly:

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[220] P. Blunt. 'Cultural Relativism, "Good" Governance and Sustainable Human Development.' 15 *Public Administration and Development* (1995) pp. 1-9. J. Cahn. 'Challenging the New Imperial Authority: The World Bank and the Democratization of Development. 6 *Harvard Human Rights Journal* (1993) p. 164. Sørenson notes that 'the debate on democracy in the Third World is both one-dimensional and based on Western concept.' G. Sørenson. 'Conditionality, Democracy and Development.' in O. Stoke, ed. *From Aid to Political Conditionality*. (London: Frank Cass, 1995) p. 392.

[221] P. Nherere. 'Conditionality, Human Rights and Good Governance: a Dialogue of Unequal Partners.' in Ginther (1995) p. 290-291.

[222] Ginther in Ginther (1995) p. 157.

[223] Shihata (vol. 1, 1991) p. 60.

[224] Shihata (vol 2, 1995) p. 60. Also UNDP. *Human Development Report (1991)* pp. 71-72

[225] UNDP. *Human Development Report (1992)* p. 25.

[226] See Moller (1997) pp. 34-35.

[227] *Report of the SG* 52nd Session, paragraph 22.

[228] K. Hossian. 'Evolving Principles of Sustainable Development and Good Governance.' in Ginther (1995) p. 20. In turn this requires changes to the constitutional structures of society to be conducive to the furtherance of these issues see

> Underlying the litany of Africa's development problems is a crisis of governance. By governance is meant the exercise of political power to manage a nation's affairs. Because countervailing power has been lacking, state officials in many countries have served their own interests without fear of being called to account.[229]

The principles underlining good governance are welcomed so long as the negative side of using good intentions for self-interested gains are minimised.[230] Issues of good governance should not be seen as being exclusive to developing countries, but as guidelines which should direct developed democracies as well as good governance 'assures that due consideration will be given to public values when decisions are made.'[231]

IV. International Human Rights Law and Democracy

The idea of good governance incorporates a view of democracy discussed in Chapter 2 as it stresses the need to look beyond political activity to incorporate other areas of society encouraging wide based and active participation by individuals in matters important to them.[232] Good governance works on the idea that there exists bad governance detrimental to individuals, society and the international system as a whole. Bad governance encompasses the denial of human rights, both civil and political as well as economic and social, inefficiency and corruption in the administration of government, lack of legal protection, political repression and, in general, tyranny and authoritarianism which inhibits self-determination for the individual and society.[233] An indicator of good or bad governance is the extent to which individuals are able to participate in the development of society.[234] The large amount of textual support for participation regarding good governance has not clarified the issue leaving any 'right to participation' indeterminate and possessing only 'the appearance of legal protection'.[235] Participation is closely linked to the issue of information and knowledge which allows individuals to be active and effective participants in society for '[p]eople are the best advocates of their own interests'.[236]

Ginther in Ginther (1995) pp. 150, 154-157, and 'Development Partnerships and Development Research: From Advocacy to Action/Reflections on Method.' in Weiss (1998) pp. 133-157.

[229] World Bank. *Sub-Saharan Africa; from Crisis to Sustainable Growth*. (1989) pp. 60-61.

[230] UNDP. *Human Development Report (1991)* pp. 75-76.

[231] Tolentino in Ginther (1995) p. 141. See OECD. *Orientations on ParticipatoryDevelopment*, paragraphs 2-3.

[232] UNDP. *Human Development Report (1992)* p. 27; Moller (1997) p. 27.

[233] K. Ginther. 'Sustainable Development and Good Governance: Development and Evolution of Constitutional Order.' in Ginther (1995) p. 157.

[234] C. Taylor. 'The Right to Participation in Development Projects.' in Ginther (1995) p. 228.

[235] See Taylor in Ginther (1995) p. 209-222.

[236] UNDP. *Human Development Report (1991)* p. 71. See Tolentino in Ginther (1995) p. 141-145, also P. Sands and J. Werksman. 'Procedural Aspects of International Law in the Field of Sustainable Development: Citizens' Rights.' in Ginther (1995) p. 178-204.

Concerning the issue of participation, international human rights law provides a strong basis for an international law of democracy covering the political, socio-economic and cultural spheres of society and the individual.[237] It is through human rights law that international law has begun to question how governments are organised and the basis upon which societies are ordered.[238] International human rights law provides the legal framework for the autonomy of individuals and groups by limiting the arbitrary use and abuse of power. It also provides a strong basis for participation in governance and society.[239] Participation is an essential issue as it goes to the core of the exercise of political and economic power in a state, it is a direct challenge to the exclusive position of a government.[240] More so than other human rights, participation is dependent upon a government for its validity but for it to be effective it needs to have a legal source outside and above the state.[241]

In examining the right to participation it is imperative that there is no arbitrary discrimination in this area, or in the application of other rights, as this would undermine their purposes completely.[242] The UDHR expounds that '[e]veryone is entitled to all of the rights and freedoms set forth in this Declaration, without distinction of any kind.'[243] Discrimination in regards to the practice of democracy and human rights is a reality of society and at the same time the most difficult obstacle to overcome.[244] If democracy and human rights are to be effective there can exist no reason for excluding individuals or groups based on arbitrary determinations 'which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'[245]

A. Protecting Participation - the UDHR and ICCPR

In laying the foundation for democratic participation the UDHR sets forth in Article 21 that

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[237] This allows international law's position on democracy to be more substantive rather than procedural, see G. Fox and G. Nolte. 'Intolerant Democracies.' 36 *Harvard International Law Journal* (1995) p. 38.

[238] See T. Farer. 'Collectively Defending Democracy in a World of Sovereign States.' 15 *Human Rights Quarterly* (1993) p. 717.

[239] H. Hannum. 'Rethinking Self-Determination.' 34 *Virginia Journal of International Law* (1993) pp. 57-58.

[240] Steiner (1988) pp. 84-85.

[241] Asante (1994) pp. 283-4.

[242] M. Banton. *Discrimination*. (Buckingham: Open University, 1994), 5. Kuwait's reservation to Article 25 of the ICCPR is an example, it reads 'Article 25 (b) The provisions of this paragraph conflict with Kuwaiti electoral law, which restricts the right to stand and vote in elections to males. It further declares that the provisions of the article shall not apply to members of the armed forces or police.' *Multilateral Treaties (1997)* p. 126

[243] Article 2, UDHR.

[244] Banton (1994) notes that 'discriminatory acts do not occur in isolation; they are parts of patterns of behaviour towards women, blacks, disabled people, etc., and they vary greatly from one culture to another.' p. 8.

[245] ICERD, Article 1 (1), 660 UNTS 195.

1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2) Everyone has the right to equal access to public service in his country.
3) The will of the people shall be the basis of the authority of government: this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or equivalent free voting procedures.[246]

Rosas sees this Article as setting the 'minimum requirements for the structure and functioning' of the state in that government must be based on will of the people and there must be democratic participation in public life.[247] Reisman views Article 21 as moving popular sovereignty from an aspiration to setting specific criteria for determining if governments conform with what he perceives as accepted international standards of democracy.[248] Robertson feels that Article 21 sets out 'the basic or minimum political rights that have to be protected in any democratic order', which implies the pre-existence of a democratic order.[249]

Undoubtedly Article 21 aspires to set out basic standards to be achieved for an international law of democracy by placing the basis of authority with the people. It further establishes that those who are entrusted to manage and control the affairs of a society must be accountable and not able to act on their own personal needs and desires, that representation is effective and participation by individuals is not limited to the vote.[250] The weakness of Article 21 is that it is an aspiration, one of great moral worth but with little substantive legal force in establishing democracy as a requirement of international law. Cerna believes that from the moment the UDHR was accepted as a resolution a right to democracy existed. Her own observation that it has been honoured more in breach than adherence demonstrates the extent to which it has not been accepted as a legally binding norm.[251]

The ICCPR, as a legally binding document, contains numerous rights normally associated with, and essential to, democracy.[252] Concerning participation Article 1 (common with the ICESCR) and Article 25 are starting points. Article 1 reads (in part)

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[246] For discussion of the travaux prepartoires, see A. Rosas. 'Article 21.' in A. Eide at al, eds. *The Universal Declaration of Human Rights: A Commentary*. (Oslo: Scandinavian University Press, 1992) pp. 301-305.
[247] Rosas in Eide (1992) p. 299.
[248] Reisman (1990) pp. 867-869.
[249] M. Robertson, ed. *Human Rights for South Africans*. (Oxford: Oxford University Press, 1991) p. 149.
[250] Robertson (1991) p. 146.
[251] Cerna (1995) p. 289.
[252] Nowak (1993) pp. 436-437.

1) All peoples have the right to self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.

The HRC has linked the requirements of participation in Article 25 and self-determination in Article 1. In the General Comment on Article 1 self determination is said to be 'of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.'[253] The rights contained in Article 25 are described as being 'related to, but distinct from' Article 1.[254] The HRC has held that the realisation of Article 1 depends upon the participation of all citizens in public life which in turn means that Article 25 rights must be ensured and guaranteed.[255]

Article 25 specifically deals with the issue of participation, it requires that

> Every citizen shall have the right and opportunity ... without any unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic election which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.

Article 25 has the appearance of a watered down version of Article 21 of the UDHR by excluding the clause that the authority of government lies with the individuals of a society. The reasons behind this were examined in Chapter 1 as states will be very reluctant to recognise such a significant statement in a legally binding document. However, Nowak expresses the view that paragraph a of Article 25 does place the legitimacy of governmental authority with the 'sovereignty of the people'.[256] The UK has expressed the opinion that UDHR Article 21 and ICCPR Article 25 combine to characterise what is considered 'free and democratic processes' which entails that

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[253] HRC. General Comment No. 12. GAOR 39th Sess., Supp. 40, paragraph 1.
[254] HRC. General Comment No. 25. UN Doc. CCPR/C/21//Rev.1/Add.7, paragraph 2.
[255] Report of the HRC. GAOR 45th Sess., Supp. 40, comments on Cameroon, p. 102, paragraph 4. Also Rosas in Eide (1992) p. 308; Higgins (1994) pp. 120-121.
[256] Nowak (1993) p. 411.

> every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives. The basis of the authority of government is the will of the people, expressed through periodic and genuine elections, by universal suffrage and held by secret ballot.[257]

In the opinion of at least one state Article 25 carries as much normative force in support of democracy as Article 21 of the UDHR.[258] However it is difficult to conclude categorically that Article 25 carries the same meaning for democracy as Article 21. It would appear possible for a state to allow for the participation necessary to meet the obligations of Article 25 without going as far as Article 21 and placing the authority of government with society.[259]

In the reporting procedure under the ICCPR, the HRC has requested states to include information concerning the constitutional and political processes allowing for the exercise of self-determination. It has not specified a particular form of government that states must possess.[260] In its comment on Article 25 the HRC leaves it open for states to choose whatever form of government they wish so long as there exists legislation which allows for the exercise of the rights in the ICCPR. In a seemingly contradictory way, the Comment places Article 25 'at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant'.[261] The HRC has backed this position in a state report: 'The Committee recommends that the State party revise the former legislation as soon as possible in order to introduce a democratic system more in keeping with the requirements of the Covenant.'[262] This implies that democracy is an important ingredient for meeting obligations of the ICCPR but democracy itself is not an obligation for adherence to the treaty.

The HRC has sketched some necessary aspects of ensuring the exercise of Article 25 which include an effective rights regime, a similarly effective system of voting,[263] a multi-party political system,[264] and the separation of powers in the government[265] to guarantee the protection

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[257] Quoted in K. Hossain. 'Emerging State Practice of Democratic Government with Special Reference to the Commonwealth and South Asia.' in Weiss (1998) p. 69.

[258] It is worth noting that at the time of drafting the UDHR the UK was opposed to the inclusion of government being based on the authority of the people due to its colonial possessions, see Rosas in Eide (1992) p. 302.

[259] The most obvious examples are with monarchical systems that allow for active participation such as in Morocco, but in the end the king remains the final authority, see Report of the HRC v. 1. GAOR 50th Sess., Supp. No. 40, paragraph 114.

[260] General Comment No. 12, paragraph 4.

[261] General Comment No. 25, paragraphs 1-2.

[262] Report of the HRC v. 1 GAOR 49th Sess., Supp. No. 40 comments on Azerbaijan, paragraph 304.

[263] Report of the HRC v. 1 GAOR 49th Sess., Supp. No. 40 comments on Jordan, paragraph 229.

[264] Report of the HRC v. 1 GAOR 49th Sess., Supp. No. 40 comments on Cameroon, paragraph 187, also comments on Jordan, paragraph 236 and Azerbaijan, paragraph 303. On the positive nature of multi-party system, Report of the HRC v. 1. GAOR 52nd Sess., Supp. No. 40, comments on Gabon paragraphs 120, 122. Also the HRC's decision in *Peter Chiko Bwalya v Zambia*. Communication No. 314/1988 UN Doc.CCPR/C/48/D/314/1988, reprinted in 1 (2)

of rights and to ensure a more effective system of governance.[266] Concerning an effective rights regime they have emphasised the importance of freedom of expression, assembly and association[267] along with the need for freedom of the press and media for informing public opinion.[268] Denials of these rights have been deemed to violate Article 25 as they not only prevent political participation but also deny the ability to criticise and oppose the government, 'a normal and essential part of a functioning democracy'.[269]

The ability to participate in the conduct of public affairs is seen by the HRC to include all areas involved with public administration as well as the formulation and implementation of policy at all levels of governance.[270] The HRC's position is that participation in public affairs includes being a member of a legislative body, the holding of executive office, the deciding of public issues through referendum or electoral process, participation in popular assemblies, and representative consultation bodies.[271] The forms of participation envisaged by the HRC include direct actions, such as elections and referendum and indirect which entail the choosing of representatives.[272] In the choosing of representatives the HRC stresses it is necessary that 'those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power.'[273]

The HRC's view on elections is that they act as a means for society to express needs and desires, and are also essential in ensuring the accountability of representatives and that

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IHRR (1994) p. 84, it was held that Zambia's one-party state which declared the applicant's party illegal violated his ability to participate in political affairs.

[265] Report of the HRC GAOR 53rd Sess., Supp. No. 40, comments on Belarus, paragraph 150, stressing the independence of the judiciary and legal profession as essential for the administration of justice, maintenance of democracy and the rule of law.

[266] The HRC's comments on Iceland view the total separation of the judiciary and the executive as necessary for effectively guaranteeing the protection of rights, see Report of the HRC v. 1 GAOR 49th Sess., Supp. No. 40, paragraph 72, also comments on Romania, paragraph 143. See further Report of the HRC v. 1. GAOR 50th Sess., Supp. No. 40, comments on Morocco, paragraph 114 where the wide scope of executive power held by the King 'has implications for the effective independence of the judiciary and the democratic processes of Parliament.'

[267] General Comment No. 25, paragraph 12. Report of the HRC GAOR 53rd Sess., Supp. No. 40 comments on Sudan emphasising that Article 25 depends upon full recognition of freedom of expression and the right to impart and receive ideas of all kinds, including those in opposition to the Government' paragraph 135.

[268] General Comment No. 25, paragraph 25. Report of the HRC GAOR 49th Sess., Supp. No. 40, comments on Jordan, paragraph 236.

[269] Report of the HRC GAOR 49th Sess., Supp. 40 comments on Cyprus, paragraph 322; Report of the HRC GAOR 50th Sess., Supp. No. 40) comments on Libya, paragraph 132.

[270] General Comment No. 25, paragraph 5. Also Fox (1992) p. 555, note 67.

[271] General Comment No. 25, paragraph 6, also paragraph 8 where taking part in public affairs also includes public debate, dialogue with representatives or through organising themselves.

[272] *Mikmaq People v Canada*. Communication. No. 205/1986 in Report of the HRC. GAOR 47th Sess., Supp. No. 40, p. 205, paragraph 5.5.

[273] General Comment No. 25, paragraph 7.

government continues to be based on the universal and free expression of the electors.[274] For the undertaking of elections it is left to states to determine what type of electoral system is to be utilised for determining representation.[275] There are, however, a number of conditions which must be met to ensure that the right to vote may be effectively exercised without any undue complications or restrictions and the rule of 'one person, one vote' must apply.[276] Restrictions on the right to vote must be reasonable with restrictions based on physical disability, literacy, education, property or party membership deemed to be unreasonable, but age being an acceptable restriction.[277] In general the HRC believes that the environment in which an election occurs needs to be peaceful and free from violence and intimidation.[278]

In spite of the HRC's position, that can be seen as imbuing Article 25 with a wide-based and active participatory nature, Nowak feels the meaning of Article 25 does not include the actual governance of society. Instead, he understands it as being 'intentionally vague in order to allow the States Parties to structure the basic right to democratic participation in a manner consistent with the various models of democracy.'[279] The position of the HRC may also be seen as providing a state-centric interpretation of Article 25 as it has expressed that it is not up to citizens themselves to ultimately decide whether or not to take part directly or through representatives in the conduct of government affairs, but that it was for the legal and constitutional system of a state to determine such participation.[280] These conclusions contribute to the indeterminate nature of the Article 25 as they allow for opposing views as to the nature of the Article 25 obligations to be adopted as legally valid.

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[274] General Comment No. 25, paragraph 9. Report of the HRC GAOR 53rd Sess., Supp. No. 40 comments on Iraq, paragraph 107 'The Committee is concerned that under article 38 (c) of the Constitution, the members of the Revolutionary Command Council are not elected by universal and equal suffrage. This is incompatible with the right of citizens to take part in the conduct of public affairs, under article 25 (a) and (b) of the Covenant. Therefore: The Committee recommends that steps be taken with a view to ensuring citizens the right and the opportunity to take part in the conduct of public affairs, either directly or through freely chosen representatives.'

[275] Steiner (1988) p. 90.

[276] General Comment No. 25, paragraphs 11-22.

[277] General Comment No. 25, paragraph 10. In *Joszef Bebreczeny v The Netherlands*. Communication No. 500/1992 UN Doc. CCPR/C/53/D/500/1992, reprinted in 2 IHRR 1995, p. 561. paragraph 9.2 'The Committee notes that the right provided for by article 25 [referring to article 25 (b)] is not an absolute right and that restrictions of this right are allowed as long as they are not discriminatory or unreasonable.' The HRC has decided in a number of cases against Uruguay that restrictions upon Article 25 cannot be based on the political opinion held by the individual and any restrictions must be proportional to the limitation envisaged, see Communication No. 32/1978 *Tourón v Uruguay*, Communication No. 34/1978 *Landinelli Silva et al v Uruguay*, Communication No. 44/1979 *Pietraroia v Uruguay*, and Communication No. 28/1978 *Weinberger v Uruguay* in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, v. 1. UN Doc CCPR/C/OP/1.

[278] Report of the HRC v. 1 GAOR 49th Sess., Supp. No. 40, comments on Mexico, paragraphs 170, 176, 180.

[279] Nowak (1993) p. 15.

[280] *Mikmaq People v Canada*, paragraph 5.4.

The obligations of Article 25 only extend to citizens of a state in contrast to the other rights that are applicable to any individual within a state. Neither the ICCPR nor the HRC has provided any definition or guidance in determining citizenship. The establishment of concise definitions for citizenship might not be welcomed as it may allow a state to utilise very restrictive practices to prevent political participation but in accordance with legally understood standards.[281] Limitations upon participation are necessary for practical purposes but at the same time they must be based on objective and reasonable criteria.[282] The ambiguity of citizenship and restrictions upon participation correspond to the overall nebulous nature of Article 25. It has been suggested that a more proactive approach by the HRC is needed with regards to this area of the ICCPR, but at the same time is not possible due to resource considerations, making the HRC more inclined to concentrate on other rights. On the other hand, it is felt that if the HRC was to become more proactive in this area it would lead to protracted debates over standards and content, in turn slowing down its work even further.[283] The overall textual ambiguity of Article 25 is due, in the opinion of some, to the fact that the Article articulates a political ideal inspiring a certain right.[284]

B. Other Instruments for Participation

The right of all individuals to participate without discrimination is emphasised through legal instruments dealing with discrimination against women and racial discrimination. Concerning women, the Convention on the Political Rights of Women[285] was an early attempt to ensure participation as the document called for the right of women to vote, to be elected and to exercise public functions on terms equal to men.[286] The Convention recognised that everyone 'has the right to take part in the government of his country'.[287] Despite its early entry into force and numerous signatures it has not had a significant impact on the participation rights of women.

A slightly stronger basis exists in the UN Convention for the Elimination of All forms of Discrimination against Women. Under Article 7

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[281] See Fox (1992) p. 553, note 59.
[282] General Comment No. 25, paragraphs 3-4. See also CERD General Recommendation XX paragraph 3, reprinted in 5 IHRR (1998) p. 18.
[283] Ebersole (1992) pp. 111-112.
[284] Steiner (1988) pp. 85-86, 93 Steiner (1988) notes another example of the vague nature of the Article is the lack of reservations concerning it, p. 93, note 60.
[285] 193 UNTS 135.
[286] Articles 1-3.
[287] Preamble. The fact that the Convention uses gender bias language in such a contradictory fashion truly raises questions concerning the real intentions of states.

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure, on equal terms with men, the right

a. to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

b. to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

c. to participate in non-governmental organizations and associations concerned with the public and political life of the country.

The Committee on the Elimination of Discrimination against Women (CEDAW) has expressed the position that '[p]olicies developed and decisions made by men alone reflect only part of human experience and potential. The just and effective organisation of society demands the inclusion and participation of all its members.'[288] It has further elaborated that '[t]he concept of democracy will have real and dynamic meaning and lasting effect only when political decision-making is shared by women and men and takes equal account of the interests of both.'[289]

CEDAW has taken a broad interpretation of what constitutes involvement in the workings of government and public affairs to include a wide variety of societal processes.[290] In a similar fashion to the HRC, CEDAW has specified various components necessary for elections such as secret ballots and universal suffrage and no unreasonable restrictions on the right to vote.[291] They suggest a proactive approach to ensuring women are part of the democratic process through the use of preferential treatment and/or quotas to ensure women are integrated into the decision-making processes.[292] In its discussion of the state reports, CEDAW continually raises the issue as to how the domestic framework hinders or allows for the participation of women in all areas of society and its suggestions and recommendations emphasise the need for governments to ensure that women are more adequately integrated in the decision making process.[293]

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[288] General Recommendation No. 23 (1997) reprinted in 5 IHRR (1998) p. 7, paragraph 13.
[289] General Recommendation No. 23, paragraph 14.
[290] General Recommendation No. 23, paragraph 5.
[291] General Recommendation No. 23, paragraphs 6, 23.
[292] General Recommendation No. 5 (1988) UN Doc. A/43/38, reprinted in 1 (1) IHRR (1994) p. 16.
[293] See the discussion of state reports in Report of the Committee on the Elimination of Discrimination against Women (Sixteenth session). GAOR 52nd Sess., Supp. No.38.

Article 5 of the UN Convention on the Elimination of all forms of Racial Discrimination reads that

> States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone … in the enjoyment of the following rights: …
>
> c. Political rights, in particular the rights to participate in elections, to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; ... .

The Committee for the Elimination of all forms of Racial Discrimination (CERD) has an important task in ensuring compliance with Article 5 as discrimination acts as the basis for denying the exercise of participation rights, an important consideration for CERD.[294] In a General Recommendation regarding self-determination CERD defined self-determination as consisting of an internal aspect which consists of

> the right of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in Article 5 (c) of the ICERD. In consequence, Governments are to represent the whole population without distinction ... .

The understanding of participation put forth in Article 5 includes a wide spectrum of electoral rights that may not be denied for any arbitrary reason.[295] CERD has further elaborated that governments are to be sensitive to the rights of ethnic groups allowing them to take part in their own development and in the government of the state in which they live.[296] The position of both CEDAW and CERD corresponds to the necessary elements of democracy as discussed in Chapter 2 as they emphasise the importance of individuals being able to participate in the processes that impact upon their lives.

While support for democracy may be found in these international instruments it has been expressed that the International Covenants are ideologically neutral and do not promote any

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[294] Report of CERD (1993) comments on Croatia. UN Doc. A/48/18, paragraph 483. Also comments on Belarus (1995) UN Doc. A/50/18, paragraph 348, where CERD demands further information on the ability of minorities to participate in society.

[295] N. Lerner. *The U.N. Convention on the Elimination of all Forms of Racial Discrimination*. (Alphen: Sijthoff and Noordhoff, 1980) p. 57.

[296] General Recommendation XXI (1996) UN Doc. A/51/18, reprinted in 5 IHRR (1998) p. 19, paragraphs 9-10.

particular form of government.[297] In the absence in any expressed statements to the contrary it can be assumed that CEDAW and CERD hold similar positions in relation to their respective instruments. The belief that the documents are ideological neutral has been a reflection of the ideological differences that have marked the international system since the creation of the UN and the efforts of the UN to be a universal body. The idea that international human rights instruments are ideologically neutral is weakening as both the HRC and the UN Committee have shown an inclination towards democracy as the most effective form of government for ensuring states meet their obligations.[298]

The acceptance of the monitoring bodies that democracy is an important element in human rights protection does demonstrate a shift in the international system towards the creation of an international law of democracy. The monitoring bodies have only recently been actively engaged in the rhetoric of democracy slowing encroaching upon the exclusive control of states over the texts in support of democracy. These efforts are a positive start but will now rely upon more active action in holding states responsible for upholding their obligations under the respective treaties and in the maintenance of a democratic society as the most effective way of ensuring those obligations are met.

V. Constructing an International Law of Democracy

Fox believes that if democracy is to have any meaning as an internationally enforceable idea then 'the community of states must be empowered to prescribe standards detailing how participation is to occur and to insist that parties to the major treaties adopt these standards as law.'[299] If freedom, justice and peace are to be realised in the world then it is imperative that individuals are able to participate in the processes which impact their lives – to participate in their own self-determination.[300] As with Franck's democratic entitlement an international law of democracy will have self-determination for its core principle as an essential precondition for the

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[297] UN Committee on Economic, Social and Cultural Rights. General Comment No. 3 (1990) UN Doc. E/1991/23, reprinted in 1 (1) IHRR (1994) p. 7. Also Steiner, pp. 87-88. But see Nowak (1993) who suggests that even though the ICCPR may be ideologically neutral anything not based on democratic governance would be in violation, p. 441. A difficult point to support in light of state practice regarding the ICCPR.

[298] The HRC has established a link between totalitarian government and serious violations of human rights making a transition to democracy favourable for the protection of rights. Report of the HRC v. 1 GAOR 49th Sess., Supp. No. 40, comments on Mynamar. The UN Committee noted in a report on the Dominican Republic that the slow movement to democracy 'inhibited the strengthening of democratic institutions, the modernisation of the machinery of government and, consequently, the effective implementation of the Covenant.' UN Doc. E/1996/22.

[299] Fox (1992) p. 595.

[300] Higgins (1994) p. 43.

recognition and exercise of other rights.[301] Self-determination is important for it allows both individuals and groups to prosper while fully participating in the political, social and economic processes around them.[302] The indeterminate nature of self-determination makes it is necessary to devise accepted ways of recognising and preserving the continual process of self-determination in line with the goals of an international law of democracy.

A. DEMOCRATIC SELF-DETERMINATION - ONCE IS NOT GOOD ENOUGH

The dominant conception of self-determination in international law continues to concentrate on the external exercise of the right, consisting of a singular act of a society in determining the status of a territory.[303] This conception is proving to be inadequate, being unable to deal with the various forms of self-determination which have evolved from a number of distinct groups in the international system. As Cassese observes 'the current legal regime is 'blind to the demands of ethnic groups, and national, religious, cultural, or linguistic minorities.'[304] It has become necessary to reconceive self-determination so that it corresponds to the changing needs of the international system and the emergence of an international law of democracy. International law has become confused and anachronistic in its treatment of claims to self-determination with events in Africa and Asia demonstrating how self-determination in the traditional sense has easily led to a suppression of democracy and human rights.[305] Any act of self-determination must involve the traditionally understood external dimension as well as internal factors to truly take account of the wishes and desires of a population in determining how society is to be ordered and governance carried out.[306] This will undoubtedly entail a great deal of controversy over meaning and appropriate procedures, for as Cassese notes, a re-conception of self-

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[301] Cassese (1979) p. 142.
[302] R. McCorquodale. 'Self-Determination: A Human Rights Approach.' 43 *International and Comparative Law Quarterly* (1994) p. 859.
[303] See Salmon in Tomuschat (1993) pp. 257-259. Orentlicher (1998) feels that post-war self-determination has accomplished what it can and it is now necessary to move on to internal considerations, p. 44.
[304] Cassese (1995) p. 238; Simpson (1996) pp. 255-56. It is within the area of the rights of minorities and indigenous peoples that the understanding of self-determination is being expanded. See the Draft Declaration on the Rights of Indigenous Peoples (1994) UN Doc. E/CN.4/SUB.2/1994/2/Add.1, especially Articles 3, 4, 19, 20 and 31; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1993). GA Res. 47/135, GAOR 47th Sess., Supp. 49, p. 210, especially Article 2, paragraphs 2 and 3.
[305] Simpson (1996) p. 257; Salmon in Tomuschat (1993) pp. 256-257.
[306] 'Indeed it is undoubtedly a paradox and a fundamental contradiction to recognize the right of peoples to self-determination without contemplating the situation of inside interference', Salmon in Tomuschat (1993) p. 265. Orentlicher (1998) raises the interesting point that if democracy is to be a principle of international law then this will include the ability of individuals to change the political boundaries of society as well, p. 3. A point refuted by M. Shaw. 'Peoples, Territorialism and Boundaries.' 3 *European Journal of International Law* (1997) p. 489.

determination 'has set in motion a restructuring and redefinition of the world community's basic 'rules of the game'.'[307]

The most basic rule undergoing change is that self-determination can no longer be a right exclusive to states. Self-determination must now be viewed as containing a continual internal process. The difference between the external exercise of self-determination and its internal manifestation is that the internal exercise of the right involves a continual and dynamic process that focuses upon individuals.[308] Internal self-determination involves the belief that the individuals of a state have the right to determine how society is ordered and managed, including adherence to non-discrimination and effective representation in government and, in general, respect for principles of good governance throughout society.[309] Internal self-determination allows individuals to freely choose their own government, representative institutions, and choose those representatives at reasonable intervals.[310] It ensures that the changing of government and ordering of society is not be carried out by a few select individuals but a task for the entire population.[311] Internal self-determination extends beyond political participation to include the continuing process of refining the social, economic and cultural development of a society.[312]

International law has primarily allowed for the singular exercise of self-determination concerning a territory, and even then not in a coherent fashion responding to the needs and desires of individuals. If self-determination is the basis for the exercise of all other rights[313] then it cannot be exercised once and discarded. A representative of the UK before the UN Third Committee described the continual nature of internal self-determination:

> self-determination is not a one-off exercise. It cannot be achieved for any people by one revolution or one election. It is a continuous process. It requires that peoples be given continuing opportunities to choose their governments and social systems, and to change them when they so choose ... .[314]

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[307] Cassese (1995) p. 1.
[308] Cassese (1995) 101.
[309] For the various views on internal self-determination see Cassese (1995) p. 101; McCorquodale (1994) p. 864; Rosas in Tomuschat (1993) p. 232; Simpson (1996) p. 270; Higgins (1994) p. 120.
[310] A. Eide. 'Minority Situations: In Search of Peaceful and Constructive Solutions.' 66 *Notre Dame Law Review* (1991) pp. 1336-1337. Also Rosas in Tomuschat (1993) p. 232.
[311] See statement by P. Jessop in United States Information Service. *Daily Wireless Bulletin*, No. 1183, (19 January 1950) reprinted in Chen, 1951, 112.
[312] J. Collins. 'Self-determination in International Law: the Palestinians.' 12 *Case Western Reserve Journal of International Law* (1980) p. 153
[313] HRC General Recommendation 12, paragraph 1.
[314] The representative continued; 'Many peoples today are deprived of their right of self-determination, by elites of their own countrymen and women; through the concentration of power in a particular political party, in a particular ethnic or

In the continual process of self-determination there must exist the opportunity for individuals not only to participate in determining the external status of a state, but also the ability to have a say in the development of the constitutive framework of society and regular participation in those areas of society which impact upon them.[315]

The present doctrine of self-determination in international law remains beyond the reach of individuals. Extending the scope of self-determination to internal factors will undoubtedly increase the contentious nature of the right leading to more disagreement over its application. For those who hold that it would be impractical, if not impossible, for international law to extend self-determination to include an internal dimension are forced to justify why such an essential right is to remain a singular occurrence dependant upon the actions of states. If democracy is to be accepted as a principle of international law, existing rules must be transformed to accommodate this new idea. International human rights law provides a beginning for this transformation as its principles are based on ideas of tolerance and co-operation. An acceptance of democratic principles in the international system is an acceptance of the internal, continual nature of self-determination.[316] The issue now becomes how to minimise the indeterminacy and ensure the effective exercise of self-determination on a continual basis.

B. Recognising Democratic Self-determination

For internal self-determination to occur a state must possess a particular form of government, for which democracy provides the most acceptable possibilities. It was discussed above how international law confines itself with the idea of effectiveness concerning the nature and structure of a government. Regionally the idea of effectiveness is losing ground to democratic legitimacy in the recognition of governments but this has not precipitated a change in the general international legal position.[317] Progress in this direction has occurred at the level

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religious group, or in a certain social class.' Statement by UK representative to the UN Third Committee (12 October 1984) 55 *British Yearbook of International Law* (1984) p. 432. Also McCorquodale (1995) as to how the UK in general has supported internal self-determination in its colonies with the prominent exception of Hong Kong, pp. 315-317

[315] Rosas in Tomuschat (1993) pp. 248-249

[316] See C. Tomuschat. 'Self-Determination in a Post-Colonial World.' in Tomuschat (1993) as to how international law has been reluctant to recognise this move, pp. 4-5.

[317] The end of the USSR and Yugoslavia provided the space for instituting democratic criteria for the purpose of recognition. This occurred at the initiative of the European Union and OSCE, see 'Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union' (16 December 1991) reprinted in 31 ILM (1992) p. 1486. However, since the member states of the EU did not follow their own guidelines for recognition, with Germany unilaterally recognising Slovenia and Croatia the initiative lost a great deal of credibility as evidence of state practice, see Orentlicher (1998) pp. 67-68. Furthermore, this is an event that is exclusively confined to Europe and cannot be

of international human rights law where it has become acceptable to pass judgment on the behaviour of a government based on the human rights standards they have agreed to, including participation rights and others related to democracy.[318] An international law of democracy guiding international practice concerning the recognition of governments would be based on core ideas as to what constitutes legitimate governance whereby individuals are able to be part of the processes which impact their lives.

The use of recognition to support an international law of democracy runs counter to the accepted principle of non-intervention in domestic affairs and has been described as a denial of self-determination.[319] Common Article 1 of the International Covenants, which is often used as the basis for self-determination, contains no detail as to the form of government to be established by a signatory state. The ICJ confirmed this point at the level of general international law expressing that '[e]very State possesses a fundamental right to choose and implement its own political, economic and social systems.'[320] By establishing obligations of democracy, it is argued that there is a denial of the dynamic process of change that occurs in society.[321] However one of the requirements which has come to be accepted as part of the idea of effectiveness is that a government must possess 'a reasonable prospect of permanence'.[322] Authoritarian rule demonstrates a relation between permanence and effectiveness as it often carries the assumption that current rulers are there forever. While democracy is a single form of governance it does allow for change in the process of governance as structures may be modified to fit society. Democracy in practice allows for more dynamism and is more capable of corresponding to the changes in society, authoritarian rule is conservative and does not usually respond positively to changes in society.[323]

In using democratic criteria for the recognition of governments it must be determined as to how the criteria be evaluated and judged, and by whom.[324] Lauterpacht provided guidance on

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regarded as a global norm, but see C. Hillgruber. 'The Admission of New States to the International Community.' 9 *European Journal of International Law* (1998) p. 491.

[318] Chen (1951) has pointed out that recognition is not limited to the emergence of new states or overthrows of government but something which has a day to day affect upon individuals, p. 13.

[319] Chen (1951) pp. 111-112. N. Mugerwa. 'Subjects of International Law.' in M. Sørenson, ed. *Manual of Public International Law*. (London: Macmillan, 1968) p. 271. Salmon in Tomuschat (1993) p. 259.

[320] *Nicaragua Case*. I.C.J. Reports (1986) pp. 130-131.

[321] Chen (1951) p. 112.

[322] Mugerwa in Sørenson (1968) p. 272. See Sen (1988) who describes permanence as 'evidenced by passage of time showing that all resistance to the control of the authority had ceased, and that the people of the country by tolerating the government over a period of time had acquiesced in its control', p. 523.

[323] Under authoritarian rule individuals are often compelled by fear to accept whatever government is there so long as life continues S. Patel. *Recognition in the Law of Nations*. (Bombay: Tripathi, 1959) p. 76. See Blix (1970) on the short-term stability of authoritarian rule, pp. 642-643.

[324] Recognition of governments can be used to disguise other self-interested goals, see Menon (1994) p. 64.

this issue through a combination of hope tempered with caution. He firstly expressed that there could be the use of democratic criteria for recognition but only 'when accompanied by appropriate international safeguards'.[325] The international system could engage in the process of non-recognition of government regarded as not meeting specified democratic criteria only 'if at the same time it provided methods guaranteeing and ensuring individual rights and government by consent within the territories of all States.'[326] As discussed above international human rights law, while confined to the statist nature of the international legal argument, has provided the possibility to achieve the type of system envisaged by Lauterpacht. Dugard and others point out that with a requirement for recognition based on an international law of democracy most states would fail to meet the accepted criteria.[327] If democracy is thought to be a good for the international system, as demonstrated by the level of global rhetoric which exists, then the fact that many states will not meet the entirety of the obligations associated with it cannot be a bar to its development. Full adherence to a law is not a condition for its existence or development. At present there is no established machinery for democratic recognition at the global level but it does exist at the regional level. In the European and Inter-American systems the machinery is in place and seen as legitimate by the states of the region.

What the regional systems demonstrate is that for recognition of what constitutes a legitimate government based on democratic criteria it is necessary to follow a collective institutional approach, as opposed to unilateral pronunciations of states.[328] Institutionalised collective recognition would help to remove the individual subjectivity of bilateral actions of states which has plagued democratic recognition in the past.[329] An international law of democracy depends upon removing the issue of determining what constitutes a legitimate

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[325] Lauterpacht (1947) p. 139.

[326] Lauterpacht (1947) p. 106.

[327] Dugard (1987) p. 128. Schachter feels that when it comes to government being based on democratic principles; 'Many, probably most, states do not met the standard; they are nonetheless recognized as having legitimate governments.' Schachter in Charney (1997) p. 24. See McCourquadale (1995) who discusses how the UK does not necessarily meet the requirements of internal self-determination, pp. 317-318. Concerning membership of the UN there is a marked difference of opinion. Franck (1995) claims that most are democratic saying that in 1994 around 130 states were 'legally committed' to democracy. He does concede a few may only be democratic in form, pp. 85-86. Higgins (1994) is of the opinion that eighty five percent of the governments represented in the UN are 'dictatorships of one sort or another.' p. 43. A final view says of the 185 member states, 50 could be described as undemocratic, M. Glennon. 'Sovereignty and Community After Haiti: Rethinking the Collective Use of Force.' 89 *American Journal of International Law* (1995) p. 71

[328] Lauterpacht (1947) notes that this does depend upon a high degree of political integration which has occurred in the regional systems but not in the global, p. 67.

[329] M. Peterson. *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995.* (Basingstoke: Macmillan, 1997) p. 121-122; Chen (1951) p. 115. Koskenniemi (1994) pp. 242-244, and how the act of collective recognition violates the basic principle of international law that states are allowed to decide their own course, p. 243.

government from the exclusive control of states.[330] Lauterpacht saw the unilateral ability of states to engage in recognition as 'disturbing' since it is possible to use 'the weapon of recognition for the purpose of achieving political advantages.'[331] Kennedy has remarked that the unilateral act of '[r]ecognition seems unsustainable as a purely discretionary sovereign power.'[332]

A collective process of recognition opens the issues involved to wider public scrutiny allowing discussions as to the nature of norms and principles involved. It acts as a more effective indicator of non-compliance and provides the necessary tools for ensuring compliance.[333] Lauterpacht felt that constructing some form of collective recognition is not an insurmountable problem. He implied that an international institution offers the best possibilities to establish the machinery to ensure the process is undertaken properly.[334] The largest obstacle to creating a system of recognition through a collective body is that governments are unlikely to give up their sovereign rights in this area to a multilateral body.[335] Furthermore, using collective recognition through a multilateral body provides no guarantee of coherence, as international organisations naturally have a strong concern to maintain continuity and the smooth functioning of the organisation.[336]

The UN is the most obvious for recognising the legitimacy of governments based upon democratic criteria with its capacity as a forum for debate combined with its procedures for determining the credentials of member states and the activities of the subsidiary bodies concerned with human rights, social, economic, and cultural issues.[337] Membership to the UN is open to all peace-loving states that accept the obligations of the Charter and are deemed by the UN as capable of meeting these obligations.[338] There is nothing in the Charter requiring

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[330] Menon (1994) p. 51.
[331] Lauterpacht (1947) p. 67.
[332] D. Kennedy. *International Legal Structures*. (Baden-Baden: Nomos, 1987) p. 135.
[333] Higgins (1963) pp. 133-134.
[334] Lauterpacht (1947) p. 172.
[335] Lauterpacht (1947) pp. 401-402.; Peterson (1997) p. 130. Menon (1994) p. 51. Authors have also concluded that the practice of the UN demonstrates it is not to be a forum for collective recognition, see van der Vyver (1991) pp. 23-24.
[336] Peterson (1997) p. 132-136; S. Rosenne. 'Recognition of States by the United Nations.' 26 *British Yearbook of International Law* (1949) pp. 437-447. Blix (1970) feels that the UN cannot act as a forum for recognition since the obligations of the Charter demand certain relations among states within the organisation, p. 693.
[337] Concerning the views of authors and the UN as a body for collective recognition see van der Vyver (1991) pp. 22-28. For any body to act as a forum of collective recognition it will need to possess the legitimacy to do so in the eyes of its members, see D. Caron. 'Governance and Collective Legitimation in the New World Order.' 6 *Hague Yearbook of International Law* (1993) pp. 30-32.
[338] UN Charter, Article 4. The Charter does not define the meaning or criteria of a 'peace-loving state', see H-J. Schütz. 'Membership.' in R. Wolfrum, ed. *United Nations: Law, Policies and Practice*. (Dordrecht: Martinus Nijhoff, 1995) pp. 877-878.

member states to adhere to any particular form of social or political ordering.[339] Practice has shown that universality has been the goal allowing all states a place in the organisation regardless of their social/political system.[340] The UN's involvement with recognition has also been as a forum for the playing out of ideological disagreements between powerful states.[341]

At an early stage of the organisation a proposal was put forth for representation in the UN to be based on the criteria of - effective authority over a territory, general consent of the population, ability and willing to achieve purposes of the Charter and respect for human rights and fundamental freedoms. This proposal was quickly dismissed as it was felt that the UN was not the appropriate place for determining the legitimacy of governments and that regardless of the UN's view on the issue it would not affect inter-state relations on recognition.[342] The accreditation process for allowing member states to take their place in the UN only looks at effective control over a territory, the ability to live up to the purposes and principles of the Charter and the ability to carry out the obligations of membership.[343] This raises a problem in that non-democratic governments are able to carry out many of the obligations of membership obligations but not necessarily any human rights obligations.[344]

The GA has stated that membership of the UN 'should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case'.[345] If the purposes and principles of the Charter are deemed to include respect for self-determination and human

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[339] During the drafting of the Charter views on criteria for membership varied from the Netherlands wanting an obligation of political institutions which ensure a state is the servant of its citizens, to the UK who called for flexible criteria of membership with no precise requirements. The view of the drafting committee recognised the difficulties in using political institutions for criteria of membership and felt that it might breach the principle of non-intervention, but that it would not be impossible to implement, UNCIO v. 7, pp. 18, 326. It is worth noting that the entry requirements of the Charter are no longer applicable once a state is a member, see M. Lachs. 'Recognition and Modern Methods of International Co-operation.' 35 *British Yearbook of International Law* (1959) p. 255.

[340] D. Nincic. *The Problem of Sovereignty in the Charter and in the Practice of the United Nations*. (The Hague: Martinus Nijhoff, 1970) p. 191. Wright notes that admission to the UN is recognition of a state and approval of credentials is recognition of a specific government. However, he points out how this is only a general form of recognition and does not impact bi-lateral relations among states. Q. Wright. 'Some Thoughts about Recognition.' 44 *American Journal of International Law* (1950) p. 550-552.

[341] See Menon (1994) pp. 54-57; J.D. van der Vyver. 'Statehood in International Law.' 5 *Emory International Law Review* (1991) pp. 22-28; Q. Wright. 'Toward a Universal Law for Mankind.'' 63 *Columbia Law Review* (1963) p. 449.

[342] Higgins (1963) pp. 146-149; H. Aufricht. 'Principles and Practices of Recognition by International Organizations.' 43 *American Journal of International Law* (1949) p. 703.

[343] Trygve Lie described the UN as an organisation of 'varying and even conflicting ideologies' which requires an ideological neutral position on behalf of the organisation, see statements in Fox (1992) p. 602.

[344] Fox (1992) sees the UN as loosing credibility if it recognises governments who violate human rights obligations but are able to meet other obligations, p. 605.

[345] 'Recognition by the United Nations of the Representation of a Member States.' GA Res. 396 (V) in *Key Resolutions*, p. 572.

rights then requirements of democracy may be utilised for determining membership.[346] In the ICJ advisory opinion on UN membership it was expressed that the ability of an entity to meet the principles and purposes of the UN are a necessary condition for membership.

Denials of membership have been explicitly linked to the illegal use of force, denials of self-determination and the imposition of racist regime.[347] Examples where the rejection of membership in the UN was due to the nature of a government were linked to wide-scale human rights abuses as occurred with Rhodesia and South Africa.[348] These denials were linked to the internal structure and practice of a government and its treatment of the society within the territory it claimed to represent.[349] The unilateral declaration of independence of the white racist regime of Rhodesia was declared illegitimate and illegal since the majority of the population was excluded from the process of governance.[350] Higgins notes that UN action in these cases shows a slight tendency to favour democratic criteria for recognising governments, but only when it involves a racist regime.[351] However, some commentators have been quick to claim that even though democratic criteria were a consideration with the non-recognition of Rhodesia other factors were equally if not more important.[352] Overall, the UN as an institution has had to rely on the idea of effectiveness in allowing government representation to the body as it has seen itself as an organisation of universal membership.[353]

Protests are raised by members concerning the nature of a regime and whether or not is should hold a seat in the UN but these protests are commonly based on political differences between individual states and rarely demonstrate a communal view on the legitimacy of a government. The credibility of the process of collective recognition may be derived from the

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[346] Resolution 396 (V) has not been applied in this way as demonstrated by the recognition of the communist government of the People's Republic of China, see GA Res. 2758 (XXVI) in *Key Resolutions*, p. 572.
[347] For a review of these situations see van der Vyver (1991) pp. 34-74.
[348] See B. Roth. 'Popular Sovereignty: The Elusive Norm.' 91 *ASIL Proceedings* (1997) pp. 497-499.
[349] For a discussion of the South African situation see D. Ciobanu. 'Credentials of Delegations and Representation of Member States at the United Nations.' 25 *International and Comparative Law Quarterly* (1976) p. 351, especially p. 366-368 where Ciobanu feels the South African situation confirms the competence of the UN to look at how a government represents a society.
[350] See J. Fawcett. 'Security Council Resolutions on Rhodesia.' 41 *British Yearbook of International Law* (1965-66) p. 112. For a rejection of Fawcett's view, which is seen as 'superfluous' and 'undesirable', see Devine (1971) pp. 410-417.
[351] Higgins (1994) p. 44. Concerning Rhodesia see SC Res. 277 (1970). Concerning the Bantustans of South Africa see GA Res 2775E (XXVI) in *Key Resolutions*, p. 125, and GA Res 3411D (XXX) GAOR 30th Sess., Supp. 34, p. 36.
[352] Binavince in Macdonald (1974) claims that for Canada there were 'a number of stronger considerations aside from popular legitimacy which have influenced the Canadian position.', p. 168. A similar situation exists today concerning Afghanistan where the Taliban hold control over most of the country but are not recognised as the rightful government due to issue of human rights and 'other considerations'. See 'The Taliban's Strategy for Recognition.' *Economist* (6 February 1999) p. 71.
[353] Menon (1994) states '... the widely held view is that admission to the United Nations is not equivalent to recognition though it has analogous effect to recognition.' p. 57. Also Salmon in Tomuschat (1993) p. 262.

general acceptance of the members of the GA of certain broad principles of international law - non-use of force, the right to self-determination and non-discrimination.[354] These principles do not have a clear consensus or a great deal of coherence in actual practice but they do represent an area of broad agreement established through debate and discussion concerning the principles and purposes of the UN. As democracy receives greater acceptance at the international level and is supported by the UN as a favourable good for the pursuit of international peace and security, making it part of the organisation's principles and purposes, then it could be used in issues of membership and accreditation. Its effective use as a criterion will be linked directly to issues of human rights protection that is another accepted area of concern for the GA and will depend on continual discussion and debate as to the nature and practice of democracy in domestic systems. The GA is also able to call on the expertise of other UN organs that report to it annually to ensure the discussion is far-reaching, incorporating all aspects of good governance.

This process would by no means be perfect for determinations of membership to any international organisation consists of an 'interplay between law, politics and ideology'.[355] Furthermore, under the present Charter arrangement action taken against a member government involves action by both the SC and the GA ensuring that the political considerations of the permanent members of the SC will dominate any action.[356] There is also the issue of the ICJ's opinion concerning membership criteria where it was stated that the requirement of Article 4 that all states be 'peace-loving' is 'an exhaustive enumeration' and that 'the terms of the paragraph preclude the idea that considerations extraneous to these principles' may be utilised.[357] The Court itself explained in the same opinion that the exhaustive character of Article 4 'does not forbid the taking into account any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article.'[358] It was examined in

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[354] Violation of the UDHR was also a reason, see GA Res 3207 (XXIX) GAOR 29th Sess., Supp. 31, p. 2.

[355] E. Osieke. 'Admission to Membership in International Organisations: The Case of Namibia.' 51 *British Yearbook of International Law* (1980) p. 189. Ciobanu (1976) feels that the political nature of the GA precludes its ability to be an effective forum for determining the proper nature of government in the absence of the involvement of a legal body such as the ICJ, p. 371.

[356] As occurred throughout the Cold War, see L. Goodrich. *The United Nations*. (London: Stevens, 1960) pp. 88-96; D. Lloyd. 'Succession, Secession, and State Membership in the United Nations.' 26 *New York University Journal of International Law and Politics* (1994) pp. 768-769. The ICJ has confirmed that any action under Articles 3-6 of the Charter must involve the SC, see *Competence of Assembly Regarding Admissions to the United Nations* (Advisory Opinion 3 March 1950). ICJ Reports (1950) p. 4. Also H. Kelsen. *The Law of the United Nations*. (London: Stevens, 1964) p. 711. This raises the issue that if the UN is to act as a forum for an international law of democracy it will need to address the lack of democracy of its own institutional structure, on this point see D. Archibugi. 'The Reform of the UN and Cosmopolitan Democracy: A Critical Review.' 30 *Journal of Peach Research* (1993) p. 301; N. White. 'Accountability and Democracy within the United Nations: A Legal Perspective.' 13 *International Relations* (1997) p. 1.

[357] *Conditions of Admission of a State to Membership in the United Nations (Article 4)* ICJ Reports (1948) p. 63.

[358] *Condition of Admission*, p. 63.

Chapter 1 how the Charter does not give rise to concrete obligations of human rights or democracy. If the overall view of the UN is shifting so that respect for democracy and human rights are becoming concerns for the organisation then its ability to examine the internal structure of a state would be legitimate.

C. Ensuring Democratic Self-Determination

Institutionalised collective recognition of a government based on democratic criteria would demonstrate the acceptance and existence of an international law of democracy making it then necessary to ensure compliance with the obligations it creates. To ensure the existence and continual process of democratic self-determination international efforts of election involvement and emphasis upon human rights obligations will provide the necessary framework for good governance in a democratic society. The issues raised above concerning the use of force or sanctions to further an international law of democracy will not be entertained as these means have proven unsatisfactory and there appears little hope in separating action from self-interest. Furthermore the use of coercive measures runs contrary to many of the principles upon which democracy and human rights are based. Involvement in elections and emphasising human rights obligations are two areas where there presently exists acceptable international practice upon which to build. Election involvement provides the necessary procedural elements to ensure democracy, with human rights obligations underlying the substantive nature of democracy. In pursuing greater involvement in elections and attention to human rights obligations there will be the residual benefit of fostering tolerance and the recognition of diversity among states, a necessary element of democracy.[359]

Involvement in elections by international institutions has been described as a guarantee of 'self-determination as a fundamental right that transcends domesticity to become an issue of international concern'.[360] Election involvement is easily criticised as a form of intervention into the domestic affairs of a state. It is suggested that if there exists an obligation to guarantee participation rights which specify the holding of elections, involvement by outside bodies cannot be illegitimate for it will be giving effect to substantive rights which already exist in law.[361] The UN has the possibility of increasing its involvement in elections based on past activities and

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[359] Salmon in Tomuschat (1993) p. 278.
[360] Evans and Olidge (1992) pp. 1728-9.
[361] Asante (1994) p. 279; Fox (1992) pp. 587-94.

existing treaty obligations dealing with the rights of political participation.[362] In expanding its involvement in elections the UN will have to appear as a neutral body if it is to be credible and effective in overcoming disputes which arise over the process of elections.[363] This problem provides its own solution, as UN involvement will naturally include representatives from a number of different states and political systems overcoming accusations of bias.[364]

A further issue to be addressed is how to decide when to become involved in elections and to what degree.[365] If the decision to become involved is left to the members of the SC then involvement would appear to be based on the interests of the superpowers and seen as an interventionist tool. The decision not to get involved in recent elections in Liberia demonstrates the reluctance of the SC to become involved in 'nations not deemed strategically important.'[366] This makes it necessary for the SG, the GA and SC to develop clear and proactive principles and procedures on the issue.[367] Decisions to become involved need to be made on the basis of clear and accepted terms of involvement with the full understanding of all the parties involved.[368] By establishing clearly the terms and purpose of the involvement it will not be possible for governments to exploit the presence of the UN to show that their system of governance has the approval of the international body thereby bestowing legitimacy.[369]

For the UN to take on a greater role in election involvement it will be necessary for it to establish a clearer position with regards to democracy and elections. The existence of resolutions in support of elections qualified by statements regarding respect for state sovereignty will keep the position of the organisation vague and it will create difficulties in establishing acceptable criteria for what constitutes free and fair elections.[370] Some argue that the UN should limit itself to only providing technical assistance as requested by a state or when elections are attached to peacekeeping missions.[371] This limited role of the UN in elections would not be

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[362] Fox (1992) p. 571, on how the UN has not brought the two different regimes together, p. 589.
[363] Stoelting (1992) p. 406. In the recent elections in Cambodia international observers were quick to declare the elections free and fair in the face of obvious irregularities with the domestic population far from convinced that democracy in practice had actually occurred, see 'EU Loses Face for Cambodia Poll Verdict.' *The Guardian* (5 August 1998) p. 10; 'Hun Sen Victory Fails to Silence Critics.' *The Guardian* (6 August 1998) p. 13.
[364] Beigbeder (1994) 34; N. Nevitte and S. Canton. 'The Role of Domestic Observers.' 8 *Journal of Democracy* (1997) p. 50.
[365] In the former-Yugoslavia the OSCE was under pressure to ensure elections were held as soon as possible in an environment no conducive to the democratic process creating the difficulty of giving legitimacy to leaders who are equally non conducive to democracy, see Orentlicher (1998) pp. 70-72.
[366] Stoelting (1992) pp. 418-419.
[367] See Stoelting (1992) pp. 382, 389.
[368] Hodgson (1992) pp. 161-162.
[369] Hodgson (1992) p. 158; Evans and Olidge (1992) pp. 1751-55.
[370] Hodgson (1992) pp. 146-7.
[371] Hodgson (1992) p. 173. Stoelting (1992) appears to claim that 'UN-monitored elections occur only in crisis-embroiled nations' p. 406 which does not appear to include humanitarian crisis, pp. 388-389.

beneficial for the development of democracy in the international system. UN GA Resolution 668 sees the role of the organisation in elections as diminishing, emphasising a shift to focusing on post-election developments. This implies the belief that once a democratic electoral system is established it will continue to function effectively. Election involvement on a continual basis is important, as there is no guarantee that one election assures democracy for the future and that sitting governments will not try to manipulate the domestic electoral laws to their advantage.[372]

Chapter 2 discussed how democracy means much more then just holding elections. That has been the past practice concerning self-determination where the single determination of a territorial unit was seen as the exercising of the right. Active protection of the participatory process after and between elections is crucial to the continuance of democracy. International human rights law has a crucial role in this regard as a safeguard for active participation and the protection of individual autonomy. Chapter 1 discussed the difficulties faced by individuals in accessing and utilising international legal instruments for the purpose of protecting their autonomy and participation. The beneficial aspects of the reporting procedures connected with a number of international instruments will provide a means by which the international system is able to assist in bringing individuals closer to these documents. The reporting procedures provide a forum for discussion concerning compliance with obligations, facilitating the realisation of rights, reviews national legislation, administrative rules, and procedures and practices to ensure conformity with obligations, the monitoring of the actual situation in a state on a regular basis, to facilitate public scrutiny of government policies, to evaluate the extent to which obligations have been realised.[373] The procedures remain statecentric in nature in that governments are free to disregard the proposals or suggestions of the monitoring body or refuse to participate all together. The importance of the reporting procedures for an international law of democracy is that they provide details of the day to day existence of democracy and information concerning the structures of governance which support a democratic society. For the reporting procedures to become more effective the monitoring bodies will have to take a clear stand on democracy instead of adhering to the position of ideological neutrality.

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[372] As demonstrated by the ruling party of the government of Mexico, the PRI who for years was able to portray the illusion of democracy while using the law to ensure its own position is not compromised. See the Inter-American Commission on Human Rights. *Report On The Situation Of Human Rights in Mexico, 1998* Chapter VI 'Political Rights.' which provides a review of the legal framework and recent reforms. Also see Nevitte and Canton (1997) p. 51; G. Hermet, et al., eds. *Elections without Choice.* (London: Macmillan, 1978) p. viii.

[373] Committee on Economic, Social and Cultural Rights. General Comment No. 1 (1989) UN Doc. E/1989/22 in 1 (1) IHRR (1994) p. 1, paragraphs 1-6. Also HRC General Comment No. 2 (1981) GAOR 36th Sess., Supp No. 40, reprinted in 1 (2) IHRR (1994) p. 2. Reporting obligations include not only providing information about domestic laws

VI. Conclusion

If international law is to move from a matter exclusively between states and become an effective factor in the lives of individuals it will need to promote and protect the view that a legitimate government is one that is representative of and accountable to those individuals in its territory. This is to be determined by the existence of effective rights which are accessible by individuals, the scope and nature of participation in the process of governance and whether or not individuals or groups are marginalised due to their socio-economic conditions. The power and attraction of the democratic process

> lies in its logic, which flows from the individual human person, the one irreducible entity in world affairs and the logical source of all human rights. At the same time that democratization will rely upon individual commitment to flourish, democratization will foster the conditions necessary for the individual to flourish.[374]

In the international system democracy is accepted, in rhetoric at least, as a desirable good.[375] The global rhetoric in support of democracy and human rights provides moral force to these ideas and require opponents to come up with a better solution, something that has yet to occur. However, rhetoric alone is not enough. Democracy is not a natural progression for the development of society, the existence of democracy in one region does not automatically signal its growth elsewhere and once established democracy is not guaranteed for infinity.[376] If the international system is to voice support for democracy than international law will have to adapt so that words become reality. The work of the UN will act as the framework for an international law of democracy due to its global scope and the fact that efforts in support of democracy come from significant cross-sections of differing societies. The diverse nature of the UN may inhibit establishing a definite agreement over the nature and content of an international law of democracy. At the same time the debate and discussion which occurs will establish a minimum threshold for the formulation and workings of an international law of democracy which will

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and other norms but also practices and decisions of courts and other state organs and further relevant facts which show the degree of actual implementation and enjoyment of rights.

[374] Report by the Secretary General. *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*. UN Doc. A/51/761 (20 December 1996) paragraph 128.

[375] Taking the existence of wide scale rhetoric as proof of the desirability of democracy does lack a certain degree of concreteness necessary for a legal principle. However it does provide evidence of the emergence of a principle and a firmer basis than that established by Teśon who believes that there should be an international law of democracy 'simply because it is the right thing to do', see F. Teśon. 'Changing Perceptions of Domestic Jurisdiction and Intervention.' in T. Farer, ed. *Beyond Sovereignty: Collectively Defending Democracy in the Americas*. (Baltimore: Johns Hopkins University Press, 1996) p. 35.

[376] See G. Sartori. 'How Far Can Free Government Travel' 6 *Journal of Democracy* (1995) p. 107. Hobsbawm (1987) has shown this to be proven in history. The halt of the second democratic 'wave' of the turn of this century demonstrates the lack of universal or inevitable process of democracy, p. 110.

contribute to the enhancement and protection of the dignity and physical survival of the individual.

Due to the diversity of and lack of agreement within the UN, measures in support of democracy remain weak. The situation is exacerbated by the fact that democracy is only recently being discussed in a substantive manner, by the indeterminacy of the international legal argument which allows for the existence of opposable but equally valid principles and the ability of states to manipulate the law to further their own interests. Warnings have been expressed against elevating democracy to a higher norm of international relations as it may 'ground the new world order on totalitarianism and subjectivity with the mask of democracy'.[377] This is a very real fear as direct action in support of democracy has often had more detrimental impacts upon the individual and society. At the regional level the use of democratic recognition, election involvement, and enhancing human rights enforcement have been utilised to ensure an international law of democracy regionally. These possibilities exist in principle in the international system but have not attained the level of agreement necessary for action. The effectiveness of regional systems in support of a regional international law of democracy will provide guidance for further global development.[378] If states are collectively willing to advance democracy as a necessary good within a smaller grouping there can be no perceivable reason why democracy is not a good worth pursing on a larger scale. As expressed in the Vienna Declaration; 'The international community should support the strengthening and promotion of democracy, development and respect for human rights and fundamental freedoms in the entire world'.[379]

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[377] Salmon in Tomuschat (1993) p. 278.
[378] See Salmon in Tomuschat (1993) p. 279.
[379] Part 1, paragraph 8.

CHAPTER 4

EXPANDING THE PROTECTION AND PROMOTION OF DEMOCRACY AND HUMAN RIGHTS IN EUROPE

I. INTRODUCTION

Europe has been successful in advancing the protection and promotion of democracy and human rights through an international legal framework. Europe has seen a great deal of development in the areas of democracy and human rights, especially in the past 10 years, but these developments remain confined to Europe and do not stand alone as evidence of a global norm. These developments demonstrate the potential and possibilities that exist for an international law of democracy and the contribution of regional arrangements to the international protection and promotion of democracy and human rights. The experiences of Europe provide insight concerning the ability of international institutions to effectively support democracy and human rights and to have a significant impact upon the lives of individuals.

Recent developments make the co-operative pursuit of common goals of democracy and human rights among the regional institutions of Europe an important condition of their development. On the one hand there exists the states formerly under communist rule that are developing systems of democracy and human rights protection. On the other, there are the established democracies that are facing low levels of participation, apathy, problems with minority groups, government centralisation, and other circumstances that have created the need for a resurgence of democracy and human rights within these societies.[1] The continual development of democracy and human rights needs to be inclusive of all of society, an important issue on a region wide scale, as the question of minorities and their place in the societies of Europe is an area of conflict, both conceptually and in very real physical terms. A related point is the present questioning of the idea of European identity - who is European and what does it mean to be European? Issues of identity are a major factor in the institutional co-operation in the region as it will be necessary to develop a single Europe and not varied levels of 'Europeaness'.

This chapter will look at the work of 3 regional organisations in Europe who take democracy and human rights as essential or primary concerns - the Council of Europe (COE), the European Union (EU) and the Organisation for Security and Co-operation in Europe (OSCE, formerly the Conference on Security and Co-operation in Europe CSCE). Each of

these bodies was set up to address a specific issue facing Europe and all have largely followed their own development. Now with the changes occurring in Europe the purposes and activities of the three are becoming closely related in pursuit of common goals related to democracy and human rights.

II. THE COUNCIL OF EUROPE

The COE has placed the protection and promotion of democracy and human rights as its primary task and as the key for building European unity. The organisation serves three basic functions: to protect and reinforce democratic pluralism and human rights; to seek common solutions to major societal problems of the member states; and to encourage a heightened sense of Europe's multi-cultural identity.[2] Regarding democracy and human rights the COE has not forced any particular model upon members or prospective members, preferring to recognise the unique situation each state faces and provide assistance within that context.[3]

A. STATUTE OF THE COE AND SUMMIT DECLARATIONS

The aims of the COE are to achieve greater unity between members for the purpose of safeguarding and realising the ideals and principles that create a common heritage and to facilitate economic and social progress.[4] The member states reaffirm their devotion to the spiritual and moral values that are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles that form the basis of genuine democracy.[5] Article 3 of the Statute establishes the criteria for membership stating that all members 'must accept the principles of the rule of law and the enjoyment of all person within its jurisdiction of human rights and fundamental freedoms'.[6] Article 8 stipulates that any member which has seriously violated the terms of Article 3 may be suspended from the

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[1] See generally COE. *Disillusionment with Democracy: Political Parties, Participation and Non-Participation in Democratic Institutions of Europe*. (Strasbourg: Council of Europe, 1994).
[2] COE. *The Challenges of a Greater Europe: The Council of Europe and Democratic Security*. (COE: Strasbourg, 1996) p. 29.
[3] A necessary position due to the recent expansion to 41 members.
[4] Statute of the COE (ETS No. 1) Article 1.
[5] The Consultative Assembly felt that democracy, individual freedoms, and the rule of law are three aspects of one reality and that they were inseparable, see COE. *Collected Edition of the 'Travaux Preparatoires' of the European Convention on Human Rights*, vol. 5, hereinafter *Collected Edition* (The Hague: Martinus Nijhoff, 1979) p. 288.
[6] This has been interpreted to included elections at reasonable intervals with secret ballot and universal suffrage, sovereign parliaments and free political parties, Parliamentary Assembly Resolution (800) 'Principles of Democracy.' (1983).

work of the organisation until it complies with Article 3 or it may have its membership revoked.[7]

In 1993, the Heads of State and Governments of the COE held their first ever summit in Vienna where they recognised the importance of democracy, human rights and the rule of law for the security and stability of Europe.[8] The assembled leaders saw the end of the Cold War as 'a historic opportunity' for peace and stability on the continent due to the widespread existence of democracy, human rights, the rule of law and a common cultural heritage.[9] The Summit marked a new purpose for the COE to create 'a Europe of democracy security' through reforming the ECHR, establishing legal commitments for the protection of minorities, combating racism, xenophobia, anti-semitism and intolerance and by improving local and regional representation. In 1997 the COE held its second summit in Strasbourg adopting a Final Declaration and Action Plan[10] targeting the strengthening of human rights and pluralist democracy, emphasising social cohesion and the essential role of education and culture. The Action Plan provided guidelines for the pursuit of democratic security through ratifying Protocol 11 of the European Convention on Human Rights (ECHR) for a single Court of human rights (see below), creating a Commissioner for Human Rights, enforcing compliance with commitments, combating racism and intolerance, and protecting minorities, promoting social rights and encouraging social cohesion. They also agreed to develop a programme on education for democratic citizenship 'with a view to promoting citizens' awareness of their rights and responsibilities in a democratic society.'

The institutional work of the COE is conducted through three bodies. The Committee of Ministers (the Committee) is the decision making body for the COE and the supervisor of the ECHR.[11] The Parliamentary Assembly (COE PA) is made up of representatives chosen from the parliaments/legislatures of each member state who adopt their own decisions and resolutions and make recommendations to the Committee dealing with policies corresponding to the aims of the COE. The COE PA is seen as a guardian of democracy and human rights and as a forum for reviewing the condition of rights in freedoms in all member states.[12] The

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[7] Greece withdrew from the organisation in 1970 in the wake of a report by the European Commission on Human Rights regarding the civil disturbances at the time and rejoined in 1974. More recently Ukraine has come under criticism for failing to meet its obligations leading to calls for its suspension, see 'The Monitoring Committee in Favour of Withdrawing the Ukraine Delegation's Credentials.' COE Press Release (20 May 1999).

[8] Vienna Declaration and Programme of Action (1993) reprinted in 1 (1) IHRR (1994) p. 240.

[9] Vienna Declaration, paragraph 2.

[10] Reprinted in 18 *Human Rights Law Journal* (1997) p. 291.

[11] ECHR, Article 54.

[12] Deputy SG of COE in *Democracy and Human rights: Proceedings of the Colloquy Organised by the Government of Greece and the Council of Europe*, (24-26 September, 1987) hereinafter *COE Colloquy*. (Kehl: Engel, 1990) p. 2.

third body is the Congress of Local and Regional Authorities of Europe (CLRAE) which works to strengthen democracy and human rights at the local and regional level within states.

1. Committee of Ministers

The Committee of Ministers acts as the executive of the COE. In 1994 the Committee declared that it has the power to ensure member states conform to their commitments to democracy, human rights and the rule of law as agreed to in the COE Statute, the ECHR and other legal instruments.[13] Under the Declaration the Committee is able to take up the issue of compliance with commitments in situations referred to it by a member state, the Secretary-General or the COE PA. Once a situation is before the Committee it will receive information on the matter and issue an opinion, recommendation or 'take any other decision within its statutory powers'. The consultations by the Committee under the Declaration are held in private with the proceedings kept secret in order to ensure an environment of 'dialogue, co-operation and mutual assistance'. This point that has come under criticism from the COE PA due to the lack of democratic transparency in dealing with issues directly related to democracy and human rights.[14]

The Committee's main activity is the adoption of an Intergovernmental Programme of Action that guides the activities of the COE. The present programme[15] focuses on assisting central and eastern European states in their transitions to democracy, improving the role of human rights and law and addressing the issues of minorities, racism, and intolerance. The programmes are based on the importance and essential nature of democracy and human rights with regards to social cohesion, quality of life and cultural pluralism. At the Strasbourg Summit the Committee was given the responsibility of undertaking reform of the COE in order to implement the idea of European democratic security and address those changes

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[13] 'Declaration on Compliance with Commitments Accepted by Member States of the Council of Europe.' 95th Session of the Committee of Ministers (10 November 1994) reprinted in 2 IHRR (1995) p. 250; 'Procedure for Implementing the Declaration of 10 November 1994 on Compliance with Commitments Accepted by Member States of the Council of Europe.' (20 April 1995) reprinted in 4 IHRR (1997) p. 244.

[14] The COE PA conducts its own monitoring activities on compliance with commitments and appears to be resentful of the Committee's procedures due to their confidential nature, which the Committee stresses is necessary to ensure a frank and constructive dialogue, see the questions of the COE PA and responses from the Committee of Ministers, reprinted in 4 IHRR (1997) pp. 246-255. Admittedly the Committee does not provide much information in their statements concerning the situation in particular member states, see Honouring Of Obligations And Commitments By Estonia, reply to Parliamentary Assembly Recommendation 1313 (1997) (CM/Del/Dec/Act(97)586/2.5, GREL(97)11, 14); Honouring of obligations and commitments by Albania, draft reply to Parliamentary Assembly Recommendation 1312 (1997) (GR-EDS(98)31 and 32).

[15] 'A Programme Equal to the Challenges of the New Europe', may be found at [http://www.coe.fr/eng/act-e/epgrmact.htm].

brought on by enlargement.[16] The increased membership will bring new and diverse demands upon the COE naturally necessitating changes structurally and conceptually to the organisation as the idea of a common heritage among members is expanded.

2. Parliamentary Assembly

The COE PA has the primary task of discussing the issues facing the COE as well as monitoring the commitments of existing members, along with providing suggestions to the Committee and issuing its own resolutions. The COE PA plays a major role in the admission process to the COE by conducting enquiries and studies as to whether a candidate fulfils all the necessary requirements of membership before giving approval to the Committee to invite a state to become a full member. As the states of central and eastern Europe expressed interest in membership the COE PA introduced in 1989 a special guest status allowing a state to participate in COE activities at a limited level. The purpose of the special status was to assist these states in their transitions to democracy and improve their structures for the protection and promotion of human rights.[17]

The COE PA has recently shown concern over the poor rates of participation in elections in Europe with a 1997 resolution on 'Instruments of Citizen Participation in Representative Democracy'.[18] The resolution is based on the need to ensure the 'active contribution of all citizens' and the concern over the currently poor rate of participation and to find means for allowing society to express their needs and stimulate democratic debate. It sees a system of representative parliamentary debate as essential and that 'the use of direct democracy must be regarded as a complement'. The COE PA has also emphasised the need for human rights education[19] as there exists 'a certain lack of human rights culture and a failure to understand the true meaning of human rights and their implications in everyday life.' It recommends that substantive efforts be taken to enhance an understanding of human rights and tolerance as 'human rights are not only a matter of government policies but also depend on the attitudes of ordinary citizens in everyday life.' The COE PA has also recently offered recommendations on the protection of refugees and asylum-seekers,[20] and concerning human rights protection in

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[16] Strasbourg Action Plan Part V. 'Structures and Working Methods.'
[17] The following states presently hold special guest status: Armenia, Azerbaijan, and Bosnia-Herzegovina. Belarus was granted guest status in 1992 but was suspended in 1997.
[18] Resolution 1121 (1997).
[19] 'On Human Rights Education.' Recommendation 1346 (1997)
[20] 'Protection and Reinforcement of the Human Rights of Refugees and Asylum-seekers in Europe Recommendation 1327 (1997).

the former-Yugoslavia.[21] The ability of the COE PA to take any substantive action upon its resolutions and decisions is limited by the power vested in the Committee (as demonstrated by the Framework Convention on Minorities, see below). The COE PA does contribute by bringing the discourse of democracy and human rights into a wider public forum raising important issues and areas for action.

3. Congress Of Local And Regional Authorities Of Europe (CLRAE)

The COE has stated that the best way of ensuring the principles of democracy and human rights is to develop democracy at the local level, for this is where individuals most directly participate in democratic life.[22] CLRAE has the purpose of bringing democracy closer to individuals by applying the European Charter of Local Self-Government.[23] In the Charter, local authorities are described as 'one of the main foundations of any democratic regime' and that it is at the local level where the bulk of political participation occurs. Article 4 provides that '[p]ublic responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen.' Debates by CLRAE have shown this idea to represent a general organisational principle for all aspects of society in the member states.[24] CLRAE has taken further efforts with the European Convention on the Participation of Foreigners in Public Life at Local Level,[25] dealing with the civil and political rights for foreign residents, including the right to vote, freedom of expression, assembly and association. There is also the LODE programme that promotes the ideas and practice of local democracy at the inter-governmental level with emphasis on the communities of central and eastern Europe, with which CLRAE is actively involved.[26]

The idea that decisions and powers which impact the individual should be as close as possible to the individual not only represents a certain degree of common sense but also enhances the democratic legitimacy of a society as individuals are more able to be part of the decision-making process. The work of CLRAE is complemented by the EU's Committee of the Regions, with both bodies striving to develop responsibility and empowerment closer to the day to day lives of individuals.

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[21] 'Functioning of the Institutions for the Protection of Human Rights in Bosnia and Herzegovina.' Recommendation 1337 (1997) calling for pressure to be placed on governments to adhere to the General Framework Agreement.
[22] COE. *Human Rights: A Continuing Challenge for the Council of Europe*, hereinafter *Continuing Challenge* (Strasbourg: COE, 1995) p. 111.
[23] 1985 ETS No. 122. Entered into force 1 September 1988, 34 signatories 31 ratifications.
[24] *Continuing Challenge* pp. 112-113.
[25] ETS No. 144. 1992 Entered into force 1 May 1997, 8 signatories, 4 ratifications.

B. EUROPEAN CONVENTION ON HUMAN RIGHTS[27]

The primary legal framework for the protection and promotion of democracy and human rights rests with the European Convention on Human Rights. The ECHR was adopted with the purpose of protecting against the revival of aggressive and repressive dictatorships by ensuring the enforcement of rights contained in the UDHR.[28] The signatories to the ECHR recognise the overall aim of the COE in creating unity among its members and that one way towards this unity is through the 'maintenance and further realisation of Human Rights and Fundamental Freedoms.'[29]

In the Preamble states reaffirm their belief in human rights which are seen as a foundation for peace and justice and 'are best maintained … by an effective political democracy and … a common understanding and observance of the Human Rights upon which they depend'. The rights and freedoms contained in the ECHR and its Protocols deal primarily with civil and political rights with some social rights included.[30] Article 1 of the ECHR obligates the states to secure the rights of all individuals within their jurisdiction.[31] Interpretation of the ECHR takes into account the UDHR, the aims of the COE, the need for effective representative democracy, and the acknowledgement of a common heritage among members with respect for the rule of law.[32] The basis of the ECHR is not the reciprocal relations of states in the field of human rights but 'to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideas, freedom and the rule of law.'[33]

The ECHR framework assumes the existence of democracy in a signatory state through the membership criteria of the COE. The ECHR itself contains no provision directly dealing with participation or democracy, with obligations regarding voting being a later inclusion in Protocol No. 1. During the drafting of the ECHR there was disagreement as to whether there should be explicit protection of democratic institutions.[34] Some states favoured such an

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[26] The efforts of the LODE programme also assist in preparing a state for membership to the COE, for details see [http://www.coe.fr/cplre/demlr/eng/elode/index.htm].

[27] ETS No. 5 as amended by Protocol No. 11 ETS No. 155.

[28] A. Robertson and J. Merrils. *Human Rights in the World*, 3rd ed. (Manchester: Manchester University Press, 1989) p. 82.

[29] ECHR, Preamble, paragraph 3.

[30] For a review of the rights in the ECHR see D. Harris, et al. *Law of the European Convention on Human Rights*. (London: Butterworths, 1995)

[31] ECHR, Article 1. Also *Austria v Italy* European Commission, No. 788/60 (11 January 1961) paragraph 58.

[32] *Kjeldsen, Bush Madsen and Pedersen v Denmark* Series A No. 23 (1976), paragraph 53. Also *COE Colloquy* pp. 18-19.

[33] *Austria v Italy*, paragraph 58.

[34] For more on the drafting history see S. Marks 'The European Convention on Human Rights and Its "Democratic Society."' 66 *British Yearbook of International Law* (1996) pp. 221-224.

inclusion,[35] while others, like the UK, felt that it would be 'inappropriate' to include provisions concerned with democratic institutions.[36] The Consultative Assembly, which was charged with drafting the ECHR, felt strongly about including provisions on democracy as a necessary means to give practical effect to the protection of rights, as the only way to ensure rights are truly protected is through a democratic regime and democratic institutions.[37] In the end, the Assembly's proposals were rejected by the Committee of Ministers. This rejection may be explained by the fact that COE criteria for membership depends upon a state being democratic, making further guarantees frivolous. But such an explanation does not hold up to the strong stance taken by the Consultative Assembly during the drafting stages of the necessity of such provisions. A more feasible explanation is likely to be in the reluctance of any government in 1950 to accept obligations concerning political participation, either in their own states or the implications this may have had for overseas possessions.

The position of democracy in the ECHR occurs along much more subtle lines as it is held that the ECHR and its Protocols exist within the context of a 'democratic society' as expressed in the Preamble. In establishing the context of a 'democratic society' the European Court of Human Rights (the Court) has usually taken the member states of the COE as examples but has also allowed for the possibility of examining the situations and practices of other democratic societies.[38] The meaning and content of a 'democratic society' is not elaborated upon concerning its inclusion in Articles 8-11. Resulting in the view of some commentators as 'a phrase heavy with uncertainty'.[39] The approach to the idea of a democratic society by the organs of the ECHR demonstrates the difficulty of giving a political concept legal elaboration for even if the members of the COE possess a common heritage the intricacies of their democratic systems do differ.[40]

To accommodate the essential differences of the democratic societies of the members states there has developed the concept of 'margin of appreciation' used by the Court to

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[35] See the remarks by Ireland in *Collected Edition,* p. 60.
[36] *Collected Edition*, p. 70.
[37] *Collected Edition*, p. 290.
[38] See L. Loucaidis. 'Restrictions or Limitations on the Rights Guaranteed by the European Convention on Human Rights.' 4 *Finnish Yearbook of International Law* (1993) p. 350. Yourow observes rightly that as the case law of the system develops there will be less recourse to comparisons outside Europe. This is to be expected as a 'regional system' develops. H. Yourow. *The Margin of Appreciation Doctrine the Dynamics of European Human Rights Jurisprudence*. (The Hague: Kluwer, 1996) p. 30.
[39] Harris et al. (1995) p, 291. One author has come up with a non-exhaustive list of the elements of a democratic society based on the statements of the Court, it includes participation, accountability, representation, pluralism, tolerance, broadmindedness, freedom of expression for public discussion and the protection of minorities. A. Clapham. *Human Rights in the Private Sphere*. (Oxford: Clarendon, 1993) p. 147.

acknowledge the variations in the implementation of rights.[41] The Court has determined that in certain situations the government is in a better position to determine the necessity and appropriateness of action. Therefore the Court should give way to this margin and leave it to the government to decide the limits placed upon rights within its own domestic setting as societies differ and no one model will work at all times.[42] The Court's use and development of the margin of appreciation has been inconsistent and vague leading to questions over its proper place within the ECHR framework.[43] One trend that has emerged is that in issues of public importance the margin of appreciation allowed by the Court will be lower as opposed to matters of a more private nature where the Court will allow a wider margin to the government.[44]

In utilising the margin of appreciation the existence of a 'democratic society' creates the basis by which the actions of governments are judged.[45] To a certain extent the margin of appreciation is a necessary element of the ECHR framework due to the level of human rights protection it has developed and the context in which violations occur. With democratic governments there is the assumption that human rights are generally adhered to and any action taken to limit rights, as with assembly, expression, etc., is justified since the elected representatives imposing the limitations possess a legitimate mandate from society. Within the ECHR framework there is the need to balance the popular mandate upon which government action is based, while at the same time ensuring that power is not arbitrarily abused or sectors of society are disadvantaged by the tyranny of the majority.[46] The margin of appreciation provides the Court with a legal tool allowing it to agree that the limitations upon certain human rights as defined by the government are necessary. The doctrine of margin of appreciation also allows governments to utilise acceptable legal language before the Court to say that restrictions upon rights are acceptable and not contrary to the democratic mandate they have been given.

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[40] The Court recognised this in *Mathieu-Mohin and Clerfayt v Belgium* Series A No. 113 (1987) 'any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another', paragraph 54.

[41] See generally 'The Doctrine of the Margin of Appreciation under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practice.' 19 *Human Rights Law Journal* (1998).

[42] *Mathieu-Mohin and Clerfayt v Belgium*, paragraph 54. Also P. Mahoney. 'Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining some Recent Judgments.' 2 *European Human Rights Law Review* (1997) p. 364.

[43] For a review of the opinions on the margin of appreciation see N. Lavender. 'The Problem of the Margin of Appreciation.' 2 *European Human Rights Law Review* (1997) p. 380.

[44] *Handyside v UK* Series A No. 24 (1979/80) paragraph 48. Also Mahoney (1997) p. 379, and where he points out that the recognition of cultural difference in not a retreat into relativism, 'Marvellous Richness of Diversity or Invidious Cultural Relativism.' 19 *Human Rights Law Journal* (1998) p. 3.

[45] P. van Dijk and G. van Hoof. *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague : Kluwer, 1998) pp. 772-773.

The margin of appreciation acts as a rhetorical tool for democratic governments to justify their behaviour, it is left to the Court to determine whether the behaviour in question is appropriate for a 'democratic society'.[47]

The margin of appreciation is a necessarily element due to the character of the ECHR but the expanded application of the Convention will require the Court to remain in firm control of its application preventing governments from manipulating its existence to the detriment of individuals.[48] At the same time the use of the margin of appreciation allows for the diversity of democratic systems to be expressed within the established ECHR framework. Again this will be an important issue concerning expansion as the differences among the societies of the member states increases. A point the Court must recognise while maintaining that all activity does not fall below acceptable standards.

1. ECHR Protection - Commission and Court into Permanent Court

The protection of rights under the ECHR was previously the work of both the European Commission of Human Rights and the European Court of Human Rights. Under the terms of Protocol No. 11 the separate Commission and Court have been replaced by a Permanent Court of Human Rights.[49] The move to a single court was necessitated by the large case-load that has developed under the ECHR demonstrating the success of individuals being able to access and utilise the ECHR.

The Court is able to hear inter-state cases and individual applications, which includes any individual, NGO or group of individuals 'claiming to be the victim of a violation'.[50] The taking of a case to the Court was dependent upon whether or not a state has agreed to the jurisdiction of the Court for individual complaints.[51] During the drafting of the ECHR the decision to have an extra declaration by state accepting the competence of the court came from the Committee of Ministers over the suggestions of the Consultative Assembly. The Assembly felt it was necessary to make the jurisdiction of the court mandatory, as it would be

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[46] See the Court's opinion in *Young, James and Webster* Series A No. 44 (1981), paragraph 63. For discussion see Marks (1996) p. 218; Mahoney (1997) p. 369; Merrils pp. 144-149.
[47] *Mathieu-Mohin and Clerfayt v. Belgium*, paragraph 52. Also Harris et al. (1993) pp. 295-296.
[48] *Dudgeon v UK* Series A No. 45 (1982) 'Notwithstanding the margin of appreciation left to the national authorities, it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it', paragraph 59.
[49] On the status of the past work of the Commission under the new system see N. Bratza and M. O'Boyle. 'The Legacy of the Commission to the New Court under the Eleventh Protocol.' 2 *European Human Rights Law Review* (1997) p. 211.
[50] ECHR, Article 34, which also stipulates that states will not take any action to 'hinder in any way the effective exercise of this right.'

absurd for governments to accept the ECHR but not accept the controls it established. The Assembly had to accept the Committee's position saying '[w]e must give way, so far as the Court is concerned, and accept its optional character. We recognise that this is the only chance of obtaining adherence of certain governments.'[52] This situation no longer holds as any new signatories automatically recognise the Court's competence to hear individual complaints.[53] The final judgment of the Court is binding and the Committee has the responsibility of supervising its execution.[54] The Court is also able to provide advisory opinions, however since 'such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined' in the ECHR or the protocols[55] this function has not been utilised and is unlikely to be used in the future.

The Court has established that the ECHR is 'an instrument designed to maintain and promote the ideals and values of a democratic society.'[56] However the Convention contains only one direct mention of what the democratic process consists of in Article 3 of Protocol No. 1, which reads

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of opinion of the people in the choice of the legislature.

The belief of democracy underwriting the entire ECHR system was expressed by the Commission who stated that Article 3 of Protocol No. 1 'presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society.'[57] The Court's treatment of Article 3 raises a larger point that '[a]ccording to the Preamble to the Convention, fundamental human rights and freedoms are best maintained by "an effective political democracy",' which in turn makes Article 3 an important aspect of the ECHR system as indicative of the existing democratic framework.[58]

The Court's view to political democracy is that a right to participate, while fundamental, is not absolute allowing for a wide margin of appreciation leaving much of the content of the

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[51] Prior to the adoption of Protocol No. 11, ECHR Articles 25 (for the Commission) and 46 (for the Court).
[52] *Collected Edition*, p. 294. One of those governments was the UK who viewed the inclusion of an automatic petition system for individuals as a 'grave danger', *Collected Edition*, p. 68. For a review of the UK's position against a human rights court, see G. Marston. 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950.' 42 *International and Comparative Law Quarterly* (1993) p. 796.
[53] ECHR, Article 34.
[54] ECHR, Article 46.
[55] ECHR, Article 47.
[56] *Kjeldsen, Busk Madsen and Pedersen v Denmark*, paragraph 53. The Court's translation of the original French text is found in *Soering v UK* Series A No. 161 (1989) paragraph 87.
[57] *The Greek Case* Commission Report (1969) paragraph 416.

right to be determined by the government, as established in *Mathieu-Mohin*.[59] The Court did feel that the Article 3 does create an obligation 'of adoption by the states of positive measures to "hold" democratic elections.'[60] The Court has expressed that the European Parliament of the EU falls under the scope of Article 3 as a means of ensuring that 'effective political democracy' exists.[61] The obligation of elections only applies to the national legislature of a state with elections at lower levels of government to be determined by the constitutional structure of the state.[62] The Court takes the stance that participation at the local level is not necessary for 'effective political democracy' which dismisses the work done by CLRAE. Considering the stance of CLRAE on the importance of regional democracy within states it appears unfortunate the Court has chosen not to apply Article 3 at the local level when it has been able to apply it to the EU.[63]

The application of Article 3 is to occur in 'conditions which will ensure the free expression of opinion'. The Court has declared this to include 'the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election.'[64] But this does not mean 'that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory.'[65] Furthermore, under Article 3 favourable legislation may be enacted which allows for minority groups to be represented in government.[66] The Court has expressed that regardless of variations upon the right to vote the 'free expression of the people' remains the core concept of democracy[67] as well as 'one of the essential foundations' of a democratic society.[68]

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[58] *Mathieu-Mohin and Clerfayt v Belgium*, paragraph 47. For a greater treatment of democracy under the ECHR see Marks (1996).

[59] *Mathieu-Mohin and Clerfayt v Belgium*, paragraph 52. The Commission has expressed that voting is not the only means of political participation available to a society but did not elaborate further, *Movement for Democratic Kingdom v Bulgaria* No. 27608/95 (1995).

[60] *Mathieu-Mohin and Clerfayt v Belgium*, paragraph 50.

[61] *Matthews v UK* European Commission No. 24833/94 (1997) paragraph 43.

[62] A similar position had been developed by the Commission, see Gomien et al. (1996) pp. 331-332.

[63] The Commission had been equally dismissive of the importance of local democracy and the applicability of Article 3, see *Mobin Ahmed, Dennis Perrin, Ray Bentley and David John Brough v UK* No. 22954/93 (1997) paragraph 98 and *Booth-Clibborn and Others v UK* No. 11391/85 (1985).

[64] See the Court's statements in *Bowman v UK* European Court Reports 1998-1, paragraph 42.

[65] *Mathieu-Mohin and Clerfayt v Belgium*, paragraph 54.

[66] *Liberal Party v UK* European Commission No. 8765/79 (1982); *Lindsay and Others v UK* European Commission No. 8364/78.

[67] See Merrils (1993) p. 127-128.

[68] *Handyside v UK*, paragraph 49. Freedom of expression is also essential for each individual's self-fulfilment, *Vogt v Germany* Series A No. 323 (1995) paragraph 52.

The Court has made it clear that a democratic society does not mean that the will of the majority will prevail over the minority.[69] During its existence the Commission contributed to this idea by declaring the need for government to be accountable to society[70] and that the 'democratic process is dependent on the interplay of a wide variety of group interests.'[71] The Court has expressed the need to take into account 'pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[72] This was in the context of freedom of expression with the same idea being applied to the freedoms of association and assembly[73] and religious freedom[74] demonstrating its nature as a general principle of democracy for Europe.

The Court has described further aspects of a democratic society as consisting of the rule of law as a fundamental principle, the need for appropriate limits to be placed upon security and police forces, and the independence of the judiciary to allow an individual recourse in cases of a violation.[75] Furthermore, access to, and the impartiality of the courts[76] are essential for a democratic society.[77] The press has a vital role to play in the democratic society as a 'means of discovering and forming an opinion of the ideas and attitudes of political leaders.'[78] And political parties constitute an 'essential role in ensuring pluralism and the proper functioning of democracy'[79] as they make 'an irreplaceable contribution to political debate'.[80]

The ECHR's approach to democracy, through the single inclusion of a right to vote, has been criticised as a 'soft' institutional approach with no expressed movement beyond elections at national levels of government.[81] In the absence of direct protection for democracy the Court has made it clear in its case law that the actions of government are to be judged on the basis of a democratic society as to be determined by the Court. It has stated that democracy is 'a

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[69] *Johnston and Others v Ireland* Series A No. 112 (1986) In the Separate Opinion of Judge De Meyer - 'democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of the dominant position', paragraph 5.

[70] *Barfod v Denmark* Series A No. 149 (1989) paragraph 64.

[71] *Markt Intern and Deerman v Germany* Series A No. 165 (1990) paragraph 203.

[72] *Handyside v UK*, paragraph 49. *Young, James and Webster* paragraph 63; *Dudgeon v UK*, paragraph 53; *Jersild v Denmark* Series A No. 298 (1994) paragraph 37. The Court has also expressed that the state is the ultimate guarantor of pluralism (*Informationsverein Lentia and Others v Austria* Series A No. 276 (1993) paragraph 38) which admits the paradox of human rights discussed in Chapter 1.

[73] *Plattfrom 'Arzte für das Leben'* Series A No. 139 (1988) paragraph 32.

[74] *Kokkinakis v Greece* Series A No. 260-A (1993) paragraph 31. *Buscarini and Others v San Marino* No. 24645/94, (judgement of the Court 18 February 1999) paragraph 34.

[75] *Klass and Others v Germany* Series A No . 28 (1978) paragraphs 42, 55.

[76] *Castillo Algar v Spain* No. 28194/95 (judgment of the Court 28 October 1998) paragraph 45.

[77] Air*ey v Ireland* Series A No. 32 (1979) paragraph 24. Proceedings before the judiciary should also be in the presence of the accused and in public *Klass and Others v Germany*, paragraph 59.

[78] *Lingens v Austria* Series A No. 103 (1986) paragraph 42; *Sunday Times v UK* Series A No. 30 (1979/80) paragraph 65.

[79] *United Communist Party of Turkey and Others v Turkey* European Court Reports 1998-1,paragraph 43.

[80] *Lingens v Austria*, paragraph 42; *Castells v Spain* Series A No. 236 (1992) paragraph 43.

[81] Marks (1996) p. 234. See also *COE Colloquy* pp. 19-20 as to how the provisions go beyond procedure to incorporate the political philosophy of the ECHR.

fundamental feature of the European public order'[82] and the ECHR generally has the purpose of upholding democracy.[83] Therefore the Court has emphasised that the rights of the ECHR are not be 'theoretical or illusory, but practical and effective'.[84] It has gone on to say that the ECHR is a living instrument that must be interpreted in the light of present-day conditions recognising the dynamic nature of democracy.[85]

The Court's approach to democracy is not necessarily soft as it has explained that '[d]emocracy … appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.'[86] The Court has perhaps not been as expressive as its Inter-American counterpart in defining the basic structures and procedures of a democracy. Greater elaboration as to how a democracy is to work could prove useful with the expanded membership of the COE. Such an endeavour is unlikely due to the lack of use of the advisory opinion machinery leaving the Court to continue defining specific elements of democracy under question in a case before it. Also the Court may feel that such an elaboration is unnecessary as it 'considers one of the principal characteristics of democracy to be the possibility it offers of resolving a country's problems through dialogue, without recourse to violence'.[87] This implies that European societies have a wide 'margin' to establish the democratic structures best fitting for their circumstances with the role of the Court making determinations regarding conflict over the exercise or limitations of rights within a democracy society.

C. European Social Charter

It has been remarked that Europe has made less progress in the realisation of social democracy than it has with political democracy.[88] The protection of socio-economic rights is primarily dealt with under the European Social Charter (ESC)[89] which consists of a supervisory mechanism based on state reports and petition procedures. From 1991-1995 the ESC underwent a large revision process updating its provisions and improving upon the

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[82] *Loizidou v Turkey* Series A No. 310 (1995) pargraph 75.
[83] *Kjeldsen, Busk Madsen and Pedersen v Denmark*, paragraph 53.
[84] *United Communist Party v Turkey*, paragraph 33.
[85] *Loizidou v Turkey*, paragraph 71.
[86] *United Communist Party v Turkey* , paragraph 45.
[87] *United Communist Party v Turkey*, paragraph 57.
[88] P. Leurecht in *The Social Charter for the 21st Century: Colloquy organised by the Secretariat of the Council of Europe* (14-16 May 1997) hereinafter *Social Charter for the 21st Century* (Strasbourg: COE, 1998) p. 20.
[89] ETS No. 35. Entered into force 26 February 1965, 31 signatories, 22 ratifications.

supervisory mechanisms.[90] The rights protected under the ESC cover a wide array of issues related to employment, unions, social security and welfare, health, the family and marginal sectors of society. Governments accept the ESC framework as a declaration of aims which are to be pursued by all appropriate means and are to submit regular reports on their compliance with the provisions agreed to in the ESC.[91] These reports are then assessed and recommendations are provided to the state based on the information provided.[92]

The protection rights in the ESC, as with the ECHR shall not be subject to any limitations except for *inter alia*, those 'necessary in a democratic society for the protection of the rights and freedoms of others'.[93] The meaning of 'democratic society' for the purposes of the ESC has not been defined and receives no other mention in the ESC or its Protocols. By way of interpretation, contributions to a democratic society can be found in Article 30 of the ESC (Revised) as it covers '[t]he right to protection against poverty and social exclusion' emphasises the need to ensure that all individuals in society have access 'to employment, housing, training, education, culture and social and medical assistance'.[94] This recognises the detrimental aspects inequalities have upon society and the possible impact for the effective functioning of democracy. The inclusion of the Additional Protocol (1988) which addresses the rights of workers to participate in the decision making process in the workplace is a recognition of the importance of democratic structures and process beyond national political institutions.

The ESC framework has been described as a necessary element for the 'democratic security' in Europe being pursued by the COE.[95] Europe does not face the severe problems as do other parts of the world with starvation, shortages in housing, health care and other areas of economic and social rights, but that does not make these rights any less important. Despite this there is reluctance in Europe to recognise socio-economic rights as an area of direct

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[90] The original ESC and subsequent changes will be referred to as the ESC framework. The Charter revisions include the Additional Protocol to the European Social Charter (1988). ETS No. 128, entered into force 4 September 1992, 21 signatories, 8 ratifications. Protocol amending the European Social Charter (1991) ETS No. 142, not yet in force, 23 signatures, 14 ratifications (9 necessary ratifications still needed) Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995) ETS No. 158, entered into force 1 July 1998, 11 signatories, 7 ratifications. European Social Charter (Revised, 1996) ETS No. 163, not yet in force, 19 signatories, 1 ratification. On the reform of the ESC see generally *Social Charter for the 21st Century*.

[91] The ESC's uniqueness lies in the fact that it is 'a political instrument for social development' and equally 'a binding legal instrument'. Statement by A. Coudrec in *Charter for the 21st Century*, p. 7.

[92] ESC Part IV.

[93] ESC (Revised) Article G.

[94] See A. Heringa. 'Social Rights and the Rule of Law.' in *Social Charter for the 21st Century*, p. 245.

[95] M. Leitao in *Social Charter for the 21st Century*, p. 34. On the enforcement mechanisms available within the ESC framework see 'The Implementation of the Collective Complaints Procedure.' in *Social Charter for the 21st Century*, p. 97; Heringa in *Social Charter for the 21st Century*, pp. 209-220.

concern for a democratic society.[96] This reluctance is most likely based in political and policy arguments over resources but there remains the need to ensure that an individual's right to food, shelter, health, work, and related aspects are protected. The existence of a stable democracy, or an effective system for human rights, depends upon the protection of vulnerable groups and the protection of those rights which are in many cases most closely associated to the individual's day to day existence, such as employment, health and education.[97] If it is implicitly understood that democracy underlies the ESC as it does the ECHR, then it is necessary for the supervisory bodies to elaborate upon this implicitness so a more explicit understanding of the ESC as part of democratic society may be understood.

D. Further Support for Democracy and Human Rights

Minorities has always been an issue for Europe but has now taken on a new meaning with the end of communism and the inclusion of central and eastern European states in European institutions like the COE.[98] In 1993 the COE PA suggested that the Committee draw up an additional Protocol to the ECHR with the specific role of protecting the rights of minorities.[99] The COE PA believed it would be more appropriate to integrate minority protection into the existing human rights system rather than creating a new and separate legal document. The Committee disagreed and took its own action to draft the Framework Convention for the Protection of National Minorities.[100] The Framework Convention considers

> that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.[101]

The Framework Convention calls for action to be taken so that minorities are not disadvantaged and for states 'to promote, in all areas of economic, social, political and cultural

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[96] Heringa in *Social Charter for the 21st Century*, pp. 192-193.
[97] See Heringa in *Social Charter for the 21st Century*, p. 200.
[98] On developments see F. Benoït-Rohmer. *The Minority Question in Europe: Text and Commentary*. (Strasbourg: COE, 1996) pp. 36-39; CO. 'Framework Convention for the Protection of Minorities and Explanatory Report.' November 1994 H (94) 10, pp. 11-12, hereinafter *Explanatory Report*.
[99] Recommendation 1201 (1993).
[100] ETS. 157. Entered into force 1 February 1998, 24 ratifications (one of which is Armenia a non-COE state). The Assembly's Recommendation, while lacking any legal force, remains a reference document for the consideration of requests for accession to the COE. There is also an earlier European Charter for Regional or Minority Languages 1992 (ETS No. 148) for discussion see S. Åkermark. *Justifications of Minority Protection in International Law*. (London: Kluwer , 1997) pp. 233-238.
[101] Preamble, paragraphs 6-7.

life, full and effective equality between persons'.[102] Article 15 calls on states create the necessary conditions allowing minorities to participate in all aspects of society, especially those most important to them.

The Framework Convention contains no definition as to what or who constitutes a 'national minority' since there is no agreement as to a more detailed definition. Instead it is left to governments to define who falls under the provisions of the Framework Convention.[103] The Framework Convention only contains objectives and programmes for implementation by signatory governments giving it a flexible and less binding nature.[104] Governments were reluctant to accept a draft protocol to the ECHR with its existing supervision choosing instead to adopt a plan of action with no right of individual petition. This manoeuvre has been described as governments taking 'refuge behind their sovereignty, which stands in the way of direct access by their subjects to an international body. In addition, they fear becoming systematic victims of accusations originating from groups of opponents.'[105] The Framework Convention also emphasises that the exercise of any right therein does not imply 'any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular sovereign equality, territorial integrity and political independence'.[106] It is for this reason that there is no granting of collective rights for minorities in order to avoid secessionist claims.[107] The weakness of the Framework Convention demonstrates 'the highest level of commitment which the states were able to make in the field of the protection of minorities.[108] The document demonstrates the reluctance of states to grant rights to minorities that are seen as an infringement upon their sovereignty. Therefore they have chosen to keep the enforcement aspect of the instrument strictly within their exclusive sphere.[109]

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[102] Article 4 (2). For a fuller discussion of the rights contained in the Framework Convention see G. Gilbert. 'The Council of Europe and Minority Rights.' 18 *Human Rights Quarterly* (1996) pp. 174-188.

[103] *Explanatory Report*, paragraph 12. Benoït-Rohmer (1996) p. 41. At present all reservations or declarations concerning the Framework convention explain what 'national minority' means in the individual state. The *Explanatory Report* asserts that the provisions of Article 'specify that the protection of national minorities ... does not fall within the reserved domain of states' but offers no concrete evidence to prove the complete truth of this assertion, paragraph 30.

[104] Åkermark (1997) further observes that it contains more limitation clauses than comparable documents, p. 231. Supervision of the provisions of the Framework Convention is given to the Committee of Ministers who, with assistance of an advisory committee, receives and requests information from states party to the Convention on measures being taken to give effect to the provisions.

[105] Benoït-Rohmer (1996) p. 44.

[106] *Framework Convention*, Article 21.

[107] Benoït-Rohmer (1996) p. 42.

[108] Benoït-Rohmer (1996) pp. 39-40.

[109] Benoït-Rohmer (1996) pp 42-43; Gilbert (1996) p. 188-189. Pejic describes the Framework convention as 'a step backward'. J. Pejic. 'Minority Rights in International Law.' 19 *Human Rights Quarterly* (1997) p. 683. Despite this Åkermark (1997) feels its importance should not be overlooked, p. 233.

Related to the issues of minorities the Vienna Summit created the European Commission against Racism and Intolerance (ECRI). The ECRI consists of independent experts who have the purpose of examining 'the effectiveness of the range of measures (legal, policy and other) taken by member States to combat racism, xenophobia, anti-semitism and intolerance and propose further action in this field' through a country-by-country approach. The ECRI has found that discrimination continues to persist throughout Europe at multiple levels of society, a situation exacerbated by the lack of anti-discrimination legislation at the domestic level. The ECRI places a great deal of importance upon legal measures for combating racism and intolerance as a means of offering the individual a remedy and shaping the attitudes of a society to see that racism is wrong.[110]

E. Democracy and Human Rights in the COE

The work of the COE in support of democracy and human rights has been beneficial to all member states and has proven significant for the states of central and eastern Europe.[111] The COE presents an ambiguous, but at the same time very clear picture concerning democracy. This is a result of its approach of not demanding a single form of democracy but allowing societies to develop within their own particular context. It is clear that to be a member a state must be a democracy and respect the rule of law and human rights. The European Court has clarified a number of the more subtle requirements of democracy, which arise from the ECHR, but even here there remains a gap in the overt protection of democratic institutions and procedures. When it comes to socio-economic aspects and minorities the COE's commitment to democracy is less clear demonstrating a lack of resolve by governments in these areas.[112] It has been remarked that the development of Europe with difficult economic conditions facing all members means the purposes and protection of the ESC system needs to be placed at the same level of the ECHR to ensure the existence of effective democracy.[113] The protection of minorities and greater efforts to combat racism also deserve to be placed on a higher level than presently exists.

The lack of support given to the explicit protection of democratic institutions and process by the legal bodies, the ambiguity of socio-economic rights in a democratic society and the

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[110] ECRI General Recommendation No. 1 (1997) 'Combating Racism, Xenophobia, Anti-Semitism and Intolerence.'
[111] See generally A. Drzmczewski. 'The Council of Europe's Co-operation and Assistance Programmes with Central and Eastern European Countries in the Human Rights Field.' 14 *Human Rights Law Journal* (1993) p. 229.
[112] Regarding the same issue in the EU context see L. Betten and N. Grief. *EU Law and Human Rights*. (London: Longman, 1998) p. 123.
[113] Statements by A. Gusenbauer member COE PA in *Social Charter for the 21st Century*, p. 15.

lack of effective protection for minorities could prove problematic with the expansion of the COE. The Court's assumption of democracy as a self-evident and pre-existing feature of the member states making it necessary only to determine to what extent the restrictions on rights are appropriate to a democratic society will soon come under fire as a mistaken assumption to make. This point has been confirmed by the SG of the COE in a speech were he stated that membership to the COE does not confirm the existence of democracy within a state, only an intention and commitment to achieving democracy.[114] The establishment of the details of a democratic society as set out by the Court will be useful but will be ineffective in situations where the basic structures of a democratic society are not in place.[115] The warnings of the Consultative Assembly during the drafting of the ECHR concerning the lack of explicit protection for democracy might soon ring true as '[i]ndividual freedom, in our democratic countries, is protected by democratic institutions. Consequently, the safeguards required, too, are inseparable from these institutions.[116] The consequence of excluding explicit protection for democracy would be that the'Convention would fail in its aim, at least in part, and upon an essential point.'[117] Throughout Europe the institutional aspects of democracy will not always be enough for all individuals to protect and preserve their dignity and survival making socio-economic concerns, and explicit protection for those who are most vulnerable, equally essential issues.

III. The European Union

The membership of the (EU) presently comprises only 15 states of Europe but it is seen as the premier organisation of the region for states to join, and is itself keen on expansion.[118] The EU is unique as it extends beyond intergovernmental relationships to have a degree of direct involvement in the day to day lives of individuals of the member states and a growing indirect involvement in the lives of individuals beyond the member states. The nature and the structure

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[114] Quoted in L. Leszczyski. 'A General Look at the Redefinition of the Protection of Human Rights in Eastern and Central Europe.' 1 *East European Human Rights Review* (1995) pp. 6-7.
[115] Russia continues to be the biggest worry, see B. Bowring. 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?' 2 *European Human Rights Law Review* (1997) p. 628.
[116] *Collected Edition*, p. 292.
[117] *Collected Edition*, p. 292.
[118] Observers often wrongly equate the EU with 'Europe' as a totality, see comments by M. Martinez in *Social Charter for the 21st Century*, pp. 37-38. Central and eastern European states that are closest to obtaining EU membership include the Czech Republic, Estonia, Hungary, Poland and Slovenia. Bulgaria Latvia, Lithuania, Romania and Slovakia remain distant possibilities with the states of the former-Soviet Union, including Russia and the former-Yugoslavia being remote possibilities for membership in the foreseeable future.

of the EU[119] has the positive effect of providing various channels of participation for individuals and providing another means by which standards of human rights may be created and enforced. At the same time the goals and purposes of the EU are primarily determined on an intergovernmental basis without any necessary structures of transparency or accountability meaning its relationship with individuals is sometimes confused.

Concerning the impact of the EU upon individuals the European Court of Justice (ECJ) determined in *Van Gend en Loos*[120] that Community law impinged directly on the rights of individuals. The case also recognised that democratic legitimacy depends upon the right of the people to participate in the law making process through representatives. Furthermore, individuals should able to vindicate their rights through judicial proceedings.[121] In practice the EU has impacted upon the lives individuals but has not been able to provide many possibilities for participation in the law making process or always being able to vindicate rights. To date, the ability of individuals to participate in the processes of the EU, either directly or through representatives remains questionable. The EU has itself not established clear guidelines concerning the extent to which democracy and human rights are applicable to the work of the organisation and the functioning of its individual institutions.[122] Due to its primarily economic nature the EU works more on the basis of achieving objectives with concern for policy being only to the extent it meets the objective.[123]

If the EU is to have a direct part in the lives of individuals then it is necessary to establish a greater degree of clarity concerning its connection to the individual. The Treaty on European Union (TEU) was supposed to mark 'a new stage in the process of creating an ever closer union' where 'decisions are taken as closely as possible to the citizen'.[124] Part of this process is the development of subsidiarity as defined in the EC Treaty to ensure decisions are made as close as possible to the individual.[125] The commitment to subsidiarity has remained primarily

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[119] The EU consists of three different legal 'pillars' which have their own distinct institutional arrangement - the European Community, common foreign and security policy and justice and home affairs, see P. Craig and G. de Burca. *EU Law, Cases, Texts and Materials*, 2n ed. (Oxford: Oxford University Press, 1998) pp. 3-4.

[120] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR, 1.

[121] *Van Gend en Loos*, page 12.

[122] For the relation between the EU and national courts in areas of rights see S. O'Leary. 'Aspects of the Relationship between Community Law and National Law.' in N. Neuwahl and A. Rosas, eds. *The European Union and Human Rights*. (The Hague: Martinus Nijhoff, 1995) p. 23.

[123] B. de Witte. 'Surviving in Babel? Language Rights and European Integration.' in Y. Dinstein and M. Tabory, eds. *The Protection of Minorities and Human Rights*. (Dordrecht: Martinus Nijhoff, 1992) p. 289.

[124] Article 1 (TEU). The Treaty of Amsterdam entered into force May 1999 and has consolidated all changes to the European Treaties in a simplified form. For further information and a table of equivalence for the older forms of the treaties see Craig and de Burca (1998) pp. clxv-clxxii.

[125] Article 5 EEC reads 'In areas which do not fall within its exclusive competence, the Community shall stake action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be

rhetorical as the actual manifestation of the principle remains difficult to determine with arguments caught up over whether decisions are better made at the EU or member state level and not actually looking at how those decisions are made.[126] Defining subsidiarity clearly and making it part of the EU policy will be an important development in clarifying the relationship between the EU and individuals.[127] As the EU becomes a larger factor in the domestic societies of the member states there is increasing pressure to overcome the 'democratic deficit' of its institutions and clarify the status of democracy and human rights within the organisation's framework.

A. Democracy and human rights in the EU Treaties

The beginnings of the EU are found in the Treaty of Paris (1951) and the Treaty of Rome (1957) where it was believed the rule of law would be upheld by the ECJ and that democracy would be secured through the eventual creation of a Parliamentary Assembly.[128] These treaties did not contain any specifics concerning democracy or human rights, primarily due to their purpose of being economic agreements.[129] At the 1972 Paris Summit, the member states reaffirmed 'their resolve to base their Community's development on democracy, freedom of opinion, free movement of men and ideas and participation by the people through their freely elected representatives.'[130] In 1977, the European Commission, Council and Parliament came together to issue a (brief) Joint Declaration on Human Rights.[131] The Declaration recognised the EC as being based on the rule of law, comprising of 'general principles of law among the member states, including fundamental rights confirmed in the early rulings of the Court.' It further declared one of the aims of the EC was to respect human rights and fundamental freedoms as derived from the constitutions of member states and the ECHR. It also expressed

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sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the propsed actions, be better achieved by the Community.'

[126] A. Toth. 'A Legal Analysis of Subsidiarity.' in D. O'Keefe and P. Twomey, eds. *Legal Issues of the Maastricht Treaty*. (London: Chancery, 1994) p. 38. Also J. Steiner. 'Subsidiarity under the Maastricht Treaty.' and N. Emilou. 'Subsidiarity: Panacea or Fig Leaf?' in O'Keefe and Twomey (1994).

[127] The governments of the EU have been accused of having a selective perception and collective amnesia concerning human rights and the origins of the union, see M. Macey. 'Greater Europe: Integration or Ethnic Exclusion?' in C. Crouch and D. Maquand, eds. *Towards Greater Europe?* (Oxford: Blackwell, 1992) p. 141.

[128] C. Duparc. *The European Community and Human Rights*. (Luxembourg: COE, 1993) pp. 11-12.

[129] Reasons put forth for the exclusion of rights guarantees include a failure to recognise the impact of the EC on individuals, the belief that rights would be protected by the ECHR, the lack of agreement between states and worries over the fact that including rights would be an interference with sovereignty, see S. O'Leary. Accession by the European Community to the European Convention on Human Rights - The Opinion of the ECJ.' 1 *European Human Rights Law Review* (1996) p. 363. Prior to the Treaty of Rome rights and freedoms were included on failed attempts at creating a defence community and political community, for this historical development see A. Clapham. *Human Rights and the European Community: A Critical Overview*. (Baden-Baden: Nomos, 1991) pp. 92-93.

[130] EC Bulletin 10-1972, p. 15.

[131] [1977] OJ C103/1.

the commitment of the EC bodies to be equally bound by human rights considerations.[132] In 1978 the leaders of the member states issued the Declaration on Democracy at the Copenhagen Summit[133] which stated that the application of the principles of representative democracy, social justice, the rule of law, and respect for human rights implies a political system of pluralist democracy guaranteeing freedom of expression and opinions within the constitutional organisation of powers and the procedures necessary to protect human rights. They furthermore declared that the respect and maintenance of representative democracy and human rights are essential elements of membership to the EC, a point only recently institutionalised in a binding treaty provision.

The European Single Act (1987) expressed ideas of democracy and human rights in a treaty-based document for the first time. The signatories declared, in the Preamble, their determination towards the promotion of democracy on the basis of fundamental rights, freedom, equality and social justice and confirmed the European Parliament (EP) as an indispensable means of expression for the democratic wishes of the individuals of member states. Commentators on the Single Act see this inclusion, even though only occurring in the Preamble, as endorsing democracy and human rights as guiding principles of the EC and its institutions.[134]

The Treaty of European Union (TEU), signed in 1992, marked a continuing commitment to the ideas of democracy and human rights as guiding principles. This commitment is further demonstrated in the changes brought about to both the TEU and EC Treaty by the Treaty of Amsterdam signed in 1997.[135] In the TEU member states confirm an 'attachment' to liberty, democracy, respect for human rights and the rule of law, and to fundamental social rights as defined by the ESC. They also express a desire to enhance the democratic and efficient functioning of the EU's institutions and to bring the EU closer to the individual through greater participation in the decision-making process.[136] The TEU expresses the objectives of the EU as the promotion of economic and social progress, strengthening the protection of the rights and interests of nationals of the EU and developing 'the Union as an area of freedom, security

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[132] The status of the Declaration is primarily seen as being political and moral even though some legal significance can be attributed to it. See L. Krogsgaard. 'Fundamental Rights in the European Community After Maastricht.' *Legal Issues of European Integration* (1993) pp. 103-104.

[133] EC Bulletin 3-1978, p. 5.

[134] Krogsgaard (1993) p. 104; N. Neuwahl. 'The Treaty on European Union: A Step Forward in the Protection of Human Rights?' in Neuwahl and Rosas (1995) p. 14.

[135] [1997] OJ C340/1.

[136] Article 1 TEU.

and justice'.[137] These objective are reinforced by the statement that the EU is 'founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'[138] The Council is entrusted with the task of ensuring members meet these objectives and may suspend members if they fail to do so.[139]

The EC Treaty adds to the these commitments by working towards balanced and sustainable development, social protection, equality, raising the standard of living and quality of life and combating exclusion.[140] The TEU also amended the EC Treaty to introduce the idea of a European citizenship that in turn would act as the basis for, among other things, greater attention to issues of democracy and human rights.[141] Part Two of the EC Treaty establishes that citizenship in a member state will create citizenship of the EU, not as a replacement of national citizenship but complementary thereto.[142] The content of what citizenship entails as expressed in Part Two is sparse with references limited to free movement, opportunities to participate in local elections and for the EP, as well as the ability of individuals to petition the EP and the Ombudsman.[143]

B. Role of Community Institutions

The decision-making powers of the EU lie solidly with the Council consisting of the heads of government of the member states and the European Commission that consists of representatives appointed by the member governments.[144] The Commission consists of individuals who have loyalty first and foremost to the Community and have the responsibility of ensuring the observance of Community commitments. Since power lies with these two exclusive bodies the democratic nature of the EU is continually brought into question.[145] EU institutions that do provide for democratic possibilities include the European Parliament (EP), the European Ombudsman and the Committee of the Regions. The EP is made up of individuals elected from constituents of the member states to a forum that is able to discuss a

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[137] Article 2 TEU.
[138] Article 6 (1) TEU.
[139] Article 7 TEU.
[140] Articles 2 and 136 EC.
[141] K. Bradley. 'Fundamental Rights and the European Union: A Selective Overview.' 21 *Polish Yearbook of International Law* (1994) p. 208.
[142] Article 17 EC.
[143] Article 18-21 EC.
[144] Articles 202 and 211 EC. Also S. Weatherill. *Law and Integration in the European Union*. (Oxford: Clarendon, 1995) p. 61.

wide range of issues concerning the EU. The EP is able to issue its own declarations and resolutions and has slowly become more involved in the decision-making process of the EU. However since the Council and Commission remain firmly in control of the decision-making process, the EU possesses what is termed a 'democratic deficit.[146]

The existence of a democratic deficit implies there is a democratic ideal for international organisations by which to measure.[147] Due to the unique situation of the EU it is difficult to determine at what level and to what extent democracy is to exist. The democratic nature of the EU comes under fire from a number of different angles.[148] There are elections to a representative body with legislative functions but these functions do not extend to substantive decision making and the body is unable to exercise control over the executive decision making bodies. The executive bodies of the EU are not directly elected by the people of Europe raising questions over their mandate for action. A great deal of the EU work and decision making lacks transparency or clarity with few means of accountability and it all occurs at a 'distance' from the individuals upon whom it impacts. The debate over the democratic legitimacy of the EU is based on the argument that decisions are made which impact upon individuals and society who have no direct impact upon or control over the decision making process, either directly or through representatives with little by way of principles guiding the behaviour of decision-making structures.

Those who disagree with this assessment offer a number of explanations supporting the democratic nature of the EU. The EP is a directly elected body which purports to represent European societies[149]and it has developed a greater role in the decision making process over time. Furthermore the EP is able to exercise some degree of control over the Council and Commission through questions and reports and by approving all appointments to the Commission. The Council's democratic nature is justified by the common argument at the international level that if a democratic government is acting on behalf of its society the body

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[145] D. Beetham and C. Lord. *Legitimacy and the EU.* (London: Longman, 1998) observe that even though governments select Commissioners and the EP approves them, the Commission is able to create its own form of autonomy avoiding accountability, p. 14.

[146] See JUSTICE. *The Democratic Deficit: Democratic Accountability and the European Union.* (London, 1996) Raworth (1994)

[147] B. van Roermund. 'Jurisprudential Dilemmas of European Law.' 16 *Law and Philosophy* (1997) pp. 365-366. See See G. Mancini and D. Keeling. 'Democracy and the European Court of Justice.' 57 *Modern Law Review* (1994) who discuss how the idea of democracy had no role at all in the early formation of the Union.

[148] This review of the democratic deficit debate relies upon the work of Craig and De Burca (1998) who provide a concise account complete with references to the voluminous literature, pp. 155-162.

[149] It is difficult at present to see the EP as 'representative' of the interests of the EU. See V. Bogdanor. 'Direct Elections, Representative Democracy and European Integration.' 8 *Electoral Studies* (1989) p. 205.

within which it is acting has an 'indirect mandate' which legitimises action.[150] The EU then possesses a twofold legitimacy where representatives to the EU executive are democratically elected and there are elections to the EP, and the bodies participate in a co-operative decision making process.[151] The lack of transparency in the decision making process is not seen as problematic since a similar situation exists at the national level which is not usually brought into question. Finally those who argue against the negative consequences of the 'democratic deficit' raise points related to the idea that the EU is not a state and should not be judged for legitimacy by similar criteria.[152]

Regardless of the nature and purpose of the EU it continues to exercise a good deal of control, direct and indirect, over the lives of individuals.[153] Individuals do possess some ability for recourse when an institution or policy of the EU wrongs them (see below) but it remains that the real power and decision making of the EU is well distanced from individuals. The primary obstacle to resolving the democratic deficit is that the purpose and goals of the EU remain unclear. It began as an economic union among states and has developed into a socio-economic framework for the societies of its members raising the important issue as to where the power over society is being exercised, at the national level, with the EU, or through a combination? The changes and developments as to the goals and purpose of the EU brought in by the Treaty of Amsterdam have not solved the issue of the democratic deficit and related problems.[154]

The issue of the democratic deficit will remain a major point of contention in the development of the EU with attention focusing on improving the existing democratic structures. The EP has been in existence since 1979 as a forum for public discussion of EU policy and actions. Individuals have long written to the EP with comments or questions regarding the behaviour of Community institutions and in the Maastricht Treaty the provisions for citizenship included the right of citizens (as well as non-EU residents) to petition the EP.[155] Commentators have dismissed the efficacy of the petition procedure as little substantive action is rarely taken with regard to individual petitions in order to avoid creating unnecessary

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[150] Craig and de Burca (1998) p. 159; Beetham and Lord (1998) pp. 11-15.
[151] 'Scope of the Co-decision Procedure.' SEC(96) 1225/4 (1996) Part IIA, paragraph 1.
[152] See generally the essays in J. Hayward, ed. *The Crisis of Representation in Europe*. (London: Frank Cass, 1995).
[153] See Beetham and Lord (1998) that intergovernmental organisations are not as distanced from individuals as is often made out, as demonstrated by human rights, environmental issues and structural adjustment policies, p. 12.
[154] L. Betten. 'The Democratic Deficit of Participatory Democracy in Community Social Policy.' 23 *European Law Review* (1998) p. 20.
[155] The Commission describes this as 'a wide means of recourse' COM(97) 230, paragraph 3.3.1.

tensions between the EP and other EU institutions.[156] This has been shown by the EP Committee on Legal Affairs and Citizen's Rights (CLACR) which monitors various areas of human rights and develops reports on human rights issues for the entire Community. The Committee is able to discuss all matters relating to human rights but has been reluctant to discuss human rights matters of individual member states.[157]

The TEU brought the creation of the European Ombudsman through the EP[158] to whom both EU citizens and non-citizen residents may petition concerning maladministration in the activities of Community institutions.[159] The ombudsman acts in the general interest of the Communities and of the citizens of the Union ensuring that all parties have confidence in the fairness and impartiality of his work.[160] The ombudsman has no enforcement powers but does possess the ability for a wide range of inquiries.[161] Commentators see two possibilities to the ombudsman's effectiveness as individuals will be able to use the office as a check on the Commission's ability to effectively and properly act as guardian of the Treaties, but equally the result could be the Commission and other institutions having their actions legitimised through the ombudsman.[162]

The TEU marked a step toward clarifying the idea of subsidiarity with the inclusion of the Committee of Regions (COR) as a body with advisory status.[163] The COR sees itself as the 'guardian' of subsidiarity in ensuring that the principle is properly applied and contributes to further integration by allowing the maximum level of participation by individuals.[164] The work of COR is of questionable importance to the executive of the EU as the recent Summit in Cardiff left the President of COR 'disappointed' but the lack of substantive action taken by the Council concerning this issue of subsidiarity.[165] The role of COR deserves greater attention from the leaders of the EU as COR is closer to the actual lives of individuals within the EU. As the EU grows the perception of 'decisional distance' will increase, necessitating efforts

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[156] See E. Boumans and M. Norbart. 'The European Parliament and Human Rights.' 7 *Netherlands Quarterly of Human Rights* (1989) pp. 47-49.
[157] Boumans and Norbart (1989) pp. 46-47.
[158] Article 195 EC.
[159] Statute of the Ombudsman [1994] OJL113/15.
[160] *Annual Report of the Ombudsman* (1995) Section I.2.2.
[161] *Annual Report of the Ombudsman* (1995) Section I.2.3.
[162] Heede (1997) pp. 604-605.
[163] Article 262 EC.
[164] 'The Contribution of the Committee of the Regions to the construction of Europe.' section II.2.
[165] 'Manfred Dammeyer Disappointed by the Conclusions of the Cardiff Summit.' [http://www.cor.eu.int/Archive/arkiv/dammeyer_cardiff/md_cardiff_eng.html].

along the lines of COR of ensuring that development occurs at all levels of society.[166] The COR has been active in establishing the importance of its role in the EU but has been given little in the way of support of an extended mandate allowing it to increase its effectiveness.[167]

C. THE ECJ DEMOCRACY, HUMAN RIGHTS AND ECONOMIC UNION

The ECJ has the broad task of ensuring 'the law is observed' in the application and interpretation of the EC Treaty.[168] The lack of human rights provisions in the early treaties led the ECJ to refuse early attempts to invoke human rights as legally enforceable in the context of Community law. In the cases of *Stork*[169] and *Geitling*[170] the ECJ dismissed the petitioners' claims that the exercise of Community law was contrary to the fundamental rights provisions in the German constitutional order. The Court went as far to say that Community law could not offer any protection for human rights.[171] These decisions were followed with another rejection of the use of fundamental rights as a means to override EC treaty provisions, even if the principles were common to the member states.[172] The ECJ's view on human rights in relation to Community law raised serious difficulties at this early stage. As already mentioned, *Van Gend en Loos*[173] created the direct effect of Community law with *Costa v ENEL*[174] confirming the supremacy of Community over domestic law and more critically, superiority to domestic constitutional law was established in *Simmenthal*.[175] This raised the issue that if Community law was to be superior to domestic laws, and the EC treaties did not provide for the protection of rights, how were the rights of individuals to be protected when they conflicted with Community policy and practice?

The ECJ became cognisant of this issue in 1969 with the case of *Stauder*[176] where it declared that Community provisions could not prejudice fundamental human rights as general

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[166] COR has recently taken on the issue of cultural diversity within the EU and the promotion of tolerance between cultures, see 'Committee of the Regions brings Cultural Diversity to the European Debate.' DCP/99330en (15 January 1999).
[167] See J. Jones. 'The Committee of the Regions, Subsidiarity, and a Warning.' 22 *European Law Review* (1997) pp. 312
[168] Article 164 [220] EC. Concerning the ECJ's jurisdiction see A, Albors-Llogens. 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam.' 35 *Common Market Law Review* (1998) p. 1273.
[169] Case 1/58 *Stork v High Authority* [1959] ECR 17.
[170] Cases 36, 37, 38 and 40/59 *Geitling v High Authority* [1960] ECR 423.
[171] *Geitling*, p. 438.
[172] Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215.
[173] Case 26/62 [1963] ECR 1.
[174] Case 6/64 [1964] ECR 585. On the issue of supremacy see Weatherill (1995) pp. 102-107.
[175] Case 92/78 *Simmenthal v Commission* [1979] ECR 777.
[176] Case 26/69 *Stauder v Ulm* [1969] ECR 419.

principles of Community law.[177] Once the ECJ recognised the existence of human rights as a consideration in the application of Community law the idea of fundamental rights began a slow evolutionary process as a principle of the Community legal order.[178] In *Internationale Handelsgesellschaft*,[179] the ECJ qualified its position in *Simmenthal* by placing the primary source for human rights issues in the EC with the common constitutional provisions of the member states.[180] *Nold*[181] confirmed a second source for human rights protection coming from international human rights treaties to which member states have become party.[182] The ECJ then began referring directly to the ECHR concerning the obligations of member states in recognising fundamental rights in the implementation of Community measures.[183] The use of the ECHR by the ECJ only exists in areas of Community law and the ECJ is not able to apply provisions of the ECHR in the absence of any relation to Community provisions.[184] The scope of Community law is continually changing and the ECJ has taken the responsibility of determining whether or not an alleged violation of fundamental rights is related to Community law.[185]

Fundamental rights have become part of the Community order for the purpose of supporting the greater integration of the Community and to facilitate the functioning of the common market.[186] Fundamental rights are not necessarily essential in themselves as their importance is linked to the advancement of the further integration of the member states.[187] The ECJ's position on this is demonstrated in their opinion in *Hauer*[188] where it was recognised that a right to property, as contained in the ECHR and in the domestic systems of member

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[177] *Stauder*, paragraph 7. See Krogsgaard (1993) p. 101 note 16, who mentions the Court's decision in Cases 18 & 35/65 *Gutmann* [1967] ECR 61 as a decision protecting fundamental human rights, in this case the principle of non bis in idem.

[178] See Neuwahl in Neuwahl and Rosas (1995) pp. 6-13; Duparc (1993) pp. 12-14.

[179] Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125.

[180] *Internationale Handelsgesellschaft*, paragraph 4.

[181] Case 4/73 *Nold v Commission* [1974] ECR 491.

[182] *Nold*, paragraph 12. But see O'Leary (1995) as to how human rights in the EU legal order suffer from indeterminacy due to a fragmentation of sources, p. 519.

[183] For examples see Neuwahl in Neuwahl and Rosas (1995) pp. 8-9.

[184] Case 12/86 *Demirel v Stadt Schwäbisch Gmund* [1987] ECR 3719, paragraph 28 'The Court has no power to examine the compatibility with the ECHR of national legislation lying outside the scope of Community law.'

[185] See Case 299/95 *Kremzaw v Austria* [1997] ECR I-2629, paragraph 15.

[186] There exist conflicting views on the treatment of rights by the ECJ with J. Coppel and A. O'Neil. 'The European Court of Justice: Taking Rights Seriously?' 29 *Common Market Law Review* (1992) p. 669 claiming the Court considers rights secondary to the furthering of the Community order and the Court manipulates the language of rights for this same purpose, 29 *Common Market Law Review* (1992) p. 669. H. Weiler and N. Lockhart. ' "Taking Rights Seriously": The European Court and its Fundamental Rights Jurisprudence.' 32 *Common Market Law Review* (1995) pp. 54 and 579 provide an extensive critique to the position of Coppel and O'Neil in an effort to discredit their claim concerning the Court's use of rights.

[187] Weatherwill comments that the ECJ has had to recognise the importance of fundamental rights of the domestic orders of the member states to ensure the legitimacy of Community law, S. Weatherwill. *Cases and Materials on EC Law*, 4th ed. (London: Blackstone, 1998) p. 64.

[188] Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

states, existed. However the ECJ dismissed the applicant's claim that this right had been violated due to the legitimate restrictions upon the right through the application of Community provisions. Rights in the Community are protected and guaranteed only to the extent that they do not impede with the objectives of further integration.[189]

On the positive side, the development of the common market has brought a degree of determinacy to a number of rights in the Community order ranging from access to social security, non-discrimination, freedom of movement, the right to property and others.[190] In this regard the ECJ has made a significant contribution by seeing the equal importance of the civil and political rights of the ECHR and the rights contained in the ESC.[191] To date no effort has been made to codify the rights the ECJ has determined to be fundamental and part of the general principles of the Community order.[192] The disadvantage of this development is that it keeps in place a great deal of indeterminacy and uncertainty as to the position applicability of human rights in the EU. The expansion of the EU in both depth and breadth is making some form of codification necessary to ensure that the negative effects of integration upon individuals are not overridden by the positive aspects of the common market.[193]

The use of the ECHR as a guiding principle for fundamental rights by the ECJ is far from clear, for even though the ECHR receives direct mention other sources have been used as well.[194] The ECJ has added to the confusion by stating that the determination of fundamental rights may be derived from the common constitutional provisions of member states, but that in determining the content of a specific right recourse cannot be made the national legislation of a member state since that would undermine the Community order.[195] Therefore the question exists as to what extent are fundamental rights and democratic principles determined to be common to the members and not just specific provisions in the constitutional framework of a

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[189] *Hauer*, paragraph 16. Also Weatherill (1995) 105; Krogsgaard (1993) p. 100.

[190] See E. Guild and G. Lesieur. *The European Court of Justice on the European Convention on Human Rights, Who Said What, When?* (London: Kluwer, 1998) for the use of the ECHR by the ECJ.

[191] See *Dafrenne v Sabena (No. 3)* Case 149/77 [1978] ECR 1365 and Case 24/86 *Blaizot v University of Liège* [1988] ECR 379.

[192] But see de Burca (1993) who attempts to create the position that the promotion of basic human rights will always be compatible with Community aims since the Community has the purpose of also creating a fairer more peaceful and democracy society, pp. 298-299. This aspiration does not have any solid basis in the EC treaties and so the position of Phelan (D. Phelan. 'Right to Life and the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union.' 55 *Modern Law Review* (1992) p. 684) and Coppel and O'Neill (1992) feel that there is no attempt to distinguish between fundamental rights and those rights specific to the Community, pp. 689-690.

[193] Clapham (1991) p. 103.

[194] Case 44/79 *Hauer v Land Rheinland Pfalz* [1979] ECR 3737. *Defrenne v Sabena* and *Blaizot v University of Liège*.

[195] *Internationale Handelsgesellschaft*, paragraphs 3-4.

specific member state and by what procedures is the ECJ to make such a determination?[196] All member states of the EU have accepted the rights incorporated into the ECHR as well as the provisions of the ICCPR and ICESCR that would also provide guidance as to which rights are common to the member states.[197] With the creation of European citizenship (see below) the issue of applicability of rights becomes crucial for determining who is able to benefit from the protection of Community procedures.[198] As it stands the ECJ has not established a comprehensive legal framework concerning the rights of EU 'citizens'.[199]

Concerning democracy, the ECJ has proclaimed the importance of democracy as part of the Community order since that order has a direct impact upon the lives of individuals.[200] The importance of democratic procedures was expressed in *Roquette Freres*[201] where it was held that when procedures of consultation by the Council with the EP are called for they must be followed in realistic terms.[202] Commentators have expressed that in a similar fashion as the ECHR, the ECJ understands democracy as existing as part of the Community legal order based on the common constitutional provisions of the members and their shared legal heritage.[203] In discussing the legitimate restrictions that may be placed upon rights the ECJ followed the practice of the ECHR emphasising that any restriction must be 'necessary in a democratic society', without elaborating further as to the content and nature of a democratic society.[204] The ability of the ECJ to effectively protect democracy and human rights is tied with the larger necessity of the EU clarifying its own purposes and principles and how individuals will fit in with them. Until that time the position remains that 'although the legal

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[196] In Case 159/90 *SPUC v Grogan and Others* [1991] ECR I-4685 the ECJ held the constitutional tradition of one member state to be indicative of fundamental rights at the Community level. This is apparently in contradiction to its statement in *Nold*, paragraph 13 where it stated the 'constitutions of member states' determine the existence of fundamental rights. In Case 7/76 *ICRA v Amministrazione delle Finanze dello Stato* [1976] ECR 1213 the AG stated that a right under a single constitutional tradition of a member state should be upheld. How traditions of rights are to be identified as Community principles will become an important issue as the EU expands and more diverse constitutional provisions become part of the legal order. Weatherwill (1995) feels the ECJ will have to pragmatic when looking to national provisions to determine common traditions, pp. 105-107. Krogsgaard (1993) feels that there need not be a numerical majority to determine which rights are fundamental to the Community, p. 107.

[197] An area member states would be reluctant to enter, see B. Brandtner and A. Rosas. 'Human Rights and the External Relations of the European Community: An Analysis of Doctrince and Practice.' 9 *European Journal of International Law* (1998) pp. 472-473.

[198] See P. Twomey. 'The European Union: Three Pillars without a Human Rights Foundation.' in O'Keefe and Twomey (1995) pp. 122-123.

[199] 'Fundamental Rights.' IGC Briefing No. 22 (9 October 1995) section II.A.2., at [http://www.europarl.eu.int/dg7/fiches/en/fiche22.htm].

[200] *Van Gend en Loos*, page 12. Also Mancini and Keeling (1994) pp. 183-184.

[201] Case 138/79 *Roquette Freres v Council* [1980] ECR 3333, paragraph 33.

[202] *Roquette Freres*, paragraphs 33-34.

[203] Mancini and Keeling (1994) p. 5.

[204] Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219, paragraph 32. Also Case 136/79 *National Panasonic v Commission* [1980] ECR 2033. In Case 294/83 *Parti Ecologiste 'Les Verts' v European Parliament* [1986] ECR 1339 the Court stated the Community was based on the rule of law, paragraph 23.

rhetoric and formal provisions may have changed, the European Union's primary focus remains an economic one'.[205]

D. Democracy, Human Rights and the EU

Discussion and debate on democracy and human rights and the EU will continue to attract controversy on two fronts. The first has already been discussed concerning the indeterminate position of these principles in the legal framework of the EU as applied by the ECJ. The second deals with the EU's external relations and its stance on democracy and human rights regarding third states, including potential new members.

Within the organisation the lack of clarity concerning the position of human rights and lack of democratic legitimacy at the executive and legislative levels will continue to be a point of discussion.[206] With regard to the issue of human rights it is felt by many that the easiest option would be for the EC to accede to the ECHR.[207] Even though every member state is bound by the provisions of the ECHR if the EC as a body became party then its institutions would also be bound by its obligations and the ECJ would be able to apply the provisions of the ECHR directly.[208] The proposal of accession to the ECHR has been rejected by the ECJ due to the current institutional arrangements of the EU treaties.[209] The ECJ stated that '[n]o Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.'[210] Following the opinion of the ECJ, the EP called on the 1996 IGC to make the necessary arrangements to allow for accession to the ECHR,[211] with little action coming to date.[212]

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[205] Craig and de Burca (1998) p. 296. Recent judgments from the ECJ which support this are Case 168/91 *Christos Konstantinidis v Stadt Altensteig* [1993] ECR I-1191; Case 84/95 *Bosphorus Hara Yollari Turizm v Ministry of Transport, Ireland* [1996] ECR I-3953. It is also reflective of the opinion of member states, de Burca (1993) p. 284.

[206] P. Raworth. 'A Timid Step Forwards: Maastricht and the Democratisation of the European Community.' 19 *European Law Review* (1994) p. 17. It has been expressed that the ECHR has been a fundamental part of EC law since 1981, see S. Ghandi. 'Interaction between the Protection of Fundamental Rights in the European Economic Community under the ECHR.' *Legal Issues of European Integration* (1981/2) p. 1.

[207] *Continuing Challenge*, p. 175.

[208] Craig and de Burca (1998) express that the ECJ's development of fundamental rights as a principle of Community law applies only to the actions of the member states and has no basis for application to EU institutions, p. 331. But see *Hoechst v Commission* Case 46/87 [1989] ECR 2859 where the Court held that the Commission must respect the right to privacy when enforcing EC competition law, paragraph 19.

[209] Opinion 2/94 'Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms.' 28 March 1996. The idea of accession appears not to appeal to members as the UK, Denmark and Sweden all lodged complaints that the opinion was inadmissible or 'premature'.

[210] Opinion 2/94, paragraph 27.

[211] 'Observance of Human Rights in the European Union.' [1996] OJ C319/12.

[212] Governments, not surprisingly, have shown reluctance towards explicit inclusion of rights in the EU framework IGC Briefing No. 22, sections I.A.4 and I.B. Also Betten and Grief (1998) pp. 124-125. The UK has expressed the position that accession of the EU to the ECHR 'would serve no useful purpose'. A Partnership of Nations. Cm. 3181.

The issue of accession raises a number of complex issues concerning human rights protection in Europe.[213] Presently the workings of the EU impinge directly upon individuals and Community law is expressly paramount to national law making clarification of rights in the EU framework a formidable step towards effectiveness.[214] Since the activity of the EU is very much part of the day-to-day lives of individuals the act of accession offers the possibility of making the EU more democratic by bringing accountability to the institutions and assisting in closing the decisional distance between individuals of the EU and the institutions.[215] However, much of the EU's work is in the socio-economic sphere which immediately raises the issue as to whether the ESC would be a more appropriate instrument to include into the EU framework.[216] The choice of becoming party to either treaty with their own pre-existing supervision framework will raise the practical issue of overlap and conflicts in jurisdiction.[217] Accession may provide increased opportunities for the individual to achieve a remedy for violations however the law may become more indeterminate and confused if the practical issues are not addressed.

An issue related to accession and the directly tied to democratic legitimacy and the role of human rights in the EU is the creation of European citizenship.[218] The creation of a European citizenship is seen as a means of clarifying the position of the individual in the EU legal order. Article 8 EC, which establishes citizenship, does not provide much substance as to what this classification contains as it only specifies that citizens may be elected to the EP and that they possess the ability to complain to the EP or ombudsman.[219] Weiler comments that Article 8 EC is 'little more than a cynical exercise in public relations … noteworthy by what is does not do than what it does'.[220] Shaw describes the benefits of European citizenship as lying beyond Article 8 (EC) including various political and socio-economic rights established within the Community order. It is hard to see the tangible benefits of citizenship in this regard as many of these rights are pre-existing, either in the form of the ECHR as binding upon all members

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[213] For more on the EU and accession to the ECHR see A. Toth. 'The European Union and Human Rights: The Way Forward.' 34 *Common Market Law Review* (1997) p. 491.
[214] Boumans and Norbart (1989) p. 50.
[215] *Continuing Challenge*, p. 175.
[216] O'Leary (1996) p. 370. O'Leary (1997) discusses how the arrangements under the Amsterdam Treaty do not remedy the distance between individuals and social policy decision making, p. 36. Also Betten and Grief (1998) pp. 121-123.
[217] See O'Leary (1996) pp. 364-366.
[218] Citizenship of the EU is obtained by being a citizen of a member state, Article 8 [17 (1)] EC. Citizenship is not a new category but supplementary to national provisions which raises difficulties with those states that have restrictive citizenship provisions, see J. Bhabha. '"Get Back to Where You Once Belonged": Identity, Citizenship and Exclusion in Europe.' 20 *Human Rights Quarterly* (1998) p. 604.
[219] The right to complain applies to non-nationals as well, Article 138e [195] EC.

states who are obligated to ensure rights to all individuals within their territory, or the four freedom rights of the EC Treaty which have existed long before citizenship was discussed.[221] The actual purpose and role of European citizenship remains unclear but it does mark a necessary step in the evolution of the EU as its growth makes it imperative to create some sense of belonging among the individuals within its sphere.[222] In the eyes of some the creation of European citizenship actually perpetuates the democratic deficit as those who do not fit the definition of 'European' are categorically excluded from the processes of the EU.[223] Unfortunately the creation of a 'European' citizenship contributes to the process of exclusion already underway in the EU raising issue with the EU's position concerning the human rights of its most immediate neighbours.[224]

The position of the EU concerning democracy and human rights in non-member states, both close to its borders and those further a field has come under criticism for being hypocritical. The institutions of the EU have not taken a strong stance concerning the human rights situation in member states but have been open and vocal about states outside the EU, which bring into question the credibility of the organisation.[225] Hoon makes the point that in the EU 'institutions are quick to comment on the state of human rights in other parts of the world, without any specific human rights yardstick against which their own action can be tested.'[226] This contradictory behaviour will impede the international credibility of the EU and create tensions within its foreign relations.[227] Alston and Weiler express the point that the

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[220] J. Weiler. 'European Citizenship – Identity and Differentity.' in M. La Torre, ed. *European Citizenship: An Institutional Challenge*. (The Hague: Kluwer, 1998) p. 10.

[221] See Weiler in La Torre (1998) pp. 13-14.

[222] The Commission views citizenship as able to close the 'perceived distance between the Union and its citizens'. 'Commission Publishes its Communication "Agenda 2000: For a Stronger and Wider Europe".' Press Release IP/97/66- Doc 97/9 (16 July 1997). P. Alston and J. Weiler. 'An 'Ever Closer Union' in Need of a Human Rights Policy.' 9 *European Journal of International Law* (1998) warn that citizenship should not be used as an easy fix to the real question of diversity in the EU p. 672. But see J. Shaw. 'The Interpretation of European Union Citizenship.' 61 *Modern Law Review* (1998) who stresses its necessity to create a sense of belonging, p. 294. The difficulty faced in creating a sense of communal belonging is exacerbated by the numerous classifications the EU gives to individuals, see Bhabha (1998) p. 596. A point O'Leary takes to demonstrate how citizenship is confined to the economic status of an individual within the EU, S. O'Leary. 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law.' 32 *Common Market Law Review* (1995) p. 540.

[223] Bhabha (1998) p. 605.

[224] See J. Sørenson. *The Exclusive European Citizenship: The Case for Refugees and Immigrants*. (Aldershot: Avebury, 1996).

[225] Boumans and Norbart (1989) p. 52.

[226] G. Hoon. 'The Restatement of Fundamental Rights by the European Parliament.' in R Beiber et al, eds. *Au nom des Peuples Européens-In the Name of the People of Europe* (Baden-Baden: Nomos, 1996) p. 24.

[227] Alston and Weiler (1998) p. 658 where they discuss the use of human rights clauses in trade agreements set unilateral conditions upon states in the less dominant position and allows the dominant party (the EU) to use the agreement to their benefit.

growth of importance of the EU as a global player means it must lead by example in placing demands of democracy and human rights upon third states.[228]

In the conducting of a Common Foreign and Security Policy (CFSP) the objectives of the member states include the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms.[229] The TEU also creates provisions for a Community policy on development that looks to contribute to 'the general objective of developing and consolidating democracy and the rule of law and to that of respect for human rights and fundamental freedoms.'[230] It has been pointed out that the uneven record of the EU in these matters is due largely to the fact that many of its institutions are not properly equipped within their specific competence to deal with matters of democracy and human rights.[231] Problems relating to conditionality and democracy and human rights were discussed in Chapter 3 and the EU is no exception to the detrimental impact these measures often have.[232] The EU includes human rights in trade agreements not only as a means of furthering human rights in the world but also as a self-interested means of ensuring an unequal power relation in its dealings with other states.[233] As discussed above, the EU is itself not bound by any conditions of democracy or human rights that it imposes upon others. The credibility of the EU as an influential international actor will be severely questioned if this situation continues. The hypocritical stance of the EU on the importance of democracy and human rights for other but not for itself has come into focus with the conditions of membership for those who wish to join the EU.

The expansion of the EU into central and eastern Europe is based on expanding the economic union that exists and this includes other objectives as well, notably the existence of democracy and respect for human rights.[234] The expansion of the EU is discussed in *Agenda*

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[228] Alston and Weiler (1998) p. 663.

[229] Article J.1 [11] TEU.

[230] Article 130u [177] EC. In 1991 the Council issued a resolution on 'Human Rights, Democracy and Development' (28 November 1991) which stressed the need for good governance which includes democratic decision making, transparency and accountability. For more on the EU's activities in this area see M. Zwamborn. 'Human Rights Promotion and Protection through the External Relations of the European Community and the Twelve.' 7 *Netherlands Quarterly of Human Rights* (1989) p. 11; European Commission. 'The European Union and Human Rights in the World.' Bulletin of the European Union Supplement 3/95. Clapham (1991) pp. 72-84.

[231] Alston and Weiler (1998) p. 667. The EU came under criticism for its role in election monitoring in Cambodia in 1998 by declaring the elections free and fair when they did not adequately undertake their observer role only visiting a small percentage of polling stations and only for a short period of time, see 'EU Loses Face for Cambodia Poll Verdict.' *The Guardian* (5 August 1998) p. 10.

[232] The EU has been described as 'encapsulating' the entire problem of linking economic agreements and aid to conditions of human rights and democracy, see K. Tomaševski. *Between Sanctions and Elections: Aid Donors and their Human Rights Performance.* (London: Pinter, 1997) pp. 41-61.

[233] Brandtner and Rosas. (1998) p. 474. On the use of ambiguous rhetoric in EU trade agreements see H. Smith. 'Putting Ethics at the Heart of Europe.' 54 *World Today* (1998) p. 76.

[234] See Brandtner and Rosas (1998) p. 472.

2000[235] where the Commission lays out the requirements, conditions and obstacles related to increasing membership. Of the conditions considered, political requirements are just one, with others covering an applicant's ability to meet the economic requirements of participation.[236] The political requirements include adherence to Article F (TEU) but the Commission makes it clear that prospective members 'are expected not just to subscribe to the principles of democracy and the rule of law but actually to put them into practice in daily life.'[237] In pointing to the realities of some applicants the Commission brings up the existence of weakness in the rule of law and lack of autonomy of local government as hindering the possibility for membership. The Commission also gives attention to the place of human rights and the treatment of and legal framework available to minorities.

Primary consideration concerning the expansion will be the continued and efficient economic union. This could mean long periods of time before new members are fully accepted.[238] Prospective members have to undergo serious changes in coming up with economic systems that will fit in with the goals of the EU. It is discussed below how the demand for free-markets, and in this case, free-markets that fit in with the EU framework, does not always correspond well with democracy and respect for rights, especially socio-economic rights.[239] Importantly the applications look at the position of all rights with scrutiny given to socio-economic rights- does raise the issue of current members and these rights. Prospective members will be caught between receiving democratic credibility by joining the EU[240] but their ability to achieve democracy is under pressure by economic demands.[241] Within the EU, expansion will require institutional reform, as the current structure will not be able to accommodate a larger number of members and their diversity, adding to the already existing

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[235]Communication of the Commission, DOC 97/6 (15 July 1997). Bulletin of the EU Supplement 5/97.

[236] The Copenhagen IGC (1993) set out the requirements of a market economy, democratic political system, and acceptance of the acquis communataire. Also M. Maresceau. 'Association, Partnership, Pre-Accession and Accession.' in Maresceau, ed. *Enlarging the European Union*. (London: Longman, 1997) pp. 14-18.

[237] *Agenda 2000*, p. 40

[238] M. Jovanovic. 'Does Eastern Enlargement Mean the End of the European Union?' 14 *International Relations* (1998) p. 34.

[239] The application assessments of the Commission look beyond merely the existence of procedural and institutional democracy to ensure some substance is there. See Commission Opinion on Slovakia's Application for Membership of the EU. Bulletin of the EU Supplement 9/97, p. 20.

[240] See C. Preston. *Enlargement and Integration in the European Union*. (London: Routledge, 1997) p. 205. The demands of democracy and rights placed on new members does not include a strong place for socio-economic rights, see Brandtner and Rosas (1998) p. 487.

[241] But see Pinder who feels that if the states of central and eastern Europe do not adopt effective market economies they will remain beset by poverty and unable to create democracy. J. Pinder. *The European Community and Eastern Europe*. (London: Pinter, 1991) p. 3.

pressures on the EU meaning political considerations between governments based on economic needs will be the primary factor in decisions.[242]

The place of the individual in the growth of the EU is bound to be uneven.[243] The EU will continue to pursue its primary economic objective but as discussed above it trying to place concerns such as fundamental rights and democracy as objectives as well.[244] However this only applies to those individuals presently within the EU as those 'outside' the organisation will be subjected to discrimination and exclusion as 'part of the process of constructing Europe'.[245]

IV. Organisation for Security and Co-operation in Europe

The OSCE[246] (formerly the Conference on Security and Co-operation in Europe (CSCE)[247]) includes members from outside of Europe but its primary focus is on security in Europe.[248] The OSCE evolved in the Cold War context with its development reflecting changes in the political climate. Recently the OSCE has moved to take a larger role in the area of security and conflict prevention in Europe based on the idea that preventing human rights abuses and ensuring democracy are essential to peace and security in the region.[249] The process of the OSCE, from its first meeting in Helsinki (1975), has had a concern with what is termed the human dimension of security issues, which includes concern for individuals and

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[242] Jovanovic (1998) pp. 34-39.

[243] It has been recently expressed that the obligations of the members states and institutions of the EU are toward the creation of rights for individuals, Cases 46/93 and 48/93 *Brasserie du Pécheur v Germany* and *R v Secretary of State for Transport, ex parte Factortame* [1996] ECR I-1029, paragraph 39 of the AG's opinion. On what basis this rights creation occurs will ultimately determine the nature and effectiveness of the rights for the individual.

[244] For the time being the position will remain that 'where a human right and an economic objective conflict, it is the right and not the objective which is modified to complement fundamental economic principles.' See Phelan (1992) p. 686.

[245] Bhabha (1998) p. 599. A positive step in the regard has been taken by the Treaty of Amsterdam endowing the EP with the responsibility of combating racism and xenophobia, Article 6a [13] EC.

[246] For the basic documents of the OSCE from its beginnings as the CSCE see A. Bloed, ed. *From Helsinki to Vienna: Basic Documents of the Helsinki Process*, hereinafter *Basic Documents I.* (Dordrecht: Martinus Nijoff, 1990); A. Bloed, ed. *The Conference on Security and Co-operation in Europe: Analysis And Basic Documents, 1972-1993*, hereinafter *Basic Documents II.* (Dordrecht: Kluwer, 1993); A. Bloed, ed. *The Conference On Security and Co-operation In Europe: Basic Documents 1993-1995*, hereinafter *Basic Documents III.* (The Hague: Kluwer, 1997).

[247] The change in name came at the Budapest Summit (1994) to reflect the change in the structure of the organisation, see M. Shapiro. 'Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation.' 89 *American Journal of International Law* (1995) pp. 631-633. Bloed refers to the name change as a waste of time see 'Human Rights News.' 15 *Netherlands Quarterly of Human Rights* (1997) p. 182.

[248] 55 states are members of the OSCE with Canada and the United States involved since the beginning. Yugoslavia has been suspended from participation since 1992, *OSCE Handbook, 1997.*

[249] This move has caused some to remark that human rights issues no longer play a major role in the workings of the OSCE. See T. Buchsbaum. 'The Human Dimension of Helsinki-II.' in A. Bloed, ed. *The Challenges of Change: The Helsinki Summit and Its Aftermath.* (Dordrecht: Martinus Nijhoff, 1994) p. 317. Others view human rights as always being the foundation, T. Buergenthal. 'The CSCE Rights System.' 25 *George Washington Journal of International Law and Economy* (1991) p. 340.

groups, their rights and the processes which impact upon their lives.[250] While the OSCE is loosing its significance today its history of rhetoric with concern for the individual has been beneficial to the struggle to bring substance to the rhetoric of democracy and human rights.[251]

A. CONFERENCES TO ORGANISATION - THE DEVELOPMENT OF THE OSCE

The OSCE started as a series of conferences adopting agreements and concluding documents setting out areas of concern and co-operation among the participants along with pledges to adhere to certain principles and behaviour. The first of these, the Helsinki Final Act (HFA)[252] set the initial framework for the development of the organisation. The HFA was a political agreement setting out a number of indeterminate and sometimes contradictory commitments, not binding legal obligations. It has been generally agreed that even though the HFA did not create legally binding obligations it does possess a good deal of legal significance.[253] As to the legal significance of the HFA this is a point primarily for international lawyers as no individual would be able to invoke the principles of the HFA in legal proceedings. The moral and political significance of the HFA was significant as it brought human rights into the public discussion between the superpowers. It also gave a great deal of hope to individuals in many of the participating states as they called upon their governments to uphold the commitments they had agreed to.[254] The indeterminacy of the HFA is increased by the reliance upon the principle non-intervention in domestic affairs providing states with an argument to refuse any discussion of human rights or related issues in their territory, a point that has persisted throughout the OSCE existence.[255] The issue of human rights in the HFA is present in Principle VII including respect for rights and freedoms, with specific mention given to freedom of thought, conscience and religion, as well as reaffirming commitments to the UDHR and the International Covenants. Principle VII also confirmed 'the right of the individual to know and act upon his rights and duties in this field.'

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[250] The human dimension was originally Basket III of the Helsinki Final Act. The Basket did not address human rights specifically but dealt with numerous issues related to human contacts. Over time the human dimension was used to describe aspects of the organisation which deal with democracy and human rights. See R. Brett. 'Human Rights and the OSCE.' 18 *Human Rights Quarterly* (1996) p. 677; A. Glover. 'The Human Dimension of the OSCE: From Standard Setting to Implementation.' 3 *Helsinki Monitor* (1995) p. 1.

[251] See N. Kritz. 'The CSCE in the New Era.' 4 *Journal of Democracy* (1993) p. 18: A. Bloed and P. van Dijk, eds. *Essays on Human Rights in the Helsinki Process*. (Dordrecht: Martinus Nijoff, 1985).

[252] See T. Buergenthal. ed. *Human Rights, International Law and the Helsinki Accord*. (Montclair: Allanheld, 1977).

[253] On the legal status of the Helsinki Final Act see O. Schachter 'The Twilight Existence of Non-Binding Legal Instruments.' 71 *American Journal of International Law* (1977) p. 296; Buergenthal (1991) pp. 375-381.

[254] *OSCE Handbook, 1997*, p. 12.

[255] Principle VI of the Final Act, in *Basic Documents II*, p. 146. Added to this is inclusion in Principle I on sovereign equality that each state shall respect the right of others to determine their own laws and regulations, see Buergenthal (1977) p. 45.

This is a significantly early recognition of the importance of the participation of individuals in the process of law and rights.[256]

The progress of the OSCE has passed through many difficult phases based on ideological differences and Cold War politics. Follow-up meetings to the original Helsinki summit were held in Belgrade (1978),[257] Madrid (1983)[258] and Vienna (1986).[259] The Vienna Concluding marked the communist bloc's acceptance that human rights were a matter for international discussion and action.[260] The Vienna document also expressed the importance of participation by individuals including the right of individuals to observe and promote the implementation of CSCE provisions and to associate with others for this purpose.[261] The Vienna Conference agreed to a standing commitment to the human dimension with three specific conferences in Paris (1989)[262] Copenhagen (1990) and Moscow (1991) which would set the stage for major changes for the protection and promotion of democracy and human rights in the CSCE context.

The Copenhagen Concluding Document was the first recognition in an international instrument of the importance of democracy.[263] Participants committed themselves to multi-party democracy based on free, periodic and genuine elections, the rule of law and equal protection under the law for all based on respect for human rights and effective, accessible and just legal systems.[264] The Document states that 'pluralistic democracy and the rule of law are

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[256] *Basic Documents I*, pp. 10-11. See E. Schlager. 'The Procedural Framework of the CSCE: From the Helsinki Consultations to the Paris Charter, 1972-1990.' 12 *Human Rights Law Journal* (1991) pp. 222-223.

[257] Belgrade Concluding Document in *Basic Documents I*, p. 219.

[258] See J. Sizoo and R. Jurrjens. *CSCE Decision-Making: The Madrid Experience*. (The Hague: Nijhoff, 1984). The Madrid Concluding Document did call for the first ever meeting devoted solely to human rights issues to be held in Ottawa which was unsuccessful, see H. Hazewinkel. 'Ottawa 1985: The Half-Way Meeting.' 3 *ODIHR Bulletin* (1995) p. 46.

[259] For the Concluding Document of Vienna see *Basic Documents II*, p. 327. On the Vienna Meeting see A. Bloed and P. van Dijk, eds. *The Human Dimension of the Helsinki Process: The Vienna Follow-Up Meeting and Its Aftermath*. (Dordrecht: Martinus Nijoff, 1991).

[260] H. Tretter. 'Human Rights in the Concluding Document of the Vienna Follow-Up Meeting.' 10 *Human Rights Law Journal* (1989) pp. 259-260. Vienna saw the adoption of a supervisory mechanism to ensure compliance with human dimension commitments starting the process of institutionalising the CSCE, see *Basic Documents II* (1993) pp. 367-369. For a study of the supervisory mechanism see A. Bloed and P. van Dijk. 'Supervisory Mechanism for the Human Dimension of the CSCE.' and F. Coomans and L. Lijnzaad. 'Initiating the CSCE Supervisory Process.' in Bloed and van Dijk (1991) pp. 74, 109. For the development of the mechanism through the Human Dimension Follow up meetings see R. Brett. 'The Human Dimension of the CSCE and the CSCE Response to Minorities.' in M. Lucas, ed. *The CSCE in the 1990s: Constructing European Security and Cooperation*. (Baden-Baden: Nomos, 1993) pp. 143-160. For examples of the Mechanism being used, see D. McGoldrick. 'Human Rights Developments in the Helsinki Process.' 39 *International and Comparative Law Quarterly* (1990) pp. 925-926.

[261] Vienna Concluding Document in *Basic Documents II*, pp. 332-334, 339.

[262] See H. Hazewinkel. 'Paris, Copenhagen and Moscow.' in Bloed and van Dijk (1991) pp. 129-132.

[263] T. Buergenthal. 'The Copenhagen CSCE Meeting: A New Public Order for Europe.' 11 *Human Rights Law Journal* (1990) p. 221; M. Halberstam. 'The Copenhagen Document: Intervention in Support of Democracy.' 34 *Harvard International Law Journal* (1993) p. 164.

[264] For the Copenhagen Concluding Document see *Basic Document II*, p. 439. Buergenthal (1990) p. 217; Halberstam (1993) p. 163; Kritz (1993), p. 19.

essential for ensuring respect for all human rights and fundamental freedoms' and recognises the need for the active involvement of all persons, groups, organisation and institutions to ensure the continual progress of the democratisation process.[265] The Concluding Document outlines a number of specific ingredients that are necessary for a society based on democracy and the rule of law[266] with the underlying belief that the protection and promotion of human rights and fundamental freedoms is a basic purpose of government.[267]

The commitments of the Copenhagen Document were strengthened at the Paris Summit (1990) with the adoption of the Charter of Paris for a New Europe marking the end of communism in the region.[268] The long held idea that states are free to choose their political, social, economic and cultural systems remained part of the rhetoric of the process, but now participants have expressed a commitment to the democratic ideas and structures.[269] The Paris Charter was seen as transforming the OSCE from 'an obscure and amorphous system' to one that had definite structures and institutional shape.[270] The new shape of the OSCE and its commitment to democracy and human rights in Europe were further refined and improved upon at the Moscow Conference on the Human Dimension in 1991[271] and the Helsinki Summit of 1992.[272] After the second Helsinki Summit the OSCE began moving from its position as a catalyst for change to reacting to events in Europe and trying to ensure that previous commitments were adhered to.[273]

B. OSCE INSTITUTIONS

The OSCE consists of a number of bodies entrusted with various aspects of security and administration. For the purposes here only three will be mentioned, the Parliamentary Assembly (OSCE PA), [274] the Office for Democratic Institutions and Human Rights (ODIHR) and the High Commissioner for National Minorities.

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[265] *Basic Documents II*, p. 440.
[266] Copenhagaen Concluding Document, paragrapns 5-15.
[267] *Basic Documents II*, p. 441.
[268] *Basic Documents II*, p. 536; Buergenthal (1991) p. 361.
[269] Buergenthal (1990) cautions that such structures will develop over time, p. 231. Charter of Paris in *Basic Documents II*, p. 537.
[270] Schlager (1991) p. 221. Also A. Heraclides. *Helsinki - II and Its Aftermath: The Making of the CSCE into an International Organisation*. (London: Pinter, 1993) pp. 13-19.
[271] *Basic Documents II*, p. 605.
[272] See Heraclides (1993); A. Bloed, ed. *The Challenges of Change: The Helsinki Summit of the CSCE and Its Aftermath*. (Dordrecht: Martinus Nijoff, 1994).
[273] E. Schlager. 'The Challenges of Change: An Introduction on Helsinki-II.' in Bloed (1994) p. 5.
[274] See R. Spencer Oliver. 'The OSCE Parliamentary Assembly: A Unique OSCE Institution.' 4 *ODIHR Bulletin* (1995/6) p. 26.

The OSCE PA was created in 1990 with the purpose of increasing the role played by state parliaments and parliamentarians in the activities of the OSCE. The primary activity of the OSCE PA is the monitoring of elections. The use of election monitoring was first included in the Copenhagen Document with a weak commitment to allow only 'appropriate' groups to observe and only to the extent permitted by domestic law allowing states to exclude or limit the presence of observers. The commitment to use election observers is limited to only national elections with sub-national involvement described as only an endeavour.[275] The OSCE PA also engages in sending special missions to areas of conflict where OSCE commitments are under threat. Recent missions to the former Yugoslavia, Turkey and Abkhazia demonstrate the Assembly's ability to pursue dialogue and confront problems even under the most difficult circumstances. While the special missions may not have any major impact in some situations it is generally believed that their presence will help to prevent human rights abuses from occurring.[276] This position has recently been severely discredited in the situation in Kosovo where members of the special observer mission (KVM) were completely powerless in even providing a contribution to a resolution to the situation there.[277]

The primary work of the OSCE for the promotion and protection of democracy and human rights rests with the ODIHR.[278] The focus of the ODIHR is to assist the participating states of the OSCE in building and strengthening democratic institutions and the implementation of human dimension commitments. The priorities for the ODIHR are the promotion of elections based on OSCE commitments and the building of civil society and democratic institutions. In their work of strengthening civil society and democratic institutions the ODIHR works closely with the media and NGOs, for the free flow of information is seen as an essential element to the democratic process.[279] They also provide a programme of co-ordinated legal support dealing with various aspects of the judiciary, the rule of law and the creation of legislation. The creation of the ODIHR has been greeted with mixed responses. It has been criticised as diverging from the purpose and overall process by placing too much

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[275] See A. Bloed. 'A New CSCE Human Rights Catalogue.' in Bloed and van Dijk (1991) pp. 60-61.

[276] See Brett (1996) pp. 687-689.

[277] The OSCE, naturally, claims it was making a significant impact in Kosovo, see 'KVM is Making a Difference.' 6 *OSCE Newsletter* (1999). While the presence of the mission undoubtedly acted as a deterent it was not able to sustain itself in the face of hostility from the Yugoslav authorities and ultimately the OSCE had to withdraw the mission, see 'OSCE Chairman-in-Office Pulls out OSCE Personnel out of Kosovo.' OSCE Secretariat, Press Release No. 24/99; 'Serbs Push Nato to the Brink.' *The Guardian* (19 January 1999) p. 1.

[278] On the activities of the ODIHR see A. Glover. 'The Human Dimension of the Organisation on Security and Co-operation in Europe - The ODIHR in Warsaw.' 2 *European Human Rights Law Review* (1997) p. 553.

[279] For the role of NGOs in the Helsinki Process see R. Brett. 'A New Role for NGOs in the CSCE.' in Bloed (1994) p. 359. There also exists an OSCE Representative on Freedom of the Media to ensure compliance with OSCE principles and commitments in respect of freedom of expression and media.

emphasis on the human dimension. The result is that issues of democracy and human rights have been relegated to a small group in Warsaw freeing up the other (more important) organs for 'more pressing' issues.[280]

The High Commissioner for National Minorities is the only OSCE official with executive functions in recognition of the importance of this area for European security and human rights situation.[281] The High Commissioner's responsibility is to identify, and seek early resolution of, ethnic tensions that might endanger peace, stability or friendly relations between the participating states of the OSCE. The High Commissioner operates independently of all parties concerned conducting on-site missions, engaging in preventive diplomacy and providing reports and recommendations. The primary goal of the High Commissioner is to promote dialogue, confidence and co-operation between conflicting parties.

The advances of the OSCE in the area of minorities have been significant as it has established political frameworks for protection which are stronger than most international legal instruments.[282] The addressing of minority issues is not from a purely human rights perspective but from the issue of security, recognising the importance of democracy and human rights are to society in terms of inclusion and participation for long-term security. The ability of the High Commissioner and the OSCE to have an impact in the area of minority protection is down to the political nature of the agreements of the organisation and the volatile nature of establishing legal safeguards for minority protection.[283] The 'success' of the role depends wholly upon the ability of the individual who fills the post to be pro-active in pursuing the mandate and able to create workable relations with governments.

C. Democracy and Human Rights in the OSCE

The OSCE, due to its own growth and the changes in Europe, has had trouble finding a place for itself in the region, especially with regard to democracy and human rights. The priorities for the OSCE have shifted to the security context that does include concerns for

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[280] Kritz (1993) p. 23. The present development of the OSCE as a tool to ensure Russia goes along with the expansion of NATO gives backing to this, see E. Mlyn. 'OSCE - Now More than Ever.' 11 *Cambridge Review of International Affairs* (1998) p. 227.

[281] The position of the High Commissioner was created by the Helsinki Concluding Document, paragraph 23, and annex II. See R. Zaagman and H. Zaal. 'The CSCE High Commissioner on National Minorities: Prehistory and Negotiations.' and R. Zaagman. 'The CSCE High Commissioner on National Minorities: An Analysis of the Mandate and the Institutional Context.' in Bloed (1994) pp. 95, 113.

[282] Brett (1996) p. 685. On the role of minority protection in the development of the OSCE see J. Wright. 'The OSCE and the Protection of Minority Rights.' 18 *Human Rights Quarterly* (1996) p. 190.

[283] See E. Schlager. 'Does CSCE Spell "Stability" for Europe?' 24 *Cornell International Law Journal* (1991) pp. 504-505.

democracy and human rights but as a secondary element of a wider purpose.[284] The organisation remains limited in its influence over the actions of states as governments have refused the presence of a mission or observer group and there was no possible action for the OSCE to oppose such a move. Examples include Kosovo (see above), as well as Belarus where the president was establishing greater authoritarian control in contravention of OSCE commitments but denied such a thing was occurring and refused the presence of a fact finding mission of the OSCE.[285] When this occurs the most the OSCE can do is provide limited information concerning the situation on the ground and provide suggestions for future action. But with the reluctance of participating states to become more involved in crisis situations the impact of the OSCE's proclamations are likely to be minimal.[286]

The rhetoric of democracy and human rights has been advanced in Europe through the OSCE but it has not been able to translate the rhetoric into effective standards with participants proving more reluctant to further the OSCE's activities in this area.[287] The ideological separation of Europe during the Cold War created fertile ground for accusations that governments were not meeting their commitments. With the end of the ideological divide governments are reluctant to strengthen further the human dimension for fear of it being used against them.[288] The development of the OSCE into a more 'legal' institution means finding a place in between the growth and activities of the COE and EU. The OSCE's efforts in this regard have not been wholly successful resulting in a body characterised by a complex structure and nomenclature with the use of obscure terminology and a tendency to produce elaborate and bureaucratic procedures which are not always used.[289]

V. Democracy and Human Rights in the Expansion of Europe

The end of the communist regimes in Europe and recent developments in the Balkans are proving to be formidable obstacles to the promotion and protection of democracy and human rights in the region. The complete restructuring of societies in central and eastern Europe, both politically and economically, has not always produced favourable results and has hindered the

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[284] Kritz (1993) points out how this all depends on money, pp. 23-25.
[285] See 'Human Rights News.' 15 *Netherlands Quarterly on Human Rights* 1997, 91.
[286] When the OSCE was in Kosovo and began making efforts to increase its presence, participating states were reluctant to commit personnel due to the instability of the area, see 'Observers Put at Risk in Kosovo War.' *The Guardian* (28 December 1998) p. 111.
[287] Glover (1995) p. 3.
[288] T. Buchsbaum. 'The Human Dimension after Helsinki-II.' in Bloed (1994) p. 311. Since the end of communism the Human Dimension Mechanism has not been used very often, see Brett (1996) p. 680; Zaagman in Bloed (1994) pp. 232-246.
[289] Brett (1996) p. 668.

consolidation of the democratisation process in some states as well as demonstrating the fragility of democratic transitions.[290] The unsettled condition of many societies of Europe along with the end of the ideological divide of the region has led to a re-examination of what Europe is or where it is located or who is part of it. Does the expansion of the membership of the regional organisations bring the common identity and heritage of its members under question, or does it enhance the understanding of democracy and human rights in the region? Related to the issues of instability and identity is the position of minorities throughout Europe and how they are able to benefit from the protection and promotion of democracy and human rights. The combination of these issues is forcing the three regional institutions to consider their roles and inter-relations in furthering democracy and human rights in the region. The COE, EU and OSCE all have a common vision as to how Europe should be, how this is accomplished differs according to the purposes of each organisation hindering effective co-operation toward common goals effective for the individual. For the future of democracy and human rights in the region the three organisations will need to concentrate their co-operative efforts for the benefit of the individual and not in the pursuit of disparate programmes supposedly for the 'good' of Europe.

A. Communists to Capitalists

The end of communism in central and eastern Europe did not automatically herald the existence of democracy with human rights protection and respect for the rule of law. The pace of change in the area has varied considerably between states with differing results.[291] The impact of the past continues to influence both the institutional and psychological change to democracy in these societies.[292] Dealing with the past is an issue for all emerging democracies and the states of Europe are no exception. It is necessary to address the impact of the past in order to build new effective structures in government, economy, and society and, most importantly, to educate individuals about the positive possibilities of democracy.[293] This final

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[290] In the process of change in the area all sectors of society are impacted, even children, see UNICEF. *Children at Risk in Central and Eastern Europe: Perils and Promises*. (Florence: Economies in Transition Studies Number 4, 1997).

[291] P. Lewis. 'Democratization in Eastern Europe.' in D. Potter, et al, eds. *Democratization*. (Cambridge: Polity, 1997) pp. 405-409.

[292] The communist past is not the sole problem as difficulties exist independent of the communist system, R. Müllerson. *International Law, Rights and Politics: Developments in Eastern Europe and the CIS*. (London: Routledge, 1994) p. 95.

[293] The past has created a certain political psychology which has made the people sceptical of terms currently being used to describe the states such as pluralism, democracy, etc., terms they have all heard before , see G. Ionescu. 'The Painful Return to Normality.' in G. Parry and M. Moran, eds. *Democracy and Democratization*. (London: Routledge, 1994) pp. 121-124.

point is perhaps the most difficult to achieve when the socio-economic situation of most societies is dire and individuals find it difficult to find anything positive about the changes that have occurred.[294] Regardless of the specific problems facing central and eastern Europe, change will not be immediate and what is important is patience,[295] as it takes time for a society to develop an effective system of democracy and human rights.[296] Establishing a democratic society requires fostering a culture or mind-set in favour of democracy[297] as '[l]aws can impose change on political and economic systems, but you cannot legislate new attitudes.'[298]

Dealing with the past means dealing with the individuals who were part of it. Societies of central and eastern Europe have approached this issue from a number of perspectives[299] with the use of 'lustration' being favoured with less than perfect results.[300] Lustration involves ensuring individuals associated with the past regimes are excluded from the political process and therefore not able to interrupt the transition to democracy - a form of 'political cleansing'.[301] Lustration has primarily involved making public the files of the former security services to discover who was involved with the regime and in what way.[302] A number of difficulties arise in the use of lustration due to the extent to which the communist party

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[294] A. Illarionov. 'The Roots of the Economic Crisis.' 10 *Journal of Democracy* (1999) pp. 68-69. In Russia it has been observed that people find it useless to protest against the government much less become actively involved in the democratic process, see J. Shapiro. 'Bleak Winter.' 54 *World Today* (1998) pp. 303-304.

[295] See R. Rose and W. Mishler. *Political Patience in Regime Transformation: A Comparative Analysis of Post-Communist Citizens*. (Studies In Public Policy, no. 274. Glasgow: University of Strathclyde, 1996). In the legal sphere it is considered necessary for a 'complete and immediate overhaul' of the legal systems, see M. Ellis. 'The Democratisation of Central and Eastern Europe: An Afterword.' 7 *American University Journal of International Law and Policy* (1992) p. 743.

[296] A point recognised by the COE, see COE. *Bridging the Gap: The Social Dimension of the New Democracies*. hereinafter B*ridging the Gap* (Stasbourg: COE, 1995) pp 33-49. See also V. Dimitrijevic. 'Political Pluralism in the Aftermath of the Eastern European Upheavals.' in A. Rosas and J. Helgesen, eds. *The Strength of Diversity:Human Rights and Pluralist Democracy*. (Dordrecht: Martinus Nijhoff, 1992) p. 5.

[297] S. White et al. *The Politics of Transition: Shaping a Post-Soviet Future*. (Cambridge: Cambridge University Press, 1993) pp. 225-229.

[298] V. Cepl and M. Gillis. 'Making Amends after Communism.' 7 *Journal of Democracy* (1996) p. 119.

[299] See L. Hayse. 'Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past,' 20 *Law and Social Inquiry* (1995) p. 51.

[300] Lustration raises a number of difficult issues such as how the past is recounted as truth, moral debates over accountability for acts that were 'legal', jurisprudential issues of due process and retrospective justiciability and enforcement and the scope of international law, see S. Cohen. 'State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past.' 20 *Law and Social Inquiry* (1995) p. 9.

[301] C. Bertshci. 'Lustration and the Transition to Democracy: The Cases of Poland and Bulgaria.' 28 *East European Quarterly* (1995) p. 436. Cepl and Gillis (1996) p. 123.

[302] M. Ellis. 'Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc.' 59 *Law and Contemporary Problems* (1996) p. 181. This may give rise to violations of privacy under the ECHR, see D. Feldman. 'The Developing Scope of Article 8 of the European Convention on Human Rights.' 2 *European Human Rights Law Review* (1997) pp. 272-273. In Hungary lustration has been extended to the private sphere to those who were involved in shaping public opinion, see G. Halmai. 'Confronting the Past: The Hungarian Constitutional Court's Lustration Decision of 1994.' 1 *East European Human Rights Review* (1995) p. 126. The use of information from the former security services creates a number of problems concerning the creation of truth, see M. Los. 'Lustration and Truth Claims: Unfinished Revolutions in Central Europe.' 20 *Law and Social Inquiry* (1995) p. 117.

permeated all aspects of society making the process of cleansing next to impossible.[303] Throughout eastern and central Europe individuals who were part of the former communist regimes have remained active in political life and many have attained high positions in the new democratic governments.[304] The impact of the continued presence of former communists has been uneven, slowing progress to democracy, as in Russia, or sometimes contributing to democracy as in Poland.[305] When lustration has occurred, the various motives behind the use of lustration has resulted in ordinary individuals being seen as associated with former regimes and excluded from the new system, resulting in a lack of human resources that has an impact on the transition to democracy.[306]

Since the communist party permeated all aspects of society and governance[307] transitions to democracy involve creating institutional and procedural structures that establish responsibility and accountability concerning those in power, mechanisms for peaceful change and the creation of public space allowing individuals to freely pursue participation in the processes of society.[308] This raises the problem of governments attempting to completely remake the socio-political system without themselves falling into chaos which will in turn impact the general condition of society and how individuals view the impact of change.[309] The primary targets for change are the legislature and judiciary. For both bodies there is the need to establish themselves as effective government organs and not merely rubber stamps for the executive.

The role of the legislature in a new democracy is important for the public's perception of the legitimacy and ability of the government to rule. In newly democratised states the role of the legislature is commonly seen in two ways, either as a body able to represent the diversity and differences of opinions in society or as an obstacle to government action due to the very same reasons of diversity and difference.[310] Legislatures have an important symbolic

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[303] For a review of the various lustration laws see Ellis (1996).
[304] This does not include the individuals who are in positions of power outside of government who owe their place to the former communist system, see Bertshci (1995) p. 435.
[305] See J. Higley et al. 'The Persistence of Postcommunist Elites.' 7 *Journal of Democracy* (1996) pp. 133-147.
[306] Ellis (1996) p. 196; J. Linz and A. Stepan. *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-communist Europe*. (Baltimore: Johns Hopkins University Press, 1996) pp. 249-251; M. Butora. 'The Delayed Return of Prodigal Sons: Reflections on the Emerging Democracies in Central and Eastern Europe.' 7 *American University Journal of International Law and Policy* (1992) p. 445.
[307] Müllerson (1994) p. 160.
[308] White et al. (1993) p. 213.
[309] White et al. (1993) p. 222-224.
[310] There is also the massive proliferation of parties all competing for a small piece of the political prize which sometimes make a mockery of the process and creates confuse and frustration for the voters, Dimitrijevic in Rosas and Helgesen (1992) pp. 10-11.

importance as representative of society and a forum for deliberation.[311] If legislatures are seen as ineffective or non-representative of society many will lose confidence in the ability of government to govern and ultimately reject the political system.[312] Ineffective legislatures, either real or perceived, allow powerful individuals in the executive to manipulate the situation and blame the lack of reform on an obstructing legislature allowing for greater centralisation of power, sometimes with popular support.[313]

The centralising tendency of the national governments makes it difficult for national legislatures to act as effective representatives and also hinders the ability of local government to operate and develop. The overall political climate of the area sees national events being more important than what is happening locally as local needs are ignored.[314] The economic difficulties of society will keep the attention on 'national' issues to the detriment of local development causing leaders at all levels to disagree over the direction of policy and priorities.[315] Enhancement of local and regional forms of participation will prove difficult to develop for such practices did not exist previously due to the strict hierarchy of the communist party.[316] Participation at all levels of society, and in all aspects, would assist the transition process as individuals would feel part of the system around them. However, with possibilities limited at both the national and local level it will difficult for individuals to perceive any beneficial aspects of the democratic process as power and decision-making remains tied to a small exclusive group.

The judiciary in the new regimes face problems, as under communism the idea of law was subordinate to the doctrine of the party, completely marginalising the law from the structures of society.[317] This gives a low impression of the law and does not fill it with any concept of effectiveness. Judges, lawyers, scholars, etc. never had the opportunity to see the law in other contexts or in a different form and will have difficulty coping with the idea that political consequences will no longer be a major factor in their decisions.[318] The efforts of the regional organisations, especially the COE, concentrate on establishing effective judicial systems in

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[311] W. Mishler and R. Rose. 'Support for Parliaments and Regimes in the Transition Toward Democracy in Eastern Europe.' 19 *Legislative Studies Quarterly* (1994) pp. 8-10.
[312] J. Dunn. *East Central Europe: The Challenges of Freedom*. (Wilton Park Papers, N. 50. London: HMSO, 1992).
[313] Belarus stands as an example as the president has changed the constitution providing himself with more centralised and authoritarian powers. Belarus was suspended from the COE in 1992 because of this but the government remains popular, see 'Referendum on Constitutional Change.' *Keesings Contemporary Archives* (November 1996) p. 41381.
[314] M. Kaldor. and I. Vejvoda. 'Democratization in Central and East European Countries.' 73 *International Affairs* (1997) p. 75.
[315] Butora (1992) p. 440.
[316] T. Clark. 'Local Democracy and Innovation in Eastern Europe.' 11 *Environment and Planning: Government and Policy* (1993) p. 183.
[317] Linz and Stepan, 248-249; Müllerson (1994) p. 179..

recognition of the essential role of the rule of law in an effective democracy.[319] The new constitutions of the states in central and eastern Europe include international standards for the protection of human rights adding to the rhetorical importance of the existence of effective legal measures.[320] It is up to the domestic judiciaries to ensure that these international standards are accessible to individuals through a credible process and not merely words on paper as they have been in the past.[321]

With political change has come economic change and the lack of economic success in many societies of the area places democracy under threat. As societies have moved away from the communist system the previous social guarantees were shown to have little substance and the existence of civil and political rights did little to alleviate the very real problems individuals faced.[322] The economic problems of the area have been worse than expected 'undermining both popular and political support for further change'[323] as leaders try to provide for demands from within and outwith society. The transitions to democracy in Europe have been equated with the need to establish free market capitalist economies.[324] The creation of a market economy, as with a democratic society, is not spontaneous and cannot be created from outside within a short period of time.[325] Market economies are social constructs that are the result of societal norms, government policies, and state sanctioned regulations, none of which existed under communist rule.[326] Events in Russia have demonstrated the difficulties of implementing free market capitalist economic systems and the detrimental and disillusioning effects on the population.[327] Disillusionment and a general loss of hope[328] are not based on selfish responses to unfulfilled unrealistic expectations but are due to a very real economic crisis as basic goods

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[318] R. Aldrich. 'Judicial Independence in a Democratic Society.' 1 *The Advocate* (1995) pp. 26-27.
[319] See Drzmczewski (1993) p. 229.
[320] For a review of the new constitutions see, V. Vereshchetin. 'New Constitutions and the Old Problem of the Relationship between International Law and National Law.' 7 *European Journal of International Law* (1996) pp. 29-41.
[321] To date the judiciary in Russia has been unable to exert any such influence becoming almost completely marginalised from the system of governance, see M. McFaul. 'The Perils of a Protracted Transition.' 10 *Journal of Democracy* (1999) p. 15
[322] See H. Suchocka. 'The Social Charter and the States of central and eastern Europe.' in *Social Charter for the 21st Century*, pp. 249-250.
[323] *Bridging the Gap*, p. 10.
[324] The transitions to democracy in eastern and central Europe are unique by occurring in a non-capitalist economy. But the context of the transition whereby communism was the antithesis of capitalist democracies made it almost inevitable that communism was to be replaced with capitalism. See D. McSweeney and C. Tempest. 'The Political Science of Democratic Transition in Eastern Europe.' 41 *Political Studies* (1993) pp. 417-418.
[325] R. Bideleux. 'In Lieu of a Conclusion: East meets West?' in R. Bideleux and R. Taylor, eds. *European Integration and Disintegration: East and West*. (London: Routledge, 1996) p. 283.
[326] Linz and Stepan, 253-3
[327] Butora (1992) pp. 442-443.
[328] See E. Gellner 'An identity crisis in the east.' *Independent* (29 April 1996) p. 13. Also Dimitrijevic in Rosas and Helgesen, (1992) p. 8.

and services cannot be provided and those that do exist remain well out of the reach of many. The lack of resources and widespread corruption resulting in conflicts over resources seriously hampers the development of democracy and human rights in society. When the economy is weak and large sectors of society suffer the easiest target for blame is the government in power who is expected to improve the situation, for that is why they were elected. The poor economic conditions and hardship that exists leads to the question as to whether democracy is the right way to go if it means a worsening situation for individuals.[329] In the societies of central and eastern Europe there is the definitive need to achieve social and economic equality for political equality to succeed.[330]

Many of the current problems facing states central and eastern Europe make the future of democratic and human rights fragile at best. The desire for the stability of the 'good old days' has allowed the emergence of leaders with authoritarian tendencies.[331] It is unlikely that authoritarian rule similar to communism will return as progress towards some form of democracy and human rights protection is the only acceptable alternative which is available to these states.[332] The instability of the democratic transition in central and eastern Europe has benefited from the existence of regional arrangements who are willing and able to assist in the transitions to democracy.[333] The existence of these arrangements has helped to ensure efforts aimed at the promotion and protection of democracy and human rights as states desire membership in these organisation who require democratic governments and respect for human rights. In the early period of the transitions to democracy (and still today) the greater emphasis of the regional organisations has been on the civil and political reforms of these states with less concern given to socio-economic areas that impact directly upon individuals.[334] As societies struggle to come to terms with the new political systems and the socio-economic difficulties they face it is necessary to ensure that vulnerable groups do not suffer disproportionately so that all sectors of society are able to benefit from the transition to democracy.[335]

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[329] G. Kardos. 'The Market, Human Rights and Pluralism.' in Rosas and Helgesen (1992) pp. 125-126. The response to changes brought about by the transitions to democracy have been uneven, see A. Grødeland et al. ' 'In Theory Correct, but in Practice' … Public Attitudes to Really Existing Democracy in Ukraine, Bulgaria, Slovakia and the Czech Republic.' 14 *Journal of Communist Studies and Transition Politics* (1998) p. 1.

[330] K. Klare. 'Legal Theory and Democratic Reconstruction: Reflections on 1989.' 25 *University of British Columbia Law Review* (1991) p. 94.

[331] In Russia Yeltsin's rule has become very centralised and personalised in nature being called a hybrid system of liberalisation and authoritarianism, see L. Shevtsova. 'The Two Sides of the New Russia.' 6 *Journal of Democracy* (1995) p. 61.

[332] See G. Nodia. 'How Different are Postcommunist Transitions?' 7 *Journal of Democracy* (1996) p. 15.

[333] A. Rosas and J. Helgesen. 'Introduction: The Challenges of Change.' in Rosas and Helgesen (1992) p. 2.

[334] M. Martinez, former President of the COE Parliamentary Assembly in *Social Charter for the 21st Century*, p. 40.

[335] Dimitrijevic in Rosas and Helgesen (1992) pp. 20-23

Socio-economic reform is based primarily on integrating these states into the global and/or regional economic systems. Efforts concentrate at the macro level with international priorities taking dominance over local concerns. This is demonstrated by the EU who has focused its programme for democratic reform in central and eastern Europe on fostering free markets with the idea that as markets become more developed, or more like the West, governments will become more democratic.[336] The EU's idea that markets make democracy is based on the belief that economic development encourages democracy and that economic improvement is necessary to legitimate and sustain a new democracy.[337] While the EU's membership criteria includes establishing a democratic framework, scant attention is paid to its overall position and foundation in a society. The desire for integration and expansion should not overlook efforts of ensuring individuals are able to participate in the processes around them and that the whole spectrum of rights, including most importantly economic and social rights, will be ensured.[338]

B. MINORITIES

A possible 'positive' characteristic of communist rule in Europe was that it tended to contain minority tensions since all individuals were oppressed and not just certain groups.[339] The development of democracy has uncovered these differences in society as described in the case of Poland.

> Democratisation at the turn of the decade meant practical recognition of the facts that Polish society was not totally homogeneous, and that members of various minority groups were also citizens and in the capacity they had the right to formulate their own preferences, to express themselves on political and cultural matters without fear of government reprisal ... .[340]

Mucha goes on to explain how this recognition of the rights of minorities automatically raises the problem of having to publicly create and define differences between groups in society.[341] This immediately creates a paradox for democracy as provisions for special treatment for

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[336] L.Diamond *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives*. (Report to the Carnegie Commission, New York, 1995) p. 33.
[337] Diamond (1995) p. 39.
[338] See Kardos in Rosas and Helgesen (1992) for rights in relation to market transitions, pp. 127-131.
[339] Müllerson (1994) pp. 95-98.
[340] J. Mucha. 'Democratisation and Cultural Minorities: The Polish Case of the 1980s/90s.' 25 *East European Quarterly* (1992) p. 472.
[341] Mucha (1992) p. 472. Macey remarks 'the new spirit of openness' in Europe has not been universally applied'. in Crouch and Maquand (1992) p. 139.

certain groups conflict with ideas of equality and non-discrimination.[342] The delineation of society along defined attributes of the person too often gives rise to conflict and controversy over the meaning of difference, a point that was explicitly demonstrated in the former-Yugoslavia.[343]

Minorities raise numerous conceptual and practical difficulties for the legal protection of democracy and human rights in any society.[344] Minority issues in Europe have a chequered past as a highly political and emotive topic short on agreement as to how 'to reinforce the image of Europe as a collection of pluralist, multicultural states'.[345] The issue of minorities is not exclusive to the states of central and eastern Europe as the established democracies of western Europe face significant minority issues in the functioning of their democratic societies.[346] Each of the three regional organisations has faced difficulty in coming to agreement upon either a political or legal framework needed to address minority issues.[347] In the states of central and Eastern Europe the problem is further intensified by the long tradition nationalism which has not always corresponded to the multi-dimensional realities of society.[348]

Efforts at minority protection in Europe have not always been successful primarily due to the difficulty in achieving agreement between governments as to future action. There is the added difficulty that no one solution will apply to all minorities in all states as groups have

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[342] N. Rodley. 'Conceptual Problems in the Protection of Minorities: International and Legal Developments.' 17 *Human Rights Quarterly* (1995) p. 48.

[343] J. Bugajshi. 'The Fate of Minorities in Eastern Europe.' 4 *Journal of Democracy* (1993) pp. 85-86. For a detailed study of minority issues surrounding the Yugoslavia situation see T. Várady. 'Minorities, Majorities, Law, and Ethnicity: Reflections on the Yugoslav Case.' 19 *Human Rights Quarterly* (1997) p. 9.

[344] First and foremost is the definitional aspect as to who or what constitutes a minority, see J. Packer. 'On the Definition of Minorities.' In J. Packer and K. Myntti, eds. *The Protection of Ethnic and Linguistic Minorities in Europe*. (Abo: Abo Akademi University, 1993) pp. 23-66. Gilbert (1996) observes that with legal instruments definitions are necessary as 'one cannot accord rights to wholly nebulous concepts', p. 162. Political agreements through the OSCE have also failed to establish a definition and the ability of the High Commissioner to 'know a national minority when he sees one' does not make the situation any clearer, see Wright (1996) p. 202.

[345] Gilbert (1996) p. 161. Also J. Mayall. *Nationalism and International Society*. (Cambridge, 1990) p. 55.

[346] The UK stands as the perfect example as the state which has one of the longest traditions of democratic structures in society in Europe but to date 'there is in Britain no forum, language or even belief in the necessity for the recognition of minorities and their rights.' T. Hervey. 'Which Rights, Whose Rights? The Identification and Protection of Minorities in British Law.' in Packer and Myntti (1993) p. 123. For individual studies of a number of European states, see B. Baumgartl and A. Favell, eds. *New Xenophobia in Europe*. (London: Kluwer, 1995). The threat of violence among groups is a real threat to Western European societies as well, see M. Benton. 'National Integration and Ethnic Violence in Western Europe.' 25 *Journal of Ethnic and Migration Studies* (1999) p. 5.

[347] Even in the OSCE after it began to take on institutional shape participants became reluctant to come to agreements on minority issues, see F. Ermacora. 'Rights of Minorities and Self-Determination in the Framework of the CSCE.' in Bloed and van Dijk (1991) p. 197.

[348] See S. Griffiths. *Ethnicity and Nationalism: Threats to European Security*. (Oxford: Oxford University Press, 1993). The term 'ethnic conflict' has been understood to include social, political or economic conflict along distinct ethnic lines, leading to confusion as to the meaning of the term, see L. Walker. 'Nationalism and Ethnic Conflict in the Post-Soviet Transition.' in L. Drobizheva, ed. *Ethnic Conflict in the Post-Soviet World: Case Studies and Analysis*. (Armonk: M.E. Sharpe, 1996) pp. 126.

widely differing goals and means of achieving them.[349] Combined, these factors make it difficult for the regional organisations of Europe to move beyond a rhetorical stance of adopting principles and action plans without achieving consensus on further substantive action.[350] The COE has only been able to achieve the Framework Convention and all of its weaknesses. There exists no explicit minority protection under the ECHR with possibilities existing under Article 14 concerning non-discrimination but this is far from clear or effective.[351] The Framework Convention is significant, as legal instruments for the protection of minorities are rare in the international scene. At the same time one must question the efficacy of providing watered-down documents just for the sake of agreement instead of working toward more effective measures. The EU has recognised, in the context of its expanded membership, that minority issues could easily place strain on the ability of the organisation, making it necessary to deal with any problems prior to membership.[352]

The inability of the EU to effectively deal with minority situations in non-member states was demonstrated by its political failures with the former Yugoslavia showing the organisation still only has limited ability and influence outside the economic sphere.[353] For those states who the EU is in association agreements there is a reliance upon the OSCE structures for ensuring compliance and problem solving concerning minorities.[354] The developed nature of minority protection within the OSCE is limited as the High Commissioner is only mandated to deal with minority issues that impact security between states and is not able directly address the minority situation within a state.[355] From the position of the individual, this limitation is another example of the reluctance of states to establish effective procedures for dealing with democracy and human rights as minority issues demonstrate the need to deal with potential problems pro-actively and directly instead of waiting for violations to occur.[356] While democracy provides the potential for greater conflict in society it also creates space for discussion and resolution by openly addressing the necessary issues.[357]

The position and treatment of minorities throughout Europe creates a number of difficult issues for the region, whether it is by keeping certain individuals out (EU), avoiding conflict

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[349] Bugajshi (1993) pp. 88-98; Müllerson (1994) p. 107.
[350] Benoït-Rhomer (1996) pp. 11-12.
[351] For the use of Article 14 and other provisions of the ECHR for minorities see G. Gilbert. 'The Legal Protection Accorded to Minority Groups in Europe.' 23 *Netherlands Yearbook of International Law* (1992) pp. 81-93.
[352] Agenda 2000. The Effects on the Union's Policies of Enlargement to the Applicant Countries of Central and Eastern Europe. Impact Study, Part II Analysis I. The External Dimension section I.I
[353] Jovanovic (1998) p. 37.
[354] Stability Pacts.
[355] Of course minority tensions within a state could easily lead to regional instability, see Wright (1996) p. 202.
[356] See Bugajshi (1993) p. 99.

(OSCE) or ensuring rights of all are maintained (COE), democracy comes under strain when minorities are treated poorly.[358] Resolving conflicts that arise due to minority issues has proven difficult as the method of resolution, legal or political, has proven controversial.[359] Legal efforts at minority protection within Europe have so far been extremely weak as governments have not been co-operative in this regard and have refused to give any authority to an impartial body for ensuring obligations are met.[360] Várady feels that legal rules alone will not solve the situations minorities face without the existence of 'a culture that accepts that minorities cannot be equal without the right to be different'.[361]

C. A Common Identity and Future Co-operation

The end of communism and the increased membership of the regional organisations in Europe raises the question as to whether or not there continues to exist a single 'European' identity. The three organisations presented here all profess the belief of a shared identity among its members as the basis for action.[362] In the Statute of the COE, the member states reaffirm

> their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'.

It is further expressed that 'for the maintenance and further realisation of these ideals and in the interests of economic and social progress, there is a need of a closer unity between all like-minded countries of Europe'.[363] At the EC Copenhagen Summit (1973) the member states issued a Document on European Identity which stated that the principles of representative democracy, rule of law, social justice are the ultimate goal of economic progress and respect for human rights and all are fundamental elements of the 'European Identity'. The preamble of the Helsinki Final Act speaks of a common history of the participants of the OSCE and a recognition of elements 'common to their traditions and values can assist them in developing

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[357] R. de Nevers. 'Democratization and Ethnic Conflict.' 35 *Survival* (1993) p. 38.
[358] For a general view of minorities and democracy see J. Crowley. 'Minorities and Majoritarian Democracy: the Nation-State and Beyond.' in K. von Benda-Beckman and M. Verkuyten. *Nationalism, Ethnicity and Cultural Identity in Europe*. (Utrecht: ERCOMER, 1995) p. 154.
[359] See Gilbert (1996) pp. 171-172.
[360] See above discussion of COE Framework Convention. The COE PA admits the weaknesses of the instrument by leaving enforcement to governments, see Recommendation 1255 (1995) paragraph 7.
[361] He feels that 'legal rules grounded on empathy' is a good start, Várady (1997) p. 54. This point is important as the break up of the USSR and Yugoslavia did not create less multi-ethnic states with the potential for conflict remaining, see Müllerson (1994) p. 99.
[362] See B. Weston et al. 'Regional Human Rights Regimes: A Comparison and Appraisal.' 20 *Vanderbilt Journal of Transnational Law* (1987) pp. 616-617.
[363] Preamble, paragraphs 2-3.

their relations'. For any co-operative arrangement there must exist some belief in a common goal or purpose with the existence of a common background or history not necessary but may prove beneficial. The future of democracy and human rights in Europe will hinge upon not only co-operation among states in joint endeavours but between the organisations through which these endeavours are pursued.

The idea of common traditions and values among the members of the OSCE is purely rhetorical, as the OSCE has always consisted of a diverse grouping of states with security being the only common factor bringing them together. The states of the OSCE share a common history based on the Cold War but this history has been marked by fundamental differences and disagreements, especially concerning democracy and human rights. The growth of the COE has raised the issue as to whether there truly exists a common heritage that unites all the states of Europe from Spain to Russia and even Turkey?[364] Foremost in this discussion is whether the system of protection established by the ECHR is under threat or at least will be diluted by the inclusion of states from central and eastern Europe. Some commentators feel that the ECHR was originally adopted by a set of states sharing common social, political, and psychological attitudes and positions that are particular and unique to this group giving the ECHR a special character.[365] They believe that by expanding the ECHR outside its original area of application its effectiveness will be weakened as a more diverse grouping of individuals will apply the ECHR with different understandings as to the meaning of rights. This difference will give rise to greater distrust among parties, the politicisation of human rights issues,[366] the authority of the Court's judgments will be questioned,[367] and there is the possibility of governments abusing the inter-state complaint system.[368] There is substance to the idea that states that were not involved with the drafting or development of the ECHR may be reluctant to accept its principles or that increased COE membership will slow down an already overloaded system.[369] However these are issues which international human rights law in general must face and, in the case of Europe, early observations show that instead

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[364] The inclusion of Turkey as a European state makes the definition of Europe even more difficult as its inclusion is based on political rather than geographical considerations. On the defining of Europe in the EU context see van Roermund (1997) pp. 357-359.

[365] R. Kay. 'The ECHR and the Authority of Law.' 8 *Connecticut Journal of International Law* (1993) pp. 219-20; D. Seymour. 'The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks.' 8 *Connecticut Journal of International Law* (1993) p. 244.

[366] Kay (1993) 220-222.

[367] H. Schermers. 'International Human Rights Law in the European Community and in the Nations of Central and Eastern Europe.' 8 *Connecticut Journal of International Law* (1993) pp. 316-318.

[368] Seymour (1993) p. 250.

[369] Seymour (1993) p. 247.

of a weakening of the system there has been an increase in the rhetoric of democracy and human rights which individuals have utilised.[370]

The idea of a common heritage or identity seems less important for the EU as a primarily economic organisation but its recent expansion has seen increased rhetoric concerning common identity. The growth of the EU and the commandeering of what it means to be 'European' bring the issue of a single identity into focus. The COE, with its 41 members, is more representative of the region of Europe than the EU with its 15 members. Academics and professionals may be fully aware that Europe as a region extends beyond the EU, however they have contributed to a common understanding of what it means to be European that looks first and foremost to the EU. The process of integration of the EU and the move to a more political union has resulted in the defining of a 'European' citizenship, a term that is unfortunately defined through a process of exclusion and discrimination.[371] Those societies who are unable to meet the criteria for membership are deemed not to be 'European' and left outside the borders until they are able to reach an acceptable level of 'Europeaness'. Within the EU commentators have provided the assessment that in reality there is not a great deal of common heritage between the member states regardless of the attempts to create a shared identity.[372] This contributes to the confusion as to the position of rights in the EU as the ECJ speaks of fundamental rights common to the constitutions and traditions of its members. It often appears that it is the Court itself who is creating common principles of law among the members to fit with the objectives of the union.[373] Further expansion will make the common constitutional traditions of the members more diverse, a point recognised by the EU[374] but one that could prove problematic for the ECJ.

Future co-operation for the protection and promotion of democracy and human rights will not necessarily be based on an inherent common heritage but will be the result of the pursuit of common goals, of an imagined community, not one of a natural common development. [375] Democracy and human rights are desired as goods across Europe and are used as symbols of

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[370] See M. O'Boyle. 'Right to Speak and Associate Under Strasbourg Case-Law with Reference to Eastern and Central Europe.' 8 *Connecticut Journal of International Law* 1993, p. 267. Attempts by individuals to utilise the ECHR in states that have only recently ratified the document is extremely high even though in most of the early cases the ECHR does not apply, see A. Gross. 'Reinforcing the New Democracies: The European Convention on Human Rights and the Former Communist Countries – A Study of the Case Law.' 7 *European Journal of International Law* (1996) p. 89.

[371] Bhabha (1998) pp. 600-601.

[372] See J. Lodge. *Crisis or Opportunity? Justice and Home Affairs*. (Hull: Centre for European Studies, 1996) p. 56. J. Gibson and Caldeira. 'The Legal Cultures of Europe. 30 *Law and Society Review* (1996) p. 79.

[373] M. Chiti. 'Are there Universal Principles of Good Governance?' 1 *European Public Law* (1995) p. 246. Also Betten and Grief (1998) p. 124.

[374] Agenda 2000, p. 103.

what it is to be European, as is demonstrated by the membership requirements of the COE and EU.[376] The creation of common identity is reinforced by the regional organisations through the use of common symbols such as a flag or name.[377] The issue of a single European identity will remain contested as the COE takes an inclusive view to what Europe is and the EU creates a more exclusionary view. Despite the rhetoric that is expressed both views demonstrate that there is no single definition of what Europe is. Instead it would be more practical to view Europe as possessing an 'open identity which is learning to learn from others.'[378] Democracy and human rights throughout Europe (taking the COE membership) will differ in perception and practice meaning no single European identity will create a single set of beliefs or practices. What is called European democracy is not a singular model, but an instance of a type of politics which can exist in other forms both in Europe and beyond.[379] No one section or individual state of Europe has a monopoly on the proper form of democracy, and all have much to learn from the diverse societies which exist within Europe.[380]

In the midst of the diversity of Europe the regional organisations will play a large role in ensuring practices and standards do not fall below acceptable limits.[381] For any organisation to be effective the commitments undertaken and the various methods of implementation need to be applied to all members in an equal fashion. This will be an issue for all European organisations as the established democracies have maintained a belief that democracy and human rights only apply to the eastern states and not themselves.[382] The development of democracy and expressions of rights can create cleavages within organisations and eliminate common ground as expressions of difference are allowed.[383]

A 1995 report by the COE stated that 'The upheavals in central and eastern Europe have triggered both political/military and economic/social reorganisation which has not yet

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[375] See B. Anderson. *Imagined Communities*. (London: Verso, 1991).

[376] At the same time this does not mean that the states of eastern and central Europe do not differ fundamentally in their ability to implement democracy and human rights, see Seymour (1993) p. 244.

[377] K. von Benda-Beckmann and M. Verkuyten. 'Introduction: Cultural Identity and Development of Europe.' in von Benda-Beckmann and Verkuyten (1995) pp. 18-20.

[378] R. Eatwell. 'Reflections on Nationalism and the Future of Europe.' in Eatwell, ed. *European Political Cultures: Conflict or Convergence?* (London: Routledge, 1997) p. 259.

[379] A-M. Rieu and G. Duprat. 'Introduction.' in Rieu and Duprat, eds. *European Democratic Culture*. (London: Routledge, 1993) p. 9.

[380] Often Europe is seen as being the model of democracy but see van Roermund (1997) who puts forth the idea that democracy is not a natural part of European culture but an artificial construct, p. 367.

[381] Schermers (1993) p. 318.

[382] See M. Estebanez. 'The OSCE Implementation Meeting on Human Dimension Issues 1995.' 7 *Helsinki Monitor* (1996) p. 2 for the reluctance of Western European states to report on their domestic situations in relation to OSCE commitments.

[383] L Hagendoorn. 'The Mechanism of Fragmentation after the Cold War.' in von Benda-Beckman and Verkuyten (1995) p. 114.

produced new, clearly defined structures.'[384] This reorganisation is not confined to the domestic systems of a number of states of Europe but equally applies to the regional organisations of Europe. The existence of three regional organisations in Europe with a common concern for democracy and human rights is obviously a positive development but at the same time one that carries with it disadvantages. Wide scale co-operation between the three was not practical before 1990 as the EU and COE mandated against the membership of communist states which the OSCE included.[385] Also before this decade each organisation had a relatively clear position in the structure of Europe with minimal overlap. There exists a number of common areas of activity between the organisations making co-operation and not competition the key to future action as attempts should be made to pool resources in areas of common activity.[386]

In the COE Vienna Declaration the changed structure of Europe is recognised along with the need for

> fuller co-ordination of the Council of Europe's activities with those of other organisations involved in the construction of a democratic and secure Europe, thus satisfying the need for complementary and better use of resources.

Greater co-operation and use of resources appears especially pertinent in the field of human rights as three organisations are developing a great deal of overlap in this area. The ECHR system is undoubtedly the foundation for human rights protection in Europe bringing into question the appropriateness of the OSCE continually pursuing its human dimension. The idea of merging the human dimension of the OSCE with the ECHR framework has been discussed on different occasions but appears unlikely in the near future due to the political considerations of the OSCE's non-European members, notably the US.[387] Along functional lines there is little difference between the possibilities now offered by the OSCE and COE in the areas of human rights and democracy as the COE engages in political persuasion in furthering human rights protection, a task previously associated solely with the OSCE. If the states of Europe are truly serious about their commitments to democracy and human rights

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[384] *Bridging the Gap*, p. 9.
[385] See T. Buchsbaum. ''The CSCE and International Organisations: Expanding Co-operation with the Council of Europe.' in Lucas (1993) p. 134.
[386] Buchsbaum in Lucas (1993) p. 141.
[387] Kritz (1993) p. 26. Bloed feels that the COE and OSCE are complimentary since they have different approaches and ways of implementing human rights standards as the use of political persuasion by the OSCE as opposed to the COE's judicial methods has proven to be more effective in certain contexts, A. Bloed. 'The Human Dimension of the OSCE: More Words than Deeds?' 6 *Helsinki Monitor* (1995) p. 2.

they should have no objections to moving from political persuasion to more judicial methods in ensuring compliance.

Relations between the EU and COE are slightly more peculiar as there exists a declared determination to work together they still tend to treat each other with suspicion and act individually.[388] This tension is most noticeable in the area of human rights protection where the ECJ is increasing its competence but without any clear direction as to the place of the ECHR in legal framework of the EU. One obvious area is co-operation between the two courts in a complementary way so that a common jurisprudence develops and the individual is able to enjoy the most effective possibilities for ensuring rights obligations are met.[389] At present the two Courts do refer to each other's rulings but within differing contexts. Greater harmony will be difficult to achieve as each court has a different overall purpose within which is applies the rights of the ECHR.[390] The fact that the ECHR Court is the delegated enforcement body of that document but the ECJ uses the same document concerning the direct impact of EU law upon individuals creates a clear need for co-operation with clearly defined roles and mandates.[391] Establishing the roles of the courts along more clearly defined lines will also assist in eliminating the confusion created for the individual as to which organisation does what and in what way.[392]

The COE and EU possess similar structures for regional government with CLRAE for the COE and the EU's the Committee of Regions. Both hold the same belief that popular participation is heaviest at those levels closest to the individual's existence[393] and both carry out similar tasks to promote this practice. The existence of both of these bodies demonstrates a rhetorical recognition of the importance attached to ensuring that the decision-making processes are kept close to those who are impacted the most.[394] As decision and policy making processes becomes more complex there is the belief that local authorities will be in a better position to meet the different needs which exist, thereby enhancing public participation at the local level.[395] At the same time neither body is being integrated into the work of either

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[388] Clapham (1991) pp. 84-86.
[389] L. Hefler and A-M Slaughter. 'Toward a Theory of Supranational Adjudication.' 107 *Yale Law Journal* (1997) p. 323-326; de Burca (1993) p. 319.
[390] Clapham (1991) pp. 59-60.
[391] See JUSTICE. *Judging the European Union*. (London, 1996) pp. 8, 13-15.
[392] For a perspective from the individual on the street see Hoon in Beiber (1996) pp. 23-24.
[393] J. Goodman. 'The European Union: Reconstituting Democracy Beyond the Nation-State.' in A. McGrew, ed. *The Transformation of Democracy?* (Cambridge: Polity) 1997, p. 181.
[394] One author states that a separation and division of powers both horizontally and vertically is part of the rule of law in democratic societies, Emiliou in O'Keefe and Twomey (1994) p. 81.
[395] S. Villadsen. 'Another Century for Local Democracy? Decentralization, Deregulation and Participation in Scandinavia and European Integration.' 17 *International Journal of Urban and Regional Research* (1993) p. 53.

organisation at a substantive level demonstrating the emptiness of the rhetoric when it comes to issues close to the individual.

The EU relies upon the work of both the COE and OSCE in its membership criteria for new applicants. The Helsinki Final Act and Paris Charter as explicitly mentioned as to be adhered to for membership to occur. The specific mention of these two documents appears peculiar since they embody much of the same principles enshrined legally in the ECHR framework, to which perspective members adhere. This magnifies the peculiar relationship between the EU and COE for if applicants to the EU are members of the COE then they have to meet the COE membership requirement of democracy. If it is so, then why rely on political documents from an organisation characterised by rhetoric with no established enforcement or supervisory mechanism?

Questions over co-operation will remain tied up in political battles as each organisation will compete for the support of governments and the public spotlight. The selective membership of the EU means that it is unlikely its reach will cover all of the Europe, or it will be many years before it comes close. The COE's membership does extend to all of Europe making its provisions on democracy and human rights and the support it gives essential to the future of Europe. The COE is not competent in the area of security giving rise to the necessity of the OSCE to continue in this area as the EU is having difficulty developing a common foreign and security policy. Other security arrangements, such as NATO, could possibly take on the competence of the OSCE in the area but no other organisation possesses the wide membership of the OSCE.[396] In many ways having three organisations in the same region all taking an active role in democracy and human rights appears a waste and inefficient use of resources. However each of the organisations approaches democracy and human rights from a particular angle which does lead to conflict and competition between them but also ensures a wide range of situations are met effectively. Therefore it is important to mobilise all the available resources and energies of all of Europe's players and harness them in relation to shared objective such as democracy and human rights.[397]

VI. Conclusion

It is widely held that democracy and human rights are well protected in Europe, this assessment stands usually regardless of events in the former-Yugoslavia or parts of eastern

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[396] See Mlyn (1998) p. 227; F. Cameron. 'The European Community and the CSCE.' in Lucas (1993) p. 265.
[397] Bulletin of the European Union, Supp. 3/95, p. 28.

Europe. The failure of the regional organisations in the former-Yugoslavia is attributed to the unique character of the problem and the context in which it occurred as no one had any real idea as to what action should be taken and how.[398] This demonstrates the absolute need for co-operation between the organisations of Europe and co-operation with global organisations in addressing the problems of the region. The position of the EU concerning the recognition of the emergent states of Yugoslavia was a rhetorical advance for the position of democracy in international ordering but fell short of substance as individual members chose not to follow their own established guidelines.[399] The suspension of the Yugoslavia from the COE has also shown the possibility of collective will coming together in support of democracy and human rights. At the same time, events in Yugoslavia demonstrate the state-based nature of international law and the extent to which concerns for democracy and human rights lose out to other interests.

The 'expansion' of Europe[400] will test the limits of regionalism in formulating effective systems for the protection and promotion of democracy and human rights as many of the ex-communist states remain 'fragile' several years on.[401] As stated above events in Europe cannot by themselves stand as evidence of an international norm or practice. Europe can stand as a guide for the future development of an international law of democracy. The ability of intergovernmental organisations to co-operate for furthering the promotion and protection of democracy and human rights will be essential for the international system. The lack of explicit protection for democracy in the legal texts could prove to be a substantial weakness for the European system. The European Court of Human Rights has established that democracy is the only acceptable system and the actions of governments will all be judged on that basis. This has greatly strengthened the system of human rights protection but does not necessarily provide the individual with a strong basis for claims in favour of democracy. The EU's backing of democracy as the only acceptable system for member states is weakened by the inability of the ECJ to enforce this aspect of the treaties.[402] The Consultative Assembly of the COE was very strongly in favour of explicit legal protection of democracy and democratic

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[398] Bideleux in Bideleux and Taylor (1996) p. 281. Orentlicher describes it as an example of what happens when democracy is poorly applied, D. Orentlicher. 'Separation Anxiety: International Response to Ethno-Separatist Claims.' 23 *Yale Journal of International Law* (1998) pp. 61-62.

[399] Orentlicher (1998) pp. 66-68.

[400] There remains the question as to how far east Europe extends. Huntington offers that 'Europe ends where Western Christianity ends and Islam and Orthodoxy begin.' S. Huntington. *Clash of Civilizations*. (London: Simon & Schuster, 1997) p. 158.

[401] The term fragile democracies was used in 1992 and is equally applicable today, see Butora (1992) p. 439.

[402] Article 6 (1) TEU states the EU is founded upon democracy and the rule of law, but the ECJ has no jurisdiction over this aspect of the Treaty.

institutions in Europe. To date their fears have not been realised. To be sure, it is unlikely that Europe will descend back into authoritarianism, but as Europe grows the limits of democracy will be tested and its ability to provide for the needs and development of individuals brought under scrutiny.

CHAPTER 5

THE PROTECTION AND PROMOTION OF DEMOCRACY AND HUMAN RIGHTS IN THE AMERICAS

I. INTRODUCTION

The inter-American system for the protection and promotion of democracy and human rights consists of all 35 states of the Western Hemisphere. These states possess a great deal of diversity within and between themselves but also share numerous common traits, with the most obvious being that all are the product of European colonialism. However, in relative terms, they are similar through a close geographical proximity and similarity in political institutions, along with the all too common economic difficulties and social inequalities in society combined with the presence of a selfish and over zealous superpower.[1] Institutions and mechanisms for the protection and promotion of democracy and human rights have long been a part for inter-American relations but have been unable to have a substantial impact until most recently. From an early stage the work of inter-American institutions for the protection and promotion of democracy has been based on the idea that the universal recognition of fundamental rights is a necessary condition for international life and the establishment of democratic societies.[2] Based on the experiences of region the approach to democracy being taken by the Organisation of American States (OAS) is holistic in nature recognising the need to support democracy politically, socially and economically.[3]

II. EVOLUTION OF THE INTER-AMERICAN SYSTEM

Inter-American relations have developed through a complex system of institutions, treaties and other international agreements, both formal and informal, resulting in the organisational framework that exists today.[4] The beginnings of regional efforts for the promotion and protection of democracy and human rights can be traced back to Simon Bolivar who called for the First Congress of American States to be held in Panama in 1826 with the goal of creating a

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[1] Inter-American Institute. *The Inter-American System: Its Development and Strengthening*. (Dobbs Ferry: New York: Oceana, 1966) p. xv. Farer describes the states in the region as differing 'in size, density, history, race, culture, wealth, development, and just about any other facet'. T. Farer. *The Grand Strategy of the United States in Latin America*. (New Brunswick: Transaction, 1988) p. 23. For the relevance of the differences/similarities see V. Bulmer-Thomas. *The Economic History of Latin America since Independence*. (Cambridge: Cambridge University Press, 1994) p. 1.

[2] C. Bauer. 'The Observance of Human Rights and the Structure of the System for their Protection in the Western Hemisphere.' 30 *American University Law Review* (1980) p. 5

[3] J. Thérien, et al. 'The Organization of American States: Restructuring Inter-American Multilateralism.' 2 *Global Governance* (1996) p. 219.

[4] H. Wells. 'The Institutional Framework of Inter-American Relations.' 13 *California Western International Law Journal* (1983) pp. 224-225; Farer (1988) pp. 23-24.

hemispheric confederation.[5] In this period of newly found independence Bolivar felt that the states of the Americas needed 'to be free under the auspices of liberal laws, emanating from the most sacred spring, which is the will of the people.'[6] The Congress adopted the Treaty of Perpetual Union, League and Confederation which never came into force but did set precedents for later Inter-American relations.[7] The initial congress was followed by three more dealing with issues of co-operation and closer political union. In the period from 1889 to 1928 six further conferences were held establishing the institutional framework of inter-American relations, primarily in areas of commerce. The Seventh Inter-American Conference at Montevideo (1933) adopted the Convention on the Rights and Duties of States[8] establishing the principle of non-intervention into the domestic affairs of a state as an important issue for future inter-American relations. Non-intervention soon developed into the guiding principle of inter-American relations, in both breach and respect for, and has been invoked heavily with regards the promotion and protection of democracy and human rights.

The Inter-American Conference on Problems of War and Peace (1945) laid the groundwork for a regional system recognising the importance of the relationship between democracy and human rights.[9] The Conference representatives endorsed their commitment to establish a system of protection for human rights and declared the adherence of the American republics to the principles of international law for the protection of essential human rights. They further requested the Inter-American Juridical Committee to come up with a draft declaration concerning human rights protection.[10] The Ninth International Conference (1948) adopted several resolutions, including the Charter of the OAS, the American Declaration on the Rights and Duties of Man, the Inter-American Charter of Social Guarantees, the Inter-American Convention on the Granting of Political Rights to Women, the Inter-American Convention on the Granting of Civil Rights to Women which granted equal civil rights for men and women, the Statute of the Inter-American Commission of Women.[11] The idea for the establishment of a court of human rights was also studied but postponed due to claims that not enough case law yet

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[5] Inter-American Institute. (1966) p. xv

[6] Quoted in 'The Americas: A Community of Nations.' An address by Vice President of the United States Al Gore to the Inter-American Development Bank (16 September 994) in 5 *U.S. Department of State Dispatch* (1994) p. 650.

[7] See Inter-American Institute. (1966) p. xvi.

[8] 165 LNTS 19.

[9] See D. Shelton. 'Representative Democracy and Human Rights in the Western Hemisphere.' 12 *Human Rights Law Journal* (1991) pp. 354-356; A. Thomas and A. Thomas. 'Human Rights in the OAS.' in N. Rodley and C. Ronning, eds. *International Law in the Western Hemisphere.* (The Hague: Martinus Nijhoff, 1974) pp. 141-145.

[10] Inter-American Institute (1966) p. 40. The Conference also discussed the 'Larreta Proposal' which called for multilateral action to defend democracy and human rights but was never formally approved, see H. Munoz. 'The OAS and Democratic Governance.' 4 *Journal. of Democracy* (1993) p. 31.

[11] Documents may be found in F.V. Garcia-Amador. *The Inter-American System: Treaties, ACHR & Other Documents*, vol.1: Legal-political affairs. (London: Oceana, 1983).

existed and the establishment of a court would require drastic changes in the legal structures of member states.[12] The Ninth Conference also adopted the resolution 'Preservation and Defence of Democracy in America'. This spoke out against governments that did not respect the rights and freedoms of the individual through the suppression of civil and political rights. It committed members to take any necessary measures to ensure that the 'free and sovereign right of their peoples to govern themselves in accordance with their domestic aspirations.' would not be disturbed.[13]

The Tenth Inter-American Conference (1954) passed as resolution entitled 'Strengthening of the System for the Protection of Human Rights' recognising a necessary relation between a system based on democracy and the protection of human rights and called on states to strengthen their domestic spheres to accommodate both. The Conference also adopted the 'Declaration of Caracas' which stated that an effective means of strengthening democratic institutions is through the respect of human rights without any discrimination. Ironically it also reaffirmed that states were free to choose their own political and social institutions a contradiction in the institutional structure of the Americas that persists today.[14]

The Fifth Meeting of Consultation of Ministers of Foreign Affairs (1959) called for the establishment of a Convention and a Commission for the protection of human rights. The Meeting also adopted the 'Declaration of Santiago' considered by some to be one of the most important texts concerning political rights in the Americas.[15] The Declaration stated that '[h]armony among the American Republics can be effective only insofar as human rights and fundamental freedoms are a reality with each on to them'. It went on to assert that the lack of respect from democracy and human rights has been a major cause of unrest in the region. It claimed that anti-democratic regimes are in violation of the OAS Charter and endanger peaceful relations in the Hemisphere.[16] The Fifth Meeting of Ministers expressly recognised the relation between the effective protection of human rights and democratic governance attempting to put the aspirations and discussions of past conferences into practice, laying the foundations for future, albeit belated, action. Unfortunately these auspicious beginnings were soon dampened by events in the region. The occurrence of authoritarian regimes, the Cold War and behaviour of the US often made concerns for democracy and human rights subordinate to security issues,

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[12] Inter-American Institute (1966) p. 40.
[13] Quoted in M. Ball. 'Issue for the Americas: Non-Intervention v. Human Rights and the Preservation of Democratic Institutions.' 17 *International Organisation* (1963) p. 23.
[14] Shelton (1991) p. 355.
[15] Shelton (1991) p. 355
[16] Resolution reprinted in Garcia-Amador (1983) pp. 21-22.

which helped to perpetuate the economic underdevelopment that was already becoming widespread in region.

III. RHETORICAL SUPPORT FOR DEMOCRACY AND HUMAN RIGHTS

A. CHARTER OF THE OAS

The Ninth International Conference established the OAS with 20 Latin American republics and the US and now encompasses all 35 states of the Americas.[17] The OAS Charter[18] entered into force in 1951 and has been amended by the Protocol of Buenos Aires (1967), the Protocol of Cartagena de Indias (1985) the Protocol of Washington (1992) and the Protocol of Managua (1993). These changes to the Charter have come in response to events occurring in the region as the OAS has tried to keep pace with the shifting political, social and economic environment attempting to further consolidate democracy, human rights, and economic and social progress.[19] The Preamble of the Charter articulates numerous aspirations concerning democracy including, the idea that 'the historic mission of the America is to offer to man a land of liberty and a favourable environment for the development of his personality and the realisation of his just aspirations'; 'that representative democracy is an indispensable condition for the stability, peace and development of the region'; 'that the true significance of American solidarity and good neighbourliness can only mean the consolidation … within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man'; and 'that juridical organisation is a necessary condition for security and peace founded on moral order and on justice'. From this beginning it has been commented by one OAS official that the basis of the OAS is a mandate from the people of the Americas.[20] If this is so that mandate has only been recently acknowledged or realised.

Article 2 contains the purposes of the OAS which include the promotion and consolidation of representative democracy; the promotion of economic, social, and cultural development and the eradication of extreme poverty which is said to constitute an obstacle to the full democratic development. Article 3 outlines the principles to which the member states adhere, including -

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[17] Cuba is a member but its present government is excluded from participating, see Resolution of the Eigth Meeting of Consultation of Ministers of Foreign Affairs (1962) in 'Fact Sheet: Organisation of American States.' 5 *U.S. Department of State Dispatch* (1994) pp. 788-789.

[18] OAS Treaty Series No. 1-E, OEA/Ser.A/2, Rev.5.

[19] S. Davidson. *The Inter-American Human Rights System*. (Aldershot: Dartmouth, 1997) pp. 3-4. On these changes see J. Arrighi. 'Les Reformes a la Charte de L'Organisation des Etats Americains: Problemes de Droit des Traites.' 43 *Annuaire Francais de Droit International* (1997) p. 93.

[20] V. McComie. 'Practical Considerations on Human Rights within the OAS Context.' 4 *American University Journal of International Law and Policy* (1989) p. 276. Vaky and Munoz believe the goals of the Charter require the exercise of effective representative democracy, see *The Future of the Organisation of American States*. (New York: Twentieth Century Fund Press, 1993) pp. 22-23.

international law as the standard of conduct for states, the faithful fulfilment of obligations; the requirement that the political organisation of member states is on the basis of the effective exercise of representative democracy; that every state has the right to choose, without external interference, its political, economic, and social system in the way best suited to it, along with the duty to abstain from intervening in the affairs of another state; the elimination of extreme poverty as an essential part of the promotion and consolidation of representative democracy and as the common and shared responsibility of the American states; that social justice and social security are bases of lasting peace; economic co-operation is essential to the common welfare and prosperity of the peoples of the continent; the recognition of the fundamental rights of the individual without distinction as to race, nationality, creed, or sex; and that the education of peoples should be directed toward justice, freedom, and peace.

Article 9, a recent addition to the Charter,[21] places an obligation for democracy as '[a] Member of the Organisation whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate' in the workings of the OAS. The Article specifies action to be taken including diplomatic measures and possibly exclusion from the organisation. Exclusion is seen as a last resort for continued efforts will be made by the OAS to ensure the suspended state fulfils its obligations. Any state that is suspended will continue to be bound by commitments agreed to with decisions surrounding the suspension taken by the General Assembly.

The provisions of Article 9 and their legal force are disputed. Mexico declared at time of signing that 'democracy is a process which comes from the sovereign will of the people, and cannot be imposed from outside.' The government expressed the belief that 'it is unacceptable to give to regional organisations supranational powers and instruments for intervening in the internal affairs of our states.'[22] The requirements for democracy set by Article 9 do conflict with Article 17 of the Charter which reads;

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[21] Articles 2, 3 and 9 were introduced by the Protocol of Washington of 1992. At the time of drafting the original Charter Brazil proposed making democracy a requirement of membership in the OAS. The failed proposal defined democracy as consisting of the plurality of political parties, freedom in voting, opportunity for private enterprises, and human rights guarantees, see Thomas and Thomas in Rodley and Ronning (1974) p. 145. The OAS did exclude Cuba from membership in 1962 for being non-democratic due primarily to the pressure of the US. The exclusion of Cuba was not a precedent for action as the principle was not applied to subsequent authoritarian regimes, many of whom had the support of the US. Prior to Article 9 there was no obligation to democracy, A. Thomas and A. Thomas. *The Organization of American States*. (Dallas: SMU Press, 1963) p. 221.

[22] OEA Ser.A/2 Add.3. General Information of the Treaty A-56.

> Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.[23]

The Inter-American Court of Human Rights has established that a 'democratic society' is the standard by which all states in the region must organise themselves (see below). In its opinion in the *Nicaragua* case, the International Court of Justice belittled the democratic obligations of the OAS Charter by implying that the commitments to democracy in the Charter mean very little and are certainly dismissable due to Article 12 and 17 statements, concerning the freedom of a state to choose how it is to be organised.[24] The opinion of the ICJ is perhaps reflective of general international law but in the regional sphere the opinion of the Inter-American Court must be taken as the authoritative word concerning obligations of democracy.

Given the economic problems that face the region, economic and social issues are a matter of concern for the OAS in undertaking efforts for the promotion and protection of democracy and human rights. Chapter VII of the Charter is entitled 'Integral Development' and includes provisions covering the economic, social, educational, scientific and technological fields of society with the agreement that 'equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of ... peoples in decisions relating to their own development are, ... basic objectives to integral development'.[25] Co-operation in development is to take place 'within the framework of democratic principles' and constitutes 'an integral and continuous process for the establishment of a more just economic and social order that will make possible and contribute to the fulfilment of the individual.'[26] The importance of development is stated in Article 47 as 'the overall improvement of the individual, and as a foundation for democracy, social justice and progress.'

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[23] Mexico's declaration to the Protocol of Cartagena de Indias reaffirms this point suggesting that democracy cannot be enforced, OAS Treaty Series No. 66, General Information of the Treaty A-50, paragraph 2. See below the discussion of Mexico's view of the Commission's efforts to enforce particular aspects of the democratic process. Harris feels the wording of Article 17 does set a legal limit on state sovereignty, but is not explicit as to what limit, D. Harris. 'Regional Protection of Human Rights: The Inter-American Achievement.' in D. Harris and S. Livingstone, eds. *The Inter-American System of Human Rights*. (Oxford: Clarendon, 1998) p. 5.

[24] Article 12 of the Charter reads 'The fundamental rights of States may not be impaired in any manner whatsoever.' See ICJ Reports 1986 at 131. The Inter-American Court of Human Rights gives a much different interpretation to the requirements of democracy in the Charter demonstrating a distinct difference between global and regional international law in support of democracy, see *The Word "Laws" in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 (9 May 1986) Inter-Am.Ct.H.R. (Ser.A) No. 6 (1986).

[25] OAS Charter, Articles 30 and 34. See also Article 45 on the participation of marginal sectors of the population in the process of development.

[26] OAS Charter Article 33. Article 31 contains the statement on democratic principles which is unclear as to whether this refers to co-operation among states in development or that development is to occur in the context of a democratic society.

While the OAS Charter creates a clear obligation to democracy it does not necessarily give rise to human rights obligations in an independent fashion. The adoption of the Charter was accompanied by the adoption of the American Declaration on the Rights and Duties of Man (the Declaration) meaning human rights provisions are largely absent from the Charter. To what degree the Charter creates binding obligations of human rights is a subject of debate with a wide range of arguments.[27] The inclusion of provisions giving rise to a range of socio-economic rights raises questions as to whether these create obligations upon states. That question has more or less been settled as it is felt that the economic and social rights provisions of the Charter are based more on national goals to be achieved rather than creating individual rights.[28] That being so it does not remove the fact that if states are obligated to possess a democratic society then it will be necessary to ensure a full range of rights that will include socio-economic rights.

B. The American Declaration on the Rights and Duties of Man

The American Declaration, adopted at the Ninth International Conference (1948) states that the Inter-American system is a 'system of individual liberty and social justice based on respect for the essential rights of man.' The resolution adopting the Declaration recognised that the rights contained within are specific to the context of the Americas at the time and that the system for protection should increasingly strengthen as conditions become more favourable. The American Declaration contains 27 articles covering a wide array of civil and political rights, alongside with socio-economic rights and provisions concerning duties to society, duties toward children and parents, duties with respect to social security and welfare, duty to receive instruction, to vote, to obey the law, to serve the community and nation, to pay taxes, to work, to refrain from political activities in a foreign country. The rights in the Declaration are subject to limitation due to the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy. These limitations recognise the existence of the individual within the wider community and the need to balance interests issues significant to the functioning of a democratic society. This recognition is important for democracy so long as selective definitions of general welfare or the advancement of democracy are not abused to the detriment of certain groups or individuals.

Article XX of the Declaration deals with participation rights and reads

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[27] On the debate over the legal character of the Charter provisions see L. Scheman. 'The OAS and the Quest for International Co-operation: American Vision or Mirage.' 13 *Case Western Reserve Journal of International Law* (1981) p. 84.

[28] *IACHR Annual Report* (1983/4) p. 138. Also M. Craven. 'The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights.' in Harris and Livingstone (1998) pp. 290-291.

> Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Article XXXIII on duties reinforces the importance of political participation by saying '[i]t is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.'

The Inter-American Commission, as a Charter body,[29] is able to apply the Declaration to all OAS members by virtue of obligations created through the Charter.[30] The efforts of the Commission in applying the Declaration has created controversy as attempts have been made to bring the US before the Commission for violation of human rights obligations under the Declaration. The US reiterates its position that the Declaration only dealt with moral principles and not binding legal obligations.[31] While the US refuses to act upon the Commission's decisions,[32] it does participate in proceedings and engages in the rhetoric of human rights protection in the public forum. The Commission can not force the US, or any other state, to act based upon the Declaration obligations but the attempt to apply its principles is a significant aspect in furthering the protection and promotion of human rights.

The principles set down in the American Declaration are applicable to all members of the OAS, through their signing of the OAS Charter as a legally binding instrument. The Declaration was considered non-binding at adoption but has been declared by the Court to be an authoritative interpretation of the Charter in the field of human rights giving it a binding status.[33] The opinions of member states on this issue show a wide level of disagreement. Costa Rica feels that the Declaration is not a treaty in the strict sense of creating binding obligations but the Court could use it as an interpretation of custom.[34] The US recognises the Declaration as possessing a certain normative value as a good intention to further human rights, but in the

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[29] OAS Charter, Article 106.

[30] Article 51 of *Regulations of the Inter-American Commission on Human Rights* (hereinafter *Regulations*) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc.6, rev.1 at 103(1992). On the application of Article 51 see D. Forsythe. 'Human Rights, The United States, and The Organisation of American States.' 13 *Human Rights Quarterly* (1991) p. 69.

[31] The Commission has taken action against the US use of the death penalty being the first time a monitoring body has found the US to be in violation of human rights obligations, see C. Cerna. 'US Death Penalty Tested Before the Inter-American Commission on Human Rights.' 10 *Netherlands Quarterly on Human Rights* (1992) p. 155. More recently in another case concerning the death penalty the US has been found in violation of Articles I (right to life), II (equality before the law) and XXVI (right to impartial hearing and freedom from cruel and unusual punishment), Report No. 57/96 (United States) *IACHR Annual Report* (1997) p. 570.

[32] *IACHR Annual Report* (1997) pp. 572, 618.

[33] *Interpretation of the American Declaration of the Rights of Man within the Framework of Article 64 of the American ACHR on Human Rights*. Advisory Opinion OC-10/89 (14 July 1989) Inter-Am.Ct.H.R. (Ser. A) No. 10 (1989). Also Davidson (1997) pp. 12-13, and Harris in Harris and Livingstone (1998) pp. 5-9.

[34] Advisory Opinion OC-10/89, paragraph 11.

government's opinion 'good intentions do not make law' therefore no obligations arise.[35] Venezuela made it clear that declarations in general do not create juridical norms.[36] Peru takes a vague position seeing the Declaration as similar to the American Convention on Human Rights in 'contributing to the promotion of human rights'[37] and Uruguay states the Declaration has a strong binding character,[38] with neither state elaborating further. The Court places the Declaration as part of the evolving inter-American law on human rights,[39] as the authoritative interpretation of the Charter of the OAS meaning states have obligations arising from it. The Court's position is clear '[t]hat the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it'.[40]

C. The American Convention on Human Rights[41]

The indeterminate nature of the Declaration was overcome with the adoption of the American Convention on Human Rights (1969) which came into force in 1978. The ACHR explicitly places the needs and desires of individuals before the interests of states.[42] In Article 1 governments agree to respect and ensure that all persons in their jurisdiction will be able to enjoy the full and free exercising of the rights in the ACHR, a point the Court views as a positive duty upon states. The Preamble of the ACHR makes it clear that 'the essential rights of man are not derived from one's being a national of a certain state, but are based on attributes of the human personality'.[43] The ACHR creates protection for 23 rights including a general clause on the progressive development of the realisation of economic, social and cultural rights.[44] For the most part the rights in the ACHR contain greater detail as to the content of the right then the

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[35] Advisory Opinion OC-10/89, paragraph 12.
[36] Advisory Opinion OC-10/89, paragraph 15.
[37] Advisory Opinion OC-10/89, paragraph 13.
[38] Advisory Opinion OC-10/89, paragraph 14.
[39] Advisory Opinion OC-10/89, paragraphs 37-38. The Court also emphasised how this is part of regional development of human rights law as opposed to general international law, paragraph 38.
[40] Advisory Opinion OC-10/89, paragraph 47.
[41] OAS, Treaty Series, No. 36, 26 signatories and 25 ratifications. El Salvador has entered a reservation which has the potential of negating much of the impact of the ACHR – 'ratification is understood without prejudice to those provisions of the ACHR that might be in conflict with express precepts of the Political Constitution of the Republic.' *IACHR Annual Report* (1997).
[42] McComie (1989) p. 276.
[43] The Additional Protocol of San Salvador on Economic, Social and Cultural Rights has a similar inclusion.
[44] For an analysis of the civil and political rights in the ACHR see S. Davidson. 'The Civil and Political Rights Protected in the Inter-American Human Rights System.' in Harris and Livingstone (1998) p. 213.

American Declaration[45] with the exception of economic and social rights that receive less attention under the ACHR.[46]

The ACHR provides for limitations on the exercise of certain rights. Article 7 on the right to personal liberty allows for a derogation if there exists 'conditions established beforehand by the constitution of the State Party concerned or by a law pursuant thereto.' Article 13 limits freedom of thought and expression to ensure the 'respect for the rights or reputations of others,' and 'the protection of national security, public order, or public health or morals.' Rights of assembly guaranteed in Article 15 and freedom of association in Article 16 can be restricted if '... necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.' Article 27 provides for circumstances when derogation from obligations in the ACHR may be allowed under the general statement of situations which 'threatens the independence or security' of a state. This is a fairly wide allowance considering the capricious behaviour of often paranoid authoritarian rulers which have been common in the region can easily result in constructed threats to the security of the state.[47] Even though derogation appears to be relatively easy to invoke the Commission has a wide scope for action being able to review the existence of derogations *sua sponte*.[48] Furthermore there exists a long list of non-derogable rights with some unique inclusions due to the legacy of violations which exist in the region. The non-derogable rights include the right to juridical personality, right to life, to humane treatment, freedom from slavery, from ex post facto laws, freedom of conscience and religion, the rights of the family, right to a name, rights of the child, right to nationality and important to democracy - the right to participate in government. Article 29 limits the extent of derogations stating that nothing in the ACHR shall be interpreted as 'precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy'.[49]

Included in the list of non-derogable rights is Article 23[50] on participation providing;

> Every citizen shall enjoy the following rights and opportunities:

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[45] See Davidson in Harris and Livingstone (1998) pp. 213-214.

[46] Craven in Harris and Livingstone (1998) p. 295. Early drafts contained extensive provisions of economic and social rights but the Commission felt it was only practical to include rights that states would actually be willing to protect, p. 297.

[47] Derogation in other international human rights instruments is limited only in times where the life of the state is threatened a more stringent qualification then the security of the state, see ICCPR, Article 4 and ECHR, Article 15.

[48] The Commission has noted that any state with a state of emergency merits its special attention in the creation of an individual state report. *IACHR Annual Report* (1997) p. 650. Also Buergenthal et al. (1986) p. 218.

[49] *Habeas Corpus in Emergency Situations*, paragraph 20. Also Davidson (1997) pp. 49-57.

[50] There exists one reservation to this article submitted by Mexico 'The Government of Mexico makes express reservation to Article 23, paragraph 2, since the Mexican Constitution provides, in Article 130, that ministers of denominations shall not have an active or passive vote, nor the right to associate for political purposes.' *IACHR Annual Report* (1997) p. 542.

(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

(c) to have access, under general conditions of equality, to the public service of his country.

In formulating a right to participation both the ACHR and Declaration articles follow a standard pattern in describing participation as mainly electing representatives or being elected and how elections should be carried out.

Paragraph two of Article 23 allows for limitations on the exercise of the above rights 'only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court.'[51] Limits on the right to participation based on nationality, education and language raise some difficult issues over who is able to participate. Nationality and language could be easily used to limit the participation of minorities and other marginal groups in a society. A requirement of education is in itself arbitrary and discriminatory and could be used to limit participation to a small segment of the population depending upon the standards and level set.[52] The Court is wary of provisions requiring a level of knowledge and education as they may 'become the vehicle for subjective and arbitrary judgments as well as instruments for the effectuation of discriminatory policies'.[53]

D. Other Instruments

The Charter of the OAS develops a connection between the existence of democracy and the need to recognise economic and social rights. Both the Declaration and the ACHR give credence to the importance of these rights but not in any great detail. The lack of detail in established human rights instruments and uncertainty of the Charter's applicability to

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[51] Davidson (1998) remarks that the restrictions in Article 23 (2) set an exclusive list and governments cannot impose any other, p. 281. But the Commission has held that it is acceptable to restrict electoral rights of those who have participated in an unlawful regime which adds a further criteria not provided for in Article 23 (2), see *IACHR Annual Report* (1993) p. 212.

[52] Cases from the United States have shown how the right to vote may be limited on an arbitrary basis through education requirements *Lassiter v Northampton Election Board* 360 US 45 (1959) and *Harper v Board of Elections* 383 US 663 (1966). For discussion see A. Winkler. 'Expressive Voting.' *New York University Law Review* (1993) p. 330.

[53] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 (19 January 1984) Inter-Am.Ct.H.R. (Ser. A) No. 4 (1984) paragraph 63.

individuals led to the adoption of an Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (1988).[54]

The adoption of the Protocol signifies the importance of economic and social rights as governments reaffirm 'their intention 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.'[55] This reaffirmation is based upon the need for 'full respect for the rights of the individual, the democratic representative form of government as well as the right of its people to development, self-determination, and the free disposal of their wealth and natural resources.' The Protocol covers rights in the areas of work, trade unions, social security, health, the environment, food, education, culture, the family, children, the elderly and the handicapped. Specifically Article 13 of the Protocol guarantees the right to education 'to enable everyone to participate effectively in a democratic and pluralistic society'. Article 5 allows for restrictions on the rights in the Protocol 'by means of laws promulgated for the purpose of preserving the general welfare in a democratic society' a rather broad statement open to multiple interpretations.

Supervision of the Protocol[56] is undertaken by the Inter-American Economic and Social Council and the Council for education, science and culture who have the responsibility of examining state reports submitted in accordance with the Protocol. The Commission has a role in the Protocol by also receiving copies of state reports and along with the Court being able to exercise their protective functions in situations where Articles 8 on trade union rights and Article 13 are alleged to be violated.[57] The Commission has dealt with the issue of economic, social and cultural rights in its Annual Report concluding that there exists a definable link between ensuring democracy and maintaining economic standards and social justice.[58] While there exists a strong recognition of the relation between democracy and human rights, and the importance of just and equitable social and economic conditions, the actual practice of ensuring obligations are met and effective action taken has not been forthcoming.[59] The Protocol has received criticism

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[54] OAS Treaty Series No. 69, 17 signatures, 8 ratifications. For drafting history see Craven in Harris and Livingstone (1998) pp. 307-308.
[55] Protocol of San Salvador, Preamble, paragraph 2.
[56] Protocol of San Salvador, Article 19.
[57] Protocol of San Salvador, Article 19 (6).
[58] *IACHR Annual Report* (1979/80) p. 210.
[59] For the Commission's treatment of economic, social and cultural rights see Craven in Harris and Livingstone (1998) pp. 311-320. In its reservation to the ACHR Argentina stated that its 'economic policy shall not be subject to review by an international tribunal.' *IACHR Annual Report* (1997) p. 774.

by taking a very general stance on the subject and not including enough protection of rights common to the area such as indigenous peoples.[60]

The ability of indigenous people to participate in their own self-determination is currently being addressed by the Proposed American Declaration on the Rights of Indigenous Peoples.[61] The Proposed Declaration recognises that indigenous groups face being marginalised in many societies which is ironic since 'some of the democratic institutions and concepts embodied in the constitutions of American state originate from the institutions of the indigenous peoples.'[62] The document covers respect for the human rights of indigenous individuals and groups as well as their right to self-government and the existence of traditional laws, institutions and customs in organising their societies.[63]

IV. Institutional Support for Democracy and Human Rights

The bodies entrusted with the task of applying the rhetoric of these texts are - the General Assembly of the OAS (OAS GA), the Inter-American Economic and Social Council, the Inter-American Council for Education, Science and Culture, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the Unit for the Promotion of Democracy (UPD). The Inter-American Economic and Social Council deals with development issues in the region and is one of the monitoring bodies under the Additional Protocol. The Council for Education, Science and Culture is the other monitoring body of the Protocol and has the underlying purpose within the Charter to 'raise the cultural level of the peoples, reaffirm their dignity as individuals, prepare them fully for the tasks or progress, and strengthen their devotion to peace, democracy and social justice.'[64] For the purposes here only the work of 4 of the bodies will be examined, the OAS GA, the Commission, the Court and the UPD, as they are at the forefront of the legal developments of an international law of democracy in the region.

A. The General Assembly of the OAS

The General Assembly being 'the supreme organ' of the OAS, has the overall responsibility for ensuring the obligations of the Charter are met and to co-ordinate the activities of the other organs, agencies and entities of the organisation.[65] The increase in democratisation in the region

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[60] Craven in Harris and Livingstone (1998) p. 310.
[61] *IACHR Annual Report* (1996) p. 633.
[62] Preamble, section 1.
[63] Declaration, sections 4 and 5.
[64] Davidson (1997) p. 6.
[65] OAS Charter, Article 54.

has been met with a more active, but limited role of the OAS GA in the democratisation process and ensuring members adhere to their Charter obligations.

In 1991 the 'Santiago Commitment to Democracy'[66] was adopted by the Ministers of Foreign Affairs leading to OAS GA Resolution 1080 on 'Representative Democracy'.[67] The Santiago Commitment declares the Organisation's dedication to the defence and promotion of democracy and human rights as a necessary advancement in the region and recognises the importance of consolidating democracy in the region.[68] Resolution 1080 declares that the interruption of legitimately elected government in the region is grounds for collective action taken by the OAS in order to re-establish a democratic government in line with the obligations of the Charter. The Resolution calls for the convocation of the Permanent Council of the OAS in the event of a 'sudden, or irregular interruption of the democratic political institutional process'. Resolution 1080 has been invoked in the cases of Haiti (1991), Peru (1992), Guatemala (1993), and Paraguay (1996).[69] The actual application of Resolution 1080 demonstrates the possibility of legally binding obligations of democracy being upheld and the effectiveness of collective action in this regard.[70]

The ability, or willingness, of the OAS GA to act as the enforcer of human rights is ambiguous with the body itself not making its role clear in practice. Weston feels that it possesses a role similar to the European Committee of Ministers partially mitigating the Court's inability to enforce judgements and rulings.[71] On the other hand, Harris and Gomez state that the OAS GA does not have such a role, as there exist no provisions for enforcement.[72] The OAS GA has shown a certain degree of activism relating to events in the late 1970s by specifically speaking out against the actions of governments in certain states and in relation to specific human rights issues such as disappearances. This activism was short lived and the body has adopted what has been termed a 'conspiracy of silence' as states have been reluctant to raise

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[66] OEA/Ser. P AG/DOC.2734/91.
[67] AG/RES. 1080 (XXI-0/91)
[68] Vaky and Munoz (1993) p. 13.
[69] See D. Acevedo and C. Grossman. ''The OAS and the Protection of Democracy.' in T. Farer, ed. *Beyond Sovereignty: Collectively Defending Democracy in the Americas*. (Baltimore: Johns Hopkins University Press, 1996) pp. 132-149.
[70] See the statements of C. Gaiviria, OAS Secretary-General at the UPD Forum 'The 1996 Institutional Crisis in Paragruay.' [http://oas.org/EN/PROG/UPD/forum/prpancg.htm].
[71] B. Weston et al. 'Regional Human Rights Regimes: A Comparison and Appraisal.' 20 *Vanderbilt Journal of Transnational Law* (1987) pp. 602-605.
[72] V. Gomez. 'The Interaction between the Political Actors of the OAS, the Commission and the Court.' p. 191 and Harris, p. 3 in D. Harris and S. Livingstone, eds. *The Inter-American System of Human Rights*. (Oxford: Clarendon, 1998).

issues in other states for fear they may be named in the next resolution.[73] Most often the OAS GA will recognise the work of the Commission and the Court and thank them for their efforts without going deeper into any pressing issues or the particular situations of a specific state.

Despite the use of Resolution 1080 the OAS GA has not actively pursued the role of enforcer democracy and human rights demonstrating the continuing tension between non-intervention and the promotion and protection of democracy and human rights in the region.[74] Governments have recently put forth a strong commitment to democracy in human rights in their Reaffirmation of Caracas[75] where on behalf of their people they

> reaffirm the commitment to the defense and promotion of representative democracy and human rights in the region, the firm will to achieve development with social justice, and the determination to make the Americas a land of peace and well-being.

The Reaffirmation lists numerous areas of concerning including democracy and human rights along with economic and social progress, drug-trafficking, land mines, demilitarisation and strengthening of the institutional order through greater co-operation. Once again governments have expressed a commitment to the creation of a better world for individuals as they reaffirm past principles. As the past has shown words alone are never enough as the require substantive action to make them real.

B. The Inter-American Commission on Human Rights

The Commission began its formal existence as an autonomous entity of the OAS in 1960 designed to promote and defend human rights in the OAS, with human rights being defined as those set forth in the American Declaration.[76] It now has a dual role as a body with competence under the OAS Charter 'to promote the observance and protection of human rights and to serve as a consultative organ of the OAS in these matters',[77] and with the Court as a supervisory body under the ACHR.[78] At its inception the Commission had only an advisory and recommendatory role and was not able to take decisions upon individual complaints that it received, instead these

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[73] See J. Lauchlan Wash, et al. 'Conference Report. The Inter-American Human Rights System: Into the 1990s and Beyond.' 3 *American University Journal of International Law and Policy* (1988) pp. 529-531; Gomez in Harris and Livingstone (1998) pp. 192-201.

[74] Gomez in Harris and Livingstone (1998) p. 191

[75] AG/DEC. 16 (XXVIII-O/98) (2 June 1998).

[76] Article 1 (2) *Statute of the Inter-American Commission on Human Rights* (hereinafter *Commission Statute*) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAE/Ser.L.V/II.82, doc.6, rev.1 at 93 (1992). See S. Davidson. *The Inter-American Human Rights System*. (Aldershot: Dartmouth, 1997) pp. 99-122; T. Farer. 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox.' 19 *Human Rights Quarterly* (1997) p. 51.

[77] OAS Charter, Article 106.

[78] ACHR, Article 33.

complaints could only be used in formulating general recommendations to member states.[79] This changed in 1966 and the Commission established an individual petition procedure for seven of the rights in the Declaration.[80] From this modest start the Commission has been able to exert substantial influence in the region. Its success in this regard is surprising since it had no legally based institutional framework on which to stand, being only the product of political resolutions. Once the ACHR came into force, the Commission was institutionalised and given an expanded role with responsibility to uphold the provisions of two documents.[81]

Article 41 of the ACHR describes the main function of the Commission as being 'to promote respect for and defence of human rights'[82] through developing an awareness of human rights in the Americas, dealing with governments on issues related to the ACHR, preparing studies and reports, and receiving communications alleging violations of the ACHR. The Commission carries out its functions through two petition procedures and an extensive reporting procedure.

Concerning alleged violations of the ACHR both states and individuals are able to petition the Commission. The inter-state procedure is dependent upon states explicitly recognising the competence of the Commission in this area. The idea being that if states make a separate declaration it lessens the risk of the procedure being used for strictly political means[83] and to date the procedure has never been used.[84] The individual complaint procedure differs from most other international human rights instruments in that by agreeing to the ACHR a state automatically recognises the Commission's competence to receive petitions from individuals.[85] The automatic recognition of the individual's ability to present complaints is a large step in progressing to a truly effective international human rights as the instrument becomes accessible for the individual immediately and does not depend on further actions by the government.

Under the ACHR there exists an *actio popularis* in the reporting of human rights violations as those who submit the claims need not demonstrate a direct personal interest in the situation. Article 44 of the ACHR allows for petitions to be submitted by '[a]ny person or group of

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[79] For a review of the Commission's early work see Thomas and Thomas in Rodley and Ronning (1974) pp. 156-164.
[80] American Declaration, Articles 1, 2, 3, 4, 18, 25, and 26.
[81] For the Commission's competence for States Parties to the American Declaration, see *Commission Statute*, Article 19, concerning member states of the OAS, see *Commission Statute*, Article 20.
[82] The Spanish text (the original draft of the ACHR) should be translated to read 'the observance and protection of human rights' a stronger statement then 'respect for'. Concerning the controversy which exists in the differences in translation between the English and Spanish texts of the ACHR in relation to the Commission's role see T. Buergenthal. 'The Inter-American System for the Protection of Human Rights.' in T. Meron, ed. *Human Rights in International Law: Legal and Policy Issues*. (Oxford: Clarendon Press, 1985) p. 453.
[83] Buergenthal in Meron (1985) pp. 454-455.
[84] See C. Cerna. 'The Inter-American Commission on Human Rights: Its Organisation and Execution of Petitions and Communications.' in Harris and Livingstone (1998) pp. 112-114.
[85] ACHR, Article 44.

persons, or any non-governmental entity'.[86] The role of NGOs and others being able to present claims on behalf of victims is of great importance in the region. The prevalence of authoritarian rulers has severely limited the ability of individuals to have access to international bodies. Furthermore the use of disappearances by governments of Latin America would have literally 'closed the case' on violations of human rights if strict requirements existed for the submission of allegations to the Commission.[87] The Commission has instituted further procedures which, in the case of disagreement over the admissibility of a petition due to the non-exhaustion of domestic remedies, places the burden of proof directly on the respondent government to show that local remedies where not exhausted.[88] Again this procedure recognises that many societies were under authoritarian systems where there existed no effective remedies under domestic law and in the current transition many legal institutions remain weak and ineffective. The issue of remedies remains a problem as the newer democratic governments continually claim that by their very nature they offer effective remedies, which may not necessarily be true.[89] Finally if a government who has been accused of a violation of the ACHR is not forthcoming in providing information or co-operating with proceedings, the Commission will adopt a presumption of truth based on the information contained in the complaint and proceed to act upon its.[90]

The Commission has focused much of its efforts on its state reports with the procedure for dealing with individual petitions suffering from neglect and inhibiting the creation of a body of interpretative jurisprudence.[91] Farer places the nature of the human rights violations in the region as a major cause for as he points out when 'governments were simply torturing and maiming, interpretation was hardly necessary'.[92] The behaviour of the Commission shows it has often followed its own selected route and not always taking into consideration the overall needs of the system and its future development. However, the concentration on state reports has helped to further the protection and promotion of human rights in the region. The ability and willingness of the Commission to openly criticise the behaviour of a government in its overall

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[86] It must be noted though that in the case of NGOs submitting petitions, the NGO must be legally recognised in a member state of the organisation which allows states to exclude an NGO for arbitrary reasons, ACHR, Article 44.
[87] The Court has spoken of the 'exceptional intensity' of the use of disappearances in the region, *Velasquez Rodriguez Case* (Houduras) (29 July 1988) Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) paragraph 149.
[88] ACHR, Article 46 (2), *Commission Regulations*, Article 37. See Farer (1997) as to how most states have not questioned exhaustion of remedies, p. 528. Also A. Trindade. 'The Inter-American Human Rights System at the Dawn of the New Century: Recommendations for Improvement of its Mechanisms of Protection.' in Harris and Livingstone (1998) pp. 401-402.
[89] 'J. Miguel Vivanco and L. Bhansali. 'Procedural Shortcomings in the Defense of Human Rights: An Inequality of Arms.' in Harris and Livingstone (1998) pp. 429-431.
[90] *Commission Regulations*, Article 42. Gomez in Harris and Livingstone (1998) pp. 178-179.
[91] Farer (1997) p. 544.
[92] Farer in Harris and Livingstone (1998) p. 61 and how now there is the need to concentrate on developing its jurisprudence pp. 61-62.

treatment of society or certain sectors can have a substantial impact as opposed to condemnation on a case by case basis.[93] Article 41 of the ACHR lays out the reporting functions of the Commission which includes general or special reports on human rights issues as determined by the Commission, its own Annual Report and reports on the human rights situation in a member state.[94] State reports are submitted to the OAS GA for discussion that usually lacks substance and only rarely are resolutions adopted which directly address the recommendations of the report.[95]

The Commission's approach to state reports has given it a power that surpasses its European counterpart and has had a significant impact on the behaviour of the states in the region.[96] Besides specific state reports, the Commission has continually included individual country studies in its Annual Report and has come under constant criticism from governments who feel this is something the Commission is not entitled to do.[97] Governments have argued that the Commission should keep to general topics in its Annual Report since it has not been authorised to carry out a study on an individual state. The OAS GA has recently suggested that the Commission's reporting procedure should move to cover each state each year instead of targeting specific individual states.[98] Resource issues will loom large in the ability of the Commission to expand in this way. What is certain is that the growth of democracy in the region will not diminish the need for state reports.[99] State reports, whether individual or part of the Commission's Annual Report, are important for monitoring the ongoing progress of human rights. They provide space for some informal action to be taken during the preparation of the reports as well as providing information on the underlying context in which democracy and human rights occurs and importantly information regarding economic, social and cultural rights.[100] The rise of democracies has contributed to the criticisms levelled at the Commission for its report procedures.[101] In a democracy the rule of law is often accepted as existing along with the appropriate institutions for providing redress when a violation is alleged. With the

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[93] Unless of course numerous cases are continually brought against a government.
[94] *Commission Statute*, Article 18. C. Medina. *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*. (Dordrecht: Nijhoff, 1988) pp. 156-159.
[95] Usually the OAS GA thanks the Commission for its work and requests the state in question to consider the recommendations, Medina (1988) pp. 155-156.
[96] Farer (1997) pp. 511-512, he also finds criticism with the reporting procedure and the failure of the Commission to undertake comparative studies in preparing the report, pp. 532-535.
[97] See C. Medina. 'The Role of Country Reports in the Inter-American System of Human Rights.' in Harris and Livingstone (1998) where she discusses the efforts of democratic governments in trying to get the Commission to stop this practice, pp. 127-131.
[98] AG/Res.1213, see Medina in Harris and Livingstone (1998) p. 119.
[99] Farer in Harris and Livingstone (1998) p. 63
[100] Medina in Harris and Livingstone (1998) pp. 131-132.
[101] Farer (1997) pp. 543-546; Vaky and Munoz (1993) p. 20.

presence of authoritarian regimes it is often easy to accuse that such institutions do not exist. Now it is more difficult to accuse democracies even if those democracies clearly do not have established institutions and procedures that are able to effectively provide redress. A long run problem that is facing the region is that human rights violations on a wide scale continue in many parts of the Americas.[102] However since the groups most affected are lower classes unable to speak out, along with continual favourable attitudes to a strong executive coupled with weak judicial systems these violations go on.[103] The strong stance of the Commission of making public the behaviour of all states is important for the effectiveness of democracy and human rights as it removes the state's exclusive position.[104]

A unique attribute of the Commission is the ability to conduct on-site investigations for the purpose of investigating allegations of human rights violations and preparing country reports.[105] The conducting of any on-site investigation requires the consent of the state in question[106] with Chapter IV of the Commission's Regulations detailing what is expected of the state when an investigation occurs. This includes ensuring the free movement and safety of the observation teams during the investigation and guarantees of protection for anyone who provides the Commission with information.[107] The use of on-site investigations has become an essential aspect for the promotion and protection of human rights in the region. They allow the Commission to overcome the reluctance of governments to provide information and reach those whose rights have been violated but for various reasons are unable to get into contact or provide information to the Commission.[108] On-site investigations and studies help to educate people about their rights and the systems for redress, facilitate the submission of petitions, and influence

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[102] See Human Rights Watch. *World Report 1998*. (New York: HRW,1998) p. 85.

[103] Farer (1997) pp. 544-545. See C. Larkins. 'The Judiciary and Delegative Democracy in Argentina.' 30 *Comparative Politics* (1998) on the judiciary in Argentina and how it is less effective under the system of democracy in place then under the authoritarian government, pp. 436-437. Also A. Cornell and K. Roberts. 'Democracy, Counterinsurgency, and Human Rights: the Case of Peru.' 12 *Human Rights Quarterly* (1990) p. 529 where they claim Peru has seen an increase of human rights violations since the transition to democracy.

[104] See Farer (1987) p. 401

[105] Prior to the coming into force of the ACHR the Commission was able, and did, conduct on site investigations by virtue of Article 11 of its Statute which allows for the holding of meetings in the territory of any Member state. The carrying out of on-site investigations may also be initiated at the request of a Member State. See Medina (1988) pp. 129-134. Davidson (1997) pp. 112-117. Article 34 (4) of the Rules of Procedure of the Court allow it to carry out on-site investigations as well.

[106] ACHR, Article 48 (2); *Commission Regulations*, Article 44 (1). Medina (1988) discusses some of the controversy surrounding the position of consent in the conducting of on site observations and concludes that consent 'is an essential requirement' p. 132. Article 18 (g) of the *Commission Statute* provides 'to conduct on-site observations in a state, with the consent or the invitation of the government in question.' This comes under the general heading of the functions of the Commission in relation to all members of the OAS, therefore the power of the Commission for on-site investigations is not limited to States Parties to the ACHR. See Medina (1988) p. 131.

[107] *Commission Regulations*, Articles 58-59.

[108] Davidson (1997) points out that the conducting of on-site investigations are not always necessary for the Commission can come up with other ways of hearing witnesses and gathering information without directly involving themselves with the state in question, p. 113.

the attitudes towards redress, giving individuals greater confidence in their possibilities for redress encouraging a greater number of applications.[109] Often the mere presence of investigators helps to ensure a greater observance of human rights obligations.[110] The on-site investigations allow the Commission to ascertain the human rights situation on the ground based on first hand information. The fact that on-site observations are conducted or even allowed shows an ability to overcome the state bias of human rights law and the idea of non-intervention into domestic affairs.[111]

Throughout its work the Commission has stated that the only way to guarantee human rights is through an effective system of representative democracy.[112] With regard to the existence of authoritarian regimes in the region the Commission clearly makes the point

> that representative democracy is the fundamental premise upon which the political and legal organisation of the American states is based. De facto governments do not therefore conform to the requirements of the American Convention on Human Rights.[113]

For its is 'a democratic framework [that is the]... essential element for establishment of a political society where human values can be fully realised'.[114] In seeing democracy as a means to realise human values the Commission is including civil and political rights as well as socio-economic rights.

The Commission has expressed that democracy depends upon, and allows for, the exercise of rights such as freedom of association, assembly, thought and expression.[115] It has stressed the need for freedom of information and expression as a way of not only creating a culture of human rights but also to ensure that the democratic process works properly.[116] In the undertaking of the democratic process politically, the Commission has shown a preference for political parties so that 'chaos and anarchy are not to reign'.[117] Elections are to be held at a regular basis[118] and must be undertaken in conditions that allow fairness and transparency so that no one party is

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[109] Weston et al (1987) pp. 618-619.
[110] Buergenthal in Meron (1985) pp. 481-482.
[111] Surprisingly governments have been accommodating to a degree in allowing the Commission to visit, see Median (1988) p. 134.
[112] *IACHR Annual Report* (1985/6) pp. 192-193.
[113] Report No. 25/98 (Chile) *IACHR Annual Report* (1997) p. 523, paragraph 31.
[114] *IACHR Annual Report* (1979/80) pp. 151-153.
[115] *IACHR Annual Report* (1980/1) pp. 345-346. Also *IACHR Report on Paraguay* (1987).
[116] *IACHR Report on Mexico* (1997) paragraphs 482-485.
[117] Case 10.109 (Argentina) *Inter-American Yearbook on Human Rights* (1988) p. 184.
[118] No specific time frame has been set by the Commission but it has stated that a ten year delay violated Article XX of the Declaration, *IACHR Annual Report* (1977) p. 93.

able to manipulate the system for its benefit.[119] The Commission has expressed the view that electoral rights are 'essential if societies are to function normally' explaining the inclusion of Article 23 as a non-derogable right.[120] Overall the Commission takes the position that electoral rights would only be rhetoric if established standards of conduct do not exist which allow for the will of society to be freely expressed.[121]

Elections and civil and political rights are essential to democracy but so are the implementation of socio-economic rights to create 'conditions in which the general population is able … to participate actively and productively'.[122] The Commission has expressed the need for wide-based and active participation for it 'guarantees that all social sectors participate in the formulation, application and revision of national programs' which leads to the greater protection of socio-economic rights.[123] There is the need for all sectors of society to participate in the political and socio-economic processes with the fostering of participation starting with the group involved but it is up to the government to provide the necessary conditions to allow for participation.[124]

Farer has expressed the opinion that the impact of the Commission on the human rights situation in the region has probably been minimal on the lives of individuals, but at the same time remains significant since the Commission often has an indirect impact on the promotion and protection of human rights.[125] Much of the reason the Commission has only had a minimal direct influence on the situation of individuals is the lack of binding force behind its decisions. The Court itself has ruled that in the region's human rights system the Court possesses the only binding powers and this extends to the entire scope of the Commission's work.[126] While it may lack legal force in its work the Commission has demonstrated the power of human rights rhetoric and the need to be pro active in the face of adversity. In undertaking its tasks the Commission places a large emphasis on the importance of educating about human rights and democracy with the purpose of creating 'a broader appreciation of the place of human rights in

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[119] See *Inter-American Yearbook on Human Rights* (1988) p. 598; *IACHR Annual Report* (1990/1) p. 525. *IACHR Report on Mexico* (1997) paragraph 471.
[120] Case 10.596 (Mexico) *IACHR Annual Report* (1993) p. 269.
[121] See Cases 9768, 9780 and 9829 (Mexico) *IACHR Annual Report* (1989/90) p. 465; *IACHR Annual Report* (1993) p. 524.
[122] *IACHR Annual Report* (1990/1) pp. 521-522.
[123] *IACHR Annual Report* (1993) p. 553. The law making process itself is to be done democratically *IACHR Report on Mexico* (1997) paragraph 758
[124] *IACHR Report on Mexico* (1997) paragraphs 617-618.
[125] T. Farer. 'The OAS at the Crossroads: Human Rights.' 72 *Iowa Law Review* (1987) p. 403.
[126] *Cabellero Delgado and Santana Case* No. 17 (8 December 1995) Inter-Am.Ct.H.R. (Ser.C) No.17 (1995) paragraph 67.

the Americas', an essential feature to carry on into the future.[127] Farer's assessment of the Commission is perhaps dated. Undoubtedly the Commission has faced numerous obstacles in trying to making human rights more effective for individuals, but given the environment within which they work their efforts have been substantial in removing the rhetoric from the control of states.

C. INTER-AMERICAN COURT OF HUMAN RIGHTS

The Court came into existence in 1978 as 'an autonomous judicial institution whose purpose is the application and interpretation' of the ACHR.[128] The creation of the Court created tensions with the Commission as disputes arose as to who is primarily responsible for human rights protection in the region.[129] The Court has defined its task as preserving the rights of victims of human rights abuses and preserving the integrity of the Inter-American system of protection.[130] Only states party to the ACHR and the Commission are able to petition the Court directly and concerning contentious cases only after the Commission procedures in Articles 48 to 50 of the ACHR have been completed.[131]

The Court is able to exercise contentious and advisory jurisdiction with its contentious scope covering the whole of the ACHR and Articles 8 and 13 of the Protocol of San Salvador. Its advisory jurisdiction allows for any member state and various OAS organs to obtain an opinion concerning the ACHR or other human rights instruments.[132] In contentious cases concerning individuals, the Court is able to pass a judgement that may contain compensatory payments

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[127] Davidson (1997) p. 108. The Inter-American Institute for Human Rights is working on educational aspects of democracy through the training of activists, rewriting of school books and curriculum which have had an authoritarian bias to them, changing them to a democratic bias, see Lauchlan et al (1998) p. 536.

[128] *Statute of the Inter-American Court*, Article reprinted in reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*. OEA/Ser.L.V/II.82 doc.6 rev.1 (1992) p. 113. The Court consists of seven judges who may be from any member state of the OAS with high moral authority and recognised competence in human rights. The criteria for choosing judges of high moral authority and competence in human rights was brought into question with the election of Dr. Alejendro Montiel Arguello who was the spokesman for the Somoza dictatorship in Nicaragua. Commentators felt his appointment raised serious questions as to how seriously states consider the elections of judges minimising the effective of the Court in protecting human rights see D. Cassel. 'Somoza's Revenge: A New Judge for the Inter-American Court of Human Rights.' 13 *Human Rights Law Journal* (1992) p. 137.

[129] See L. Frost. 'The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges. 14 *Human Rights Quarterly* (1992) p. 171.

[130] *In the matter of Viviana Gallardo et al.* (13 November 1981) Advisory Opinion No. G 101/81, Inter-Am.Ct.H.R. (Ser.A) (1984) paragraph 13.

[131] ACHR, Article 61. See *In the matter of Viviana Gallardo et al.*, paragrapah 23.

[132] ACHR, Articles 62 and 64. In the Court's first advisory opinion on the interpretation of Article 64, the Court claimed that it was able to provide an advisory opinion on any human rights provisions applicable in the Western Hemisphere. This allows the Court to utilise regional and universal provisions for protection in its attempts to protect human rights. *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human)* Advisory Opinion OC-1/82 (24 September 1982) Inter-Am.Ct.H.R. (Ser. A) No.1 (1982) paragraph 44. Also C. Parker. ' "*Other Treaties*": The Inter-American Court of Human Rights Defines its Advisory Jurisdiction.' 33 *American University Law Review* (1983) p. 211.

made to the victim.[133] The Court may order interim measures in situations of 'extreme gravity and urgency, and when necessary to avoid irreparable damage to persons' either in matters directly before it or in situations brought to its attention by the Commission.[134]

The Court has been slow in making its mark on the Inter-American system since states have proved reluctant to recognise its jurisdiction and by a lack of co-operation from the Commission.[135] The Court's contentious caseload is slowly growing and substantial progress has been made through the use of its advisory opinion.[136] Even though the Court is created by the ACHR it has established that it may take into consideration any human rights treaty relevant to the American states, giving credence to the holistic approach to human rights protection and recognition of the benefits of co-operation between legal systems. The Court sees the obligations created by the ACHR to be applicable to each individual state party, regardless of the position or actions of another state party.[137] Human rights protection in the eyes of the Court is *sui generis* in nature and not determined by treaty relations between states.[138]

The Court has taken the long history of rhetoric surrounding democracy in the region and combined with the continual references in the regional human rights instruments, has established that the existence of democracy is the standard by which the actions of governments are to be judged. The Court has described democracy as;

> The concept of rights and freedoms as well as that of their guarantees cannot be divorced from the system of values and principles that inspire it. In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.[139]

The Court expressed a more succinct position where '[o]bviously, representative democracy is based on the Rule of Law which presupposes that human rights are protected by law'.[140] The

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[133] ACHR, Article 63 (1).
[134] ACHR, Article 63 (2); *Rules of Procedure*, Article 24. The Commission is also able to request provisional measures under Article 29 (2) of its Regulations and has expressed that the failure to adhere to requested measures is a violations of obligations, see *IACHR Annual Report* (1997) page 966, paragraph 29.
[135] Prior to 1990 the Court only has a handful of cases on its docket. Since 1990 it has passed down over 17 judgments in contentious cases along with a number of provisional measures and decision on reparations. For information see the Court's internet site [http://corteidh-oea.nu.or.cr/ci/ HOME_ ING.HTM].
[136] Buergenthal considers the advisory jurisdiction of the Court 'more extensive than any international or regional tribunal'. T. Buergenthal. 'The American and European Conventions on Human Rights: Similarities and Differences.' 30 *American University Law Review* (1981) p. 162.
[137] See Davidson (1997) pp. 77-80.
[138] Advisory Opinion OC-1/82, paragraph 24.
[139] *Habeas Corpus in Emergency Situations* Advisory Opinion OC-8/87 (30 January 1987) Inter-Am.Ct.H.R. (Ser. A) No. 8 (1987) paragraph 26. See also *Judicial Guarantees in States of Emergency* Advisory Opinion OC-9/87 (6 October 1987) Inter-Am.Ct.H.R. (Ser. A) No. 6 (1987) paragraph 35.
[140] Advisory Opinion OC-6/86 paragraph 8.

Court's definition of a democratic society is dependent upon legal procedures providing for the legitimacy of government and the protection of human rights, ensuring the elements of participation and autonomy from Chapter 2.

The rule of law and the existence of human rights provisions are of primary importance in a democratic society. The Court has stated that the only legitimate law is one which is duly 'passed by the Legislature and promulgated by the Executive' and 'enacted for reasons of general interest' with the main purpose of protecting the individual and creating an environment for self-determination.[141] Since the purpose of law is to serve the general interest or welfare of society it requires a specific institutional form for its creation as '[l]aw in a democratic state is not merely a mandate of authority cloaked with necessary formal elements.' The Court drew a necessary connection between the legality of rules and the legitimacy of the rule makers giving rise to the requirement of the 'effective exercise of representative democracy.'[142]

The legal protection of human rights is necessary so that state power is to be restricted based on 'the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power'.[143] There must be a 'set of guarantees' to ensure state power does not violate the rights of individuals. The Court has said that

> [p]erhaps the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution. Such a procedure not only clothes these acts with the assent of the people through its representatives, but also allows minority groups to express their disagreement … so as to prevent the majority from acting arbitrarily'.[144]

The Court recognised a specific regional development in this area based on the principle of legality found throughout the constitutions of the Americas and 'is one and the same as the idea and the development of law in the democratic world and results in the acceptance of the existence of the so-called requirement of law (reserva de ley) by which fundamental rights can only be restricted by law, the legitimate expression of the people'.[145] The Court makes it clear that at no time is a government able to act in self-serving manner as the bond between the principle of legality, democratic institutions and the rule of law always exists.[146] The Court has emphasised the need for 'an independent and impartial judicial body having the power to pass

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[141] Advisory Opinion OC-6/86 paragraphs 27, 29-30.
[142] Advisory Opinion OC-6/86 paragraph 32.
[143] Advisory Opinion OC-6/86 paragraph 21.
[144] Advisory Opinion OC-6/86 paragraph 22.
[145] Advisory Opinion OC-6/86 paragraph 23.
[146] Advisory Opinion OC-6/86 paragraph 24. Also *Godínez Cruz Case* (Honduras) (20 January 1989) Inter-Am.Ct.H.R. (Ser. C) No. 5 (1989) paragraph 150.

on the lawfulness of measures adopted in a state of emergency.'[147] This ensures that remedies will be effective and the rule of law maintained at times when it is most needed.[148]

The Court has also provided insight concerning two elements of a democratic society – the principle of non-discrimination[149] and freedom of expression.[150] Regarding non-discrimination the Court stated that equality is part of the essential dignity of the individual and cannot be reconciled with special treatment to different groups based on assumed superiority.[151] However it was expressed that starting at the point of universal human dignity 'it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above.'[152] The Court took the position that differential treatment may exist in society but that 'no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things'.[153] Differential treatment is discriminatory and not part of a democratic society when it is offensive to human dignity and there is 'no objective or reasonable justification' for the differing treatment.[154]

In its discussion of freedom of expression the Court placed the existence of the right firmly in the context of democracy as it 'constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.' The Court went to say '[i]t is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.'[155] And, finally, that '[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests.'[156] Judge Gros Espiell has further explained that freedom of expression, as a necessary element of a democratic society, is bound to bring about

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[147] Advisory Opinion OC-6/86 paragraph 30.
[148] Advisory Opinion OC-9/87 paragraph 24
[149] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 (19 January 1984) Inter-Am.Ct.H.R. (Ser. A) No. 4 (1984).
[150] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights)* Advisory Opinion OC-5/85 (13 November 1985) Inter-Am.Ct.H.R. (Ser. A) No. 5 (1985).
[151] Advisory Opinion OC-4/84 paragraph 55
[152] Advisory Opinion OC-4/84 paragraph 58.
[153] Advisory Opinion OC-4/84 paragraph 57
[154] Advisory Opinion OC-5/85 paragraph 56. See also Judge Piza's Dissenting Opinion at paragraph 12.
[155] Advisory Opinion OC-5/85 paragraph 69.
[156] Advisory Opinion OC-5/85 paragraph 70.

conflict making it necessary to balance the individual's right to freedom of expression with respect for the reputation of others in society.[157]

In contentious proceedings the Court has reinforced the belief that the state is based on the consent of society declaring that 'the power of the state is not unlimited, nor may the state resort to any means to attain its ends as they always remain subject to law and morality.'[158] The Court also expressed that a state who is a signatory to the ACHR has the duty 'to organize governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.'[159] This was affirmed in *Castillo Paez*[160] where it was stated that 'the right to effective recourse to a competent national court or tribunal is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.'[161] As the Court hears more contentious cases it will be able to further develop the details of a democratic society as established in its advisory opinions. For now the priority continues to be ensuring those whose rights have been grossly violated in the past receive some form of redress.

The future of the Court as an effective instrument for promotion and protection of democracy and human rights will depend very much on its relations with the Commission. The two will have to agree to more amicable terms giving the individual the best possible system of protection. Trindade observes that if there is to be a *system* for human rights protection then the supervisory bodies need to show greater co-operation.[162] Co-operation between the two bodies is limited as demonstrated by the Court's habit of going over the facts of the case again without taking the Commission's investigations as authoritative.[163] The Court and the Commission each have a substantial contribution to make but more effort should be placed on a sharing of the labour and not competing for it.[164]

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[157] *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 of the American Convention on Human Rights),* Advisory Opinion OC-7/86 (29 August 1986) Inter-Am.Ct.H.R. (Ser. A) No. 7 (1986). Separate Opinion of Judge Gros Espiell, paragraph 5

[158] *Velasquez Rodriguez*, paragraph 154.

[159] *Velasquez Rodriguez*, paragraph 166.

[160] *Castillo Páez Case* (Peru) (3 November 1997) Inter-Am.Ct.H.R. (Ser. C) No. 34 (1997).

[161] *Castillo Paez Case*, paragraph 82.

[162] Trindade in Harris and Livingstone (1998) p. 134.

[163] *Gangaram Panday Case* (Suriname) (21 January 1994) Inter-Am.Ct.H.R. (Ser. C) No.16 (1994) paragraph 30; Trindade in Harris and Livingstone (1998) pp. 412.

[164] Trindade in Harris and Livingstone (1998) pp. 414-417.

D. UNIT FOR THE PROMOTION OF DEMOCRACY

In 1990 the General Assembly passed a resolution calling for the creation of the Unit for the Promotion of Democracy,[165] the body was formally established by the Secretary-General on 15 October 1990.[166] The mandate of the UPD is to provide for democratic development by assisting member states in preserving and strengthening their political institutions and democratic procedures. The primary priorities of the UPD are to ensure elections are effective, to provide training to legislatures and to promote and disseminate information about the democratic process and democratic values. Based on these priorities the democratic vision of the UPD consists of furthering good governance, citizen participation and free and fair elections. The UPD sees elections as a significant part of the democratic process but meaningless unless set within an informed and vigilant electorate that remains active, and has reciprocal communication with those elected.[167] The ultimate success of democracy depends on citizens not leaders, a concept firmly established in the UPD's work.[168]

The UPD's activities are far-reaching dealing with the building of democratic institutions, assisting in all aspects of elections, acting as a centre for information and dialogue of democracy issues, and participating in special programmes essential to democratisation but not normally part of traditional activities. Democracy is not a naturally occurring entity and while institutions alone do not ensure the existence of democracy they do provide an essential element of a democratic society. The UPD works with local institutions to assist the personnel involved in the practice of democracy through the exchange of knowledge, training, the development of support services, and encouraging citizens' participation through education and the existence of mechanisms allowing for greater participation. Electoral participataion is a major part of the UPD's work as the involvement of international institutions in domestic elections has become a common occurrence as a means of providing legitimacy to the electoral process and ensuring the technical framework needed to conduct elections. The UPD has observed 37 elections in over half of the OAS member states at all levels of governance and it all areas of the election process.[169] It has also carried out training for electoral officials, the development of documentation and information centres for electoral institutions; the providing of assistance in updating voter lists and maintaining electoral information; the provision of assistance on

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[165] AG/RES 106/90.
[166] Executive Order No. 90-3 (15 October 1990).
[167] Farer (1988) pp. 117-121.
[168] 'As citizens of this democracy, you are the rulers of the ruled, the law-givers and law-abiding, the beginning and the end.' Unit for the Promotion of Democracy of the OAS. 'Democracy in the Americas.' 45 *Americas* (1993) p. 55.
[169] The UPD recently observed the electoral registration in Belize something done for the first time, see S. Griner. 'Talking with the Voter.' 2 *Democracy* (1998) p. 1.

electoral legislation reform, election administration and other fields, and the conducting of studies on election infrastructure needs.

The exchange of information and construction of dialogue are key essentials to democracy, both established and developing, and underlies the purpose of the information function of the UPD. They have recently held a Democratic Forum on Paraguay where the ability of the OAS to respond quickly to the democratic crisis in that country demonstrates its new competence in the area of democracy. The special programmes of the UPD show that the success of democratisation goes beyond institutions and elections and sometimes involves addressing specific issues facing societies in the transition process. The Special Programs of the UPD come at the request of a member state for a specific purpose with the common characteristic that they subsist almost entirely on external funds and consist of significant human and financial resources with a substantial field presence. A significant number of the special programs are implemented in countries or regions in the wake of conflict or in transition to democracy in order to meet specific needs.[170] It is too early to evaluate the success of the UPD in furthering democracy and human rights in the region. The support it has so far received and the actions it has undertaken demonstrate a commitment to the future and the potential for having a significant impact in the region.

V. Obstacles to Democracy and Human Rights in the Americas

The Americas has a long institutional history of inter-state efforts of co-operation that have often addressed the protection and promotion of democracy and human rights in the region. Parallel to this, have been the very real assertions of the importance of non-intervention in domestic affairs, the widespread existence of authoritarian governments and economic crisis, along with weak institutional structures. The position of democracy and human rights in the development of the region has been primarily of rhetorical value only as demonstrated by actual events. Alongside the realities of the region there continually remains a strong desire for democracy and the protection of human rights on the ground.[171] This is evidenced by the fact that the OAS Charter, a product of half of century of inter-American co-operation, contained few references to democracy and human rights in its original form with non-intervention clearly

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[170] The programmes the UPD have been involved with include - co-operation with the UN for the purpose of promotion respect for human rights and democratic institution building in Haiti; supporting the peace negotiations and disarmament process in Suriname; providing training for demining personnel and assisting countries in the clearance of mines; promoting peaceful resolutions to conflicts and supporting legislative and electoral reforms in Guatemala.

[171] T. Farer 'Collectively Defending Democracy in the Western Hemisphere: Introduction and Overview.' in Farer (1996) pp. 9-11.

present as a guiding principle.[172] However as the region has changed the Charter has been amended marking a progression from rhetoric to substance. The European system for the protection of human rights works on the assumption that there exists at the domestic level effective measures which intend to limit the powers of government, making the task of supervision bodies one of reinforcing and clarifying previously existing and generally accepted constraints. In the Americas domestic measures have rarely existed in an effective form meaning that the work of the OAS has been in creating effective measures from scratch rather than clarifying pre-existing structures.[173]

The future of democracy and human rights in the region will be determined by the ability of the OAS to address the low levels of economic development,[174] the complications created by the presence of the US, the persistence of strong individual leaders which often prove a threat to democracy, and its own inherent weaknesses.

A. Socio-Economic Development and Inequality

The Inter-American system has addressed the necessary connection between socio-economic conditions, human rights and democracy from an early stage. The Declaration of Caracas (1954) expressed the conviction of American states to effective democracy through respect for the individual and promoting policies of economic well-being and social justice to raise living standards.[175] Today obligations concerning socio-economic rights exist through the Charter, the Declaration as an interpretation of the Charter, through the ACHR in Article 29[176] and generally in the Protocol of San Salvador. These commitments are all expressed within the overall framework of an existing democratic society. It will be important for the OAS to ensure follow-up and future action on these commitments, as economic difficulties remain problematic for the consolidation of democracy throughout the region.[177] The ability of the OAS to assist in socio-economic progress is limited as it relies upon the resources of member states for its own

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[172] Thomas and Thomas (1963) feel that the adoption of the Charter and the Declaration are part of the rhetorical commitment of member states and were not intended to create any binding obligations related to democracy and human rights, pp. 140-141.

[173] See Farer (1997) 512. Also Harris in Harris and Livingstone (1998) p. 2.

[174] Most states in the region come midway between the developed industrialised states and the poorest states of Africa and Asia. For further information see Inter-American Development Bank. *Aannual Report 1998*. (Washington, D.C., 1999); Bulmer-Thomas (1994) p. 3 and generally.

[175] C. Stoetzer. *The Organisation of American States*, 2nd ed. (Westport: Praeger, 1993) pp. 245-6.

[176] Davidson (1997) sees Article 29 as also bringing in obligations under the ICESCR, pp. 36-37. On the Commission's treatment of economic and social rights under the ACHR see Craven in Harris and Livingstone (1998) who concludes that the Commission has a wide area in which to improve its monitoring and supervision capabilities in this area, pp. 297-321.

[177] H. Wiarda. *Latin America at the Crossroads: Debt, Development and the Future*. (Boulder: Westview, 1987) pp. 59-60; J. Torre. 'The Politics of Economic Crisis in Latin America.' 4 *Journal of Democracy* (1993) p. 104.

existence and programmes. A vicious circle develops as the OAS is unable to assist member states that are unable to provide the organisation with greater resources.[178]

In the transitions to democracy many of the Latin America states went against common trends as the authoritarian regimes were able to achieve high economic growth without loosing their grip over society and when the transitions did occur the economic situations of many countries worsened.[179] The present economic ills of much of the region are a substantial influence on the future development of democracy and human rights as governments face 'the discontent of the people over the inability of the government to satisfy their basic needs.'[180] The economic difficulties for many states are 'deep-seated, complex, and numerous', inextricably tied to deep inequalities within society.[181] The inequities of economic and social standing have origins to the colonial period and have continued through the authoritarian regimes where any attempt by lower classes to challenge the structure of society was met by undemocratic action taken by the military or elites to preserve the status quo.[182] The situation continues today as economic policies upset one group or another making it difficult for the government to create wide reaching polices that appear effective to all groups and not just concessions to those with political clout.[183]

The current process of democratisation is 'threatened by widespread poverty, social barriers of caste and class, low educational levels, deteriorating public services'[184] which have an uneven impact on certain sectors of society.[185] Inequalities in society are part of the historical development of the region and continue to create an environment of mistrust for much of the

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[178] See Harris in Harris and Livingstone (1998) p. 22. The problem is heightened by the situation that many of the democracies in the region are far from solid and progress looks to be minimal, see T. Karl. 'The Hybrid Regimes of Central America.' 6 *Journal of Democracy* (1995) pp. 72-86.

[179] S. Mattiace and R. Ai Camp. 'Democracy and Development: An Overview.' and L. Landim. 'Nongovernmental Organizations in Latin America.' in R. Ai Camp, ed. *Democracy in Latin America: Patterns and Cycles*. (Wilmington: Scholarly Resource, 1996) pp. 3, 165.

[180] C. Nino. 'The Debate over Constitutional Reform in Latin America.' 16 *Fordham International Law Journal* (1992/3) p. 636. See also Wiarda (1987) who observes; 'Entire *systems* of politics and governance are being shaken and undermined.' (emphasis in original) p. 5.

[181] See Wiarda (1987) pp. 1-2, 11-38, he places a great deal of the explanation for economic problems in Latin America upon the impact of international factors beyond their control (the US) and the historical and present position of leaders and elites.

[182] Cornell and Roberts (1990) p. 531.

[183] N. Barletta. 'Economic Policy and Democracy.' in R. Pastor, ed. *Democracy in the Americas: Stopping the Pendulum*. (New York: Holmes and Meier, 1989) p. 107. Also L. Meyer. 'Democracy from Three Latin American Perspectives.' in Pastor (1989) pp. 33-34. The need to keep the economy strong has contributed to the prevalence of strong central leaders, but it is recognised that measures for economic growth should not be at the price of democratic safeguards. The president of Venezuela has recently achieved the power to implement economic reforms without the approval of the legislature, see 'A New Broom in Venezuela.' *Economist* (6 February 1999) p. 61.

[184] R. Millett, 'Beyond Sovereignty: International Efforts to Support Latin American Democracy.' 36 *Journal of Interamerican Studies and World Affairs* (1994) pp. 9-10.

[185] Diamond observes that even if regular elections and changes in government occur democracy remains under threat if socio-economic issues are not dealt with, L. Diamond. 'Democracy in Latin America: Degrees, Illusions, and Directions for Consolidation.' in Farer (1996) pp. 76-77.

system which will slow democratic development.[186] The inequalities of the region impact the position of many indigenous communities who either do not benefit from the full protection of rights offered or who have not been included into the democratic process.[187]

The Commission has stated that democracy

> should be translated into substantive improvements in the quality of life of the great majority, if not all, of the population. Work, health, education, suitable housing and the like would flow necessarily and naturally as a result of the preservation of certain individual guarantees and of the rule of democratic institutions.[188]

This will prove to be complex in practice as many states face wide social inequality and are characterised by the lack of attention given to the needs of the poorest and marginal groups of society.[189]

Inequalities within societies are further troubled by the socio-economic inequalities that exist among the states of the region. As the richest state in the region and of the OAS, the US plays an important role in the economic development provisions of the Charter. When the Protocol of Cartagena de Indias[190] introduced into the Charter provisions for action in this area the US was quick to make its opinion clear on the binding nature of the provisions. At the time of signature the US stated that Articles 29, 30, and 31 of the Charter 'do not create enforceable legal obligations and do not affect the sovereign rights and discretion of donor and recipient states with respect to the provision and receipt of assistance'.[191] The position of the US impedes the co-operative efforts needed to effectively address the situation from the perspective of the individual as co-operation and efforts at all levels, regional, sub-regional and international are necessary to overcome the economic difficulties of the region.[192] The Declaration of Managua calls for action to be taken against factors which impede democracy but adopting the declaration

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[186] Karl (1995) pp. 83-84.

[187] D. Yashar. 'Indigenous Protest and Democracy in Latin America.' in J. Dominguez and A. Lowenthal, eds. *Constructing Democratic Governance : Latin America and the Caribbean in the 1990s*. (Baltimore: Johns Hopkins University Press, 1996) pp. 87-105; X. Gorostiaga. 'Problems and Chances of Democracy in Central America.' in J. Hippler, ed. *The Democratisation of Disempowerment: The Problem of Democracy in the Third World*. (London: Pluto, 1995) p. 93 who describes indigenous people as 'not recognised as authentic citizens'. The Proposed American Declaration on Indigenous Rights will address these issues but is has yet to receive approval from governments, see *IACHR Annual Report* (1996) p. 625.

[188] *IACHR Annual Report* (1983/4) p. 137.

[189] Barletta in Pastor, ed. (1989) pp. 108-109. The Commission has pointed out the need for states to address these issues and how it will not produce a great strain on national economies, see *IACHR Report on Brazil* (1998) Chapter II, paragraph 15.

[190] OAS Treaty Series No. 66.

[191] The US went on in even more emphatic and ideologically charged terms to say it 'will continue to help Member States fulfil their goals of social justice through assistance it considers appropriate to support democracy, human rights and the poor of the region', OAS Treaty Series No. 66, General Information A-50/2.

has 'proved much easier than translating its principles into action'[193] and will continue to be the case in the socio-economic field with the attitude of the US.

B. ROLE OF THE US

The position of the US with regard to economic conditions is part of the larger situation whereby the region has been described as 'America's backyard' making the US a contributor to both the stability and instability of the area.[194] The US is the chief contributor of funds to the OAS allowing for much of the Organisation's activities to be carried out and gives one country a disproportionate amount of influence over its activities. The US has continually held the attitude that it possesses a free reign in determining the affairs of the region. This has resulted in the situation where it is sometimes conceived that inter-American relations does not mean relations among American states but relations among the US and other countries of the region.[195] This relationship has passed through stages from where the US claimed an almost absolute right of intervention into the affairs of other American countries, to a recognition of non-intervention, to co-operation in the region to fight off communism and deal with socio-economic problems.[196] The OAS has been a tool for both sides in this struggle with Latin American states seeing the OAS as a way to hedge against the power of the US who in turn has seen the organisation as a way to further its own domestic policy goals.[197]

The behaviour of the US has hindered the work of the OAS as resistance to US policies within the OAS reinforces claims of national sovereignty and non-intervention which has sometimes lead to actual US intervention, worsening the situation and discrediting the OAS system.[198] The recent attention given to issues concerning socio-economic development has led to controversy as to the extent to which the US is legally bound to provide assistance to less-developed states in the region weakening the ability of the OAS for institutional co-operation.[199] The role of the US is essential in all areas of the work of the OAS but there needs to be found a way to continue with the US's physical contribution to the organisation while limiting its

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[192] Barletta in Pastor (1989) pp. 104-105. For more information concerning the impact of the recent global economic troubles on the region see World Bank. *Weathering the Storm: Latin America and the International Financial Crisis.* (Washington: The Bank, 1999).
[193] Millett (1994) p. 10.
[194] The US has publicly admitted it has used the region for its own security priorities, see C. Medina. 'Human Rights News - Inter-American System.' 9 *Netherlands Quarterly on Human Rights* (1991) p. 325.
[195] Wells (1983) p. 225; Arrighi. (1997) p. 95.
[196] For the historical development see Wells (1983) pp. 225-234. For discussion on the various interventions by the US in the region see Farer (1988).
[197] See Thérien et al (1996) pp. 232-234; Farer (1988) pp. 25-31.
[198] Forsythe (1991) p. 74.
[199] See Wells (1983) pp. 241-243.

ideological pressure. This will allow space for the OAS to develop an autonomous role in the region and not be tied to the superpower of the region.[200] The position of the US as an obstruction to the goals of the OAS is not absolute, as Forsythe has shown the development of support for democracy and human rights (at a highly abstract level) has occurred independently of the US.[201]

As the OAS, in its own right, becomes a higher profile factor in furthering democracy and human rights in the region the US appears to be channelling its efforts into other areas of regional co-operation through, most notably, the Summit of the Americas.[202] The work of the Summit consists of a number of similar areas of concern for the OAS and therefore proceeds parallel to the organisation in its own undertakings. Importantly the OAS only works in areas delegated to it by the Summit and as a general information source. The Summit's work in democracy and human rights, which are stated as a high priority, have not been so delegated. The existence of dual procedures for strengthening democracy and human rights would normally be welcomed but considering the US is not bound by the bulk of the legal procedures of the OAS, and considering the minimal resources of the region, the US efforts to boost a political process appear as the continuance of traditional politics for the region.

C. Strong Authoritarianism

The historical development of the region demonstrates a tendency for strong centralised authoritarian forms of rule that have contributed to the poor economic situation and inequalities in society, the recurring authoritarianism which has plagued the region and an overall lack of confidence in government.[203] Colonialism has had a direct impact on the presence of authoritarian regimes enhanced by aspects of the Iberian heritage that accepted disparity in society and the strong Catholic influence which reinforced hierarchy and responsibilities.[204] Independence from colonial rule did not create any true change in societies, with elites merely replacing the colonial rulers with the same methods of control.[205] The development of democracy in many states has followed a similar pattern as autocrats are replaced by elected

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[200] Millett (1994) p. 19.
[201] Forsythe (1991) pp. 75-89.
[202] Information about the Summit process may be found at [http://www.summit-americas.org/].
[203] M. Crahan, ed. *Human Rights and Basic Needs in the Americas*. (Washington: Georgetown University Press, 1982) pp. 26-33.
[204] Crahan (1982) 36, 40.
[205] J. Black. *Latin America, Its Problems and Promise: A Multidisciplinary Approach*. (Boulder: Westview, 1984) p. 64; Crahan (1982) pp. 35-36.

presidents who in turn exercise a great deal of personal control within the democratic framework.[206]

The role of the military as a political institution also has a history in the region as the military has taken advantage of the belief in strong leaders seeing itself as the only proper guardian of the state and protector of national security.[207] This was often accompanied by human rights abuses, the suppression of democracy and dampening any social progress.[208] In some cases military/authoritarian rule brought about improved economic situation leading Chile's former ruler, General Pinochet, to say that government should not be judged based on legitimacy from the people but from the economic accomplishments it achieves.[209] Unfortunately these accomplishments come at a high price in human suffering as the presence of military rule creates instability within society and beyond.[210] The military has not been completely discredited as a study of Venezuela has shown that those in favour of democracy are also in favour of military intervention in politics if it means saving or moving the democratic process along, demonstrating a strong paradox of Latin American democracy.[211] Transitions to democracy in Chile and Argentina have shown the ability of the military to exert influence over society after it has given up power.[212] This has led to a response by democratically elected leaders who attempt to overcome the negative influences of the military by concentrating power in their own hands which in itself raises a threat to democracy.[213]

Hyper-presidentialism, the situation where there is support for a strong individual leader regardless of the system of governance, is common to the region.[214] The prime example of the region is President Fujimori in Peru who carried out his own coup d'etat, dissolved parliament

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[206] See Larkins (1998) pp. 424-427.

[207] In Latin America the military considers itself an important institution of the nation, full of pride and demanding of respect, therefore it very often feels that its behaviour was somehow justified by the situation, see Crahan (1982) p. 50; Crawford (1990) p. 26.

[208] Farer (1987) pp. 403-405; B. Loveman. 'Protected Democracies and Military Guardianship: Political Transitions in Latin America, 1978-1993.' 36 *Journal of Interamerican Studies and World Affairs* (1994) pp. 109-110

[209] Quoted in Crahan (1982) p. 108.

[210] See the position of Hurrell who feels that democratisation in Argentina and Brazil led to greater co-operation in the region based on a harmony that could not come about with military governments, A. Hurrell 'Regionalism in the Americas.' in L. Fawcett, and A. Hurrell, eds. *Regionalism in World Politics: Regional Organization and International Order*. (Oxford: Oxford University Press, 1995) pp. 256-258.

[211] See D. Myers and R. O'Connor. 'Support for Coups in Democratic Political Culture: A Venezuelan Exploration.' 30 *Comparative Politics* (1998) p. 193. While the evidence in support of this exists history has shown that military regimes rarely act with such noble causes.

[212] See D. Pion-Berlin and C. Arceneaux. 'Tipping the Civil-Military Balance: Institutions and Human Rights Policy in Democratic Argentina and Chile.' 31 *Comparative Political Studies* (1998) p. 633-635.

[213] Pion-Berlin and Arceneaux (1998) p. 657.

[214] Nino (1993) pp. 640-644.

and suspended the constitution, but with apparent wide support for his actions.[215] In Argentina, President Menem 'has governed the country "as he sees fit," without significant political impediments, checks and balances or other regulatory supervision'.[216] The conditions of many societies in the region have provided the excuses for individual leaders to exercise a good deal of control and authority over the policy-making machinery.[217] At the same time, for the long-term success of democracy these individuals will have to cede their personal control over the power of the government to avoid the detrimental effects of authoritarian rule.[218] The continuance of strong leader without appropriate domestic checks on power will prove dangerous to the process of consolidating democracy and human rights in the region if an individual is allowed to openly abuse the democratic system.[219] The position of strong central authorities has caused both the legislature and judiciary to be weak checks on power. Legislatures are often powerless in checking the exercise of the power of the president through the terms of the constitution or due to the practical realities of the political situation.[220] The judiciary is often not independent being linked to the executive either constitutionally or personally, either way, limiting its ability to independently promote and protect democracy and human rights.[221] The consolidation of democracy along with the protection of human rights and social and economic development in the region requires each branch of government to be independent, reliable and efficient an area where much of the region is weak.[222]

A further complication facing the future of democracy is that a number of societies face the dilemma of what to do about the human rights violations of past regimes. The use of amnesty

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[215] See C. McClintoch 'Peru's Fujimori: A Caudillo Derails Democracy.' 92 *World Affairs* (1993) pp. 112-119; M. Cameron. 'Latin American *Autogolpes*: Dangerous Undertows in the Third Wave of Democratisation.' 19 *Third World Quarterly* (1998) p. 219.

[216] See Larkins (1998) 'Today, political power in Argentina is not so much exercised in a representative fashion as it is wholly delegated to the president, to be wielded as he deems most appropriate', p. 423.

[217] A. Valenzuela. 'Latin America: Presidentialism in Crisis.' 4 *Journal of Democracy* (1993) p. 4. Pastor links this to poor economies as leaders negotiate with other interests. R. Pastor. 'Introduction: The Swing of the Pendulum.' in Pastor, ed. (1989) p. 9. In dealing with the various interests of society see L. Whitehead. 'The Consolidation of Fragile Democracies: A Discussion with Illustrations.' in Pastor, ed. (1989) pp. 76-95.

[218] Valenzuela (1993) p. 5. The impact of authoritarianism may also be constituted through the democratic process as is occuring in Venezuela. President Chavez is holding elections in order to institute changes in the constitutions that many feel will give him complete power over the government, 'Venezuelans OK Plans to Rewrite Constitution.' CNN Report (25 April 1999) [http://www.cnn.com/WORLD/americas/9904/25/venezuala.refer/ index.html].

[219] M. Cameron. 'Self-Coups: Peru, Guatemala and Russia.' 9 *Journal of Democracy* (1998) pp. 125-139.

[220] See R. Perina. 'Strengthening the Legislative Branch.' 2 (3) *Democracy* (1998) p. 4. In Mexico the legislature has been powerless due to the control exercised by the individuals who run the dominant party the PRI, see D. Wallis. 'Executive-Legislative Relations & the Consolidation of Democracy in Mexico.' Paper presented March 1999 Political Studies Association Annual Conference, Nottingham.

[221] Valenzuela (1993) p. 7.

[222] In Peru, President Fujimori has dismissed members of the Constitutional Court who oppose any of his proposed changes to the constitution, subsequently negating any impact the Court might have, see Human Rights Watch (1998) p. 133. In *Loayza Tamayo Case* (Peru) (17 September 1997) Inter-Am.Ct.H.R. (Ser. C) No. 33 (1997) the joint concurring opinions of Cancado Trindade and Jackman express dissatisfaction with military tribunals in Peru as they

laws, which waive past violations of human rights and other criminal activity no longer possessing victims with a right of redress,[223] has been common in the region in order to secure and facilitate the transfer of power to civilian rule. Amnesties are often justified as a compromise to stabilise society and necessary to allow society to move on. The ability of an amnesty to act as a fair compromise allowing all of society to move on is not guaranteed as the military has often manipulated the use of amnesties to preserve their own place before relinquishing power.[224] It is a difficult area for new democratic governments trying to find a balance between addressing the past and working for the future for it sets the stage for all future action in the areas of democracy and human rights.[225] It is suggested that it is good for a new government to fully investigate past abuses of human rights and to punish those responsible in order to show that it is not associated with the past regime, improving its credibility in domestic society and beyond.[226]

The Commission has dealt with the issue of amnesties with its position on the issue inconsistent to a degree.[227] It has been held that the use of amnesty and continued adherence by a democratic government to their provisions can be considered a violation of Articles 1 (non-discrimination in respect of rights), 2 (domestic effect), 8 (right to a fair trial) and 25 (right to judicial protection) of the ACHR.[228] The Commission is clear that self-amnesties, such as those passed by Chile, are not valid since they were not 'laws' created through the legitimate democratic process.[229] On the other hand the Commission stated that it recognised that

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lack impartiality required under Article 8 of the ACHR. A point the full court did not wholly address. See generally I. Stotzky, ed. *Transition to Democracy in Latin America: The Role of the Judiciary*. (Boulder: Westview, 1993).

[223] On the use of amnesty for past human rights violations see D. Orentichler. 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime.' 100 *Yale Law Journal* (1991) p. 2537; N. Roht-Arriaza, ed. *Impunity and Human Rights in International Law and Practice*. (Oxford: Oxford University Press, 1995).

[224] J. Pasqualucci. 'The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the INter-American Human Rights System.' 12 *Boston University International Law Journal* (1994) pp. 344-345. For an empirical analysis of the impact of amnesty laws see A. de Brito. *Human Rights and Democratization in Latin America: Uruguay and Chile*. (Oxford: Oxford University Press, 1997).

[225] D. Pion-Berlin. 'To Prosecute of Pardon? Human Rights Decisions in the Latin American Southern Cone.' 16 *Human Rights Quarterly* (1994) p. 106. For information on Truth Commissions in the region see P. Hayner. 'Fifteen Truth Commissions-1974-1994: A Comparative Study.' 16 *Human Rights Quarterly* (1994) pp. 597-655. Also R. Sieder. *Impunity in Latin America*. (London: Institute of Latin American Studies, 1995) pp. 1-3 and where it is stated that the issue of impunity for the past is not peripheral to the democratic transition but fundamental to the entire democratic process, p. 53.

[226] Kokott (1993) p. 159. Sieder (1995) feels that a characteristic of good government regardless of ideology is accountability, which means that those responsible for violations need to be held accountable since governments inheret the actions of past governments, p. 7.

[227] See Lutz in Harris and Livingstone (1998) pp. 348-361. For a review of the Commission's position regarding amnesties see D. Cassel. 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities.' 59 *Law and Contemporary Problems* (1996) p. 197.

[228] For a recent treatment of amnesty laws see Report 25/98 (Chile) *IACHR Annual Report* (1997) pp. 512-540. Concerning how amnesties may be a violation of obligations under the ACHR see the Court's discussion in the *Velasquez Rodriguez Case* from paragraph 160. Also Lauchlan Wash et al. (1988) p. 556; Kokott (1993) p. 156.

[229] *IACHR Annual Report* (1985/6) p. 193. The Commission's view is based on the Court's reasoning in Advisory Opinion OC-6/86.

transitions to democracy often meant dealing with past violations of human rights and that this was a delicate area where national bodies are the most appropriate forum to deal with it. The Commission concluded that 'only the appropriate democratic institutions - usually the legislature - with the participation of all the representative sectors, are the only ones called upon to determine whether or not to decree an amnesty and of the scope thereof'. In the case of Uruguay, a referendum was held by the democratic government to determine whether or not the amnesty laws could stand. The entire process was fraught with irregularities and severe questions concerning the fairness of the vote but the end result showed the population voting in favour of the amnesty law.[230] Yet before the Commission it was held that the action taken in Uruguay regarding amnesties violated the ACHR.[231]

The Court has declared the Commission competent to express an opinion on the legality of domestic laws but it is unable to express an opinion on the law-making process.[232] This limitation does not appear to fit in with the Court and Commission's belief of the necessity and underlying framework of a democratic society. If the only valid amnesties are those that are properly created through a legitimate democratic process then monitoring bodies should be entitled to address the process as well as the resultant law. As a solution to the amnesty issue it has been suggested that requests for advisory opinions from the Court submitted by either governments or the Commission would help to clarify the position of amnesties in the Inter-American human rights framework establishing a legal precedent.[233] In turn this would strengthen the position of civilian governments trying to cope with the past and enhance their credibility.[234] As it stands the role of the Commission on amnesties is heavily tempered by political considerations for in situations when it has found amnesties to violate the ACHR it has stopped short of direct condemnation or requiring action or sending it to the Court.[235]

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[230] Concerning events in Uruguay see de Brito (1997) pp. 125-151

[231] Lutz comments that in the conducting of the referendum the military exerted pressure on the populace in Harris and Livingstone (1998) p. 358 which would contradict the Commission's own standards for the conducting of genuine elections. In the cases of Argentina and Uruguay the ACHR was applied retroactively raising some questions but it was felt that similar obligations applied through the Charter and American Declaration and that there exists a customary requirement to punish crimes against humanity, see Kokott (1993) p. 159.

[232] See *Certain Attributes of the Inter-American Commission on Human Rights*, Advisory Opinion OC-13/93 (16 July 1993) Inter-Am.Ct.H.R. (Ser. A) No. 13 (1993) paragraph 29.

[233] Pasqualucci (1994) p. 366.

[234] Suggestions of Prof. Goldman in Lauchlan et al. (1988) pp. 537-538. It is commonly held that the use of amnesty is a show of weakness of the government and an inability to initiate a proper and strong transition to democracy since from the outset, democracy and human rights principles are not applied. This in turn takes away credibility from the government and does not bode well for the future. See Crawford (1990) pp. 91-92.

[235] Lutz in Harris and Livingstone (1998) pp. 359-361. Pasqualucci (1994) p. 367.

D. NON-INTERVENTION AND WEAKNESS OF THE OAS

The ability of the OAS and any of its institutions to act on matters concerning democracy and human rights is severely curtailed by 'the most sacrosanct principle of the Americas - the doctrine of non-intervention'.[236] When Mexico ratified the Protocol of Cartagena de Indias, which revised the OAS Charter giving the OAS a greater degree of operational competence, it entered a statement to the effect that the OAS has no independent power and that there is no legal possibility for a dynamic reinterpretation of the Charter allowing the organisation to act of its own initiative.[237] Mexico's position exemplifies the general attitude of governments in the region who are willing to express support for the OAS and its principles but at the same time ensure that no practical measures may be taken without their expressed consent. The idea of non-intervention first emerged among the American states in their attempts to exert independence from colonial rule and was soon directed towards resisting US domination of the region and has since been utilised to avoid obligations of democracy and human rights.

The inter-American system has shown that there exists at least a belief in democracy as the standard for the region, a belief that lacks substantive action and demonstrates the need for procedural and substantive reform on the behalf of the OAS.[238] The euphoria of the success of democracy that began this decade has been lessened by 'a recent drought of creative initiatives … and a sense of drift' in the organs of the OAS.[239] Domestically there no longer exists state sponsored programmes of human rights violations and repression but widespread violations of rights continue in a more obscure way with few remedies available in the new democratic structures to provide redress.[240] The Commission and the Court obviously have an important role in this regard but face the new challenge of dealing with violations concerning democratic governments who vehemently deny responsibility for wrong doing and offer little co-operation under the belief that their democratic mandate means they can do no wrong.[241]

The OAS needs to engage in institutional consolidation so the obligations of member states are clearly understood. The changes to the Charter have been necessary to respond to the

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[236] Thomas and Thomas in Rodley and Ronning (1974) p. 138. Governments continue to take a hostile stance towards human rights monitors, see Human Rights Watch (1998) pp. 88-89.
[237] OAS Treaty Series No. 66, General Information of the Treaty A-50/4. Panama has stated that Article 1 of the Charter empowers no organ of the OAS to take any action 'that implies any derogation form the sovereignty' of a Member State.
[238] D. Acevedo. 'The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy.' in L. Damrosch, ed. *Enforcing Restraint: Collective Intervention in Internal Conflicts.* (New York: Council on Foreign Relations, 1993) pp. 141-144
[239] Dosman, 1997.
[240] Thérien et al (1996) p. 229; M. Poppovic and P. Pinheiro. 'How to Consolidate Democracy? A Human Rights Approach.' 47 *International Social Science Journal* (1995) p. 75.
[241] Farer in Harris and Livingstone (1998) p. 64.

changing needs of the region and help further the progress of democracy and human rights. They have also been criticised for creating an unequal legal framework with multiple layers of obligation weakening the effectiveness of the organisation.[242] The differing status of the various amendments leads to confusion as to where the basis for action by the OAS originates.[243] This has been demonstrated by the lack of universal support in the region for actions demonstrating there is no single vision within the OAS on the ideas behind the consolidation of democracy for the region or how ideas should be put into action.[244] States have been fully supportive of action taken in support of democracy on some occasion and less enthusiastic at others.[245] The end result is the sometimes protection and promotion of democracy and human rights but not always with the whole hearted practical support of the Organisation and its members.[246] Despite the advances in democracy and human rights in the region values such as democracy and human rights are often relegated to a lower priority for state action.[247]

Currently there is discussion about reform of the Inter-American human rights system.[248] The Commission has produced a report on the 'Inter-American Program for the Promotion of Human Rights' outlining the ideas behind reform and action to be taken. The programme has three objectives which are to reinforce the defensive mechanisms of the human rights system through disseminating information about its operation, strengthen national institutions and educate the entire population of the region about human rights, especially vulnerable groups. Many of the efforts are welcomed but there appears to be funding problems preventing all aspects of the programme from being implemented which combined with the less than co-operative attitude of governments will inhibit the effectiveness of the reforms.[249]

This underlies the problem facing all of the efforts of the OAS - it may be able to obtain rhetorical agreement but getting substantive support is another issue altogether and one which will influence the future of democracy and human rights in the region. There is a real possibility then while the rhetoric of reform will be voiced loudly substantive action will not necessarily be

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[242] Arrighi (1997) pp. 96-98; H. Jiménez. 'Introductory Note.' 33 *International Legal Materials* (1994) p. 981.
[243] See Arrighi (1997) pp. 101-102. This is crucial concerning the obligations of democracy established by the Protocol of Washington which 11 member states have yet to ratify. The Protocol of Cartegana de Indias lacks 3 ratifications and the Protocol of Managua lacks 4 ratifications.
[244] See D. Acevedo and C. Grossman. 'The Organization of American States and the Protection of Democracy.' in Farer (1996) pp. 132-149.
[245] Thérien et al. (1996) pp. 228-229. The application of Resolution 1080 is an example of an effective mechanism that is used inefficiently, see A. Valenzuela. 'Paraguay: The Coup that Didn't Happen.' 8 *Journal of Democracy* (1997) p. 54.
[246] Millett (1994) p. 17
[247] Thérien et al. (1996) p. 228; Vaky and Munoz (1993) pp. 39-40. Human Rights Watch (1998) observes that even though governments may be willing to accept criticism concerning abuses they continue to fail to make programmes and efforts for the eradication of violations a priority, p. 85.
[248] AG/RES. 1488(XXVII-O/97) and AG/RES. 1546 (XXVIII-O/98). Also *IACHR Annual Report 1997*, pp. 891-926.
[249] Gomez in Harris and Livingstone (1998) pp. 182-189.

forthcoming. This has been demonstrated this decade by the fact that just about every state in the region has declared support for democracy. But the lack of democratic reality facing the considerable majority of individuals in the region[250] exemplifies the need for continual action and that words alone do not create democracy or adherence to human rights. Furthermore, there is the need to overcome the reluctance of states to empower a regional organisation to actively protection and promote democracy. Governments may express their dedication to democracy but they alone should not be left with determining the existence of democracy.[251]

VI. Conclusion

Buergenthal, in providing a comparative study of the Inter-American and European human rights systems, offers an anecdote where one of his colleagues, commenting on the European Court's dealing with a case of corporal punishment in schools, says that if these were the only problems to worry about in the Inter-American system the human rights problem would be solved.[252] Buergenthal's point in relating this story is that one must take into consideration the environment in which a human rights system exists before passing judgment on its effectiveness.[253] Harris observes that the Inter-American human rights system has not yet had the opportunity to develop a specifically American view to human rights due to the nature of the violations before the Court and Commission.[254] To a large degree this is true as the severity of violations dealt with has not given the opportunity for elaboration on the more intricate subtleties of human rights protection. What the Court has made clear, which is significant, is that democracy is the standard by which all states and governments must base themselves, as a necessary condition for effective human rights protection. The Commission has stressed the need for socio-economic conditions to be met alongside civil and political rights in a holistic approach.[255] While these ideas may been assumed to exist in Europe they are in their infancy for much of the Americas, their legal elaboration at this early stage is a significant development for an international law of democracy in the region.

The existence of the OAS as a regional organisation with universal membership has only just been achieved with the recent decisions of Canada and the Caribbean states to join.

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[250] See Diamond in Farer (1996) p. 53.
[251] Mexico has entered a reservation to the Protocol of Washington expressing its 'deep commitment' to democracy but finds it 'unacceptable to give to regional organizations supranational power and instruments' for what it considers interventions into the internal affairs of states, OEA Ser.A/2 Add.3, General Information of the Treaty A-56. If a deep commitment truly exists then there should be no bar to openness of the ability of others to scrutinise actual practices.
[252] Buergenthal (1987) p. 304.
[253] Buegentthal (1987) p. 305.
[254] Harris in Harris and Livingstone (1998) p. 12.
[255] Vaky and Munoz (1993) p. 70; Thérien et al. (1996) p. 219.

Currently all states in the region, with the exception of Cuba, have democratically elected governments. To a certain degree this may be attributed to the efforts and success of the OAS in promoting and protecting democracy and human rights in the region. The OAS has progressed from an 'inert' body to an effective institutional force in the region.[256] Institutional co-operation among states is on the rise in the region as demonstrated by the recent Summits of the Americas that are becoming a common occurrence. The summits have fortified the position of the OAS on democracy with numerous declarations of intent which fully support the efforts of the OAS. In the 1994 Miami Summit Plan of Action democracy is placed as the 'central priority of the Americas' with the OAS seen as the principal body for promoting and consolidating democracy the region.[257] The value of the Summit Plans of Action are yet to be seen, as much of the rhetoric has yet to be formulated into actual implementation.[258]

The Inter-American system for the protection and promotion of democracy and human rights still has a great deal of growth and development to undergo before it becomes a truly effective system for the region. The system's ability to grow and develop is very encouraging, as it has proven in the past that it is able to overcome opposition and hostility towards its existence and work to have an impact upon the lives of individuals. Further encouragement comes from the great deal of textual rhetoric in the region in support of democracy and human rights. These texts are slowing becoming closer to the individuals of the region as the visibility of the OAS and its organs continues to grow. As individuals appeal to these organs and are able to utilise the texts then effectiveness grows. Democracy and human rights must become an overarching priority for the region if full effectiveness is to be achieved. A great deal of regional activity is still conducted from the priorities of states with individual concerns addressed only when necessary or convenient. The OAS has a solid basis from which to grow and plenty of fertile texts upon which to support its position and work. The largest task facing the OAS is its ability to become a truly independent force in furthering an international law of democracy for the Americas, turning the words of the past into a realistic future for the individuals of the region.

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[256] UPD (1996).
[257] OAS Summit Documents. 1998.
[258] AG/RES. 1551 (XXVIII-O/98) The preamble of the resolution runs nine paragraphs reiterating or recalling past statements in support of democracy the six substantive paragraphs do not call for any substantive action.

CHAPTER 6

THE PROTECTION AND PROMOTION OF DEMOCRACY AND HUMAN RIGHTS IN AFRICA

I. INTRODUCTION

Africa[1]

> is today the most marginal, the most oppressed, the most exploited, the most poverty-stricken, the most debt-ridden, the most unstable, and the most denigrated continent in the world. What Africa needs, [is] ... democratisation of the political, social, and economic landscape of Africa ... there must be a new spirit of and enthusiasm for democracy, empowerment, accountability, social justice, equality, respect for human rights, popular participation and the guarantee of freedoms and liberties.[2]

These words by an African scholar show the difficulties that Africa faces in creating an effective system to promote and protect democracy and human rights in the region. Extremely low levels of economic development, the continual existence of authoritarian governments, the prevalence of ethnic unrest, the disintegration of the state and state structures on a growing scale, natural disasters, and the general loss of hope both within and outwith the region have combined to create a general sense of unrest and instability throughout Africa. This prevailing climate of unrest and instability has considerably hindered efforts to develop democracy and human rights at both the local and regional levels.[3]

The creation and development of effective institutional mechanisms for the protection and promotion of democracy and human rights in Africa faces numerous obstacles. The great amount of diversity throughout the Continent must be recognised as a significant factor as there are no common political or social traditions that may act as a basis for regional co-

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[1] This chapter takes into consideration Africa as a whole but it must be noted that the states of northern Africa are mainly Arabic/Islamic nations and when it comes to issues of democracy and human rights these states are heavily influenced by events in the Arab world, see E. Quashigah. 'Protection of Human Rights in the Changing International Scene: Prospects for Sub-Saharan Africa.' 6 *African Journal of International and Comparative Law* (hereinafter *RADIC*) (1994) p. 93.

[2] Statement by J. Ihonvbere. 'Pan-Africanism: Agenda for African Unity in the 1990s.' Keynote address at the All-African Student's Conference, University of Guelph, Ontario, Canada, 27 May 1994. In a recent report of the UNDP, of the 48 states classified as 'Least Developed Countries' 31 are from Africa. In ratings of GNP Per Capita, the middle income layer (GNP above $766) only 13 states qualify and all are near the low-side. In the Human Development Index of the 44 states classified as 'Low Human Development' 33 are African, UNDP. *Human Development Report, 1998.* (Oxford: Oxford University Press, 1998) pp. 224-226.

[3] See 'The Challenges of Domesticating Rights in Africa.' in R. Cohen et al., eds. *Human Rights and Governance in Africa.* (Gainesville: University Press of Florida, 1993) p. 256, and R. Sklar and M. Strege. 'Finding Peace Through

operation.[4] What does exist is a common experience of oppression, poverty and under-development whereby the needs and aspirations of the individuals of the Continent are not being met.[5] The furthering of democracy and human rights in Africa will not necessarily fulfil these needs and aspirations but it will be able to provide a start and a degree of hope for the future.[6]

The utilisation of international law for the protection and promotion of democracy and human rights in Africa brings with it a number of difficulties. International law was first used in Africa as a tool of oppression for colonialism, it then became a tool of liberation for the self-determination of Africans.[7] It is now used in both capacities. Authoritarian leaders of Africa rely on claims of sovereignty and non-intervention to repel any criticisms of how they treat their societies and oppressed individuals invoke the rhetorical force of international law as a tool of liberation against the behaviour of leaders. The state-centric nature of international law has allowed authoritarian leaders to prevail with political opponents and ordinary citizens alike being denied participation in governance and the protection of basic rights.[8] In several states this has become a vicious spiral as authoritarian regimes fail to achieve progress in the economic and social spheres leading to ever increasing authoritarianism.[9] The last decade has presented some possibility for hope with the end of apartheid in South Africa and the end of military rule in Nigeria. Naturally these developments are welcomed as they provide an example for the rest of Africa to follow, but in themselves democracy and human rights are far from ensured and events in two states cannot speak for an entire continent, especially when both societies still face a long and difficult task of consolidation.

Democracy in Sahelian Africa.' 91 *Current History* (1992) p. 224 who feel that greater concern for democracy and human rights has helped to stabilise the Sahel.

[4] See J. Wiseman. 'The Rise and Fall and Rise (and Fall?) of Democracy in Sub-Saharan Africa.' in D. Potter et al, eds. *Democratization*. (Cambridge: Polity, 1997) pp. 272-273. On how this diversity affects attempts at regional co-operation see E. Bello. 'The Dark Continent: A Difficult Road to Unity.' in E. Bello and B. Ajibola, eds. *Essays in Honour of Judge Tasim Olawale Elias*, vol. 2 (Dordrecht: Martinus Nijoff, 1992) p. 789. This diversity also applies to the political culture of Africa, see J. Yoyder. 'Good Government, Democratisation and Traditional African Political Philosophy: The Example of the Kanyok of the Congo.' 36 *Journal of Modern African Studies* (1998) p. 484.

[5] I. Nguema. 'Human Rights Perspectives in Africa: The Roots of a Constant Challenge.' 11 *Human Rights Law Journal* (1990) p. 261.

[6] A. Aidoo. 'Africa: Democracy without Human Rights?' 15 *Human Rights Quarterly* (1993) p. 704.

[7] P. Kunig. 'Regional Protection of Human Rights: A Comparative Introduction.' in P. Kunig, ed. *Regional Protection of Human Rights by International Law: The Emerging African System*. (Baden-Baden: Nomos, 1985) p. 36. For a review of the application of international law during the colonial period of Africa see M. wa Mutua. 'Why Redraw the Map of Africa: A Moral and Legal Inquiry.' 16 *Michigan Journal of International Law* (1995a) pp. 1120-1142.

[8] Kannyo in Y. El-Ayouty and I. Zartman, eds. *The OAU After Twenty Years*. (New York: Praeger, 1984) pp. 157-158.

[9] Kannyo in El-Ayouty and Zartman (1984) p. 169.

II. The OAU: Dictators and Democracy

A. Early Reluctance

In 1963 leaders of the independent African states signed the Charter of the Organisation of African Unity (OAU)[10] creating a regional organisation open to all members of the Continent and its surrounding islands. The OAU[11] developed out of the pan-Africanism movement dating back to the mid-nineteenth century and a desire of the new states to protect their independence through regional unity.[12] The leaders at the time were 'determined to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our States, and to fight against neo-colonialism in all its forms.'[13]

The purposes of the OAU as laid out in Article 2 (1) of the Charter include - the promotion of unity, efforts to achieve a better life for the peoples of Africa, the defence of state sovereignty, territorial integrity and independence, the eradication of colonialism and international co-operation with regard for the UN Charter and the UDHR. To achieve these purposes members agree in Article 2 (2) to co-ordinate and harmonise policies in the fields of politics, diplomacy, economics, transport, communications, education, culture, health, sanitation, nutrition, science, technology, defence and security. In pursuing these purposes members further agree in Article 3 to adhere to the principles of sovereign equality of all members, the non-interference in internal affairs, respect for state sovereignty and territorial integrity, the right to an independent existence for states, the peaceful settlement of disputes, condemnation of political assassinations and subversive activities, the total emancipation of African territories which are still dependent, and a commitment to the non-aligned movement in international relations. The OAU Charter exemplifies the context of the period in which it was adopted mirroring the primary concerns for Africa in the 1960s. The concerns included issues of internal security, the maintenance of economic assistance from the West, the desire for African unity, the defence of state sovereignty and the desire of African leaders to solidify their own personal positions of power.[14] The OAU was established on a purely interstate basis

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[10] 479 UNTS 39. Entered into force 13 September 1963.

[11] On the OAU see S.O. Agbi. *The OAU and African Diplomacy, 1963-1979*. (Ibadan: Impact, 1986); Z. Servenka. *The Unfinished Quest for Unity: Africa and the OAU*. (London: Friedmann, 1977); El-Ayouty and Zartman, eds, 1984; Y. El-Ayouty, ed. *The OAU after Thirty Years*. (Westport: Praeger, 1994); M. Kamto, J. Pondi and L. Zang. *L'O.U.A.: Rétropective et Perspectives Africaines*. (Paris: Economica, 1990); K. Kranfona. *Organisation of African Unity: Twenty-Five Years On. Essays in Honour of Kwame Nkrumah*. (London: Afroworld, 1988); G. Naldi. *The Organization of African Unity: An Analysis of its Role*. (London: Mansell, 1989).

[12] On the Pan-African movement see I. Geiss. *The Pan-African Movement*. trans. A. Keep. (London: Methuen, 1974); V. Thompson. *Africa and Unity: The Evolution of Pan-Africanism*. (Harlow: Longmans, 1969).

[13] Quoted in I. Wallerstein. *Africa: The Politics of Unity*. (London: Pall Mall Press, 1968) pp. 64-65.

[14] See C. Welch. 'The OAU and Human Rights: Regional Promotion of Human Rights.' in El-Ayouty, ed. (1994) pp. 53-54; O. Ojo and A. Sesay. 'The OAU and Human Rights: Prospects for the 1990s and Beyond.' 8 *Human Rights*

with no real intention to develop autonomous institutional structures or further integration as the importance of state sovereignty outweighs institutional development. The emptiness of the commitments and contradictory nature of the purposes and principles of the Charter are a reflection of the domestic situation of its members and has influenced the institutional development of the OAU.[15]

The attitudes of the founding members are reflected in the absence of democracy and human rights as an original part of the organisation. It also explains the gap of 20 years before these ideas were included in the organisation's activities.[16] The Preamble of the OAU Charter contains vague references to ideas such as 'the inalienable right of all people to control their own destiny' and 'that freedom, equality, justice and dignity are essential objectives to the legitimate aspirations of the African peoples.' There is also mention to the UDHR in Article 2 as a guideline for international co-operation and co-operation between states, but not in relation to obligations concerning the treatment of individuals.[17] The work of the OAU in the context of decolonisation and the ending of apartheid has been put forth as examples of the organisation providing support for the rights of peoples.[18] The activities of the OAU toward apartheid have been termed 'hypocritical' as the organisation seemed motivated more by political considerations than human suffering as some African states maintained relations with South Africa and/or possessed deplorable human rights records themselves.[19] The support shown for self-determination in colonial situations does not place the OAU firmly in support of democracy and human rights. In the process and context of decolonisation the OAU and the member states gave only limited support for democracy and human rights to the extent necessary to harness support for independence and condemn the colonial powers.[20] Consistent with the prevailing practice of international law, self-determination was seen as an act of removing foreign control but was not extended to the subsequent organisation of the new states as no consideration was given to ability or right of the individuals in society to determine

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Quarterly (1986) pp. 91-92. Mulei considers the strong adherence to non-intervention as a 'pathological obsession that has greatly contributed to the disturbing ineffectiveness of the OAU'. C. Mulei. 'The Role of the OAU in the Democratisation Process - A Case of Lack of Clear-Cut Policies and Political Will Towards an Open Society.' 6 *Proceedings of the American Society of International Law* (1994) p. 62.

[15] Agbi (1986) p. 3.

[16] See Kannyo in El-Ayouty and Zartman (1984) pp. 159-60. Hyden in Cohen et al, eds. (1993) sees the OAU's non acceptance of human rights as laying 'the foundation for authoritarian rule in post-independence Africa', p. 262.

[17] But see B. Andemicael. *The OAU and the UN: Relations Between the Organization of African Unity and the United Nations*. (New York: Africana, 1976) who feels that human rights obligations do exist through the mentions of the UN Charter, pp. 229-230

[18] Umozurike feels '[d]espite the paucity of references to human rights, the practice of the OAU was distinctly anti-colonialist and anti-apartheid' U.O. Umozurike. *The African Charter on Human and Peoples Rights*. (The Hague: Martinus Nijhoff, 1997) pp. 25-26. Also Andemicael (1976) p. 230.

[19] B. Ambrose. *Democratization and the Protection of Human Rights in Africa*. (Westport: Praeger, 1995) pp. 10-11.

their lives in a continual process. Once the majority of the continent had obtained independence concerns for democracy and human rights were put on hold in relation to OAU affairs with the overall attitude of the organisation towards the subject bordering on stoicism.[21]

The OAU has shown a lack of concern for issues of democracy and human rights by interpreting any relevant provisions narrowly and with full regard to state interests. The principle of non-intervention has remained strong and the organisation's position has attracted criticisms from its own members. When Tanzania invaded Uganda bringing the downfall of Idi Amin and ending his wave of terror it was Tanzania who was condemned by the OAU for violating the principle of non-interference while Amin's actions were ignored. Julius Nyerere spoke out against this criticism by saying that the OAU was discredited when under the pretext of non-interference it allowed leaders to commit atrocities and take no action.[22] Nyerere stood alone on the issue, as the OAU has long remained reluctant to act in direct support of human rights or democracy.[23]

Calls for the regional protection of democracy and human rights in Africa began with the Law of Lagos Conference (1969)[24] that stressed the need to link the newly found independence of the African states to the principles and practice of democracy and human rights. The proposals put forth at the conference included the creation of a system of human rights protection. The idea was favoured by some OAU members, but the Assembly as a whole decided that the most pressing issue for the region was ending colonial rule in areas where it still existed in Africa.[25] The OAU later declared support for the Lusaka Manifesto (1969) a document declaring an acceptance of 'the belief that all men are equal and have equal rights to human dignity and respect' and that there is a 'right and duty to participate as equal members of the society, in their government.'[26] These statements remained rhetoric as the OAU took no action upon them. From the start the OAU followed the principle of non-intervention and did not question the structure and ideology of member governments and their

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[20] Welch in El-Ayouty (1994) p. 55; wa Mutua (1995a) p. 1141.
[21] V. Mani. 'Regional Approaches to the Implementation of Human Rights.' 21 *Indian Journal of International Law* (1981) pp. 107-108.
[22] See W. Tordoff. *Government and Politics in Africa*. (Basingstoke: Macmillan, 1984) p. 247.
[23] For examples see Kannyo in El-Ayouty and Zartman (1984) pp. 162-163.
[24] The Lagos Conference was not an inter-state affair, a point that would explain the strong rhetoric but lack of action concerning its conclusions. For a review of the conference see *Journal of the International Commission of Jurists* (1961) pp. 2-28.
[25] Commentators feel the lack of action taken on the conference recommendations was detrimental to the human rights protection and further regional integration, see R. D'Sa. 'The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action.' 10 *Australian Yearbook of International Law* (1987) p. 104; Kannyo in C. Welch and R. Meltzer. *Human Rights and Development in Africa*. (Albany: SUNY Press, 1984) p. 128.
[26] Umozurike (1997) p. 25.

societies with all forms accepted as equally valid.[27] The only duty placed upon members is to 'observe scrupulously the principles enumerated in Article III', the first three of which deal with the preservation of sovereignty and non-interference in domestic affairs severely limiting the OAU's possibilities for protecting and promoting democracy and human rights.

B. The Advent of Human Rights

The process of overcoming the sanctity of non-interference in domestic affairs within the OAU has begun with the development and acceptance of the African Charter on Human and Peoples' Rights (ACHPR).[28] Much of the impetus leading up to the drafting of the ACHPR did not come from the member governments of the OAU but from interested parties within and outwith Africa.[29] The process leading to the ACHPR began with the aforementioned Law of Lagos Conference that was followed by a number of other meetings on the subject of human rights in Africa involving the UN and a number of international and regional NGOs.[30] In 1979 the Secretary-General of the OAU was instructed to establish a committee to draw up a preliminary 'draft for an African Charter on Human and Peoples' Rights' which was approved by the Assembly in 1981 and entered into force in 1986.[31]

As with the OAU Charter the nature of the final version of the ACHPR reflects the challenges facing the region at the time of its drafting. The mood of the drafting was dominated by the situation of apartheid in Southern Africa, the effects of the failure of the New International Economic Order and the overall drift to authoritarianism on the continent.[32] At the time humanists in Africa believed in human rights as the common heritage of humanity and an integral part of the African political tradition and saw the ACHPR as means towards the full liberation and development of Africa free from both internal and external oppression. While the document reflects the humanist view its final provisions were determined by governments who were not willing to concede any limitations upon their power resulting in the final form of the ACHPR not adequately representing the needs and desires of individuals,

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[27] E. Kwam Kouassi. 'The OAU and International Law.' in El-Ayouty and Zartman, 1984, pp. 45-46.
[28] OAU Doc. CAB/LEG/67/3/Rev. 5, reprinted in 21 *International Legal Materials* (1982) p. 58.
[29] See B.G. Ramcharan. 'The Travaux Preparatiores of the African Commission on Human Rights.' 13 *Human Rights Law Journal* (1992) p. 307; Kannyo in El-Ayouty and Zartman, 1984, 163-66
[30] For a summary of the conferences dealing with democracy and human rights in Africa following the Lagos Conference see Naldi (1989) pp. 109-110.
[31] Ramcharan (1992) pp. 307-314. All states of Africa have signed and ratified the Charter with the exception of Ethiopia and Eritrea, 10 *RADIC* (1998) p. 530.
[32] E. Kodjo. 'The African Charter on Human and Peoples Rights.' 11 *Human Rights Law Journal* (1990) pp. 272-274.

taking a greater concern for state interests.[33] Nwanko feels the intention of African leaders was not to improve the human rights situation in Africa but only to create 'an impression of liberalism' to placate western interests.[34]

Under Article 1 of the ACHPR states are obligated to recognise the rights, duties and freedoms contained therein and shall undertake legislation and other measures to give to effect to them. This immediately raises the question of the binding character of the ACHPR for earlier drafts included the terms of 'guarantee and ensure respect' for rights, expressing a stronger obligation and calling for specific action by governments. These were, however, rejected[35] for the less forceful tone which can be seen as not specifically placing obligations upon states to guarantee the rights in the ACHPR, but only to try and give effect to them.[36] Article 25 obligates governments to 'promote and ensure … respect of the rights and freedoms' contained in the Charter and ensure that rights, freedoms, and duties are all understood. Article 26 places a duty upon States Parties 'to guarantee the independence of the Courts' and 'allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed' in the ACHPR. Through Article 2 the individual is able to enjoy all rights and freedoms in the Charter without discrimination of any kind. Examples given as possibly discriminatory distinctions include; race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth, or other status. The inclusion of ethnic discrimination is important for Africa and human rights law in general for it allows for greater opportunities for those who are not of similar ethnic origin as the leaders.[37] The inclusion of non-discrimination based on origin, birth and fortune is important for individuals who are not native Africans but still significant parts of African societies. Article 2 makes a substantial

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[33] Kodjo (1990) p. 274.

[34] C. Nwankwo. 'The OAU and Human Rights.' 4 *Journal of Democracy* (1993) p. 51. Mulei (1994) describes the Charter 'on the one hand as an instrument to forestall agitation for meaningful democracy within the states, and at the other end of the spectrum, as a public relations exercise - fronting the African leaders as upholders of human rights', p. 68; C. Anyangwe. 'Obligations of States Parties to the African Charter on Human and Peoples' Rights.' 10 *RADIC* (1998) p. 659. For the specific example of Tanzania, see I. Shivji. 'The Rule of Law and Ujamma in the Ideological Formation of Tanzania.' 4 *Social and Legal Studies* (1995) p. 151.

[35] R. Gittleman. 'The African Charter on Human and Peoples' Rights: A Legal Analysis.' 22 *Virginia Journal of International Law* (1982) pp. 688-689.

[36] See Anyangwe (1998) who argues that there is a specific obligation of 'recognition' meaning rights are to be observed and measures taken to put the rights into practice, pp. 629-635. The Commission has expressed a similar view in *Commission Nationale des Droits de l'Homme et des Libertiés v Chad* Communication 74/92 (11 October 1995) reprinted in 18 *Human Rights Law Journal* (1997) p. 34, unfortunately this has not been played out in state practice.

[37] Gittleman (1982) p. 683.

effort in attempting to adhere to the principle of equality and provide protection for all individuals, an essential element for an effective democracy.[38]

Throughout the drafting stages it was repeatedly asserted that the ACHPR must be African in nature and based upon 'the values of African civilisation which should inspire and characterise their reflection on the concept of human and peoples' rights.'[39] Elements giving the ACHPR its African character include the existence of peoples' rights and the relation between individual and society, the concept of duties, emphasis on the right to development, the preference for reconciliatory forms of dispute settlement over justiciable methods.[40] The ACHPR contains an equal mix of civil and political rights and socio-economic rights, along with a number of rights applicable to peoples (not defined). The Charter give no direct priority given to any one group of rights placing economic, social and cultural rights at a position equal to civil and political rights as directly enforceable rights and not as rights to be progressively achieved. Anyangwe goes further to say that there are specific obligations upon the state to be proactive with regards to socio-economic rights, something lacking from the civil and political rights provisions.[41] The problem faced in providing for both sets of rights is the lack of resources for when economies are underdeveloped and debt is out of control, it will prove very difficult for any state to ensure the basic rights to their populations regardless of their nature.[42]

Articles 27 to 29 of the ACHPR define the issue of duties which includes duties of the individual in relation to other individuals, duties to the family, society, the state, and the international community. As with the Inter-American system the inclusion of duties not only creates obligations for individuals but also implies obligations upon governments to inspire the importance of these duties to society.[43] The formulation of duties in the ACHPR has been described as detrimental to the individual due to the indeterminate language used, providing

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[38] Umozurike (1997) has commented that due to the diverse nature of African societies and the complex factors involved the non-discrimination clauses in application should be seen as relative rather than strict mathematical formulations of absolute equality, p. 30.

[39] ACHPR, Preamble, paragraph. 4. Naldi (1989) states that the drafters were so determined in assuring that the final product was strictly an African document that references concerning co-operation with non-African entities were dropped, p. 111. Bello claims it is for this same reason that other regional conventions were not copied, see E. Bello. 'The African Charter on Human and Peoples' Rights: A Legal Analysis.' 194 *Recueil des Cours* (1985-V) p. 28.

[40] Umozurike (1997) pp. 87-96, who also includes strong moral statements contained in the Charter but does not elaborate as to which statements. Also W. Benedik. 'Peoples' Rights and Individual Duties.' in Kunig, ed. (1985) p. 63. An inclusion in the Charter which is not necessarily African is the protection of the right to property, see Olaka-Onyango (1995) pp. 49-50.

[41] Anyangwe (1998) pp. 642-646. He goes on to specifically look at the obligations arising under Articles 16, 17, 18, the rights to health, education and a family respectively but concludes that issues of resources prevent proactive measures by states.

[42] See Umozurike (1997) who feels that in the context of Africa, these rights should have been formulated in progressive terms otherwise they become a mockery, pp. 46-48.

[43] U.O. Umozurike. 'The African Charter on Human and Peoples' Rights.' 77 *American Journal of International Law* (1983) p. 907.

governments with legally acceptable reasons to treat individuals in a manner contrary to other human rights principles.[44] This need not always be the case as Article 28 places the duty on all individuals to 'respect and consider' other individuals without discrimination and to 'maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance'. Respect and tolerance are essential to a democratic society, not only among individuals, but between the government and individuals. If governments fail to treat individuals with mutual respect and tolerance it is difficult to require similar behaviour from individuals. Duties have also been seen as having a positive side in assisting the process of state building by helping to create a greater sense of statehood and patriotism.[45] Again this depends on whether duties are utilised as a means to enhance respect and tolerance in society or as a tool for arbitrarily gaining compliance.[46]

The inclusion of duties is to be seen as paired with rights in the overall context of society and not allow for the suppression of the individual who remains the primary focus of the ACHPR.[47] The ACHPR recognises that the individual does not exist in a personal vacuum but must be placed in the group context created by the surrounding society as expressed by the inclusion of peoples' rights.[48] By including group rights alongside individual rights the Charter is attempting to demonstrate that the two do not conflict rather they are complementary and reflective of society.[49] The idea of individual rights co-existing in harmony with group rights creates a situation of mutual respect and consideration and allows for greater participation and dialogue within a society.[50] Criticisms against group rights arise when the individual is subordinated to the needs and desires of the larger group.[51] Individuals cannot survive without the group, in turn the group depends upon the actions of its members. There exists continuous reciprocity between the two in a relation not of subordination but

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[44] Umozurike (1983) p. 911.

[45] T. Huaraka. 'The African Charter on Human and Peoples' Rights: A Significant Contribution to the Development of International Human Rights Law.' in D. Premont, ed. *Essays on the Concept of a "Right to Live." Essays in Honour of Yougindra Khushalani.* (Brussells: AIHR, 1988) p. 202.

[46] Take for example Umozurike's (1997) opinion that the duty to the State (Article 27 (1)) could help prevent brain drain and a loss of the best and brightest individuals, who instead could put their creative capabilities into the State, p. 65. At the same time this does raise the issue of freedom of movement.

[47] Kodjo (1990) pp. 278-279.

[48] R. Kiwanuka. 'The Meaning of "People" in the African Charter on Human and Peoples' Rights.' 88 *American Journal of International Law* (1988) p. 82. The inclusion of peoples' rights is seen as distinctly African but Anyangwe (1998) points out that 'collective rights, are rights which escape serious mention in domestic law', p. 626.

[49] T. van Boven. 'The Relation Between Peoples' Rights and Human Rights in the African Charter.' 7 *Human Rights Law Journal* (1986) p. 189; Huaraka in Premont (1988) p. 195.

[50] Umozurike (1997) pp. 117-19.

[51] This has been borne out in practice as well, see J. Haynes. 'Democracy and human rights in Ghana: The Record of the Rawlings' Regime.' 90 *African Affairs* (1991) pp. 412-413.

mutual co-operation.[52] The formulation of group rights does not necessarily pose a potential threat to the individual but it has been commented that the vague and sweeping statements in relation to peoples' rights is a weakness with the result being mere rhetoric and distraction from the real problems groups and individuals face.[53]

The formulation of group rights in the ACHPR also acts as a basis for the recognition of democracy through the exercise of self-determination. Article 20 (1) provides that all peoples have a right to existence and that

> [t]hey shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

Article 20 was originally formulated as a means of preventing outside powers from having an impact on the development of African states. Today it could be seen as providing for the right of a society to make free choices about its development and the development of the individuals within it, which must include the existence of democracy.[54] However, numerous African states has shown that there does not exist a free choice for peoples, either as a group or individually, in determining their political status, economic or social structures.

Participation in the policies that determine the political, economic, and social structures of a society has not been common in Africa despite the existence of Article 13 which reads:

> 1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
>
> 2. Every citizen shall have the right of equal access to the public service of his country.
>
> 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

The ability to participate may be limited 'in accordance with the provisions of the law' but there is no elaboration on what sort of limitations are possible. Furthermore, there is no mention of elections or that the will of the people is the basis of government, omissions which

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[52] See R. Etienne-Mbaya 'The "New" Human Rights in International Law.' in G. Alfredsson and P. Macalister-Smith, eds. *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and Human Rights of other Vulnerable Groups*. (Kehl: N.P. Engel, 1996) pp. 383-390.

[53] S. Neff. 'Human Rights in Africa: Thoughts on the African Charter on Human and Peoples' Rights in the Light of the Case Law from Botswana, Lesotho, and Swaziland.' 33 *International and Comparative Law Quarterly* (1984) p. 347.

[54] Kodjo (1990) p. 281.

demonstrate the fear of African leaders towards democracy.[55] The restrictive treatment given to participation rights exemplifies the efforts made to ensure that the final document was acceptable to the African states of the time, thereby not posing any true challenge to the authority of government.[56]

Many of the rights in the ACHPR suffer from over expectations that are unlikely to be met.[57] Furthermore the language used in a number of rights provide the potential of arbitrary limitations being placed upon the exercise of the rights concerned. The limitation clauses allow for rights to restricted depending upon the law, or public need and/or interest which is to be defined in various contexts.[58] The extent of limitations in other regional instruments are allowable only as necessary in a democracy society, a provision distinctly missing from the ACHPR. The existence of authoritarian regimes, often with ineffective or non-existent judiciaries allows for the law to used as a tool of oppression and a not as a check on power. With the absence of a base-line for determination of restrictions the supervisory body of the ACHPR cannot establish the extent to which behaviour is in conformity with the document. Even in states with limited democratic accountability the courts are sometimes under pressure or influence from government leaders. Kodjo points to the 'legal' limits often found in domestic statutes concerning collective rights of assembly and association which allow a government to proclaim adherence to the ACHPR in principle but actually deny a right in practice through the application of the 'law'.[59] Chapter 1 discussed the use of vague and indeterminate language in human rights instruments. The ACHPR demonstrates the extent to which the use of this language by states goes well beyond concerns for flexibility to creating an instrument short of effectiveness as the individual encounters numerous obstacles outside of their control.

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[55] B. Wanda. 'The One-Party State and the Protection of Human Rights in African with Particular Reference to Political Rights.' 3 *RADIC* (1991) pp. 768-769. Van Boven (1986) feels that the Charter declares that the state is not an end in itself but that it derives its meaning and legitimacy from the people and in turn represents their rights and interests, p. 190. But there exists no concrete evidence to support this.

[56] C. Welch. 'The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment.' 14 *Human Rights Quarterly* (1992) p. 49. At the 13th Session of the Commission, Assistant S-G of the OAU Osman admitted that in relation to democracy and human rights, the Charter reflects what was possible at the time of drafting but admits the improvements are possible, 13 *African Commission Report* (1993) p. 2.

[57] Examples include Article 15 providing a right to work, Article 16 on the right to 'enjoy the best attainable state of mental and physical health', and Article 17 on the right to education. The economic situation in most socieites will prevent individuals, or in some cases even the bulk of society from enjoying these rights on a regular basis.

[58] In general the scope of limitations in the Charter are much wider than any other human rights instruments, see C. Flinterman and E. Ankumah. 'The African Charter on Human and Peoples' Rights.' in H. Hannum, ed. *Guide to International Human Rights Practice*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 1992) p. 166.

[59] Kodjo (1990) p. 277.

Within the Charter framework governments maintain the last word retaining 'exorbitant power' in the formulation of human rights law on the continent.[60] A further point is that there exists no derogation clause to protect rights in exceptional circumstances. This does not mean no derogation is allowed, only that extra protection is not available to the individual in times of conflict. This omission becomes extra troubling with leaders like Uganda's Museveni saying that conflicts are sometimes 'necessary and healthy'.[61] In his farewell speech to the OAU, Nelson Mandela made it clear that democracy and participation are necessary for Africa in that

> we must all accept that we cannot abuse the concept of national sovereignty to deny the rest of the continent the right and duty to intervene when, behind those sovereign boundaries, people are being slaughtered to protect tyranny.

He reminded African leaders that the 'legitimacy of our governments derive from our commitment to serve the interests of the people on the basis of mandates given by the people themselves.'[62]

As Mandela himself is painfully aware this has not been the view of African leaders of the past fifty years. Recently there are calls for reforms to the ACHPR in order to redress its inherent mistakes. These calls have not received wide support as it is claimed that it is more important to maintain a stable document at this point in time before bringing in change. Further it is feared that leaders could manipulate this change to weaken the ACHPR even further. Instead greater use should be made of the existing provisions of the ACHPR to expand the document and develop greater experience in the culture of human rights on the continent.[63]

C. Further Support for Democracy and Human Rights

Following the adoption of the ACHPR the OAU slowly began to show support for human welfare in the context of democracy and human rights. The African Charter on the Rights and Welfare of the Child was adopted in 1990.[64] In the same year the African Charter for Popular Participation in Development and Transformation was adopted.[65] The latter document is an

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[60] E. Kouassi in El-Ayouty and Zartman (1984) p. 58.
[61] PanAfrican News Agency 'Museveni says some African Conflicts are Necessary.' (3 May 1998). Stories may be found at [http://www.africanews.org/].
[62] Farewell Speech To The OAU (8 June 1998).
[63] On the proposals for change see R. Murray. 'Report on the 1996 Sessions of the African Commission on Human and Peoples' Rights.' 18 *Human Rights Law Journal* (1997) p. 19.
[64] OAU Doc. CAB/LEG/24.9/49 (1990). To date there are 24 signatories and 8 ratifications, 10 *RADIC* (1998) p. 533.
[65] UN Economic Commission for Africa E.C.A. Res 691 (XXV) in UN Doc. A/45/427 (1990).

all-embracing statement on development calling for wide-based participation by all sectors of society, the need for human rights and the end to conflicts. It views participation as the

> empowerment of the people to effectively involve themselves in creating the structures and in designing policies and programmes that serve the interests of all as well as to effectively contribute to the development process and share equitably in its benefits.[66]

The document provides essential elements for the future development of Africa but in its 8 year existence it has received scant attention.[67]

The refugee problem has raised human rights issues bringing about the Addis Ababa Document on Refugees and Forced Population Displacements in Africa (1994).[68] The document recognises the refugee problem as resulting from, *inter alia*, intolerance, massive human rights abuses, the lack of democracy and public participation and the poor management of public affairs.[69] Recommendation One of the document stresses the need to examine the factors contributing to refugees including 'the establishment of a firm foundation for democratic institutions and governance; the respect of human rights; the promotion of economic development and social progress'. Recommendation Two calls upon the leaders of Africa to

> rise up to the challenges of practising politics of inclusion and popular participation in national affairs, creating a firm foundation for responsible and accountable governance, and promoting social progress, economic development and a just and fair society.

Other instruments include the Declaration on a Code of Conduct for Inter-African Relations (1994)[70] which includes an affirmation by governments

> that friendly relations among our peoples as well as peace, justice, stability and democracy, call for the protection of ethnic, cultural, linguistic and religious identity of all our people including national minorities and the creation of conditions conducive to the promotion of this identity[71]

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[66] Ambrose (1995) p. 175.
[67] See Ambrose (1995) pp. 175-176.
[68] Adopted by the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, Addis Ababa, Ethiopia, 8-10 September 1994. There is also the older Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45 (20 June 1974) 41 parties. See Lawyers Committee for Human Rights. *African Exodus: Refugee Crisis, Human Rights And The 1969 OAU Convention*. (New York: The Committee, 1995).
[69] Part Two, Recommendation I. 'Root Causes Of Refugee Flows And Other Forced Population Displacements.' paragraph . 8.
[70] Assembly of Heads of State and Government, Thirtieth Ordinary Session, Tunis (13-15 June 1994).
[71] paragraph 4.

The Treaty Establishing the African Economic Community[72] lists in Article 3, under the Principles of the Treaty, the recognition, promotion and protection of human and peoples' rights in accordance with the ACHPR and accountability, economic justice and popular participation as aspects of development. The Treaty of the Southern African Development Community[73] expresses the need to involve peoples in development and integration through the guarantee of democratic rights, observance of human rights and the rule of law.[74] Article 4 obliges member states to act in accordance with human rights, democracy and the rule of law. Most recently, the foreign ministers of the OAU states met to discuss the issue of human rights in Africa and issued the Mauritius Declaration.[75] The document reaffirms the universality of human rights and calls on greater co-operation with NGOs but leaves the primary responsibility for the promotion and protection of human rights with the state. The meeting and declaration are significant as they mark the first time that leaders have come together to discuss the issue of human rights. At the same time but confining the protection and promotion of human rights with the state its impact is likely to be minimal since most states of Africa have not been active in this regard.

The sum total of the impact of the ACHPR and other statements in support of democracy and human rights in Africa must not be overemphasised beyond the rhetorical level. African governments have shown a reluctance to accept a human rights framework by not taking an early initiative in establishing the ACHPR, by not incorporating the Charter into their domestic law and by not taking an active role in engaging with the texts for the benefit of the individual.[76] As Ambrose warns 'African leaders draw up elaborate plans, they often fail to actualise them'.[77] Oloka-Onyango describes these promises as having 'been drowned in the battle-cries of warlords'.[78] The activities of the OAU clearly demonstrate the difference between reality and rhetoric as sovereignty outbids concern for the individual. The past few years has seen an increase in the rhetoric of democracy and human rights in Africa. It can only hoped that African leaders no longer ignore the rhetoric and begin to act upon it for the benefit of the individual.

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[72] 3 *RADIC* (1991) p. 792.
[73] 5 *RADIC* (1993) p. 418, 15 signatories.
[74] Preamble, paragraph 7.
[75] PanAfrican News Agency. ''African Ministers Adopt Human Rights Declaration.' (17 April 1999).
[76] T. Orlin. *Human Rights Development in Africa: The Banjul Conference of the African Association of International Law*. (Abo: Institute of Human Rights, 1990) p. 12, quoted in Welch (1992) p. 60.
[77] Ambrose (1995) p. 175.

III. PROMOTION AND PROTECTION OF DEMOCRACY AND HUMAN RIGHTS

A. THE OAU

The activities of the OAU are led by the Assembly of Heads of State and Governments (the Assembly) as the supreme organ of the organisation.[79] Below the Assembly are the Council of Ministers who perform much of the preparatory work for the Assembly as well as overseeing the implementation of Assembly decisions.[80] There also exists a Secretariat whose position is primarily administrative in nature, but which is developing into a more active role in the workings of the organisation.[81] Decisions taken by the Assembly are only recommendations to member states and those not in favour are not bound by them.[82] There exists no system of formal sanctions for violations of the Charter, except for the suspension of membership for non-payment of dues.[83]

The organisational structure of the OAU is cumbersome making it difficult for the organisation to react quickly to situations as they arise. Member governments are not always supportive in their participation due either to unstable domestic situations or priorities lying elsewhere in turn weakening support for the organisation in domestic societies.[84] The OAU itself suffers from a lack of resources and technical knowledge and assistance, preventing it from carrying out even the basic administrative tasks.[85] The OAU has been an ineffective organisation in many of the areas it proclaims to have competence as members have frequently and has openly flouted the principles of the Charter seriously undermining the organisation's credibility.[86] In the promotion and protection of democracy and human rights the organisation has failed considerably as other interests have taken priority.[87]

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[78] J. Oloka-Onyango. 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa.' 26 *California Western International Law Journal* (1995) p. 60.

[79] OAU Charter, Article VIII.

[80] OAU Charter, Article XIII.

[81] OAU Charter, Articles XVI-XVIII. The Charter also called for a Commission of Mediation, Conciliation and Arbitration to handle disputes among member states, (Article XIX) but this body was never fully established or ever utilised.

[82] E. Kwam Kouassi. 'The OAU and International Law.' in El-Ayouty and Zartman, 1984, 47; ervenka (1977) who feels the matter of the binding force of decisions was deliberately left ambiguous, p. 22.

[83] See Mulei (1994) p. 67. As of June 1998, over forty-eight million US dollars were owed to the Organisation, Panafrican News Agency 'OAU Owed 48 Million By Member States.' (2 June 1998). One commentator has stated that the OAU needs to change its position on these matters if it is to retain credibility, Y. El-Ayouty. 'An OAU for the Future: An Assessment.' in El-Ayouty, ed. (1994) p. 186.

[84] Tordoff (1984) pp. 259-60.

[85] Tordoff (1984) pp. 244-5.

[86] Tordoff (1984) p. 259; Mulei (1994) p. 67. For an extremely positive view of the OAU in strengthening the African state, fighting against colonialism, furthering African co-operation and promoting human rights see Wembou in El-Ayouty (1994) p. 16. One author feels that the OAU was not set up to handle all of Africa's security requirements but only had the purpose of solving problems in Southern Africa on African terms and over time it has taken to developing its role in other areas, H. Bretton. *Power and Politics in Africa*. (London: Longman, 1973) pp. 89-90.

[87] Nwankwo (1993) p. 50; Umozurike (1997) p. 24.

The OAU has shown a slowly developing concern for human rights, and most recently democracy, as part of its own initiative and as a reaction to pressures form inside and outwith Africa.[88] The present Secretary General of the OAU has stated that

> the most serious threat to Africa comes from a sometimes poor relationship between the people and their governments .... the African masses have not by and large, been given adequate opportunities to find an outlet for their creative energies and apply them to development.[89]

One area where the OAU has attempted to become more active is election involvement, but to date only small delegations of observers have been sent, primarily as symbolic gestures.[90] This minimal involvement in elections has attracted criticism from governments even though the OAU has only become involved when its presence has been requested.[91] Support for democracy and human rights by the Assembly has been primarily in the context of development.[92] At its 1990 Summit the Assembly recognised that development depended upon wide-based and popular participation in the process of government. It is also necessary to create a 'political environment which guarantees human rights and the observance of the rule of law,' along with assuring 'high standards of probity and accountability particularly on the part of those who hold public office.'[93] The right to development has further been defined to include the right of every human being 'to participate in, contribute to and enjoy the economic, social, cultural and political development of the society.'[94] The Assembly has spoken of the importance of ensuring respect for human rights in enhancing peace, stability and development, with the necessity of promoting popular participation in the process of government and development in the context of a political atmosphere which guarantees human rights and the observance of the Rule of Law.'[95]

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[88] Kannyo in Welch and Meltzer (1984) pp. 129, 138-139. See also Ramcharan (1992) p. 307.
[89] Quoted in El-Ayouty (1994) pp. 188-9. As with the United Nations this opinion only represents the feelings of the SG and not the organisation as a whole. There is nothing in the OAU Charter that allows for the SG's initiatives to be institutionalised as he will have to rely on informal actions to achieve the most results. El-Ayouty (1994) p. 184.
[90] See L. Garber. 'The OAU and Elections.' 4 *Journal of Democracy* (1993) pp. 55-59. The ability of the OAU to be more active in elections is undoubtedly tied to the issue of resources. In the 1997 elections in Liberia the OAU was only able to send 15 peoples observers, whereas a single NGO from the US sent 40, Panafrican News Agency. 'OAU to Observee Liberian Polls.' (13 July 1997).
[91] Garber (1993) p. 55.
[92] El-Ayouty (1994) p. 182.
[93] Declaration of the Assembly of Heads of State and Government of the OAU on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World. Addis Ababa, July, 1990.
[94] 'Resolution on the African Commission on Human and Peoples' Rights.' Assembly of Heads of State and Governments, 29th Ordinary Session, 1993.
[95] 'Resolution on the African Commission on Human and Peoples Rights.' Assembly of Heads of State and Government, 28th Ordinary Session, 1992.

While the OAU is slowly becoming '[a]ware of the fact that people have a fundamental right to participate fully in the making of policy decisions which affect their lives at all levels'[96] very little substantive action has been taken to turn the rhetoric into practice. For the OAU to provide effective protection for democracy and human rights it will be up to the member states to themselves take on commitments to democracy and human rights in their domestic settings.[97] As there is a rise in calls for wide based participation in the development of the region it is hoped the OAU will reconsider the position of sovereignty and non-intervention allowing for the effective implementation of agreements.[98] Change will come slow to the OAU, as one author has noted '[t]he world has completely changed, since 1989; the OAU has not, since 1963.'[99] The OAU could follow a similar development to that of the OAS whereby support for democracy and human rights in member states was rare but due to the persistence of various bodies of the organisation concerned with democracy and human rights both members states and the organisation began to accept the importance of democracy and human rights beyond the rhetoric.[100] For that to happen the OAU will need to overhaul its institutional arrangements for conducting its activities and resolving disputes as informal arrangements to solve problems instead of using Charter machinery which has proven ineffective.[101]

B. African Commission on Human and Peoples' Rights

The onerous task of ensuring governments meet their obligations under the ACHPR has been entrusted to a single body in the African Commission. All but two states of the region have ratified the document but little effort has been made to incorporate the provisions into the domestic codes preventing the individual from directly invoking the Charter when protection is necessary. Umozurike argues that there is a minimum requirement of implementation of the rights in the Charter[102] but ensuring compliance means overcoming ideological prejudices and the historical nature of the continent, African social structures, and conflicts regarding the

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[96] 'Resolution on the African Charter for Popular Participation in Development and Transformation.' Council of Ministers, 52nd Ordinary Session, Addis Ababa July 1990, preamble para. 3, reprinted in 2 *RADIC* (1990) p. 669.
[97] Mulei (1994) p. 72. A point raised by an official from Angola pointing to the absence of a democratic culture in Africa as contributing to many of the regions problems, Panafrican News Agency. 'Absence of Democratic Culture Undermines the OAU.' (26 May 1998).
[98] El-Ayouty (1994) p. 189.
[99] El-Ayouty (1994) p. 179.
[100] Garber (1993) pp. 58-9.
[101] El-Ayouty (1994) p. 185. There are currently plans underway for a restructuring of the OAU that will take two years to implement, Panafrican News Agency. 'Scheme for Restructuring OAU Secretariat Adopted.' (23 March 1999).
[102] Umozurike (1997) p. 4.

visions of the universe and the organisation of the world.[103] Mbaya remarks that the ACHPR provides the possibility for creating a solid legal foundation for the protection and promotion of democracy and human rights and the task of developing these possibilities lie with the African Commission.[104] The creation of the African Commission experienced a similar development process as the ACHPR as human rights activists wanted a body capable of enforcing human rights principles, with even some calling for a court. Governments were, however, reluctant to create a body able to scrutinise their behaviour.[105]

The African Commission was created as a body within the OAU 'to promote human and peoples' rights and ensure their protection in Africa.'[106] The Commission's position from the start has been opaque since it is originally a creation of the ACHPR meaning its mandate is confined to the provisions of that document and to those states that have duly ratified it. Article 30, however, creates the Commission as a body of the OAU with the task of promoting and protecting rights in Africa as a whole. As it stands, with the wide ratification of the ACHPR, this point is a secondary issue but could have easily led to confusion as to the role of the Commission.[107] Under its mandate the Commission possesses three tasks - promoting human rights Africa, receiving communications concerning violations of the Charter, and maintaining a reporting procedure by states parties.[108] In undertaking its duties the Commission is able to utilise any method of investigation and may hear from any person capable of enlightening it.[109] Articles 60 and 61 allow the Commission to draw inspiration from, or take into consideration, a wide variety of international human rights instruments beyond the ACHPR.

The Commission has been most active in its promotional activities and has generated some positive successes directly due to its work.[110] The Commissioners individually undertake the bulk of the Commission's promotional activities with the sheer size of Africa

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[103] Nguema (1990) 263. It has been noted that Africa has certainly had it problems in developing human rights but Europe and the Americas have gone through similar periods, see Mulei (1994) p. 56.

[104] Mbaya in Alfredsson and Macalister-Smith, eds. (1996) feels it is through its confirmation of other international human rights instruments which make it a real instrument in achieving the freedom and development of the individual, expressing a will to support and protect rights, p. 68.

[105] On the history of the Commission see Bello (1985) p. 36.

[106] ACHPR, Article 30.

[107] *Rules of Procedures of the African Commission* (1995) Rule 102 (2) limits communications only to those concerning states party to the Charter. See C. Odinkalu and C. Christensen. 'The African Commission on Human and Peoples' Rights: The Development of Its Non-State Communication Procedures.' 20 *Human Rights Quarterly* (1998) pp. 236-7

[108] ACHPR, Article 45 details the mandate of the Commission. See E. Bello. 'The Mandate of the African Commission on Human and Peoples Rights.' 1 *African Journal of International Law* (1988) p. 31.

[109] ACHPR, Article 46.

[110] See Ankumah (1996) on how a visit by Umozurike to Ghana resulted in the creation of the NGO Ghana Committee on Human and Peoples' Rights, p. 21.

and the existence of only eleven commissioners limiting their ability to promote the ACHPR.[111] The state reporting procedure under the Charter is considered part of the promotional work of the Commission.[112] The Commissioners have been split over the nature and purpose of the state reports with some seeing it as a means of verifying adherence to the ACHPR and others viewing the procedure as only a means of ensuring implementation without passing judgment on the actual compliance of states.[113] The Commission has taken great efforts to improve the reporting procedure[114] but states have still failed to take their obligation in this regard seriously undermining the effectiveness of the procedure.[115]

Regarding the protective functions of the Commission the ACHPR provides for two communication procedures concerning violations; one involving inter-state communications and the other dealing with communications from groups and individuals. The inter-state complaint procedure, which has not been used to date, involves the Commission trying to reach a amicable solution to the dispute before referring the matter to the Assembly.[116] The procedures for other communications allows any interested party, individuals, groups or NGOs to lodge a complaint with the Commission concerning the actions of a state party which may violate the Charter.[117] While in essence any interested party may petition the Commission the admissibility of the communication faces a rather more restrictive treatment than other human rights systems.[118] Upon receipt of a communication if information requested from a state party is not received the Commission may come to a decision based on the facts provided in the original complaint.[119] This has allowed the Commission to be more active in undertaking its role instead of being kept paralysed by the inaction or inability of states to co-operate. Once the Commission comes to a decision on a communication it forwards the decision to the Assembly who is then responsible for taking any action based upon the Commission's findings.

To date the Commission has been reluctant in its pronouncements and resolutions to elaborate upon the content and meaning of many of the articles in the ACHPR. Decisions and

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[111] Ankumah (1996) also points out that the Commissioners usually limit themselves to visiting large urban areas and educational institutes, p. 21.
[112] *1995 Rules of Procedure*, Chapter XV.
[113] 13 *African Commission Report* (1993) p. 3. Anyangwe (1998) pp. 637-642.
[114] Reference to Resolution on Submitting reports
[115] See Welch in El-Ayouty (1994) pp. 65-6. At the 9th Ordinary Session of the Commission only ninety minutes was given to the examination of three initial reports.
[116] ACHPR, Articles 47-54.
[117] Ankumah (1996) pp. 52-53; Odinkalu and Christensen (1998) pp. 250-252.
[118] ACHPR, Article 56. Umozurike (1997) expresses the opinion that individual communications come under a good deal of unnecessary scrutiny, pp. 75-76.

comments by the Commission concerning state reports and individual complaints are typically brief with little explanation or reasoning provided. Through its resolutions the Commission has spoken of the importance of democracy as a principle itself and its contribution to the promotion and protection of human rights. The Commission has affirmed 'that the best government is one elected by, and accountable to the people' and that the forcible take over of government violates Articles 13 (1) and 20 (1).[120] In a resolution on Nigeria[121] the Commission stated its belief 'that the restoration of democracy in Nigeria will be a positive step in African development' and called upon the government to allow free participation in government and elections. Concerning the military take-over in the Gambia, the Commission expressed 'that all governments should be based on the consent of the people freely expressed by them and through their chosen representatives and that a military government is a clear violation of this fundamental principle of democracy', and that military rule 'is a clear setback to the cause of democracy and democratic development in the Gambia and Africa generally'.[122] In its 'Resolution on the Human Rights Situation in Africa'[123] the Commission expressed alarm at the resurgence of illegal seizures of government, condemning the seizure of power by undemocratic means and called upon 'all African Governments to ensure that elections and electoral processes are transparent and fair'. In a resolution on education[124] the Commission acknowledged the importance of education in the effective implementation of the ACHPR and that education related to democracy and human rights should involve every organ of society. The resolution welcomes effort to further education of democracy and human rights underlining 'the importance of education as an active vehicle of inculcating the values and corresponding behaviours in civil society based on full respect for human and peoples' rights, democracy, tolerance and justice.'

Specifically concerning participation rights, in reviewing the report of Togo, the Commission found it disturbing that Togo claimed the right to participation under Article 13 of the ACHPR could not be guaranteed to all in developing countries. The Commission did not elaborate on its concern only requesting further clarification of the statement.[125] In

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[119] See Odinkalu and Christensen (1998) who note that the Commission often gives longer than the stated three months, p. 250.

[120] 'Resolution on the Military.' 16th Ordinary Session, 1994.

[121] 'Resolution on Nigeria.' 16th Ordinary Session, 1994.

[122] 'Resolution on the Gambia.' 16th Ordinary Session 1994.

[123] 16th Ordinary Session, 1994 .

[124] 'Draft Resolution on Human and Peoples' Rights Education.' 14th Ordinary Session, 1993. Resolution on the African Commission on Human and Peoples' Rights, AHG-/Res.227(XXIX), published in the Commission's 6th Annual Activity Report, 1992-1993

[125] Initial Report on Togo. 13 *African Commission Report* (1993) p. 13.

Katangese Peoples' Congress v. Zaire[126] a communication was submitted calling for the recognition of the right of self-determination for the region of Katanga based on Article 20(1) of the ACHPR. The Commission stated that '[a]ll peoples have a right to self-determination. There may however be controversy as to the definition of peoples and the content of the right.' It went on to say that the exercise of self-determination may vary but must accord with the wishes of the people. In this case the Commission decided that there had been no violation of since there was no evidence of violations of other human rights including Article 13 (1). The Commission's statement demonstrates the need for self-determination to contain an internal element of continual participation but the Commission's reasoning expressed that self-determination may occur but only when 'fully cognisant of other recognised principles such as sovereignty and territorial integrity' which the Commission is 'obliged to uphold'. The Commission finds itself locked in the indeterminacy of the international legal argument proclaiming a right but qualifying it based on state interests.

Since its inception the Commission has progressively enhanced its role within existing structures and against competing attitudes to slowly develop as a body able to further the promotion and protection of human rights in Africa.[127] A significant restraint the Commission has eliminated was the requirements of confidentiality of its proceedings[128] that have been described as 'unnecessarily restrictive.'[129] By making its own operations more public the Commission is able to disseminate information about human rights to the wider public of Africa, making individuals aware of its work.[130]

The Commission remains caught in a limiting institutional and practical relation with the Assembly, as it is reliant upon the body for its budget, for the publishing of its reports and for taking the final decision on the findings of the Commission. Commentators have described this reliance as making the Commission a sub-committee of Assembly with no independent authority that has a substantial effect on the ability of the Commission to exercise its

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[126] Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995, Thirty-first Ordinary Session (26 - 28 June 1995).

[127] Welch in El-Ayouty (1994) p. 70; Umozurike (1997) p. 72 he also remarks this has caused the Commission to take a low profile in its work, p. 29.

[128] Under the original *1988 Rules of Procedure*, Rule 32 stated the Commission's proceedings are to be held in camera, with Rule 33 providing for the Commission to issue a communique at the end of its session through the SG of the OAU. In the *1995 Rules of Procedure*, Rule 32 now reads that the Commission's session shall be held in public unless it is necessary to hold private meetings and Rule 33 allows the Commission itself to issue a communique at the end of its sessions.

[129] W. Benedek. 'The Ninth Session of the African Commission on Human and Peoples' Rights.' 12 *Human Rights Law Journal* (1991) p. 217.

[130] *1995 Rules of Procedure*, Rules 107 and 108. Also Welch in El-Ayouty (1994) p. 67.

functions.[131] Weston has suggested that the close ties to the Assembly, as the leading body of the OAU, gives the Commissions work an added degree of significance when action is taken.[132] This is unrealistic as the work of the Commission will often come in direct conflict with the members of the Assembly making the pressure upon the Commission to conform with the Assembly's wishes immense.[133] There is a definite need for the Commission to distance itself from the Assembly in order to eliminate the political pressure and become more autonomous. The restrictive conditions that have been placed upon the Commission are more in line with the preservation of state interests then for providing an adequate remedy to individuals concerning violations of the Charter.[134]

Regardless of its drawbacks and limitations the existence of the Commission as a body capable of guaranteeing that the principles contained in the ACHPR are respected is significant for the region.[135] The mere presence of the Commission is a direct challenge to the reluctance of the governments to respect human rights and brings into question the sanctity of non-intervention into domestic affairs as a legal principal guiding African affairs.[136] The Commission represents a possibility but has not yet fully developed itself bring into question its ability to provide any form of effective protection of human rights when violations of the Charter occur or even if the Commission is in a position to act upon the communications its receives.[137] Due to its lack of substantive impact the Commission has been called 'a toothless tiger', but one which has been able to legitimise the human rights debate in Africa with the potential of increasing the prospect of Africans themselves taking steps to prevent human rights abuses.[138] The ability of the Commission to bring the human rights debate into a wide public forum in Africa is significant for the future. The ability of the Commission to move beyond discussion to effective action is limited by its own institutional structure and resource factors that hinder the work of all African institutions. Much of the efficacy of the Commission relies on the efforts of the individual Commissioners and how they utilise the

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[131] Gittleman (1982) pp. 712-713; B. Weston et al., 'Regional Human Rights Regimes: A Comparison and Appraisal.' 20 *Vanderbilt Journal of Transnational Law* (1987) pp. 622-623.
[132] Weston et al. (1987) pp. 613-614.
[133] See Odinkalu and Christensen (1998) pp. 278-80. The Commission's tendency to lean towards state concerns over those of individuals is shown by the way in which time frames are set for communications with states receiving the greatest leeway.
[134] Kodjo (1990) p. 280.
[135] Bello (1985) p. 35.
[136] Welch in El-Ayouty (1994) p. 53.
[137] Umozurike (1983) pp. 911-12. The point has been raised that in the present framework of the Charter the ability of the Commission to achieve an amicable settlement in all cases is the best that can be expected and should therefore not be expected to take on the role of a judicial body, see Umozurike (1997) p. 79. On how the Commission is not always effective in achieving this modest goal, see Odinkalu and Christensen (1998) pp. 244-247; Nwankwo (1993) p. 53.

ambiguous and sometimes confusing institutional framework.[139] The persistence of the Commissioners and the creation of a human rights court will assist the Commission's efforts at strengthening democracy and human rights in the region. In the end the prevailing political, social, and economic conditions of Africa will determine the Commission's ability to make an impact.[140]

C. AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS[141]

The existence of the Commission as the sole supervisory body under the ACHPR was due to the fact that few governments would accept a judicial body able to pass judgement on their behaviour.[142] The absence of a human rights court has also been explained due to African traditions that do not include confrontational judicial procedures but are more in tune with co-operative conciliatory procedures in resolving conflict.[143] The situation has now changed as the Assembly has adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998). Under the terms of the Protocol the Court is to be a body of the OAU complementing the protective side of the Commission's work, recognising that the Commission has only been just able to fulfil its role as a promoter and unable to take on the role as protector.[144]

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[138] See Hyden in Cohen et al. (1993) p. 264.

[139] Umozurike (1997) p. 83. See the Commission's guidelines on state reports and the extra additions they require. 'A basis thus exists for much more vigorous action on economic and social rights by the Commission than is laid out in the Charter', Oloka-Onyango (1995) p. 54.

[140] Neff (1984) p. 346. Also Oloka-Onyango (1995) who feels the Commission has failed in a more active interpretation of economic and social rights under the Charter due to political considerations, p. 56.

[141] See Government Legal Experts Meeting on the Question of the Establishment of An African Court of Human and Peoples' Rights (6-12 September 1995) Cape Town South Africa. (OAU/LEG/EXP/AFC/HPR (1)) 8 *RADIC* (1996) p. 493 (Cape Town Draft); Second Government Legal Experts Meeting on the Question of the Establishment of An African Court of Human and Peoples' Rights (11-14 April 1997) Nouakchott, Mauritania. (OAU/LEG/EXP/AFC/HPR/RPT (2)) 9 *RADIC* (1997) p. 423 (Nouakchott Meeting); Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights. (OAU/LEG/EXP/AFC/HPR/PROT (III)). 9 *RADIC* (1997) p. 953 (Addis Ababa Draft); H. Boukrif. 'La Cour Africaine des Droits de L'Homme et des Peuples: Un Organe Judiciaire au Service des Droits de L'Homme et des Peuples en Afrique.' 10 *RADIC* (1998) p. 60

[142] O. Gye-Wado. 'A Comparative Analysis of the Institutional Framework for the Enforcement of Human Rights in African and Western Europe.' 2 *RADIC* (1990) p. 193.

[143] This does not explain the calls for the creation of a court at the Law of Lagos conference and the existence of court systems in domestic systems. The emphasis on conciliation and negotiation is partly due to African traditions and is beneficial to legal development but it also shows the unwillingness of governments to expose themselves to a legally binding judgement. C. Flinterman and E. Ankumah. 'The African Charter on Human and Peoples' Rights.' in H. Hannum, ed. *Guide to International Human Rights Practice*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 1992) p. 162.

[144] Addis Ababa Draft, Preamble, paragrapah 4, Articles 1 and 2. Opinions of Isaac Nguema, Chairman of the African Commission and Ould Khalifa, Minister of Foreign Affairs and Co-operation , Mauritania, see Nouakchott Meeting, p. 424. Also Addis Abbaba Draft, paragraphs 8.

The court is to have eleven judges taken from the member states of the OAU as elected by the Assembly.[145] By Article 3 the jurisdiction of the Court extends to all cases submitted to it concerning the application and interpretation of the Charter, the Protocol 'and any other pertinent human rights instrument ratified by the States concerned'.[146] This provides the Court with a potentially wide jurisdiction as shared by the Commission.[147]

Access to the court was a contested issue with original proposals giving states premiere access with access for individuals and groups limited to 'exceptional' circumstances.[148] It was discussed at the Nouakchott Meeting that by giving preferential access to governments and excluding individuals the Court would not be able to address the needs of individuals. Delegates pointed out that states had never used the Commission for complaints and it would make no sense to give them exclusive access to the Court. They stressed the fact that it was individuals and NGOs who made use of the Commission and it was for them that the Court was needed. The result is the present Article 5 which allows the Commission, a State Party which has lodged a complaint to the Commission, a State Party against whom a complaint has been lodged with the Commission, a State Party whose citizen is a victim of a human rights violation, relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it.[149] Access for individuals and groups is subject to a separate declaration by states under Article 34 (6) accepting the Court's jurisdiction in this area. By having individual petitions subject to special declarations the Protocol follows the practice of the ICCPR and the ECHR and brings into question the purpose of the Court in providing effective protection for individuals. There will most likely be a great deal of reluctance on the behalf of African governments to accept the individual jurisdiction meaning the Court will not

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[145] Articles 11 and 14 (1). The independence of the judges is based on international law (article 17 (1)) and a number of measures were adopted to ensure that the judges remain independent throughout the functioning of their duties. Addis Ababa Draft, Articles 16-19. It is also worth noting that it is up to the Court itself to decide on the ability of a judge to carry out their duties but that it is possible for the OAU Assembly to override the decision and remove a judge (Article 19 (2)). The independence of judges is important in the African context as few domestic judges are immune from pressure from government executives, see Ankumah (1996) p. 125. Recently, the independence of Commissioners has been brought into question as a number also hold government positions, see Murray (1998) pp. 21-22. Also Oloka-Onyango (1995) discusses the problems concerning the independence of the judges for the proposed court of justice for the African Economic Community, p. 59 note 401.

[146] Addis Ababa Draft.

[147] Article 3 (2) Addis Ababa Draft leaves the matter of settling jurisdiction to the Court an essential element for its effectiveness, see G. Naldi and K. Magliveras. 'The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison.' 8 *RADIC* (1996) pp. 947-8. Tunisia put forth a proposal making the jurisdiction of the Court to be subject to a declaration of acceptance by individual state parties, but this was dismissed as being unreasonable, Nouakchott Meeting, p. 427.

[148] Cape Town Draft, Articles 5 and 6.

[149] Addis Ababa Draft, Article 5 (1) a-d.

be seeing very many cases unless the Commission can somehow become very pro-active in this area.[150]

In the exercise of its contentious functions the Court has also been given the competence of trying to reach an amicable settlement in a case before it, a function similar to that of the Commission. The inclusion of this role has been criticised for copying the function of the Commission and creating unnecessary overlap.[151] There is the distinct possibility of overlap especially considering the fact that parties may petition the Court directly. On the other hand if the use of non-justiciable methods for solving disputes is part of the African tradition a combination of methods could prove to be more conducive to participation in the Court's activities for both states and individuals.[152] The Court is also to have an advisory function through Article 4 concerning 'any legal matter relating to the Charter or any other relevant human rights instruments ratified by the States.' Once the Court reaches a decision in either its contentious or advisory role it will notify the parties involved and the member states of the OAU with the Council of Ministers given the task, on the behalf of the Assembly, of monitoring the execution of the judgement.[153] States parties to the Protocol agree to comply with the Court's judgment in any case in which they are involved and to guarantee execution of the judgment but outside of the role of the Council of Ministers it is not clear how the Court will ensure its judgements are carried out.[154]

The Protocol will come into force once fifteen states have deposited the appropriate ratifications.[155] The number needed for ratification was subject to intense debate with many favouring a much higher number before the Protocol enters into force. At the Nouakchott Meeting, Tunisia and Algeria called for two-thirds of all OAU members to ratify, whereas Nigeria wanted a simple majority of the OAU members. The apparent logic for basing ratification on OAU membership and not parties to the ACHPR was based on the fact that the OAU would be financing the workings of the Court.[156] By insisting on a high number of ratifications governments were openly trying to create further obstacles to effective human rights protection and demonstrating a lack of resolve in actually seeing a court created. The success of the Court will depend upon the support given to it by the OAU and its bodies, the

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[150] It is hoped that the Court will take a broad interpretation of the admissibility requirements in gaining access to the Court, see Naldi and Magliveras (1996) pp. 953-4.
[151] Article 9. Also Nouakchott Meeting, p. 427-8.
[152] Umozurike (1997) pp. 92-3. Mulei (1994) p. 69.
[153] Addis Ababa Draft, Article 29.
[154] See Naldi and Magliveras (1996) as to how this differs from the other regional courts, pp. 963-5.
[155] Addis Ababa Draft, Article 34. There are presently 30 signatories and 2 ratifications.
[156] El-Sheikh (1997) p. 950.

attitudes of states and its acceptance in civil society.[157] From the outset, support for the Court has been minimal as governments failed to submit comments on the Protocol when requested.[158] Representation at the drafting meetings was sparse with only 19 states participating at the Nouakchott Meeting that came up with the final wording of the Protocol,[159] and only 28 in attendance at the 34th Summit which adopted the Protocol. There is no doubt that the Protocol establishing the Court is far from perfect and as with any regional Court, it will have problems getting itself established both in terms of support and resources.[160] As with the ACHPR the terms of the Protocol have not been as strong as hoped in order to obtain ratification from states.[161] The Court will have the opportunity to develop its role from the outset and it is hoped that the pitfalls of the Commission will be avoided and the Court will be more effective from the outset.[162] While much depends upon the members of the Court in establishing themselves, as with the Commission they will face a number of significant obstacles beyond their control in ensuring the effective promotion and protection of democracy and human rights in Africa.

IV. Obstacles to the Protection and Promotion of Democracy and Human Rights in Africa

The attitudes and behaviour of the western world towards Africa, both during colonialism and since, have significantly impacted the difficulties Africa faces. At the same time, a great number of Africa's ills can be attributed, on a case by case basis, to the actions of individual leaders taking the region into its present situation.[163] These individuals alone are not the only reason for Africa's problems but the detrimental impact of those who have abused power within Africa is recognised as a major contributor to the continent's ills. When democracy and human rights are offered as contributions to possible solutions to Africa's problems criticisms arise that these are principles not applicable to African societies, or that the solutions offered are colonialism in another disguise. What these criticisms have been unable to eliminate is the

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[157] El-Sheikh (1997) pp. 951-952. Naldi and Magliveras (1996) place the onus on the international community for ensuring the Court has the necessary resources to survive, p. 954.
[158] Naldi and Magliveras (1996) p. 969.
[159] Nouakchott Meeting, p. 423.
[160] There are currently plans for two other courts under economic treaties which have in their mandate the protection of democracy and human rights, see The Treaty Establishing the African Economic Community, 3 *RADIC* (1991) p. 792, and The Treaty of the Southern African Development Community 5 *RADIC* (1993) p. 418.
[161] Naldi and Magliveras (1996) p. 944; Anyangwe (1998) p. 626.
[162] The details of the working of the Court are to be established when the body adopts its own Rules of Procedure which is to be done in co-operation with the Commission, Articles 8 and 33. I. El-Sheikh. 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples Rights: Introductory Note.' 9 *RADIC* (1997) p. 951.
[163] See generally Mulei (1994) and Umozurike (1997).

continual call by Africans to participate in their own self-determination and that of their societies, however defined. Democracy and human rights will not automatically end the continual underdevelopment of the region. At the same time, it is up to opponents to explain how the persistent exclusion of the majority of society is beneficial to the long-term interests of the region. As discussed in Chapter 3 the emphasis on various aspects of good governance continually return to the necessity of wide-based and active participation by society. Increasing participation in the future development of democracy and human rights in Africa faces a number of obstacles including but not limited to, the issue of applicability of principles of democracy and human rights as universal ideals, the existence of authoritarian regimes and socio-economic underdevelopment.

A. Culture and Applicability

African leaders have continually rejected democracy and human rights as part of a larger rejection of western imperialism.[164] During the drafting of the ACHPR the need for the document to be African in nature was expressed, with 'being African in nature' never clearly defined but understood to mean that the ACHPR could not be like western legal instruments. Discussion and debate concerning the differences between African society and western society have been widespread and taken to extremes to claim that conceptions and practices of democracy and human rights cannot be similar in any way due to the inherent nature and evolution of the particular societies. Writers on the subject have provided varied accounts of the development of democracy and human rights in African societies ranging from the romanticised to the non-believers.[165] In this debate there is a tendency to group all of sub-Saharan Africa as one common society with all groups possessing a similar past, overlooking the diversity which exists within Africa. The historical development of African societies is essential for understanding systems of today but is must be kept in mind that democracy and human rights are no more a naturally historical part of the European or American tradition then to the African tradition.[166] Traditions of democracy and human rights both in practice and

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[164] Nguema (1990) p. 264.

[165] Umozurike (1997) p. 12; For a sampling of these writers see C. Lancaster. 'Democracy in Africa.' 85 *Foreign Policy* (1991) p. 149; J. Ojwang. 'Liberal Values in African Constitutional Development: Some Reflections.' 3 *Proceedings of the African Society of International Law* (1991) pp. 19-31; Ambrose (1995) pp. 1-4.

[166] See M. Ottaway 'Democratization in Collapsed States.' in I. Cartman, ed. *Collapsed States: The Disintegration and Restoration of Legitimate Authority*. (Boulder: Lynne Rienner, 1995) p. 243; P. Chabal. 'A Few Considerations on Democracy in Africa.' 74 *International Affairs* (1998) p. 299. J. Liebenow. *African Politics: Crises and Challenges*. (Bloomington: Indiana University Press, 1986) pp. 46-47.

structures will vary widely according to the particular challenges a society faces.[167] The diversity of practices and structures need not be seen as right or wrong but instead should be approached as providing a more comprehensive handling of the issues involved.[168] Ideas of democracy, human rights and the rule of law all have a place in the African context since they are based on respect for the human being, something which all African societies accept.[169] What Africa demonstrates is that the love of freedom is universal but so is the propensity to deny it to others.[170]

It is not expected that democracy and human rights in Africa will mirror existing western systems. There will always be what has been termed 'the African Cultural Fingerprint' - a set of institutional and normative values governing the relation between individuals, society and nature that are unique to Africa.[171] The idea of a cultural fingerprint is not confined to Africa as all regional systems recognise specific cultural beliefs and practices that influence the systems for the promotion and protection of democracy and human rights. The fingerprint is unique to each setting for it demonstrates a specific understanding of how democracy and human rights are perceived based on the universal recognition of the value of humanity.[172] The concepts of peoples'rights, individual duties, emphasis on non-justiciable measures in dispute settlement, and anti-colonialism all give the ACHPR a unique African character.[173] By creating and preserving laws and customs which are common to a specific society or groups of societies it is possible to create a system that is recognisable to whom it applies allowing those

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[167] M. Haile. 'Human Rights, Stability and Development in Africa: Some Observations on Concept and Reality.' 24 *Virginia Journal of International Law* (1984) pp. 584-585. The author goes on to state that the realisation of human rights in the West is not due to the philosophic tradition but to the economic and social changes which created favourable conditions for the realisation of human rights in an institutionalised form, p. 587.

[168] E. Siegert. 'Human Rights as a System. Interaction. Priorities.' 3 *Proceedings of the African Society of International and Comparative Law* (1991) p. 114. In general see A. An-Na'im, ed. *Human Rights in Cross-Cultural Perspectives: A Quest For Consensus*. (Philadelphia: University of Pennsylvania Press, 1992); A. An-Na'im and F. Deng, eds. *Human Rights in Africa: Cross-Cultural Perspectives*. (Washington D.C: The Brookings Institution, 1990).

[169] N. Busia. 'The New World Order and its Implications for Human Rights and Democracy in Africa - A Critical Appraisal.' 5 *Proceedings of the African Society of International and Comparative Law* (1993) p. 93.

[170] L. Adegbite. 'African Attitudes to the International Protection of Human Rights.' in A. Eide and A. Schou, eds. *International Protection of Human Rights*. (Stockholm: Almqvist and Wiksell, 1968) p. 69.

[171] M. wa Mutua. 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties.' 35 *Virginia Journal of International Law* (1995b) p. 339.

[172] wa Mutua (1995b) pp. 348-352. By forwarding the idea of a cultural fingerprint we are generalising common features for a region but in a manner which is not static or pre-determinative. Instead it allows for the inclusion of wide cultural practice based on associated world views.

[173] Umozurike (1997) pp. 87-96. The emphasis on culture and traditions in Charter are also seen as uniquely African but this inclusion has also been criticised on the basis that culture and tradition as dynamic concepts cannot be legally defined and 'traditional practices' have been linked with the poor treatment of individuals, see Nwankwo (1993) pp. 51-52.

to whom the law applies to feel part of the system, enhancing legitimacy for rules and processes.[174]

In furthering a region's 'cultural fingerprint' it is not to be used as a basis for the complete rejection of 'other' systems or wider global ideas and practices. It is essential to establish an appropriate balance between universal values and regional/local applications making it necessary to look across cultures for understanding.[175] There is also the need for co-operation among societies and groupings, for no one set of beliefs is superior. By looking to understand the differences between societies instead of condemning, the overall structure for the protection of the individual will benefit. It is possible to view the ideas of duties, group rights and non-justiciability as harmful to the protection of human rights. In certain cases this may hold true but to dismiss the validity of these concepts as effective for the individual merely because they do not have a precedent in other human rights system would be wrong.[176] Systems for the promotion and protection of democracy and human rights are going to share common principles and institutional structures regardless of the cultural fingerprint of a particular region. This demonstrates the common existence of the value and worth of the individual. Differences between systems of protection also reflect the differing social realities individuals face.

In the African context the acceptance of outside sources and beliefs as beneficial and not detrimental to African societies has been slow in coming. This is perhaps due to the behaviour of African leaders in the past who have exploited so-called 'African' beliefs or traditions in order to brutally repress their societies. A contributing factor to the rejection of outside ideas is the impact of the colonial period that imposed European values upon Africa resulting in widespread disillusionment and a loss of identity. During the colonial period, European or western ideas and practices were seen as better and right in comparison to African ideas and practices. Today there remains the tendency of donor nations and those outside Africa who are involved in democracy and human rights to triumph their own brand of democracy and human rights without taking into account African perspectives and possibilities. The continuation of colonial mentalities is detrimental to the future of Africa making it necessary to resurrect African ideas of the individual and society which were discounted by colonialism, but in an

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[174] M. Lakishman. 'Traditional Concepts of Human Rights in Africa.' in Welch and Meltzer, p. 32. See the discussion of 'decisional distance' in Chapter 1.

[175] wa Mutua (1995b) p. 358. D'Sa (1987) claims the ACHPR has much in common with the other regional conventions since it would have been imprudent to ignore internationally recognised human rights standards, p. 107.

[176] Benedik in Kunig, ed. (1985) p. 94.

expanded form combining universal conceptions with localised belief systems.[177] As Umozurike has observed, the development of democracy and human rights in Africa is dependent upon African and non-African influences by 'following the universal trend while retaining African specificity arising from our history, traditions and circumstances.'[178]

B. Colonialism to Authoritarianism: Independence to Collapse

Contempt for ideas and practices associated with Western society is no surprise given the detrimental impact of the colonial period and the destruction of the natural evolution of African societies.[179] It has been argued that colonialism did bring some positive benefits to Africa, in terms of language, technology, etc., as colonial powers felt that they were acting for the good of Africa.[180] Colonial rule, however enlightened or humanitarian it claimed to be, was by its nature authoritarian and an abuse of power as control was exercised through force and exclusion.[181] In each case the coloniser implemented their own form of governance, legal systems and institutions for ordering of society under the claim that these systems were better than indigenous systems and would bring a better life for Africans.[182] It quickly became apparent that the use of these systems by the colonisers was not for the betterment of Africans but for the preservation and advancement of European dominance.[183] The rhetoric of the law was used by colonisers to portray progress when in reality it only brought wide-spread disillusionment as Africans realised they were not benefiting from the colonial presence. It became apparent that 'civilisation' meant degradation and the suppression of Africans and

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[177] Nguema (1990) pp. 264-268. Also Introduction, Welch and Meltzer. p. 8

[178] Umozurike speaking at the Opening of the 10th Session of the African Commission, Banjul (8 October 1991) reprinted in Umozurike (1997) pp. 237-8.

[179] See J. Herbst. 'Responding to State Failure in Africa.' 21 *International Security* (1997) pp. 127-130. MacDermot feels that a large reason for the lack of human rights adherence in certain states is that 'they have not had time to develop political and social systems adapted to their own traditions and needs.' N. MacDermot. 'The Credibility Gap in Human Rights.' 3 *Dalhousie Law Journal* (1976) pp. 266-7.

[180] See C. Young. 'The African Colonial State Revisited.' 11 *Governance* (1998) pp. 106-107.

[181] C. Young. 'Africa: An Interim Balance Sheet.' 7 *Journal of Democracy* (1996) p. 55.. The extent of force and exclusion used varied depending upon the colonial power and the importance of the colony in question, see Liebenow (1986) pp. 27-37.

[182] Forms of control over colonies differed between the colonisers. The UK made the widest use of 'indirect rule' as indigenous Africans were supposedly given a degree of autonomy. The idea of indirect rule represents an example of the 'double gesture' discussed in Chapter 1. The work of Lugard demonstrates the emptiness of indirect rule as an effective means of self-determination for Africans. He wrote how 'liberty and self-development can be best be secured to the native population by leaving them free to manage their own affairs', however this management of their own affairs could only occur under the laws and policy of the colonial administration, F. Lugard. *The Dual Mandate in British Tropical Africa*. (Edinburgh, 1922) pp. 94-95. Fetter points out how management of the colonies was based on the self-interested needs of the coloniser which meant issues of economics and finances determined to what extent Africans were allowed by the colonisers to secure their own self-development, B. Fetter. *Colonial Rule in Africa: Readings from Primary Sources*. (Madison: University of Wisconsin Press, 1979) pp. 9-13.

[183] Umozurike (1997) believes that profits and territory were the primary motive for colonialism as demonstrated by the administrative structures which were created to ensure the maximum exploitation of human and material resources and appropriation of people and territory, pp. 20-21.

their ideas.[184] The fact that the imposition of colonial rule did not provide tangible benefits in the governance of Africa is demonstrated by the legacy of authoritarian rule that followed independence.[185] The overall impact was to weaken the effectiveness of indigenous standards and traditional institutions by placing them as inferior but without replacing them with new ideas that were able to respond to the needs and desires of Africa.[186]

At the decline of colonial rule some democratic reforms were instituted swiftly by the colonial powers with no transition period to self-rule.[187] The measures introducing self-rule for Africans were not democratic since it consisted of the imposition of a form of governance by the colonial powers that they felt would best serve the African societies. Large sectors of society, those who were most impacted by the changes were not involved in the decision-making process in determining the shape of governance. Since the people were excluded from the decision making process both during colonial rule and in the creation of independent states they felt no sort of allegiance to the colonial rulers or their systems perpetuating the feeling of disillusionment.[188] In many cases the colonial system of governance and control was quickly adopted and used in the post-independence society, allowing powerful African leaders to replace colonial masters by similarly using force and exclusion to control society.[189] The end of colonialism marked a new period in human rights development in African but not necessarily an improvement. The leaders of the liberation struggles who used the human rights struggle as a rallying cry against colonialism soon became authoritarian on a level equal to or worse than colonial leaders. This selective use of the rhetoric of democracy and human rights in the post-colonial period provides evidence of the continuing impact of colonialism as leaders have a powerful resistance to any significant political change and rely on the continual use of repression.[190]

During the independence movement autonomous widespread participation was not encouraged nor allowed as social movements were suppressed and activity was channelled

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[184] See Hyden in Cohen et al (1993) p. 260.
[185] Oyugi et al p. 44. P. Manikas. 'Transitions to Democracy in Sub-Saharan Africa: An Overview.' in C. Bassiouni and Z. Motala, eds. *The Protection of Human Rights in African Criminal Proceedings*. (Dordrecht: Martinus Nijhoff, 1995) p. 372.
[186] C. Welch. 'Human Rights as a Problem in Contemporary Africa.' in Welch and Meltzer, pp. 13-15.
[187] L. Diamond. 'The New Wind.' 39 *Africa Report* (1994) p. 50-54. The exception was Portugal who instituted no democratic reforms.
[188] E. M'Bokolo. UNESCO Courier. p. 14; Hyden in Cohen et al (1993) p. 261.
[189] 'Coercion, and not consent, was the prevalent mode of political rule and political change in post-independence Africa ...' Shivji (1995) p. 147. Also R. van Eijk. 'The United Nations and the Reconstruction of Collapsed States in Africa.' 9 *RADIC* (1997) pp. 574-575. El-Ayouty (1994) p. 188; Young (1998) p. 108-111.
[190] J. Kraus. 'Building Democracy in Africa.' 90 *Current History* (1991) p. 212; K. Good. 'Accountable to Themselves: Predominance in Southern Africa.'' 35 *Journal of Modern African Studies* (1997) p. 547.

into the single cause of achieving independence.[191] Once independence was achieved, wide-based participation was still discouraged and repression was justified as necessary to eliminate political elements who threatened the newly established states.[192] Unity was seen as the ultimate goal and this unity was defined by controlling elites who viewed any opposing ideas as seditious.[193] All energy was channelled into a single party line or ideology and the one-party state became an almost regional norm in Africa by the 1980s, expressed as necessary to achieve national unity.[194] The creators of one-party states claimed they held full respect for democracy and human rights but more and more this idea is being brought into question.[195] In theory the one-party state could be seen as compatible with democracy and human rights if all members of the electorate have equal access, change is possible in the party and the government and the needs and desires of individuals may be freely expressed and are acted upon by leaders.[196]

Regardless of the institutional set-up of a one-party system the possibility of abuse is always there. If leaders are unwilling to allow for change through a peaceful process which may remove the exclusive control of the party the right of participation is denied and other rights are not respected.[197] In practice the one-party state has been unable to provide a fair and just system of governance as the method of rule is often harsh, arbitrary and authoritarian. Respect for human rights and democracy only occurs to the extent that it matches the party's goals.[198] By its very nature the one-party state violates the right to participate freely in governance as it denies the right of free association and assembly and prevents the free expression of and dissemination of information.[199] Under a system of one-party rule the role of government becomes subordinate to the party or leading group resulting in exclusionary practices and coercion to eliminate any opposition and push forward the goals of the rulers.[200]

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[191] M. Mamdani. 'Africa: Democratic Theory and Democratic Struggle.' 39 *Dissent* (1992) p. 313.
[192] B. Kelso. 'A Sorry Record.' 39 *Africa Report* (1994) pp. 60-61.
[193] M. Robinson. 'Aid, Democracy and Political Conditionality.' in G. Sørenson, ed. *Political Conditionality.* (London: Frank Cass, 1993) pp. 86-87; Liebenow (1986) pp. 40-55.
[194] A. Babu. 'Human Rights and the One-Party State in Africa.' 2 *Netherlands Quarterly of Human Rights* (1989) p. 188.
[195] Julius Nyerere, who is seen as the creator of the one-party and its biggest defender, has called for the idea to be reconsidered, see J. Quigley. 'Perestroika African Style: One-Party Government and Human Rights in Tanzania.' 13 *Michigan Journal of International Law* (1992) pp. 611-612.
[196] J. Milimo. 'Multiparty Democracy in Africa: Lessons From Zambia.' 10 *International Journal on World Peace* (1993) p. 40.
[197] Quigley (1992) pp. 624-625, 646-647.
[198] B. Wanda. 'The One-Party State and the Protection of Human Rights in Africa with Particular Reference to Political Rights.' 3 *RADIC* (1991) p. 770.
[199] Wanda (1991) pp. 758-759, 766.
[200] See Haynes (1991) generally on Ghana.

The end result is inefficient government as policies become unworkable and irrelevant to the people as the ability to influence and choose is limited.[201]

Another detrimental influence on democracy and human rights is the cycle of violence and repression created by the frequency of military forms of rule in Africa.[202] As with other parts of the world, military involvement in political affairs has been widely justified as the best way forward for a society.[203] In practice military regimes are not conducive to widespread participation or dynamic change, as they possess a stubborn belief that their policies are the only the only correct ones and must be followed as orders to be carried out. The instability caused by military participation in politics has impacted Africa in a similar fashion as Latin America and there remains the problem of what to do with the continued presence of the military after the creation of civilian government.[204] Military influence is on the decline as a number of states are attempting to consolidate civilian governments.[205] The UN Secretary-General Koffi Annan has commented in the African context that there is the accepted view 'that military coups against democratically elected Governments by self-appointed juntas are not acceptable has become an established norm.'[206] The OAU and the African Commission have likewise spoken out against the inappropriateness of military involvement in government.[207] However the continued existence of war within and between African states means that the military still has a major role in African politics which stresses the need for continued vigilance in this area.[208]

The end of one-party systems and military regimes and the creation of multi-party structures have not automatically brought positive results to African societies lending support to arguments that multi-party systems exacerbate societal tensions and bring violence, showing

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[201] Babu (1989) p. 190. Shivji (1995) discusses a poll taken in Tanzania in 1991 where 78% percent of the rural population favoured the continuation of the one-party system but also demanded change in the set-up and structure of the system so that it was more responsive and allowed for wider participation, pp. 161-162.

[202] R. Joseph. 'Africa, 1990-1997: From Abertura to Closure.' 9 *Journal of Democracy* (1998) pp. 8-10. On the military in African politics see S. Decalo. *Coups and Army Rule in Africa: Studies in Military Style*. (New Haven: Yale University Press, 1976); R. First. *The Barrel of a Gun: Political Power in Africa and the Coup d'Ilat*. (London: Penguin, 1970); J. Harbeson. *The Military in African Politics*. (New York: Praeger, 1987).

[203] Manikas in Bassiouni and Motala (1995) points out the military has not only overthrown democratic governments but also one-party states, and other military regimes, p. 377-378

[204] N. Chazan et al. *Politics and Society in Contemporary Africa*. (Boulder: Lynne Rienner, 1992) p. 66.

[205] Nigeria is the most obvious examples but it remains to be seen to what extent it is successful in the long-term.

[206] Report of the Secretary General on the Work of the Organization. GAOR 52nd Sess., Supp. No.1 (A/52/1).

[207] PanAfrican News Agency. 'OAU Draws Measures To Deal with Military Coups.' (30 May 1997). African Commission 'Resolution on the Military.' 16th Ordinary Session, 1994.

[208] While the end of military rule in Nigeria is a positive step away from the involvement of the military in politics events in Sierra Leone, Guinea-Bissau, Niger, the Congo, and the Comoros all demonstrate the military remains an active factor in the growth of democracy, see 'West African Bloc Tackles the Flurry of Coups.' 24 May 1999) [http://www.cnn.com/WORLD/africa/90905/24/].

they are not conducive to African societies.[209] This has been held as the justification of one-party systems since independence and often used by the military as an excuse for seizing power. As the legitimacy of overt authoritarian rule wanes a new practice of a 'no-party system' has emerged but has not necessarily demonstrated a substantive difference in practice from one-party systems.[210] The 'no-party system' justifies itself by preventing the possibility for violence along ethnic lines but in doing so it prevents the possibility of widespread and active participation.[211] Inter-ethnic violence in Africa is often less based on political differences among individuals but more due to the manipulation of society by leaders.[212] On a scale of relative disruption to society the negative effects of multi-party politics cannot be claimed to be greater than authoritarian rule[213] and a multi-party system provides greater hope for the future. A multi-party system will not be a catch all solution as evidence from existing multi-party systems shows the ability of elites to maintain exclusive control over the political process. There is also the lack of experience and understanding as to how a multi-party democracy will operate which shows the need for patience as a democratic culture evolves.[214] Wiseman charts the present proliferation of political parties in some African states as being correlative of the lack of democratic progress as the large number of parties create more problems than it brings in positive developments for the advancement of democracy.[215] The difficulties experienced with the introduction of pluralistic societies and political systems do not mean they are inapplicable to African societies. It does demonstrate the overall instability of those societies and their structures due to the legacies of past and unfavourable conditions at present.[216]

The structures and forms of African societies at the attainment of independence were not necessarily part of the natural development of African societies and in recent years the overall collapse of societies has been seen as there has been a failure of state structures to provide

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[209] See Shivji (1995) who describes the end of the one-party state in Tanzania as followed by 'an upsurge in the parochial racial, ethnic, religious and narrow nationalistic rhetoric followed by instances of racial and religious violence', p. 149. Also S. Makinda. 'Democracy and Multi-Party Politics in Africa.' 34 *Journal of Modern African Studies* (1996) pp. 556-557.

[210] Uganda is the leading example of the no party system which has brought increased democracy at all levels of society but still raises a number of questions regarding its long-term viability, see N. Kasfir. '"No-Party Democracy" in Uganda.' 9 *Journal of Democracy* (1998) p. 49.

[211] See Human Rights Watch. *World Report 1998*. (New York: HRW, 1999) p. 5.

[212] E.K. Quashigah. 'Legitimacy of Governments and the Resolution of Intra-National Conflicts in Africa.' 7 *RADIC* (1995) p. 287.

[213] J. Wiseman. *The New Struggle for Democracy in Africa*. (Aldershot: Avebury, 1996) pp. 110-111,

[214] Makinda (1996) pp. 567, 570.

[215] Wiseman (1996) pp. 108-109.

[216] Mahmud points out how change does not come easy in any society and while many of the events in Africa do not appear favourable they can be seen a a positive development, S. Mahmud. 'Democratization and the Political Dimensions of Adjustment in Africa.' in Shepard and Sonko (1994) p. 137.

effective governance for society.[217] States such as Somalia, Liberia, Rwanda, and Congo (Zaire) have fallen into a condition where there exists recognisable borders but everything within those borders is lawlessness and anarchy, resulting it what has been termed 'suspended statehood.'[218] Others like Sierra Leone, Sudan and Angola are following a very similar path and future as a central government may be in control in the capital but not beyond. It is felt that the basic inability of the state, as constructed by the colonial period, to accommodate ethnic differences is resulting in widespread internal strife and general oppression which in turn creates instability and refugee flows contributing to the instability of the entire continent.[219] The left over colonial arrangements, militarisation related to the Cold War and the insistence of sovereignty by the international system allowed for African leaders to establish authoritarian rule showing that much of the failure of the state in Africa may be directly attributed to individual African leaders.[220] The approach taken by African leaders after independence was often based on personalised leadership and patron relations leading to an overall lack of faith in state structures as the majority of the population realised it does not have a stake in the system.[221] The situation has proven detrimental to democracy, as the inability of the state to provide for the needs and desires of society is endemic in Africa resulting in the inability to internalise democracy.[222]

The solution to the problem is elusive as there remains the attitude of the need to continue with the borders defined during colonisation even though the criteria for statehood is not met, much less the existence of a connection between the territory, those who claim to rule and the population.[223] Based on this wa Mutua speaks of the need to overcome the present state which is just the colonial state in another form for it alienates individuals and destroys identity.[224]

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[217] wa Mutua (1995a) describes it thus 'The imposition of the nation-state through colonization balkanized Africa into ahistorical units and forcibly yanked it into the Age of Europe, permanently disfiguring it.' [footnotes omitted] pp. 1114-1115. Also Herbst (1997) p. 120; Young (1998) p. 103. Much of the cause of the collapsed state must also be given to the economic conditions, see below and van Eijk (1997) p. 579.

[218] Y. Abdulquwi. 'Reflections on the Fragility of State Institutions in Africa.' 2 *African Yearbook of International Law* (1994) pp. 3-4. Other terms equally used include 'collapsed states', 'weak state', 'soft state', none of which are exclusive to Africa, see van Eijk (1997) p. 573. Authors who emphasise that collapsed states are not the norm and there does exist viable states and societies in Africa include C. Clapham. 'Degrees of Statehood.' 24 *Review of International Studies* (1998) p. 157; Young (1998) p. 101-102.

[219] A. Abdullahi. 'The Refugee Crisis in Africa as a Crisis of the Institution of the State.' 6 *International Journal of Refugee Law* (1994) pp. 562-580; Y. Ghai. 'The Theory of the State in the Third World and the Problem of Constitutionalism.' 6 *Connecticut Journal of International Law* (1991) p. 416; wa Mutua (1995a) p. 1144-1150.

[220] E. Gyimah-Boadi. 'Civil Society in Africa.' 7 *Journal of Democracy* (1996) p. 126, also wa Mutua (1995a) p. 1119.

[221] Hyden in Cohen et al, eds (1993) pp. 265-6; Ottoway in Cartman (1995) p. 235. See Shivji (1995) who explains how the tyrannical use of the law reduced its legitimacy in the eyes of the ruled, pp. 154-155. For a review of political development in Africa see Chazan et al. (1992) pp. 42-68.

[222] wa Mutua (1995a) pp. 1157-1158. Yoyder (1998) p. 486.

[223] Herbst (1997) pp. 122, 131.

[224] wa Mutua (1995a) pp. 1160-1161.

The collapse of states can no longer be dismissed as single events but should be taken together as an indication of the problems the continent faces.[225] Van Eijk offers the suggestion of intervention based on humanitarian grounds when collapse occurs alongside the establishment of preventive measures such as economic support and re-establishing the Trusteeship system.[226] Herbst points out that the further development of African societies must come from the individuals within for any change to the state cannot be imposed from outside again.[227] Ottaway supports a democratic solution involving a greater amount of the population having a stake in the system. This poses the difficulty of providing the best long-run solution but at the same time is the most difficult to implement as there is a need for basic agreements as to how the democratic process will work which is unlikely.[228] Wa Mutua argues democracy is not enough for Africa to overcome its problems if it means democratising existing states. He expresses the need to 'redraw' the map of Africa by allowing self-determination to flourish as the present system can no longer sustain itself and adherence to existing borders is 'a straightjacket that continues to deny freedom to millions of Africans'.[229]

Africa is at a 'critical juncture' and the actions taken now will determine whether the future is one of 'disintegration' or 'reconfiguration'.[230] The problem faced from an international legal perspective is that the conditions for democracy and human rights within states, or any of the alternatives offered above, all depend upon the existence of a government representative of the population. In a situation where there is no recognisable government or the absence of structures for a society to express their needs and desires the ability of international law to offer change is severely limited.[231]

C. UNDERDEVELOPMENT

The failure of African states has been worsened by the underdevelopment of the entire continent, a situation which is also directly attributable to colonial exploitation, neo-colonial activities and the behaviour of state officials.[232] Ambrose has placed poverty as perhaps the

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[225] Herbst (1997) p. 125. See Oloka-Onyango (1995) 'The fact is that whether by omission or commission, the state still has a significant role to play in African politics and society', p. 62.
[226] van Eijk (1997) pp. 585-597.
[227] Herbst (1997) p. 132.
[228] Ottaway in Cartman, ed. (1995) p. 235.
[229] wa Mutua (1995a) p. 1175.
[230] L. Villalón. 'The African State at the End of the Twentieth Century: Parameters of the Critical Juncture.' in L. Villalón and P. Huxtable, eds. *The African State at a Critical Juncture: Between Disintegration and Reconfiguration.* (Boulder: Lynne Rienner, 1998) pp. 7-8.
[231] Van Eijk (1997) p. 574.
[232] C. Mahalu. 'Human Rights and Development: An African Perspective.' 1 *Leiden Journal of International Law* (1988) p. 17. See G. Shepard. 'Debt, Development and Democracy: The Rights versus Efficiency Debate in

largest obstacle to democracy and human rights in Africa and one that will probably be the hardest to overcome.[233] It has been put forth that African states cannot afford to ensure the protection of civil and political rights due to underdevelopment, much less be expected to provide socio-economic rights.[234] Poor economic conditions and widespread poverty has led leaders to emphasis a right to development - the content of which is determined by the government of the time and often used as a tool for the arbitrary abuse of power.

The control over resources within society by governments and elites has lead to massive inequalities that are not conducive to the development of democracy. In the absence of effective accountability in government large sectors of the population have become marginalised both economically and politically.[235] Chabal discusses how mismanagement or unequal management of the economy, presently and heavily influenced by the past, results in negative effects for the whole of society.[236] Even in situations where there exists the possibility for economic practices to be beneficial for society, unequal power arrangements have brought negative effects as 'political factors determined economic practice.'[237]

It is in Africa that the importance of good governance discussed in Chapter 3 becomes very clear. The connection between the civil and political aspects of society and socio-economic conditions and possibilities are all part of the necessary framework for society and cannot be separated.[238] Societies become caught in poor socio-economic conditions which when they reach extreme proportions eliminate the ability for self-determination as the physical self of individuals is destroyed. Wide-based participation in the economic process is non-existent in several respects, as the domestic decisions concerning economic development are made by the small ruling groups and their decision making is constrained by the powers of

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Adjustment.' in Shepard and K. Sonko, eds. *Economic Justice in Africa*. (Westport: Greenwood) who sees the collapse of Somalia as representative of the condition of Africa and an event which is clearly a 'man-made crisis', p. 1, also Chabal (1992) pp. 150-151. The specifics reasons for the underdevelopment of Africa is highly contested debate, see Wiseman in Potter et al. (1997) p. 274.

[233] Ambrose (1995) pp. 145-160. Also P. Huxtable. 'The African State Toward the Twenty-First Century: Legacies of the Critical Juncture.' in Villalón and Huxtable (1998) pp. 280-284. Also Chabal (1995) pp. 48-52; Haile (1986) p. 301-302. Clapham (1998) rightly points out that 'States are expensive to maintain' p. 156.

[234] Oloka-Onyango (1995) p. 51.

[235] Wiseman in Potter et al. (1997) p. 275.

[236] This will be the primary problem facing the future of democracy in Nigeria. Incoming president Olusegun Obasanjo has stated 'We don't believe democracy will be sustained with the burden of debt we have now', but he faces the problem that the outgoing military regime has cleaned out most of the governments financial holdings, see 'IMF pledges quick aid if Nigeria sticks to reforms' and 'Nigeria Brings 15 Years of Army Rule to a Close.' (27 May 1999) [http://cnn.com/WORLD/africa/9905/27/BC-NIGERIA-DEMOCRACY.reut/].

[237] Chabal (1992) pp. 163, 150-163.

[238] O. Mbachu. 'Democracy in Black Africa: A Theoretical Overview.' 31 *Coexistence* (1994) p. 153.

the international economic system along with continued economic support which is given to non democratic regimes.[239]

The situation of underdevelopment has proved costly to democracy and human rights. Through internal mismanagement and external pressures economies have continually worsened and people become more discontent. Instability has also followed as leaders are no longer able to purchase popularity from the population and a loss of legitimacy occurs when they are no longer able to provide basic goods.[240] It is suggested that the way out of Africa's economic problems is to open up the economic system and process to greater participation from individuals.[241] External actors have a serious role to play concerning the economic conditions of domestic societies and the ability of democracy and human rights to grow in these unfavourable settings.[242] The issue of lack of resources also limits the ability of regional institutions to provide effective assistance. The economic conditions of Africa do not provide much in the way of hope for the future of democracy and human rights in the region. At the same time the region's situation should not be written of as hopeless. As good governance takes hold and is put into practice Africans will slowly be able to benefit from the process of self-determination as they will be able to participate in the decisions which impact their lives, something which has not been common in the past.[243]

V. Conclusion

The prospects for democracy and human rights in Africa are not bright but neither are they extinguished.[244] The rhetoric of democracy and human rights exists[245] and is being used by the people of Africa in struggles to exercise their right to self-determination - this time in relation to indigenous authoritarian rule and transnational influences. There is the need to go beyond the rhetoric for an overall democratisation of society, not just the establishment of institutions

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[239] Haile (1986) p. 302. It is these ruling groups and their close followers who benefit from possessing political power and by connection the national wealth, see Quashigah (1995) p. 287 and van Eijk (1997) p. 576-577; Economist. *The World in 1997*, p. 90.

[240] Joseph (1998) pp. 10-12. On the competition for resources in society and the impact this has on leaders, see Young (1996) pp. 57-60.

[241] See Haile (1986) p. 328 and generally.

[242] For the impact of external actors and forces and the related literature see Oloka-Onyango (1995) pp. 20-40. Tomasevki (1997) observes that external actors have supported the development of democracy in the region but they have been motivated less by good will and more by the ability to exploit the vulnerable economic situation of Africa, p. 181.

[243] Some authors feel that international economic organisations such as the World Bank and IMF have not been living up to the ideas of good governance as their programs have brought about negative impacts on domestic society, see generally Shepard and Sonko (1994).

[244] See Gyimah-Boadi (1998) 18-31. See Young (1996) how in some cases authoritarian leaders continue to dominate but have in stages taken more liberal positions, p. 57.

and holding of elections but almost more importantly improving socio-economic conditions.[246] Change will not be an easy process as democracy and human rights are dynamic and once they become part of the public discussion they are potentially explosive bringing positive results but also attracting negative reactions.[247] The colonial experience and subsequent years of authoritarian rule have resulted in the lack of experience with democracy and human rights in Africa adding to the explosive potential[248]

At present the ability of the actors in civil societies to enhance and ensure the democratisation process is uneven.[249] The poor economic conditions and lack of resources in the region effects the ability of civic associations to establish themselves and maintain an independent position.[250] The development of civil society is further troubled due to high levels of illiteracy and the lack of agreement over what causes deserve the strongest commitment.[251]

The role of NGOs in the process of development civil society is important as they are able to provide a monitoring mechanism for human rights, an educative function for expanding knowledge about democracy and human rights and in general providing the necessary action and support for a society committed to democracy and human rights.[252] Given the economic and social circumstances of Africa effective action by NGOs needs to move beyond 'traditional human rights work' and give greater attention to economic and social issues.[253] However given the circumstances of Africa these changes may never be able to fully manifest themselves with the result of the creation of 'virtual democracies' where there exists the illusion of democratic practice and structures, but without the substantial basis that civil society provides.[254]

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[245] Villalón in Villalón and Huxtable (1998) p. 4. But see Makinda (1995) who observes how the rhetoric of democracy is continually ignored by African leaders, p. 571.

[246] S. Decalo. 'The Process, Prospects and Constraints of Democratization in Africa.' 91 *African Affairs* (1992) p.8; S. Riley. 'Political Adjustment or Domestic Pressure: Democratic Politics and Political Choice in Africa.' 13 *Third World Quarterly* (1992) p. 549. Villalón in Villalón and Huxtable, eds. (1998) explains how elections alone do not tells us about the possibilities for sustained democratisation and have been utilised to hinder the process, pp. 15-16. Also Chabal (1998) p. 300; T. Maluwa. 'Discourse on Democracy and Human Rights in Africa.' 9 *RADIC* (1997) p. 70.

[247] Hyden in Cohen et al (1993) p. 256.

[248] See Makinda (1996) pp. 557-558.

[249] Gyimah-Boadi (1996) pp. 118-9. See S. Ndegwa. 'Civil Society and Political Change in Africa: The Case of Non-Governmental Organizations in Kenya.' 35 *International Journal of Comparative Sociology* (1994) p. 19 who argues that NGOs in Kenya have been able to overcome legislation against them to contribute to political reform.

[250] Gyimah-Boadi (1996) generally.

[251] Ambrose (1995) p. 20. Busia (1993) places illiteracy as one of the pressing needs for participatory democracy, p. 151.

[252] In general see C. Welch. *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organisations.* (Philadelphia: University of Pennsylvania Press, 1995). Also Ambrose (1995) pp. 99-118.

[253] Oloka-Onyango (1995) pp. 66-70.

[254] Joseph (1998) pp. 3-4, he further expresses the position that this creation of the illusion of democracy is something both governments and their foreign sponsors engage in, p. 11. The development of civil society where NGOs and other groups may be active participants in the protection and promotion of democracy and human rights is a very

The ability of the OAU as the regional institution of Africa to contribute to the growth of democracy and human rights is troubled as 'basic tenets in African politics that have acquired the lore of sacredness or sanctity' in the eyes of the OAU will hinder development.[255] For there to be an effective regional system for the promotion and protection of democracy and human rights the OAU needs to seriously reconsider its position and structure as it 'has failed to serve the human development needs of the peoples of Africa'.[256] Overcoming the issue of non-interference in domestic affairs and state sovereignty will be necessary for the OAU to emerge as a regional organisation able to effectively act in support of democracy and human rights.[257] The organisation will have to address the issue of collapsed states discarding another sacred principle of the inviolability of the borders established by the colonisers, recognising the lack of effectiveness of the state in providing for individuals resulting in a lack of identity and increased distrust in leaders. There is a need for Africans to experiment and design their own forms of a state so that solidarity and social cohesion may be maintained through institutions individuals will identify with as institutions which acknowledge and promote pluralism, self-government, popular empowerment and equity.[258] The OAU needs to accept the internal and continual process of self-determination and its applicability in the post-independence period[259] allowing it to meet its expressed purpose of achieving 'a better life for the peoples of Africa'.[260]

The applicability of law and rights in the self-reflecting process will remain an issue as efforts to support democracy are still seen as imperialistic and not applicable to the African cause, but it will be up to these authors to provide alternatives beyond their critiques.[261] The

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uneven area in the region where some states are truly committed to pluralism and others adamantly opposed to it, see Human Rights Watch (1999) p. 11.

[255] El-Ayouty (1994) pp. 186-88.

[256] Ambrose (1995) p. 163.

[257] See A. Akinyemi. 'The OAU and the Concept of Non-Interference in Internal Affairs of Member States.' 46 *British Yearbook of International Law* (1972-73) pp. 393-400. In the recent seccessionist struggle in the Comoros the OAU held an 'unflinching commitment' to sovereignty and territorial integrity, see PanAfrican News Agency. 'OAU Appeals to Member States to Intervene in Comoros.' (8 December 1998). The inability of the OAU to muster an form of collective action in the Comoros has resulted 'where the average Comorian no longer have anything good to say about the organisation', 'OAU Losing Face in Moroni.' (27 February 27 1999).

[258] Abdulquwi (1994) pp. 6-8.

[259] A. Sesay. 'The OAU and Continental Order.' in T. Shaw and 'S. Ojo, eds. *Africa and the International Political System*. (London: University Press of America, 1982) p. 170-171. Anyangwe (1998) points out the need for domestic acceptance of these ideas as has occurred in Ethiopia and South Africa, p. 657.

[260] OAU Charter Article II (1). The Charter recognises the ability to determine political status and economic and social development in Article 20 (1). The growth of sub-regional economic co-operation may contribute to the ability of the OAU support democracy as the economic groups are recognising the importance of peace, democracy and human rights in ensuring conditions conducive to economic growth, see M. Ndulo. 'Harmonisation of Trade Laws in the African Economic Community.' 42 *International and Comparative Law Quarterly* (1993) pp. 103-106.

[261] Shivji (1995) describes the current support for democracy in Africa as 'being incessantly drummed into our ears by the intellectuals of the West and forced down our throats by imperialism and its agencies', p. 169. He may be

role of external actors looms large for the future as outside powers have continually been involved in African affairs and will continue to do so.[262] The influence of outside actors will have a substantial impact on democracy and human rights as their involvement needs to be based on support for Africans and not the pursuit of self-interest and strategic goals.[263]

Regardless of the opinions or actions of outside actors there remains 'the tenacity of the idea that democratic rule *ought* to exist' in Africa.[264] It is suggested that democracy is the beginning of the cure to Africa's ills as greater participation will ensure rights are protected and needs and interests are met.[265] The growth of democracy and human rights in Africa will not be the same as elsewhere in world as priorities differ. Democracy and human rights in Africa go far beyond certain civil and political rights. Alongside the importance of civil and political rights the practical need for survival brings emphasis to socio-economic rights, beliefs in the importance of community and the individual represents more realistic views of society and concerns for peace and the environment demonstrate the need for concern of the surrounding world as part of the overall process of self-determination for the individual and society.

Africa faces a critical juncture in the development of democracy and human rights in the region. It is possible to identify a number of advances that bode well for the future of the region. The creation of a human rights court and the movement of the OAU to recognise the importance of democracy and human rights provide a great deal of hope for the strengthening of the regional arrangement. Domestic events throughout the region with a great deal of democratic activity occuring demonstrate how the rhetoric of the texts is becoming part of the lives of individuals. It is important not to overemphasise these events as the effectiveness of what has been achieved is minimal or other outstanding factors remain as impediments to democracy and human rights.

South Africa will be holding its second elections this decade, an example of how the democratic process can work in a multi-ethnic state with a substantial negative past to deal with. The extremely high levels of violence and lack of economic progress for a large majority of the population keep the benefits of democracy in question. Across the Continent there are positive signs but just as many negative ones. Military coups and violent challenges to the

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correct in his observations on the difficulties of rights and law in Africa but he needs to propose specifically what to do.

[262] In general see Chazan et al. (1992) pp. 377-416.

[263] See Makinda (1995) pp. 562-573. Events elsewhere in world have attracted more attention from external actors, leaving Africa's problems largely neglected, see Mahmud in Shepard and Sonko (1994) p.151.

[264] Wiseman in Potter, et al, eds. (1997) p. 272 (italics in original). Also Wiseman (1996) where he presents evidence of the continued move to democracy.

[265] See Oloka-Onyango (1995) pp. 60-62.

government continue in western Africa creating widespread instability across the area.[266] If Nigeria is able to institute and consolidate its democratically elected government with the military finally disassociating itself from politics then its neighbours might soon follow. Further instability comes from the unrest across the north of Africa as sections of society continue to dispute what is best for the people. Massive refugee flows in the Great Lakes region keeps the animosity between states in the region at a high level. Leaders such as Mugabwe in Zimbabwe, Moi in Kenya, Museveni in Uganda and Chiluba in Zambia are paying a very superficial respect for democracy when in reality they are further consolidating personal rule of their countries, autocrats in the clothes of democrats.[267]

Democracy and human rights are making progress in Africa. Slow, difficult progress with visible setbacks, but progress nonetheless.[268] The impediments to democracy and human rights in the region are well known and can be overcome. The only way to overcome these impediments will be to ensure that all individuals are given the equal opportunity to participate actively in the processes that impact upon their lives. They only ones who know what is best for Africa are Africans themselves, therefore they should be given the voice and ability to pursue what is best for the region, something that an international law of democracy can hopefully make a substantial contribution to.

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[266] To demonstrate the scale of instability the area faces, last year during the coup in Guinea-Bissau thousands of refugees fled north towards Senegal only to meet up with Senagalese refugees fleeing south due to the war between the government and rebels, see 'Disaster Feared in Bissau Exodus.' *Guardian* (24 June 1998) p. 13.

[267] The actions of Mugabe are the most well known as he spoke out against that country's judicial system for enforcing human rights standards when the government was accused and found guilty of false imprisonment and torture of two reporters, see 'Mugabe 'the Black Mamba' Bares His Fangs.' *Guardian* (8 Febuary 1999) p. 12; 'Twilight of the Tyrant.' *Observer* (14 February 1999) p. 23. Concerning Kenya, Uganda and Zambia, see Human Rights Watch (1999) p. 9.

[268] The increase of elections throughout Africa is seen by many as evidence of how democracy has taken hold. The unfortunate side is that many of these elections are marred by widespread irregularities that bring their credibility into question, see Human Rights Watch (1999) pp. 7-9.

CONCLUSION

I. THE ABSENCE OF REGIONAL ARRANGEMENTS

The global popularity of democracy and human rights is a positive development for the international system and an area international law needs to take full attention of. Presently, the rhetoric of democracy and human rights is far greater than the actual ability of individuals to effectively enjoy any international legal principle of democracy, with human rights slowly moving toward greater effectiveness. Globally the gap between rhetoric and substance remains very wide. Regionally the gap has been closed significantly. In Europe the combined efforts of the three regional organisations has significantly brought the rhetoric of democracy and human rights closer to the individual. The Inter-American system has shown how the rhetoric of democracy and human rights can eventually overcome even the most hostile environments in ensuring the law not only speaks about the individual but actual offers something to the individual. In Africa the gap between rhetoric and substance continues to be indicative of the overall malaise of the region but with the hope of what has been accomplished elsewhere there exists the potential for closing the gap.

The development of regional arrangements for the protection and promotion of democracy and human rights has yet to occur in Asia or among the states of the Middle East. These regions have seen efforts at various levels through the initiative of the UN or NGOs but the initiative of domestic governments has been sparse with greater attention being placed elsewhere, primarily related to concerns of economics, trade, defence and security. The reason why it cannot be held that there exists a global norm of democracy is that large sections of the globe have yet to subscribe to its principles. This is not to say that the absence of a regional arrangement for the protection and promotion of human rights precludes the development of democracy. What the previous chapters have shown is that regional arrangements have been better able to further the underlying ideas of an international law of democracy through their human rights work that takes into account the peculiarities of the particular region. Human rights deal with issues of participation, tolerance, the ability of individuals to be part of the forces around them. These are the very same principles upon which democracy is based as well. These principles do not exist in one set model for all to accept as they do differ between societies, but difference should not be used as an excuse for their absence.

A. Co-operation in the Middle East

The League of Arab States consists of 22 states with the purpose of strengthening relations among members and dealing with matters of 'a general concern with the affairs and interests of the Arab countries'. The areas of concern for the League cover a wide range of issues with no explicit mention of matters related to political or legal co-operation.[1] Sovereignty and non-intervention are laid down as guiding principles as '[e]ach member-state shall respect the systems of government established in the other member-states and regard them as exclusive concerns of those states. Each shall pledge to abstain from any action calculated to change established systems of government.'[2] Co-operative efforts within the League have been mostly concerned with security issues concerning Israel and in the preservation of the existing political order within and between countries.

The League has established a Permanent Arab Regional Commission on Human Rights,[3] which has acted in support of human rights in the area generally, as well as in conjunction with the UN, but has yet been unable to make any significant progress at the intergovernmental level.[4] The Arab Charter on Human Rights[5] was adopted by the League in 1994 but has yet to enter into force. The Charter provides that all peoples have the right to determine their own government and that the people are the source of authority.[6] It goes on to cover a wide range of rights including socio-economic provisions concerning work and education.[7] The Charter allows for full religious freedom,[8] a significant measure for the region. The Charter also suffers from strong limitation clauses as the rights to religious freedom and participation may be limited by the law with no other guidance provided as to the scope of the exercise of the law. The Charter will have a supervisory body whose only task will be to receive state reports and comment upon them.[9]

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[1] League of Arab States Charter, Article 2, paragraphs a-f.
[2] League of Arab States Charter, Article 8. Also H. Hassouna. 'The League of Arab States and The UN: Relations in the Peaceful Settlement of Disputes.' in B. Andemicael, ed. *Regionalism and the United Nations*. (Dobbs Ferry: Oceana, 1979) p. 299.
[3] K. Vasak. *The International Dimensions of Human Rights*. (Westport: Greenwood, 1982) pp. 576-577.
[4] I. Pogany. 'Arab Attitudes toward International Human Rights Law.' 2 *Connecticut Journal of International Law* (1987) p. 367.
[5] Reprinted in 18 *Human Rights Law Journal* (1997) p. 151.
[6] Articles 1 (a) and 19.
[7] Articles 29-32, 34.
[8] Articles 26-27.
[9] Articles 40-41.

Beyond the League, Islamic states from across the Middle East and Asia have come together in co-operation through the Organisation of Islamic Conference (OIC). [10] In the Charter of the Islamic Conference (1972),[11] the signatories resolve to work towards solidarity among Islamic people as a means towards progress, peace and justice. In doing so they reaffirm their commitments to the UN Charter and human rights, with their objectives including the end of racism and safeguarding for individuals their 'dignity, independence and national rights'.[12] In so doing there is full respect for non-interference, sovereign equality and the non-use of force in inter-state relations.[13] In 1991 the OIC issued the Cairo Declaration on Human Rights in Islam.[14] The Declaration uses much of the language common to international human rights law but places the language into the political context of Islam, as understood by the drafters resulting in a divergence from established international standards.[15] The Declaration itself is also a divergence from the domestic law of many of the OIC states raising questions as to what extent it represents a unified Islamic view of human rights.[16]

Co-operation among Arab states is marked by tension among leaders as to who is most able to further the 'Arab Interest' in both religious and political terms leading to most states following their own independent agenda.[17] There has been some co-operative efforts demonstrated by occasional summits that have been described as the 'highest and broadest expression of the collective Arab will'.[18] These summits also demonstrate the lack of substantive will towards co-operation as not all governments are invited, or even choose to attend. Co-operative efforts only seem to come about in a time of crisis or as a reaction to a specific event[19] a process likely to continue to shape interstate relations.[20] This ad hoc tendency has been linked to the long legacy of authoritarianism in the region leading to an

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[10] H. Moinuddin. *The Charter of the Islamic Conference and Legal Framework of Economic Co-operation among its Member States.* (Oxford: Clarendon, 1987). Report of the Secretary-General. *Cooperation Between The United Nations And The Organization Of The Islamic Conference.* UN Doc. A/53/430 (24 September 1998).
[11] 914 UNTS 111.
[12] OIC Charter, Article II (A).
[13] OIC Charter, Article II (B).
[14] UN Doc. A/CONF.157/PC/62/Add.18.
[15] For a review of the Declaration see A. Mayer. 'Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?' 15 *Michigan Journal of International Law* (1994) pp. 327-350.
[16] Mayer (1994) p. 348.
[17] P. Vakikiotis. *Arab and Regional Politics in the Middle East.* (New York: St. Martin's, 1984) p. 79. C. Tripp. 'Regional Organization in the Arab Middle East.' in L. Fawcett and A. Hurrell, eds. *Regionalism in World Politics: Regional Organization and International Order.* (New York: Oxford University Press, 1995) p. 289.
[18] 'Pains but No Gains.' *The Guardian* (21 June 1996) p. 19.
[19] Arabs themselves question the usefulness of these summits, see 'Arab States Grasp Nettle of Unity.' *The Guardian* (22 June 1996) p. 14. On the lack of co-operation in general see H. Howard. 'The Middle East in World Affairs.' in T. Ismail, ed. *Government and Politics of the Contemporary Middle East.* (Homewood: Dorsey, 1970) pp. 467-468.
[20] Tripp in Fawcett and Hurrell (1995) pp. 296-289.

emphasis upon the sovereign independent state as the basis for action, which impedes efforts at collective co-operation.[21]

The Arab world is characterised by strong state systems with the primary purpose of self-preservation resulting in the bulk of state resources and activities being controlled by a centralised government.[22] The persistent emphasis on sovereignty hinders the possibility of co-operation as governments will view a regional arrangement for the protection and promotion of human rights as an infringement of their sovereignty.[23] One of the larger shows of unity among states in the region came in response to the rise of a regional human rights NGO, the Arab Organisation for Human Rights (AOHR).[24] The growth and impact of the AOHR has faced open hostility from governments. At the same time its efforts illustrate the problems and possibilities for the region for democracy and human rights and demonstrates, in that hard-work and persistence, based on the belief the democracy and human rights contain desired human goods, may lead to small but significant advances.[25] The development of regional co-operation in the Middle East will continue to be beset by the general unrest of region. There are no quick and easy answers to the problems which exist as even perceived positive developments, such as autonomy for Palestine, is tempered by occurrences which underline the necessity of human rights development in the region.[26]

B. Co-operation in Asia

Regional efforts in support of human rights in Asia has mainly come from NGOs with little effort given to the idea by governments.[27] Many states of Asia are part of the OIC as well as members of the Asia-Pacific Economic Co-operation (APEC)[28] which has created a system

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[21] E. Podeh. 'The Emergence of the Arab State System.' 9 *Diplomacy and Statecraft* (1998) p. 75.

[22] E. Sivan. 'Constraints and Opportunities in the Arab World.' 8 *Journal of Democracy* (1997) p. 103. Even where electoral systems are in place they do not provide substantive democracy in terms of actualising a change of government, see 'Arab Democracy For Ever?' *The Economist* (7 June 1997) p. 68.

[23] Generally, E. Kedourie. *Democracy and Arab Political Culture*. (London: Frank Cass, 1994). Also Vakikiotis (1984) pp. 135-151.

[24] J. Crystal. 'The Human Rights Movement in the Arab World.' 16 *Human Rights Quarterly* (1994) p. 435.

[25] Generally, Crystal (1994). A reason put forth for by governments for opposition to the AOHR was the already existent state of democracy in the region, see Crystal (1994) p. 446. On issues of democracy in the Middle East see 'Democratisation in the Middle East.' 7 *Journal of Democracy* (1996) 83-153.

[26] In the short existence of the Palestinian Authority serious questions have been raised concerning human rights as it has shown a tendency for centralised authoritarian style of rule with grave human rights abuses. See F. Azzan. 'Update: The Palestinian Independent Commission for Citizens' Rights.' 20 *Human Rights Quarterly* (1998) p. 338

[27] D. Bell. 'The East Asian Challenge to Human Rights: Reflections on an East West Dialogue.' 18 *Human Rights Quarterly* (1996) pp. 655-666. Concerning regional organisation in Asia see M. Haas, ed. *Basic Documents of Asia Regional Organisation*. (Dobbs Ferry: Oceana) especially volume VIX (1985). Concerning human rights see F. de Varennes, ed. *Asia-Pacific Human Rights Documents and Resources*. (The Hague: Martinus Nijhoff, 1998); V. Leary. 'Human Rights in the Asian Context: Prospects for Regional Human Rights Instruments.' 2 *Connecticut Journal of International Law* (1987) p. 319.

[28] See Y. Kodama. 'Asia-Pacific Region: APEC and ASEAN.' 30 *International Lawyer* (1996) pp. 367-389.

based on flexible and voluntary relations among its diverse members. The Seoul Declaration (1991) expressed one of the objectives of APEC as being the achievement of the common interests of the region's inhabitants.[29] However the emphasis of action has been strictly economic staying clear of any political issues which might touch national sensitivities.[30]

States in the region have shown a willingness to discuss the development of regional arrangements for human rights but efforts have remained at the rhetorical level with little substantive action taken.[31] As with the states of the Middle East ideas of sovereignty and independence are still very strong, with little willingness on the behalf of governments to give any of it up.[32] The region is further characterised by continued conflicts between neighbouring states, underdevelopment, multi-ethnic societies, authoritarian traditions, etc., which all impede efforts at co-operation.[33] The recent economic crisis to impact much of the region has hindered the possibility of establishing regional arrangements for human rights.[34] Co-operation in the region does occur in the creation of a common Asian identity as a form of challenge to western conceptions of democracy and human rights but beyond this outward projection there is little by way of common interest.[35]

Creating a single regional system for Asia is probably impossible due to its geographical size, making sub-regional co-operation the most practical solution.[36] Regional organisation does not look imminent in Asia but at the same time the region should not also be seen as 'arid ground' with no future hope.[37]

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[29] Kodama (1996) pp. 369-370.
[30] Kodama (1996) pp. 378-379.
[31] For a review see C. Dias. 'Regional Human Rights Arrangements in the Asian and Pacific Region: Progress Made and Some Options Available.' in Centre for Human Rights. *Fourth Workshop on Regional Human Rights Arrangements in the Asian and Pacific Region,* Katmandu, 26-28 February 1996. (New York: UN, 1996) pp. 73-77, hereinafter *Fourth Regional Workshop*.
[32] R. Foot. 'Pacific Asia: The Development of a Regional Dialogue.' in Fawcett and Hurrell (1995) pp. 229-241; H. de Jonge. 'Democracy and Economic Development in the Asia-Pacific Region.' 14 *Human Rights Law Journal* (1993) p. 301.
[33] de Jonge (1993) pp. 301-306.
[34] The recent economic collapse of many domestic economies in Asia cast a shadow of earlier assessments such as de Jonge (1993) 'South East Asia is political stable and economically prosperous region.' p. 301. A few years later neither point holds true for a number of states.
[35] 'Conclusion .' in Fawcett and Hurrell (1995) pp. 323-324). This is not to say that all of Asia shares the same conception of democracy and human rights, see Y. Ghai. 'Human Rights and Governance: The Asia Debate.' 15 *Australian Yearbook of International Law* (1994) pp. 5-6.
[36] R. Pinto. 'Régionalisme et universalisme dans la protection des droits de l'homme.' in A. Eide and A. Schou. *International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium*, 25-27 September 1967. (New York: Interscience, 1968) pp. 402-406. M. Haas. 'Asian Intergovernmental Organizations and the UN.' in Andemicael (1979) p. 237.
[37] de Varennes (1998) p. 3.

C. THE BANGOK DECLARATION OF THE VIENNA WORLD CONFERENCE

Prior to the Vienna World Conference preparatory regional meetings were held with a purpose of ensuring that the diversity of views in the world were adequately expressed at the global meeting. States from Asia and the Middle East came together to issue the Bangkok Declaration.[38] Within the Declaration there is a strong emphasis on sovereignty and non-interference in domestic affairs, reinforcing the belief that all states have the right to determine their political systems, economic, social and cultural development.[39] The participants felt that states have the primary responsibility for promotion and protection of human rights,[40] with international measures needed to provide underlying guarantees.[41] They welcomed the role played by national institutions in the protection and promotion of human rights but expressed the belief that the 'eventual establishment of such institutions are best left for the States to decide'.[42] The Declaration recognises that human rights are universal in nature but need to be considered in the context of the dynamic process of international norm creation whereby the significance of national and regional particularities, historical, cultural, and religious backgrounds all become essential elements.[43]

The Bangkok declaration exemplifies the continued emphasis upon the state that characterises Asia and the Middle East and acts as an impediment to establishing regional arrangements for the protection and promotion of human rights. The need for regional arrangements is accepted in general but is tempered by the belief that their creation will only occur 'on the basis of the conditions of the region'[44] which presumably implies the attitudes of governments. Furthering the protection and promotion of democracy and human rights in both regions will be a troubled process, as governments will in principal remain opposed to any such progress. There is a definite lack of space for the participation of individuals within domestic societies, much less space for the rhetoric of democracy and human rights to develop into substance. External actors will play an important role in these regions but they also bring with them competing concerns of economics and security with issues of democracy and human rights being secondary to stability.

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[38] UN Doc. A/Conf.157/PC/59 (7 April 1993). Viewing the Bangkok Declaration as representative of all of the Middle East and Asia is difficult as only 34 states plus the Palestinian Authority attended the regional meeting, see UN Doc. A/Conf.157/ASRM/Inf.1 (26 May 1993).

[39] Bangkok Declaration, paragraphs 5-6.

[40] Bangkok Declaration, paragraph 9.

[41] Bangkok Declaration, paragraph 15.

[42] Bangkok Declaration, paragraph 24.

[43] Bangkok Declaration, paragraph 8.

[44] *Fourth Regional Workshop* (1996) p. 5.

Both the Middle East and Asia are caught in a circular pattern impacting the future development of democracy and human rights. Regional arrangement for the protection and promotion would be able to complement and build upon the few initiatives that exist and exploit the rhetoric. At the same time governments are unwilling to pursue such an endeavour. The result is that individuals are left without any support beyond the textual rhetoric, leaving states firmly in control of the priorities and needs of these regions.

II. Regionalism and International Law

The process of the Vienna World Conference marked a significant development in the protection and promotion of global human rights by bringing together regional expressions and moving on towards a wider global agreement.[45] In the preparatory work for the Conference the three regional conferences all drafted their own declarations recognising a necessary relationship between regional and global systems of protection. In the Tunis Declaration[46] of African states it is stated that the observance and promotion of human rights are a global concern to which all states must contribute, but that 'no ready-made model can be prescribed at the universal level since the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded.'[47] The San José Declaration[48] from the Latin American and Caribbean states stressed 'the importance of co-ordination and co-operation between the UN and the inter-American system of human rights'.[49] As discussed above, the Bangkok Declaration recognised that human rights are universal in nature but that they must be considered in the context of national and regional peculiarities and various historical, cultural and religious backgrounds.[50]

The Vienna Declaration is a product of these regional collaborations as it proclaims all rights are universal[51] but they must be understood in the context of national and regional peculiarities and in light of the various historical, cultural and religions backgrounds. The document makes it clear that regardless of the different backgrounds all states are duty bound

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[45] See C. Schreuer. 'Regionalism v. Universalism.' 6 *European Journal of International Law* (1995) pp. 484-485. But see Cerna who appears to see the regional meeting as a threat to universality, C. Cerna. 'Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts.' 16 *Human Rights Quarterly* (1996) p. 742.

[46] UN Doc. A/Conf.157/PC/57 (24 November (1992). The Tunis meeting was attended by 42 African states, see UN Doc. A/Conf.157/AFRM/Inf.1/Rev.1 (3 December 1992).

[47] Tunis Declaration, paragraph 5.

[48] UN Doc. A/Conf.157/PC/58 (11 February 1993). The San José meeting was attended by 23 states, excluding Canada and the United States, see UN Doc. A/Conf.157/LACRM/Inf.1 (5 Febuary 1993).

[49] San José Declaration, paragraph 22.

[50] Bangkok Declaration, paragraph 8.

to protect all human rights.[52] The Declaration recognises that regional arrangements have a fundamental role in protecting human rights and that they should reinforce universal standards so long as regional peculiarities do not stand as an excuse for non-compliance with established global standards.[53] The Conference endorsed the strengthening of regional arrangements as they have a fundamental role to play in the protection and promotion of human rights.[54]

A. Universal or Regional International Law?

The Vienna Declaration was a significant step in the international system for the protection and promotion of human rights as it recognises an important relationship between universal and regional views concerning human rights.[55] It also brought the issue of the relationship between universal and regional arrangements in the process of international law into a more public light for discussion. The presence of the UN as the primary means of organisation in the international system has led to the belief of the necessity of a universal system of international legal regulation, especially concerning human rights. At the same time the practical reality of regional arrangements demonstrates the necessity of both co-existing in the international system. In the development of the international system universal arrangements have often been characterised as too weak and incoherent for effective action while the rise of regionalism is seen as fragmentation of the system as well as allowing for abuses by regional powers.[56] There is no logical reason to give absolute primacy to either the UN or regional arrangement as the most appropriate means for international legal enforcement as both have an equal contribution to make to the overall system.[57] The existence of regional arrangements will not lead to a weakening of the larger international system while at the same time '[u]niversality does not mean uniformity. It does mean, however, that regional international law, however variant, is a part of the system as a whole and not a separate system, and it

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[51] Vienna Declaration and Programme of Action. UN Doc. A/Conf.157/24 (Part I) (13 October 1993) Part I, paragraph 1.

[52] Vienna Declaration, Part I, paragraph 5.

[53] Any effort at co-ordination of instruments cannot be made to operate to the detriment of the individual, see A. Trindade. 'Co-Existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels).' 202 *Recueil des Cours* (1987-II) pp. 114, 126.

[54] Vienna Declaration, Part I, paragraph 37. The final document also expressed the need to establish regional arrangements in areas where they do not exist, Vienna Declaration. Part II, paragraph 76.

[55] A. Bayefsky. 'Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies.'' 9 *Ratio Juris* (1996) p. 44.

[56] Schreuer (1995) p. 477.

[57] Inter-American Institute of International Legal Studies. *The Inter-American System: Its Development and Strengthening*. (Dobbs Ferry: Oceana, 1966) p. 3.

ultimately derives its validity from the system as a whole.'[58] Regional arrangements are not able to handle or solve all of the problems of a particular area, a task a universal arrangement is equally unlikely to fulfil on a global scale.[59]

The UN Charter recognises the existence of regional arrangements in an uneven manner as regional arrangements are the first step in action concerning the maintenance of peace and security but always subordinate to the global UN system.[60] In both theory and practice regional arrangements have long been seen as acceptable for international action but subordinate to the global system.[61] More recently the co-existence between global and regional arrangements is becoming accepted as a practical way forward for international law.[62] In actual practice the UN has had to resort to various types of regional arrangements in areas such as the maintenance of peace and security,[63] economic and social programs,[64] and environmental protection.[65]

Regional arrangements provide both positive and negative factors to the development of any international law.[66] They have the possibility of being more conducive for action as states in a region will often possess a common history, traditions and cultures and characteristics.[67] The social, cultural, geographic proximity of the states will bread a similarity of views which over time will help to eliminate physical conflict and give rise to greater co-operation.[68] The relatively small geographical area involved with a regional arrangement allows for a more

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[58] R. Jennings 'Universal International Law in a Multicultural World.' in M. Bos and I. Brownlie, eds. *Liber amicorum for the Rt. Hon. Lord Wilberforce.* (Oxford : Clarendon, 1987) p. 41. An extreme development of regional international law would be bad for the system, a regional positivism would develop resulting in legal chaos, J. Starke. 'Regionalism as a Problem of International Law.' in G. Lipsky, ed. *Law and Politics in the World Community.* (Berkeley: University of California Press, 1953) p. 118. Van Dijk observes that international law is by definition not universal in character, see P. van Dijk. 'Common Standard of Achievement. About Universal Validity and Uniform Interpretation of International Human Rights Norms. 13 *Netherlands Quarterly of Human Rights* (1995) p. 106.

[59] G. Bebr. 'Regional Organisation: A UN Problem.' 49 *American Journal of International Law* (1955) p. 166 .

[60] See B. Simma et al. *The Charter of the United Nations: A Commentary.* (Oxford: Oxford University Press, 1994) p. 679. Also E. Frey-Wouters. 'The Prospect for Regionalism in World Affairs.' in C. Black and R. Falk. *The Future of the International Legal Order*, vol. 1. (Princeton : Princeton University Press, 1969) pp. 530-531.

[61] R. Yalem. 'Regionalism and World Order.' 38 *International Affairs* (1962) p. 461. For a history of regionalism in the context of the UN and the League of Nations see R. Akindele. 'From the Covenant to the Charter: Constitutional Relations between Universal and Regional Organizations in the Promotion of Peace and Security.' 8 *Israeli Law Review* (1975) p. 91.

[62] The rise of regionalism is seen as a pragmatic response to the increasing needs of the international system, W. Lang. 'New Regionalism in a Changing World Order.' in K. Wellens, ed. *International Law Theory and Practice, Essays in Honour of Eric Suy.* (The Hague: Martinus Nijhoff, 1998) p. 32; Yalem (1962) p. 460.

[63] See Schreuer (1995)pp. 489-498 and references within.

[64] P. Newman. 'Regionalism in Developing Areas: UN Regional Economic Commissions and Their Relations with Regional Organizations.' in Andemicael (1979) p. 339; E. Haas. 'The UN and Regionalism.' 3 *International Relations* (1970) pp. 796-797.

[65] D. Freestone. *The Road to Rio.* (Hull: University of Hull Press, 1994) pp. 8-9.

[66] Schreuer (1995) compares it the federalism debate at the domestic level, p. 477.

[67] H. Levie. 'Some Constitutional Aspects of Selected Regional Organizations: A Comparative Study.' 16 *Columbia Journal of Transnational Law* (1966) p. 15; Frey-Wouters in Black and Falk (1969) pp. 553-554.

efficient allocation of resources and delegating of tasks when it comes to problem solving procedures.[69] Governments will likely be more inclined to follow the directives of a regional arrangements since supervisory bodies will possess greater legitimacy being sees as having a greater understanding of the more localised situation then a global body.[70] The inability of a universal arrangement to understand or take into consideration the particularities unique to a region often results in action being seen as outside interference.[71] It is for reasons of closeness, and a common experience resulting in a deeper understanding which give regional arrangements a higher degree of legitimacy and co-operation among states.[72]

While regional arrangements present a number of attractive possibilities they also have an equal number of negative potentials which impede co-operation.[73] Within regions the actual commitment of member states is not always as deep as it is perceived as states may selectively use regional or universal procedures depending upon individual needs. Homogeneity is not a given or automatic situation within any region and the closeness of states may result in deep seeded antagonisms and continued physical conflict.[74] Regional powers may be able to manipulate the arrangement in the pursuit of its own self-interested goals. In turn other states in a region may prefer universal arrangements as an attempt to avoid a regional power, as well as an opportunity for the acquisition of resources not available at the regional level.[75] The wide range of experience and knowledge that a universal arrangement, like the UN, possesses could help to fill the gaps that a regional arrangement is unable to cover.[76]

B. Universal and Regional Systems for Democracy and Human Rights

The growth of regional arrangements for the protection and promotion of democracy and human rights should be seen as a positive move since the greater the initiative in furthering human rights promotion and protection the greater chance for an effective international system

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[68] N. MacFarlane and T. Weiss. 'The United Nations, Regional Organisations and Human Security: Building Theory in Central America.' 15 *Third World Quarterly* (1994) p. 283.
[69] R. Schema. 'The OAS and the Quest for International Co-operation: American Vision or Mirage.' 13 *Case Western Reserve Journal of International Law* (1981) p. 101.
[70] A.H. Robertson and J.G. Merrills. *Human Rights in the World*, 3rd ed. (Manchester: Manchester University Press. 1992) pp. 223-224; MacFarlane and Weiss (1994) p. 283.
[71] J. Donnelly. 'International Human Rights: A Regime Analysis.' 40 *International Organization* (1986) p. 637.
[72] Robertson and Merrills (1992) pp. 223-234; Frey-Wouters in Falk and Black (1969) p. 551.
[73] J. Nye. 'Regional Institutions.' in C. Black and R. Falk, eds. *The Future of the International Legal Order*, vol.4. (Princeton: Princeton University Press, 1972) pp. 433-436.
[74] I. Claude. *Swords Into Ploughshares: The Problems and Progress of International Organization*, 4th ed. (New York: Random House, 1964) p. 105; Schreuer (1995) p. 479; MacFarlane and Weiss (1994) pp. 283-285.
[75] Schreuer (1995) p. 479.
[76] Yalem (1962) pp. 468-469.

of protection.[77] Universal and regional arrangements for the protection and promotion of democracy human rights will share similar goals and purposes but the actual pursuit of these goals and purposes will differ throughout the world.[78] The practical existence of universal and regional arrangements has the down side of placing greater demands upon states for their resources.[79] The increase in reporting procedures and other obligations can actually harm the effectiveness of a human rights treaty, as states are unable to meet their responsibilities lessening the impact of the obligations entered into.[80] There is a definitive need to establish a international human rights system based on the complimentary co-ordination and co-operation between the UN and regional arrangements.[81] The present existence of a wide variety of human rights instruments, both universal and regional have in practice reinforced each other[82] allowing for cross-interpretations leading to greater clarification and understanding as well as providing the individual with a rich source of possibilities for protection.

When the UN Charter was drafted suggestions for regional arrangements for the protection and promotion of human rights were rejected and accused of deviating from the purposes of the UN and not recognising the equal worth of all of humanity.[83] However, the lack of substantive agreement at the global level over human rights issues has caused the UN to become more open to regional arrangements.[84] The UN has discussed the issue of regional human rights protection expressing varying attitudes on the issue. Regional arrangements have been described as subordinate to UN efforts[85] and only possibly being able to contribute to an effective system of human rights protection.[86] Over time it has been recognised that contacts between the UN and regional arrangements have become regular practice and efforts should be made to enhance these efforts.[87] An attempt to define the relationship between the

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[77] B. Weston, et al. 'Regional Human Rights Regimes: A Comparison and Appraisal.' 20 *Vanderbilt Journal of Transnational Law* (1987) p. 588.
[78] L. Miller. 'The Prospects of Order Through Regional Security.' in Black and Falk (1969) pp. 591-592.
[79] Smithers 'Toward Greater Coherence.' in Andemicael (1979) pp. 18-20.
[80] See generally M. Reisman. 'Establishment of a Regional Human Rights Arrangements in the Asian and Pacific Region: Experiences of other Regions.' in *Fourth Regional Workshop* (1996) pp. 26-30.
[81] Trindade (1987) pp. 122-123. A point recognised by Boutros-Ghali while he was SG of the UN, see B. Boutros-Ghali. 'The UN and Democracy.' 4 *Law and Public Policy* (1995) p. 12.
[82] Trindade (1987) p. 401.
[83] Weston et al. (1987) p. 588; Vasak (1982) p. 451.
[84] See Vasak (1982) p. 451. In 1996 U Thant visited the Council of Europe, the first visit of its kind, where he said 'In recent years regional organisations have come to be more clearly regarded as complementary to the world organisation, rather than as substitutes to it. In serving peaceful regional interests, they will, ... more and more become the pillars upon which the larger structure of world order can be firmly established' quoted in A. Robertson. 'The Council of Europe and the UN.' in Andemicael (1979) p. 499.
[85] 'Regional Arrangements for the Protection and Promotion of Human Rights.' GA Res. 37/172 GAOR 37th Sess., Supp. 51 p. 97, also G.A. Res. 42/152 GAOR 42nd Sess., Supp. 51 p. 125 (all subsequent GA resolutions mentioned have the same title as GA Res 37/172)..
[86] GA Res. 39/115 GAOR 39th Sess., Supp. 51 p. 209.
[87] GA Res. 41/154 GAOR 41st Sess., Supp. 53 p. 207.

UN and regional arrangements was made seeing regional human rights standards as complementing universally accepted standards and that any inconsistencies should be dealt with by the appropriate bodies.[88] More concrete reference has been made to the relationship seeing regional arrangements as 'fundamental' in reinforcing the global system[89] and making co-operation between regional arrangements and the UN 'crucial'.[90]

The existence and work of regional human rights arrangements is to be encouraged and given greater attention[91] as they mark a definitive possibility for improving the effectiveness of the global human rights system.[92] No matter how effective regional arrangements turn out to be in the end, the rights they recognise, the institutions established, and the procedures prescribed add up to an assault on the global state sovereignty system.[93] In any attempt to integrate different systems for the protection of human rights there must be every effort to ensure that standards are raised, or at the least, never go below universally agreed minimum standards as laid out in the UDHR.[94] Regional arrangements can provide improvement upon universally accepted norms as they are in the best position to develop standards that exist at the universal level into workable and acceptable principles of actual application.[95] However it is not an automatic process that rights protected under regional arrangements will automatically be more advanced than universal arrangements.[96] The organisation suggested here does not call on the UN to impose specific standards on various parts of the world, neither does it allow for regional arrangements to establish their own systems of protection which go below minimally accepted standards.[97]

Regional and universal human rights instruments should be seen as complementing rather than competing against each other.[98] There exist practical problems in the existence of

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[88] GA Res. 45/167 GAOR 45th Sess., Supp. 49 p. 280.
[89] GA Res. 51/102 GAOR 51st Sess., Supp. 49 p. 207.
[90] Report of the Secretary General. 'Regional Arrangements for the Promotion and Protection of Human Rights.' UN Doc. A/51/480 (11 October 1996) paragraph 3.
[91] Weston et al. (1987) p. 637.
[92] Commission on Human Rights. Resolution 1996/55. 'Advisory services, technical co-operation and the Voluntary Fund for Technical Cooperation in the Field of Human Rights.' paragraph 9 that emphasises that the objective of the Voluntary Fund is to provide financial support for international co-operation aimed at building up and strengthening national and regional institutions and infrastructures which will have a long-term impact on improving the implementation of international conventions and other international standards on human rights.
[93] Weston et al (1987) p. 614.
[94] Vienna Declaration, Part I, paragraph 37 reads that regional standards should reinforce existing universal standards.
[95] R. Pinto. 'Régionalisme et Universalism dans la Protection des droits de l'homme.' in Eide and Schou (1968) p.412; T. Meron. 'Norm Making and Supervision in International Human Rights: Reflections on Institutional Order.' 76 *American Journal of International Law* (1982) p. 761.
[96] See discussion of OIC Declaration above.
[97] Meron (1982) pp. 761-762.
[98] Trindade (1987) p. 23. Claude (1964) viewed the regional/universal relations as being one of 'concomitant supplements' but with regional playing the subordinate role, p. 112.

multiple procedures and attempts to ensure human rights guarantees are applied in a uniform way, with minimum overlap.[99] Now that the UN is no longer hostile in its view of regional human rights arrangements there is more of a sense of unity in human rights then in competition between instruments.[100] An integrated approach would prevent unnecessary duplication, conflicts and variations ensuring that provisions would be established and supervised by the most competent organisations.[101]

The adoption of the ECHR was a direct effort by a regional organisation to develop a system of protection and promotion where global efforts were too slow. When the OAS adopted the ACHR the issue was raised as to whether the member states preferred to have a single universal system concerning human rights or the coexistence of regional and universal systems. If the latter was preferred, should the inter-American system be limited to only protecting the UN standards or should it develop regional standards as well. In the end the establishment of co-existing regional and universal systems of protection was preferred along with the development of regional norms in the area.[102] In Africa, the development of human rights protection and promotion was as much a product of outside pressures as it was internal forces, but still based itself upon regional peculiarities. This demonstrates is that the protection and promotion of democracy and human rights relies upon efforts at all levels of the international system,[103] an area that remains full of potential and possibility.[104]

III. The Global Application of Democracy and Human Rights

The most beneficial consequence of a combined regional/universal approach to the protection and promotion of democracy and human rights is its ability to accommodate the conflict over applicability of standards through increased dialogue and discussion leading to

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[99] Robertson and Merrills (1992) p. 225. Trindade (1987) points out that the co-ordination of human rights treaty agreements can in no way be detrimental to the individual due to the special character of the treaties, p. 98. Also S. Werners. 'Co-operation Between Jurisdictions on Different Levels in the Field of Human Rights.' 15 *Netherlands International Law Review* (1968) p. 394.

[100] Trindade (1987) pp. 24-25.

[101] Meron (1982) p. 756. The UN Commissioner for Human Rights and attached office will have a large role to play in co-ordinating co-operative activities between the UN and regional arrangements, see Commission on Human Rights Resolution 'Regional arrangements for the promotion and protection of human rights.' 1997/34 (11_April 1997). Also Vienna Declaration, Part II, paragraph 92.

[102] Thomas and Thomas in Rodley and Ronning, 169.

[103] The combination of regional and universal action has proved fruitful in the Inter-American system in the instances of Haiti and Guatemala, see V. Vaky. *The Future of the Organization of American States*. (New York: Twentieth Century Fund, 1993) p. 26)

[104] Report of the Secretary General (1996) paragraph 23.

greater understanding.[105] Arguments concerning the inapplicability of principles such as democracy and human rights are commonly based on some sort of cultural relativism[106] - which underlies the assertion that external agents should not interfere with internal affairs based on the idea of sovereignty.[107] Too often expressions of relativism consist of the state abusing its position as the exclusive definer of human rights in order to serve its own interests, not to preserve tradition or culture.[108] The context of rights may differ within and among societies but there remains a universal duty of all governments to provide effective arrangements to ensure the maintenance of the survival and dignity of the individual.[109] The establishment of regional arrangements in the Europe, the Americas and Africa has shown that these institutions are just one part of the overall international system.

A universal system for the protection and promotion of democracy and human rights would never be able to require uniform principles and behaviour across the globe.[110] The context in which democracy and human rights exist are essential to their comprehension and will depend upon the socio-cultural background in which they are applied.[111] A significant benefit derived from a focus on regional arrangements is that such an approach allows for a theoretical formulation between the 'discreteness of the State and the undifferentiated international system.'[112] In determining to what extent democracy and human rights exist in the various regional systems, and in individual States, there is the problem of relative degrees of importance given to the individual components involved in democracy and human rights.[113] The importance given to the various aspects of democracy and human rights will vary from state to state and region to region, with each state or group of states arguing its system and

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[105] Bell (1996) points out that at the level of the 'basic' human rights such as freedom from torture, genocide, slavery, there is little disagreement. It is when rights enter a 'gray area' concerning socio-economic rights, family issues and addedly participation that conflict over meaning and applicability arises, pp. 642-643.

[106] A further issue related to cultural relativism is the applicability of democracy and human rights along gender lines, see E. Brems. 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse.' 19 *Human Rights Quarterly* (1997) p. 136.

[107] M. Freeman. 'The Philosophical Foundations of Human Rights.' 16 *Human Rights Quarterly* (1994) p. 494.

[108] See A. Pollis. 'Cultural Relativism Revisted.' 18 *Human Rights Quarterly* (1996) p. 316; J. Donnelly. 'Cultural Relativism and Universal Human Rights.' 6 *Human Rights Quarterly* (1984) p. 411.

[109] H. Schue. *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*. (Princeton: Princeton University Press, 1980) p. 17.

[110] See van Dijk (1995) pp. 114-119.

[111] P. Baehr. *The Role of Human Rights in Foreign Policy*. (Basingstoke: Macmillan, 1994) pp. 21-22; Robertson and Merrills (1992) p. 225. Cerna (1994) disagrees saying there can be no regional norms only 'regional arrangements which supervise compliance with international standards', p. 752.

[112] L. Cantori and S. Spiegel. 'The Analysis of Regional International Politics: The Integration versus the Empirical Systems Approach.' 27 *International Organization* (1973) p. 467; H. Bull. *The Anarchical Society: A Study in World Politics*. (London: MacMillan. 1977) p. 305.

[113] A. Ritter. 'Comparative Assessments of Freedom.' 6 *Connecticut Journal of International Law* (1991) pp. 561-562. It has been held that the debate over applicability demonstrates a degree of universality on a difference in emphasis, see de Jonge (1993) p. 302.

values are superior without seeing beyond the ideological cloud and looking at the actual practices that occur.[114] Therefore an effective system for the protection and promotion of democracy and human rights must allow for difference but at the same time prevent abuses justified by diversity. Diversity is not seen as weakening the international system of human rights, when channelled in an effective manner it will strengthen the basis of international human rights by providing deeper understandings as to the meaning of democracy and human rights.[115]

Difference in the applicability of democracy and human rights, commonly viewed as the West versus the rest, have a long history in international relations[116] and are most commonly based upon personal assumptions as opposed to realistic observations.[117] Democracy and human rights must be 'culturally authenticated' to be acceptable the imposition of certain system derived from an outside source can never be seen as legitimate.[118] Democracy and human rights are part of the everyday lives of individuals and should be recognised as such.[119] The discourse of democracy and human rights provides the ability of individuals throughout the world to articulate their concerns and desires related to their day-to--day existence.[120] International instruments are the beginning of this discourse but since they are static documents they cannot be expected to contain the discourse, especially when it comes to application. Presently a great deal of the international discourse of democracy and human rights focuses on the issue of cultural relativism, emphasising irreconcilable differences rather than working towards creating effective substantive law.[121] The clearest way to a more effective international law of human rights is to listen to the voices of those who have the greatest concern with the law and not to confine it through the exclusive use of power.[122]

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[114] R. Howard. 'Monitoring Human Rights: Problems of Consistency.' 4 *Ethics and International Affairs* (1990) p. 40. M. Freeman. 'Human Rights and Real Culture: Towards a Dialogue on 'Asian Values'.' 16 *Netherlands Quarterly of Human Rights* (1998) pp. 27-28.

[115] Nino expresses the belief that as a sociological fact 'societies differ in their ethical judgements or that people tend to follow the prevailing evaluations of their community … but this does not affect the validity or possibility of universal moral judgements.' C. Nino. *The Ethics of Human Rights*. (Oxford: Clarendon, 1991) p. 103.

[116] For a historical view see H. Bull. 'The Revolt against the West.' In Bull and A. Watson, eds. *The Expansion of International Society*. (Oxford: Oxford University Press, 1984) p. 217.

[117] See D. Emmerson. 'Singapore and the "Asian Values" Debate.' 6 *Journal of Democracy* (1995) pp. 96-101.

[118] G. Joffe. 'Sovereignty and Intervention: The Perspective for the Developing World.' in M. Heiberg, ed. *Subduing Sovereignty: Sovereignty and the Right to Intervene*. (London: Pinter, 1994) pp. 89-90.

[119] A-B. Preis. 'Human Rights as Cultural Practice: An Anthropological Critique.' 18 *Human Rights Quarterly* (1996) p. 311.

[120] Preis (1996) pp. 289-290.

[121] See C. Joyner and J. Dettling. 'Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law.' 20 *California Western International Law Journal* (1990) p. 275.

[122] Freeman (1998) pp. 38-39.z

IV. The Future of democracy and Human Rights

The amount of activity in relation to democracy that has occurred in the past few years demonstrates the desire for democracy throughout the world. This activity, as shown throughout this work also demonstrates the many obstacles faced in formulating an effective international law of democracy that is based on human interests and not state interests. One commentator, looking to the future, has recently written

> that we need to prepare ourselves for new forms of democracy in the twenty-first century: at the spatial level, as we expand our horizons beyond the nation-state; at the normative level, as we recognize that the attainment of global democracy cannot be divorced from a concern with a measure of economic equality and social justice on the one hand, and with the political and cultural diversity of the peoples of the earth on the other; and finally, at the institutional level, as we seek to reconcile the seemingly irreconcilable – state interests, class interests, religious indentities, national identities, economic interests, ecologicial imperatives, and so on ....[123]

These are all issues that an international of democracy must keep in mind in its development and be able to continually address. Democracy and human rights are not systems created by certain societies to be copied by others. Instead they are aspirations or goals that have been sought throughout history. If democracy is seen as including ideas such as freedom, justice, liberty, equality, the rule of law, and participation in the decision making process, then it is possible to distinguish its existence occurring in many forms depending on the characteristics and circumstances of the individuals and society involved.[124] How and where democracy will develop and take hold is not known exactly and academic studies have proven indecisive.[125] The democracy of Athens and other Greek cities was unique to their circumstances[126] and depended upon a number of factors that are today seen as extremely anti-democratic and in violation of human rights. If human rights are about the physical survival and dignity of the human person then it would be difficult to claim the idea is inapplicable to certain societies. How survival and dignity are pursued will differ among individuals around the world but will always maintain a common basic standard or goal. Universal legal

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[123] P. Resnick. *Twenty-First Century Democracy.* (Kingston: McGill-Queen's University Press, 1997) p. 3.
[124] D. Treadgold, D. *Freedom: A History.* (New York: New York University Press, 1990) p. 5.
[125] See R. Dix. 'History and Democracy Revisited.' 27 Comparative Politics 1994 pp. 91-105.
[126] R. Dahl. *Democracy and Its Critics.* (New Haven: Yale University Press, 1989). pp. 18-19.

instruments are able to reflect this common standard and goal but they are unable to provide an all encompassing means for achieving it.[127]

The future of democracy and human rights depends upon individuals participating and being knowledgeable of the possibilities around them. A regional arrangement is much better placed to be close to the individual in order to have an impact when it comes to international law. Regional arrangements are better placed in terms of resources and understanding to address the issues of democracy and human rights a society faces, universal arrangements will continue to provide the basic standard that all individuals throughout the world desire.[128] Both regional and universal arrangements for the protection and promotion of democracy and human rights will provide the necessary processes allowing individuals and society to develop themselves as well as develop the attitudes necessary for tolerance and diversity within society and the world.

The development of an international law of democracy will not be a naturally occurring process. Neither can it be constructed from a single site in the international system. It must consist of co-operative efforts of dialogue throughout the world. Chapter 3 discussed the numerous possibilities that exist at the global level that inform an international law of democracy. Chapters 4-6 presented the efforts of regional arrangements in the same regard and how that level of activity has a serious contribution to make to the global development of an international law of democracy. In fact the contribution of regional arrangements to the global development of democracy is absolutely essential. It has been continually held that there exist universal principles of democracy and human rights that all societies strive for. At the same time how these principles manifest themselves in practice will vary due to the diversity of society, not only between regions but within regions. In the end the combination of efforts work towards a more effective international system from the perspective of the individual.

Europe has seen the development of the rhetoric of human rights and democracy move closer and closer to the individual. The European system for the protection and promotion of democracy and human rights stands as an example for global developments in a number of regards. The co-operation and co-ordination of the three regional organisations in Europe provides guidance as how similar co-operation should (or should not) be formulated between

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[127] A. Cassese. *Human Rights in a Changing World*. (Cambridge: Polity, 1990) pp. 48-49.
[128] Commission on Human Rights. Resolution 1997/45 'Regional arrangements for the protection and promotion of human rights in the Asian and Pacific region.' (11 April 1997) paragraph 4 'regional arrangements play a

global and regional arrangements. Europe is also significant for its current process of change from a small grouping of states to a much larger, more diverse grouping which has not resulted in a lowering or fragmenting of standards. The regional organisations of Europe have taken democracy and human rights as their guiding principles. Member states have had to follow these principles as both individuals and the organisations have worked to put the rhetoric into reality.

The Inter-American system has shown how a proactive nature on the behalf of regional organisations is able to bring results in a hostile environment. The region shows the power of the rhetoric of democracy and human rights as states there had long proclaimed their virture but did not pursue it in day to day life. It further shows the benefit of having a regional arrangement close to the situation as it was able to exploit this rhetoric in a way a global body would not have been able. The development of democracy and human rights in the Americas is following a rather unique course but one that is firmly placed in the global system. The Americas brought to the global system the criteria for statehood that led to the requirement of effectiveness for international law. It is now the Americas that are formulating a clear legal standard of democracy that its member states must follow. Hopefully the principles and practices of the Americas will become part of the global international law once again.

Presently Africa is facing numerous difficulties in furthering an international law of democracy, as it has faced difficulties in consolidating a system of human rights protection. Africa does show how diversity may exist but the goals and principles are able to guide the development of the law. Africa has a significant contribution to make to an international law of democracy by bringing its diversity to its development. This diversity must be used to enrich an understanding of democracy not to minimise it. Africa unfortunately shows the persistence of the state-centric nature of international law and its negative impact upon democracy and human rights. African leaders have been able to use the state-based system to manipulate the words of democracy and human rights in providing the double gesture of the law. The rhetoric of democracy and human rights is slowly taking hold in the region and as it does the regional organisation is also slowing becoming more active in the area. The African experience clearly shows that the only effective international law of democracy is one that takes the individual as its primary concern and not the interests of states.

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fundamental role in promoting and protecting hum an rights and that they should reinforce universal human rights standards, as contained in international human rights instruments, and their protection'.

An international law of democracy will draw upon all of the above momentum to gain strength as a guiding principle of the international system. The progress made in the Americas and Africa provide hope and possibilities for similar developments in Asia and Middle East. As an international law of democracy develops we must remain ever vigilant that the words spoken are not alone substituted for the reality on the ground. The international legal argument continues to allow for international law to speak of concern for the individual but remains within the control and under the influence of the interests of states. The development of an international law of democracy will assist in improving the condition of the international legal argument for the benefit of individuals. Democracy consists of individuals being part of the processes that impact upon their lives, this includes the development of international law. As international law becomes more and more a part of our everyday lives it becomes more and more necessary to ensure that all actors in the international system are able to participate and not just an exclusive group.

In 1907 Elihu Root stated that the best way to ensure a peaceful world is to make sure that individuals are aware of the rights and duties they possess through international law.[129] To be aware of what is happening around them, both domestic and international. In the present situation, events of international nature are taken over by the state eliminating the role of the individual to a great extent. Both regional and universal arrangements for democracy and human rights bring the individual into the international system as a concern and as a participant. This must bode well for the future. For international law to continue to be an effective part of the international system it must further itself from the perspective of the individual. For if international law is unable to be a credible part in the lives of its largest constituency then it is doomed to irrelevance. This piece has only been able to identify the key areas of development for an international law of democracy, those areas that are most beneficial to the individual. The next step is to exploit these possibilities by bringing the individual closer to the texts so that all may participate in the development of the international system. International law now has to recognise that effectiveness is no longer sufficient. States have been reluctant to recognise this development as it brings into question their very existence. By forwarding an international law of democracy international law will become an effective force for the individual, continually responding to the needs and desires of individuals showing that the rhetoric is not empty.

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[129] E. Root. 'The Need of Popular Understanding of International Law.' 1 *American Journal of International Law* (1907) p. 1.

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