CHAPTER THREE

AN OVERVIEW OF THE EXISTING REGIONAL MECHANISMS OF HUMAN RIGHTS IN THE WORLD
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3.1 Introductory

There are several factors responsible for the emergence of regional mechanisms for human rights monitoring. One of the reasons, according to several scholars, was that territorial proximity of the States. The territorial closeness was thought to be more suitable to keep a vigil over the human rights conditions at regional level which is not possible under international mechanism, as it would require more time and funds. Also, in case of international accountability political issues like sovereignty become a big hurdle. As another political reason, it was also considered wiser to keep control of one’s own region to avoid any foreign interference in the name of ideology etc. etc.

In addition to the above mentioned reasons, later, there grew a wave of new ideas in favour of regional human rights mechanisms for example, cultural relativism, which emphasized that human rights can be adopted as per the cultural values and may vary in nature and scope. Then there was an argument differentiating between the first and the second generation human rights which projected that the civil and political rights are the foremost focus of human rights as they are individual in nature, whereas the second generation human rights are of economic, social and cultural nature which are second priority as they are dependent on the first generation human rights. However, the debate emerged over this convenient divide which said that the nature of a given society would decide the priority of one kind of human rights over other. Hence, respective societies of region may adopt their own set of human rights with the scope defined as per their culture. Also there were several criticisms towards the international regime of human rights under the UN for being too weak etc. etc.
All these ideas supported the establishment of regional human rights systems.

In such a background, regional human rights regimes were first established in Europe and then in America. As V.S. Mani has put it in his paper ‘... recognizing the advantages of a regional approach to human rights and stirred by atrocities of the Axis Power during the Second World War, both the European and the American communities set out to create their own human rights systems.’\(^1\) I start this chapter by introducing these two most established regional human rights mechanisms. I have also discussed the African and the Arab initiatives on regional implementation of human rights in the same chapter.

### 3.2 Introduction to the European Human Rights Mechanism

Regionalism is an old concept, however, in case of human rights it emerged in twentieth century only.\(^2\) In 1948, America came up with an American declaration on human rights, which was an indication of the presence of regional consciousness of human rights. Later, in 1950, the Council of Europe drafted a European Convention on Human Rights. This was the actual beginning of the treaty based regional human rights mechanisms in the world. Since the European Convention was the first treaty based system I am discussing this system as first in this chapter.

The European human rights mechanism is the first treaty based human rights mechanism and also the most complex one. Generally, this system is considered to be run under the auspices of the Council of Europe, however, the Council of Europe is only the first of the other European organisations to launch human rights monitoring system and not the only one, as is generally misunderstood. As a matter of fact, the European mechanism for human rights consists of three different organizations with different nature and scope. These three organizations are namely: the Council of Europe (CoE), the Organization for Security and Cooperation in Europe (OSCE), and the European Union (EU). This part of the chapter will present an overview of human rights arrangements in these three European organisations.

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\(^2\) For further details, see: V.S. Mani, 1981, pp. 98-100.
3.2.1 Development of the European Human Rights Mechanism

The history of European human rights mechanism has a long philosophical gestation period. All the historical-philosophical developments in western religions of Judaism and Christianity discussed in the second chapter specifically relate to European philosophy of human rights. Also, political ideas of European thinkers from Greek Socrates to English John Locke have contributed a lot in the growth of this concept. Thirdly, the legal developments involving the concept of human rights have also taken place in Europe, for example, the Twelve Tables of Rome, the Charter of Rights of England, the Magna Carta, the French Declaration etc. etc. Moreover, the European countries played an important role in the drafting of the International Bill of Human Rights. Rene Cassin of France, known as the ‘Father of the UDHR’ is one such example. However, the role of Europe did not stop at the drafting of UDHR. It continued at regional level and Europe became the first region to introduce treaty based regional human rights mechanism.

Europe saw an early development of the consciousness towards human rights protection at regional level. First reason for this probably was that Europe was most affected by the aftermath of the two world wars being the battle field for both the world wars. And after the war was over the defeated countries of Germany and Italy also became a concern for fear that they might adopt a reactionary approach yet again. There was urgent need to see to it that Europe does not fall prey to another world war.

Secondly, the divide between the Western bloc and the Soviet bloc was felt right after the Second World War. The European States wanted to protect themselves from the impact of Communism and to deal with that they wanted to give a more pleasing and effective slogan, which they found in human rights. Thirdly, and the most direct link to European human rights mechanism was that the European countries were not very content with the final draft of the UDHR and wanted some changes which were not incorporated, as mentioned in the second chapter. Hence, it will not be wrong to

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3 For further details, see: Shveta Dhaliwal, 2008, pp. 215-231.
4 V.S. Mani, 1981, pp. 96-118, at p. 98.
say that the regional planning for a European human rights mechanism was felt simmering even before the end of the Second World War.

During the inter-war period itself there were attempts to unite Europe as a federation and to make all the European countries democratic so that they become more respectful towards human rights. In addition to the religious (Judeo-Christian) homogeneity of the European countries there were other factors also which facilitated the idea European regionalism those were, common cultural and legal features, mixed market economies and democratic regimes in majority of the States.

3.2.1.1 The European Human Rights Monitoring Under the Council of Europe

The traces of European regionalism can be found in the Briand Plan of 1930 forwarded by a French Foreign Minister, Mr. Aristide Briand, who mooted the idea of European Federal Union. The idea behind this plan was to unify Europe by converting Europe in a federation and at the same time retaining the sovereign status of the member States. In 1946, the British Prime Minister in his speech at the University of Zurich mooted the idea of ‘United States of Europe’.

At that time the present regionalism of Europe was nowhere in sight, however, in three years time in 1949, as a consequence of Treaty of London, the Statute of the Council of Europe was adopted by ten west European States. These States were

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9 Available at: http://docs.fdrlibrary.marist.edu/psf/box51/a466b20.html. Visited on 24 February 2010.


11 *id.*

12 The ten founding members of the Council of Europe were: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom.
thought to be more suited for such an initiative since there was great deal of socio-cultural and economic similarities amongst them.\textsuperscript{13} This is an argument which will be taken up in the discussion on South Asia and SAARC in the subsequent chapters.

The International Committee of the Movements for European Unity organised the Congress of Europe and met from 8-10 May in 1948 in Hague.\textsuperscript{14} The Statute of the Council of Europe was adopted in this Congress. The Statute came into force in 1949. Coincidently, the Statute was signed at St. James Palace where developments for the UN had also taken place as mentioned in the second chapter. At the Congress, a resolution was adopted, which in its introductory read:

\begin{quote}
The Congress, \textit{Considers} that the resultant union or federation should be open to all European nations democratically governed and which undertake to respect a Charter of Human Rights;

\textit{Resolves} that a Commission would be set up to undertake immediately the double task of drafting such a Charter and lying down standards to which a State must conform if it is to deserve the name of democracy.\textsuperscript{15}
\end{quote}

The Congress gave great deal of attention to human rights.\textsuperscript{16} The hidden agenda behind this focus on human rights was to democratise all the European countries, keep communism at bay and to unify the region.\textsuperscript{17}


\textsuperscript{15} Available at: \url{http://Conventions. Council of Europe. int/ Treaty/ en/ Treaties/ HTML/ 001. htm}. Visited on 24 February 2010.


\textsuperscript{17} In May 1951 the Committee of Ministers invited each Member State to appoint a Permanent Representative who would be in constant touch with the organization and would reside in Strasbourg. For further details, see: Gordon L. Weil, “The Revolution of the European
Here it is relevant to mention here that all the States parties to the European Union (EU) are members of the Council of Europe, which further strengthens the oneness of the regional efforts towards the human rights enforcement.

3.2.1.1.1 The Composition of the Council of Europe and Drafting of the European Convention on Human Rights

The Council of Europe is constituted of the Committee of Ministers, comprising the Foreign Ministers of each member State, the Parliamentary Assembly composed of Members of the Parliament of each member State, and the Secretary General as head of the Secretariat of the Council of Europe.\(^{18}\) The Committee of Ministers is the decision making body of the Council of Europe.\(^{19}\) The Parliamentary Assembly of the Council of Europe (PACE),\(^ {20}\) can be considered the oldest international parliamentary assembly\(^ {21}\) with a pluralistic composition of democratically elected members of the parliament, established on the basis of an intergovernmental treaty.

All these organs of the Council of Europe were designed to play some role in the human rights monitoring which I will discuss in the later part of the chapter. All the new measures for the promotion and protection of human rights usually stem out of the Parliamentary Assembly of the Council of Europe.\(^ {22}\) After the Council of Europe was established, in its first session of its Consultative Assembly, now known as the Parliamentary Assembly, in August 1949, the Assembly assigned the Committee on Legal and Administrative Questions with the duty to prepare the first draft on human rights.\(^ {23}\)

\(^{18}\) Available at: http://www.coe.int/t/cm/home_en.asp. Visited on 1 February 2010.

\(^{19}\) Available at: http://www.coe.int/t/cm/aboutCM_en.asp. Visited on 1 February 2010.


In the preliminary discussion on the ‘comprehensive system of guarantee of human rights’ there was a debate on the issue of civil and political rights and the economic, social and cultural rights, similar to the debates during the drafting of UDHR and later the Covenants. It was obvious that the socialist States stressed on the inclusion of the economic, social and cultural rights which was agreed to by the other members in principle save their doubts on the practical enforceability of these rights.\textsuperscript{24}

The Committee of Ministers and the Assembly finally agreed that only civil and political rights should be included in the Convention. Secondly it was decided that the English definition of rights would be accepted for the European Convention and third decision was that a Court would be established and States would have to give separate acceptance to it by making a declarations.\textsuperscript{25} The Committee also restricted the Convention to individual rights.

The European Convention was finalized in two phases. In the first phase rights like right to life, freedom from inhuman punishment and slavery were finalized. Rest of the rights like right to property, rights of the parents to supervise their children's education, guarantees of free elections etc. etc. was to be finalized in a separate additional Protocol to the Convention.\textsuperscript{26} It was a well thought out strategy resorted to by the Council of Europe, by deciding on the less controversial rights first and the contentious ones later, in a separate Protocol. This approach can also be adopted in case of South Asia where the members countries have complex problems related to human rights.

By September 1949 the draft on European human rights guarantees was prepared and the Consultative Assembly adopted a report on it. In this report the European Commission on Human Rights and a European Court of Human Rights were also

\textsuperscript{24} Gordon L. Weil, 1963, p. 806.
\textsuperscript{25} ibid., pp. 806-807.
\textsuperscript{26} This supports the argument forwarded by a supporter of cultural relativism and regional human rights regimes, Bikhu Parekh, who favours a balance between the minimalist and the maximalist approach while establishing regional human rights mechanisms. For further details, see: Bikhu Parekh, “Non-Ethnocentric Universalism”, Tim Dunne and Nicholas J. Wheeler, (eds.), \textit{Human Rights in Global Politics}, Cambridge University Press, Cambridge, 2006, pp. 128-159, at p. 150.
proposed as the organs to run the mechanism. In the month of November in the same year the Committee of Ministers of the Council of Europe decided to appoint a Committee of Governmental Experts, to prepare an initial draft of the Convention. In September 1949 the Teitgen Report was presented which facilitated the final draft by 7 August 1950 by the Committee of Ministers.\textsuperscript{27}

Some provisions like the individual complaint system to the European Court were decided to be kept optional at this stage. Such decisions were similar to the deliberations while drafting of the Covenants as discussed in the second chapter. On 4 November 1950 the European Convention on Human Rights (ECHR) was signed in Rome.\textsuperscript{28} The ECHR came into force on 3 September 1953 after 39 ratifications. The ECHR refers to the UDHR, “considering that the Universal Declaration aims at securing the Universal and effective recognition and observance of the rights therein declared”.\textsuperscript{29} And has several other similarities with the UN system which will be highlighted throughout this part of the chapter.

3.2.1.2 Introduction to the European Convention on Human Rights, 1950

The Convention was divided in five parts of 66 Articles with an Additional Protocol. The Article 2-12 and the Article 14 provide for different human rights guaranteed by the\textsuperscript{30} Convention. The first article of the ECHR is a step in the direction of realizing true essence of human rights. It says that all the States parties to the Convention must guarantee the rights mentioned in the section I of

\begin{itemize}
\item \textsuperscript{29} In addition to the above mentioned organs of the CoE there is the Conference of Local Authorities of Europe which was created in 1957. It later was renamed the Conference of Local and Regional Authorities. It was opened for signature by Council of Europe member States on 15 October 1985; it came into force on 9 September 1988. This body works to fortify democracy at the national and regional levels in Europe. For more details see: http://www.coe.Int/t/congress/presentation/default_en.asp. Visited on 22 February 2010. Also, see: Henry Steiner, Philip Alston and Ryan Goodman, 2008, p. 937.
\item \textsuperscript{30} Henry Steiner, Philip Alston and Ryan Goodman, 2008, p. 937.
\end{itemize}
the ECHR to everyone under their jurisdiction,\(^{31}\) hence, binding the States party to the Convention to ensure human rights to their people.

The original Convention included twelve rights\(^{32}\) in its part one and more were added by way of Protocols. Articles 15-18 explain the restrictions on the exercise of the rights guaranteed in the Convention. Article 15 of the Convention\(^{33}\) provides for the derogation clauses, wherein the States parties may derogate from the guarantees mentioned in the Convention ‘in times of war or other public emergency’.\(^{34}\) This provision is similar to the Article 4 of the International Covenant on Civil and Political Rights of the United Nations. As another similarity between these two human rights treaties, there are some non-derogable rights mentioned in both these treaties, for example, right against torture\(^{35}\).

However, there are some differences between these two human rights treaties. Firstly, the derogation clauses of the ICCPR and the ECHR are not absolutely same and secondly, unlike the two Covenants, the European Convention does not provide for the right to self-determination.\(^{36}\)

Section II of the Convention provided for the nomenclature of the European Commission of Human Rights and the European Court of Human Rights in Article 19.\(^{37}\) Section III provided for the functions and procedures of the Commission

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from article 20-37. It is important to mention here that article 25 of the Section III introduced the individual complaint mechanism in the European human rights system. This was a unique feature introduced by the European Convention especially keeping in mind that till 1966 the ICCPR was not drafted and neither was there any such other individual communication provision actively in use at that time. Section IV was devoted to the Court from article 38-56. And the final Section V which provided for the explanation of the expenses, ratifications etc. from article 60-66.

The original Convention was substantially amended by the Protocol 11 which I will discuss after having explained the original framework for the implementation of the ECHR. Here it is important to mention another similarity between the ECHR and the ICCPR and the ICESCR that in all the three the Protocols are kept optional and need separate acceptance by the States party to the main treaty.

The European Convention provided for the machinery for the human rights mechanism which is discussed ahead. Till date it is the most well planned monitoring system including the original Convention and the changes made to it. This feature will come out on its own as we proceed in this chapter.

3.2.1.3 Organs of the European Convention on Human Rights, 1950

The drafters of the ECHR planned two major organs to institutionalize the implementation of the rights guaranteed. A Commission of Human Rights and a Court of Human Rights were primarily established for this purpose. In addition to these two, the Committee of Ministers was also involved in human rights monitoring which was a political organ of the Council of Europe. The detail of the role of these institutions in the promotion as well as protection human rights in Europe has been discussed ahead. It is important to note that this regional human rights regime may have some inspiration for the building new regional regimes for human right in different parts of the world, in this case South Asia. The overview of the European Commission of Human Rights is given ahead to facilitate this purpose.

38 id.
39 id.
40 id.
The first organ of the European Mechanism of Human Rights is the European Commission on Human Rights. It was created in 1954 and consisted of one member from every Member State\(^{42}\) and the members were to be elected by the Committee of Ministers.\(^{43}\) The members of the Commission were to serve the Commission as independent individuals and not as government representatives.\(^{44}\) The main function of the Commission was to receive State communications against other States.\(^{45}\) This function was assigned to the Commission from the day of its establishment. However, it acquired the competence to handle the individual communications\(^{46}\) in 1955, since it was subject to the declared acceptance of at least ten contracting States.\(^{47}\)

Para I of the Article 25 of the ECHR mentions that the Commission can receive petitions ‘from any person, non-governmental organizations or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions’ which gives rise to two connotations; first that the States have to separately make declarations to accept the individual petition system. Secondly there is no reference to the private entities in case of violation of human rights which has given rise to a legal concept known as *Drittwirkung*.\(^{48}\)

The CoE has also established an office of European Commissioner on Human Rights.\(^{49}\) Main function of this office was to promote human rights education quite like the Office of High Commissioner on Human Rights which works under the UN Secretariat. This office also offers mediation in case of political problems of the States parties and also visits the States to see the ground reality of the

\(^{42}\) Article 20 of the ECHR. 1950.
\(^{43}\) Article 21 of the ECHR. 1950.
\(^{44}\) Article 23 of the ECHR. 1950.
\(^{45}\) Article 24 of the ECHR. 1950.
\(^{46}\) Article 25 of the ECHR. 1950.
\(^{48}\) For further details, see: Pieter Dijk, *et al.* 1998, pp. 22-23.
human rights conditions\textsuperscript{50} by a panel of experts. The functioning of the Office of the European Commissioner on Human Rights reflects some universal as well as some regional ways of monitoring of human rights. For example, the mediation and on-site visits are somewhat similar to the 1235 procedures of the UN and the panel of experts resembles the special Rapporteurs of the UN\textsuperscript{51}, discussed in the previous chapter and it is also similar to the on-site visits adopted by the African human rights mechanism mentioned later in this chapter.

The main role of the Commission was to sieve out cases as inadmissible, thereby, reducing the workload of the Court.\textsuperscript{52} However, it also had another role: to reach a friendly settlement between the parties\textsuperscript{53} with the help of a Sub-Commission.\textsuperscript{54} If the friendly settlement is arrived at then the Commission sent its report to the Committee of Ministers and to the Secretary-General of the Council of Europe.\textsuperscript{55} In case the friendly settlement is not reached then the Commission sends the report to the Committee of Ministers and to the parties to the conflict.\textsuperscript{56} In this report the Commission may make proposal regarding the situation which are generally agreed to by the Committee of Ministers.\textsuperscript{57} If within three months of sending of the report to the Committee of Ministers the case is not referred to the European Court of Human Rights then the Committee may by two thirds of majority sit as a committee and take up the case.\textsuperscript{58}

The Convention also laid down for the admissibility pre-requisites to take up the cases. The Commission would take up the case only after all the domestic remedies have been exhausted in States as well as individual complaints.\textsuperscript{59} And in case of individual complaints the complaints must not be anonymous,

\textsuperscript{50} For further details, see: http://www.coe.int/t/Commissioner/default_en.asp. Visited on 2 February 2010. Also, see: Henry Steiner, Philip Alston and Ryan Goodman, 2008, p. 937.
\textsuperscript{51} For further details, see: http://www.iwgia.org/sw1512.asp. Visited on 2 February 2010.
\textsuperscript{53} Article 28 (b) of the ECHR.
\textsuperscript{54} Article 29 of the ECHR.
\textsuperscript{55} Article 30 of the ECHR, 1950.
\textsuperscript{56} Article 31 of the ECHR, 1950.
\textsuperscript{57} A.H. Robertson and J.G. Merrills, 2005, p. 131.
\textsuperscript{58} Article 32 of the ECHR, 1950.
\textsuperscript{59} Article 26 of the ECHR. Also, see: A.H. Robertson and J.G. Merrills, 2005, p. 128.
incompatible with the provisions of the ECHR, manifestly ill-founded etc.\textsuperscript{60}

According to an important view, the Commission was created as an administrative barrier between the individual and the Court and was used as a means of filtering out a very high proportion of cases, thus considering far more cases than the Court.\textsuperscript{61} The role of the Commission came under review for a number of reasons which are discussed ahead while discussing the European Court of Human Rights. It is noteworthy that the present day European Human Rights System has no Commission.

The next important organ of the European human rights regime is the Committee of Ministers. From the above discussion it is clear that the Commission was designed as an advisory body which provided assistance for the Committee of Ministers. Article 13 of the Council of Europe Statute mentions the details of the Committee.\textsuperscript{62} The Committee was essentially a political body since it was to be composed of the Foreign Affairs Ministers of each State of the Council of Europe with additional key role in supervising of the Convention. Therefore this organ has dual status, one as the Statute body of the Council of Europe.

In Article 3 of the Statute of the Council of Europe States that all the States willing to become the member of the Council of Europe conform to the human rights standards of the Council of Europe and Article 4 mentions that after satisfaction on the nature of laws of the particular State the Committee of Ministers may grant the membership to that State.\textsuperscript{63} And as an organ under the Convention the Committee enjoys a very important role in the monitoring of the Convention. Article 46 of the Convention attaches the role of follow up of the

\textsuperscript{60} Article 27 (2) of the ECHR. In 1976 there was another international human rights redressal system introduced by the ICCPR, which gave rise to a possibility that a complaint could be subject to simultaneous mechanism. However, this situation was covered under a provision in the ECHR which provided for a ground for inadmissibility of a complaint in case it is being investigated under any other international procedures. For further details, see: A.H. Robertson and J.G. Merrills, 2005, p. 129.


\textsuperscript{62} Rhona K.M. Smith, 2007, p. 119

judgments of the European Court to the Committee of Ministers.\textsuperscript{64}

In Article 47 of the ECHR the Court may give advisory opinion to the Committee of Ministers on legal questions or interpretation of the Convention. In addition to all the above functions related to the Convention the members of the Commission were elected by the Committee of Ministers.\textsuperscript{65} The next organ of the European mechanism is the European Court. I will deal with the original position and functioning of the Court as perceived in the original ECHR and then move on to discussing the changes made in its role.

The last but not the least is the European Court of Human Rights, the most established and the most successful human rights court of all the regions. The Section II of the original ECHR of 1950 under Article 19 provided for the establishment of the European Court of Human Rights. Section III dealt with the number of Judges, which was equal to the number of States Party to the Convention according to the Article 20 of the Convention.

The judges act in their independent and personal capacity and the qualifications for the judges are mentioned in Article 21 which requires the person to have some juristic experience as similar to the UN’s International Court of Justice, the Hague, the judges at the European Court must have some legal qualifications.\textsuperscript{66} The Parliamentary Assembly elects the Judges out of the three nominations of the respective State.\textsuperscript{67} The tenure of the judges was fixed to be of six years\textsuperscript{68} and they can be dismissed by the two thirds majority votes of the sitting judges.\textsuperscript{69}

Articles 25-32 of the European Convention provided for the structure of the Court

\begin{itemize}
\item \textsuperscript{64} Rhona K.M. Smith, 2007, p. 119.
\item \textsuperscript{65} Helen Fenwick, 2007, p. 22.
\item \textsuperscript{66} A.H. Robertson and J.G. Merrils, 2005, p. 132.
\item \textsuperscript{68} Article 23 of the ECHR, 1950. Available at: http://www.hri.org/docs/ECHR50.html#C. SecII. Visited on 4 February 2010.
\item \textsuperscript{69} Article 24 of the ECHR, 1950. Available at: http://www.hri.org/docs/ECHR50.html#C. SecII. Visited on 4 February 2010.
\end{itemize}
and the procedures. Which is not discussed here since this was greatly changed due to Protocol 11 to the ECHR and is discussed later in this part of the chapter. The permanent seat of the European Court of Human Rights is at Strasbourg, France. Similar to the Commission, the Court also elects its President by way of the parliamentary Assembly of the Council of Europe.

In case of the European human rights mechanism the Protocol eleven has great importance since it has greatly changed the whole process of mechanism. It was adopted on 11 May 1994 and came into force on 1 November 1998, after all the States parties ratified it. It was to come into force after one year of ratification. It amended section II to IV of the European Convention and abolished the European Commission on Human Rights and also reduced the role of the Committee of Ministers. This protocol made the European Court of Human Rights a full time Court. This was done to uncomplicated the mechanism.

The European Court was provided for in Article 25 of the original ECHR. The number of judges in the Court was kept equal to the number of member States of the Council of Europe as provided in Article 38 of the ECHR. The Court like Commission elected its own president. All the members acted in their personal capacity as provided in Para 3 of Article 39 of the ECHR. The ECHR's Original jurisdiction included matters concerning interpretation as well as application of the Convention. In case of application of the Convention the Court could hear cases referred to it by the States only, and not individuals according to Article 44 of the Convention.

This jurisdiction was also not full as it was subject to general declaration made by States to accept the Court’s jurisdiction over State complaints, as per Article 46 of the European Convention. States could also give temporary acceptance for a particular case, under Article 48 of the Convention. Jurisdiction of the European Court was added to by way of additional Protocol nine of 1996 which provided for including individual petitions to be included in European Court's jurisdiction. In

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1994 the Protocol on European Court of Human Rights came into force with ten ratifications. However, the European Convention’s original jurisdiction was to continue for States which had not accepted the ninth Protocol to the European Convention.

In addition to increasing the jurisdiction of the European Court the ninth Protocol also added to the role of the European Court. Article 5 of the Protocol provided for a special procedure for individual petition, which added Para 2 to Article 48 of the European Convention, which provided for creating a special panel of three judges to examine individual cases and decide on their admissibility to the Court. One of the members of this panel would be national of the relevant individuals petitioner. However, this procedure would not apply to cases which are referred to the Court by the Commission or a contracting State.

Under the original ECHR the admissibility of all the cases was to be decided by the European Commission on Human Rights and has to submit its report on the case to the Committee of Ministers. This process was also amended by Protocol nine by way of Article 2 of the Protocol which added that the Commission’s report should be transmitted to the applicant also to facilitate the applicant’s decision whether to take the case to the European Court or not.

For all the cases the court would sit as a Chamber of nine judges with president, Vice-President and one judge from any of the State Parties. After the Chamber there was a Grand Chamber, consisting seventeen judges, which dealt with questions related to interpretation of European Convention. The Chamber could also relinquish jurisdiction in favour of the Grand Chamber. Grand Chamber was introduced in 1993. In case the violation is found the European court has no power to order remedial measures within the Convention rather it is expected of the respondent State to do the needful. However, we will see in the next part of this chapter that in case of Inter-American regional human rights Convention, these powers are clearly defined. Article 50 of the European Convention

73 ibid., p. 133.
75 A.H. Robertson and J.G. Merrills, 2005, p. 133.
76 ibid., p. 134.
77 id.
provides for ‘just satisfaction’ to the victim in case the national laws of the respondent State do not facilitate any remedy.\textsuperscript{78}

According to Article 53 of the decisions of the Court are binding and the execution of the Court decisions is taken care of by the committee of ministers as per Article 54 of the European Convention which greatly contributes to the success of the Strasbourg system of human rights monitoring.

... the Strasbourg system works quite well in practice and the requirement that governments should explain to the committee of ministers how they are implementing the Court’s judgment is certainty of value”.\textsuperscript{79}

The European mechanism after Protocol 11, 1994 needs special attention here as it was responsible for drastic changes and further strengthening of the European Court of Human Rights. This protocol removed the hurdles from the way of the upcoming court as discussed ahead. Since 1950 the membership of the European Convention had increased almost four times in forty years. Secondly the individual complaint mechanism introduced by Protocol 9 increased the burden of the European Court of Human Rights. This problem was further added to by the complicated system of filing cases and deciding admissibility. Thus, there was felt a need to introduce certain changes on the system.\textsuperscript{80}

The most obvious weakness of the old system was its extraordinary complexity: three organs worked together in a protracted, multi-phase procedure. There was considerable overlap between the competent Committees of the various organs, which meant that work was often duplicated. Nor was the interplay of the Commission, Court and Committee the only difficult matter: the structure of the review system and the mixed judicial and political character of the decision-making organs made the internal decision-making process a complicated affair. In sum, the review system was ponderous, expensive and difficult for the complainant to understand. There was a considerable risk that the various organs would reach different decisions in substantially similar cases – as happened on several occasions in decisions of the Commission and Court. A further weakness was the absence of any purely judicial mechanism for the review of first instance Convention decisions [i.e. decisions of the Commission or the Committee of Ministers].\textsuperscript{81}

\begin{footnotesize}
\textsuperscript{78} ibid., p. 135.
\textsuperscript{79} id.
\textsuperscript{80} Helen Fenwick, 2007, p. 22.
\end{footnotesize}
This insight of the European system speaks for the system’s scope and adaptability and liveliness. It is also noticeable that the human rights system of Europe was based on CPRs and had little room for the protection of ESCRs. After eleven years smooth functioning of the system there was felt a need of having a mechanism for the ESCRs as well. It was done by way of the adoption of European Social Charter in 1961. The next part of the chapter will discuss this charter in detail.

3.2.1.4 The European Social Charter, 1961


The European Social Charter is the third of a series of European treaties aiming to protest Human Rights after the Statute of Council of Europe, signed in London on 5 May 1949 and the Convention for the Protection of Human Rights and fundamental freedoms that is the European Convention on Human Rights signed in Rome on 4 November 1950. The Council of Europe signed a Treaty on Social Rights in 1961 in order to enlarge the scope of Human Rights Mechanism of Europe by including the ESCRs as well. This European Mechanism for Human rights was functional since 1950 when the European Convention on Human Rights was signed by the Council of Europe. In consequence of this treaty on Social Rights the Council of Europe guaranteed some Social and Economic Human Rights to its people. These rights were not included in the European Convention on Human Rights, 1950 as the nature of Rights in this Convention was Civil and Political.

It took more than a decade for Europe to incorporate Economic and Social Rights in its Human Rights Mechanism, which re-emphasizes the preference of the West towards the CPRs as they are more liberal in approach. The European Social Charter has been supplemented thrice by way of Protocols adopted in 1988, 1991.

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and 1995. The Charter has also been revised in 1996.\textsuperscript{84}

The system for supervision of this Charter is done by way of National Reports, provided for in the Article 21 of the Charter. There can also be occasional reports under Article 22, details of which are discussed ahead. These Reports are examined by the Committee of Experts, composition of which is mentioned in the Article 25 of the Charter. After this stage the reports are submitted to the Governmental Committee under Para 1 of Article 27 of the Charter to be examined by the sub-Committee of the Governmental Social Committee of the Council of Europe.\textsuperscript{85}

In addition to being the oldest treaty based human rights system working for a region and being the most successful one in its kind the European System has other traits to it too. It is one of the most complicated and interlinked regional human rights systems of the world. As mentioned above the Council of Europe is not the only European organization to working for human rights in the region. Other such organization is the Organisation on Security and Cooperation in Europe (OSCE) and its human rights works are discussed ahead.

\subsection*{3.2.3 The Organisation on Security and Cooperation in Europe and Human Rights}

The Council of Europe is not the only regional body to protect human rights in the region as mentioned earlier also. There is the Organisation on Security and Cooperation in Europe (OSCE) which is also involved in this mechanism.\textsuperscript{86} I will give an overview of the OSCE and its functions related to human rights. OSCE was originally known as the Conference on Security and Cooperation in Europe (CSCE).\textsuperscript{87}

\begin{thebibliography}{99}
\bibitem{84} Henry Steiner, Philip Alston and Ryan Goodman, 2008, pp. 1018-1019.
\end{thebibliography}
The CSCE opened in 1973 and concluded in Helsinki in August 1975. Thirty Five States agreed to the Helsinki Final Act\textsuperscript{88} which was later followed by ‘the CSCE Process’.\textsuperscript{89} The CSCE was essentially a political understanding of the Detente period of the cold war\textsuperscript{90} era and was an effort towards the bringing the East and the West on the same platform. While opening up of the Iron Curtain it was realized that there were great human rights concerns in these countries. The Vienna Concluding Document was adopted in January 1989 and proved to be the link between the Helsinki Final Act and the CSCE’s awakening to human rights protection. In 1989 the CSCE met at Paris and launched a ‘Human Dimension Mechanism’ to provide a redressal to the victims at the hands of the States.\textsuperscript{91}

The similar meeting was held in June 1990 at Copenhagen to sign the Charter of Paris or the Paris Charter for a New Europe and to promote ‘human dimension’.\textsuperscript{92} It was decided that the first step in this direction would be to introduce a complaint system known as the Vienna Mechanism.\textsuperscript{93} The Vienna Mechanism was a State complaint system and the States could report against the other State for any human rights violation\textsuperscript{94} similar to the Inter-State Communication System of the UN discussed in second Chapter. This concern for human rights was further expressed during the fourth Vienna follow-up meeting at Moscow in 1991\textsuperscript{95} and Moscow Mechanism was adopted wherein \textit{ad hoc} missions of independent experts

\textsuperscript{88} Angela Romano, \textit{From Détente in Europe to European Détente: How the West Shaped the Helsinki CSCE}, P.I.E. Peter Lang, Brussels, 2009, pp. 55-57.


\textsuperscript{91} Michael Haas, 2008, p 287.

\textsuperscript{92} Id. Also, see: http://www.osce.org/odihr/13371. html. Visited on 23 February 2010.

\textsuperscript{93} Available at: http://www.osce.org/odihr/13483. html. Visited on 22 February 2010.

\textsuperscript{94} Available at: www.osce.org/item/4056. html. Visited on 22 February 2010.

assisted in solving a problem this is similar to the Inter-American Commission on Human Rights and the UNHCHR’s methods of onsite-visits and the fact finding missions respectively.

On 1 January 1995 the CSCE was renamed as OSCE. The OSCE is a highly decentralized organization and is composed of Parliamentary Assembly based at Copenhagen, The Permanent Council, which meets in Vienna and a Permanent Secretariat at Prague, which later moved to Vienna in 1994. With time the increasing concern of the organization for human rights was seen in the growth of the organization itself. In 1990 the Council of Ministers for Foreign Affairs was created. It is headed by the Chairperson in Office and is assisted by Special Representatives who work on some aspect of human rights issues, for example racism, trafficking etc.

It is important to note that this role is similar to the UN’s Special Rapporteurs and the Thematic Missions as discussed earlier. In 1997, the Office for Democratic institutions and Human Rights was the new name given to the Office of Free Elections, established in 1991. In addition to all the above mentioned initiatives the OSCE also set up committees under the Parliamentary Assembly and one of those is the Democracy, Human Rights and Humanitarian Committee, and the High Commissioner on National Minorities, both established in 1992.

The last of the European trio working for human rights in the region is the youngest organization of the region; the European Union (EU). The human rights approach of the EU is discussed in the following here onwards.

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96 There were three procedures in this mechanism. First, establishment of a Resource List to appoint experts from every country member to CSCE, second procedure was the Mission of Experts which could be three in number at the maximum. These experts could be invited by the States to “address a particular clearly defined question on its territory related to the human dimension”. The third was the Mission of Rapporteurs. In case the State does not establish the Mission within ten days of the request of the requesting State then the requesting State with other six States could initiate this mission to establish facts and report to the CSCE institution named Office for Democratic Institutions and Human Rights (ODIHR). For further details, see: www.osce.org/item/4056.html. Visited on 23 February 2010. Also, see: Michael Haas, 2008, p. 289.

3.2.4 The European Union and Human Rights

European regionalism has kept a balance between respect for Sovereignty of States and Supra-nationalism as mentioned earlier also. The EU represents the latter. The history of this organization goes back to 1944 when a union called Benelux was established by Belgium, Luxemburg and the Netherlands and operationalised in 1948. The second step was taken in 1952 by way of Marshall Plan. During the Cold War the Organisation for European Economic Cooperation (OEEC) was established to facilitate the Marshal Plan aid.98

In 1951 the Benalux countries along with France, Italy and Germany established the European Commission for Steel and Coal (ECSC) and in 1957 the same group of countries set up the European Atomic Energy Agency (Euratom). In 1960 European Free Trade Association came up. To make a similarity between the regional developments of South Asia and the Europe it is interesting to note that SAARC came up with the idea of Free Trade Area (SAFTA) in 2004 during the twelfth Summit held at Islamabad, which shows the lagging behind of the South Asian region and also the apparent lessons it has taken from Europe.

In 1986 the Single European Act merged ECSC, EEC and the Euratom into European Community (EC). Further in 1992 the Benelux joined the three economic organizations of the EC and created European Union by way of Treaty of European Union (TEU)99 or Maastricht Treaty. This treaty came into force in 1993. Originally the Maastricht treaty did not provide for human rights provisions however, human rights could be seen in between the lines of the treaty100, for example, the EU was to work for Labour law, social security etc which were human rights aspects of any individual. Article B of the Treaty mentions one of the objectives of the treaty as under:

...to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through

98 ibid., p. 281.
the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty.’\(^{101}\)

In 1997 there was an amendment in the Maastricht treaty known by the name of the Amsterdam treaty. This added democracy and human rights in the formal agenda of the EU. This treaty also added the Charter of Fundamental Social Rights of Workers, known as the Social Charter; a similarity between the EU and the CoE as was referred to earlier in this chapter.

In addition to all the above mentioned actions of the EU the European Court of Justice has also been using and upholding the ECHR in its decisions.\(^{102}\) In June 1999 the heads of State of the EU committed to have a Charter of Fundamental Rights during a meeting at the European Council at Cologne adopted at Nice in December 2000.\(^{103}\) The most striking feature of this Charter is that like the African Charter on Human and peoples’ Rights, 1981, is that it includes the ESCRs.\(^{104}\)

From the above explanation it is clear that the European system deserves to be known as the most established system of human rights protection at regional level. Also, it can be said that this region has a lot of inspiration to offer for planning new regional human rights mechanism. Despite the European System being the oldest and the most established system, there effort to understand the regional mechanisms for human rights does not end here. There is another similar system with its own unique importance and relevance and that is the Inter-American System for Human Rights (I-AHR). It is discussed in the following paragraphs.

3.3 The Inter-American Human Rights Mechanism

Interestingly America has been the first region in the world to have taken the first step towards regionalization of human rights, even before the initiatives of the United Nations or the CoE. The American Declaration on the Rights and Duties


\(^{102}\) Javaid Rehman, 2003, pp. 182-183.

\(^{103}\) *ibid.*, p. 189.

\(^{104}\) *ibid.*, pp. 190-195.
of Man, 1948 is the only human rights document which does not refer to the UDHR because this document came four months before, in April 1948. In 1998, the Declaration was renamed as the American Declaration of Rights and Duties of Persons in order to make it a more gender neutral document. Another important feature of this first American human rights document was that it referred to the duties aspect of human rights which connects it to the ‘Asian Approach’ of these rights. Having touched the importance of the Inter-American system of human rights we will discuss this regional system in detail as under:

The Inter American mechanism for the protection of human rights works under the regional organization named the Organization of American States (OAS). The OAS was adopted in consequence of Bogota conference in 1948; however, the movement for human rights and regional cooperation in America is much older and can be traced back to the American movement for independence way back in 17th century. In 1822, Simon Bolivar proposed a ‘meeting of plenipotentiaries of the Americas’ in order to establish a confederation of the newly independent republics. Second attempt in this direction was made by way of the First International American Conference held at Washington from October 1889 to April 1890. This Conference resulted in the International Union of American Republics, better known as the Pan American Union. From 1889 to 1954, Pan American meetings were regularly held to discuss general topics of concern to the American republics. The focus of this Union was economic development and pacific settlement of disputes. During the


107 For further details, see: http://millercenter.org/academic/americanpresident/events/10_02. Visited on 19 July 2010. Also, see: A.H. Robertson and J.G. Merrills, 2005, p. 197.


Second World War the Inter American Conference on Problems of War and Peace was held in Mexico in February to March 1945 to deliberate upon the post war prospects of the region. The suggestions of this conference are believed have an inspiration for Chapter VIII of the UN Charter on regional organizations and their potential role with the UN, being prepared at the same time.\textsuperscript{110} The next Inter-American Conference was held in Rio de Janeiro in 1947 and was devoted to promote peace and security in the region.\textsuperscript{111}

It was followed by the Bogota Conference in 1948. In this Conference the important documents were adopted. First the OAS Charter and second the Declaration on the Rights and Duties of Man. From here the wave for Inter-American Human Rights Movement began. In 1959 a meeting of foreign ministers was held at Santiago which concluded in favour of taking the Regional Declarations to the next level by way of adopting a Convention. Secondly, it was instructed in the Santiago meeting that the Inter American Council of Jurists will prepare the draft Convention on Human Rights; and for Inter American Court; thirdly, it decided to create an Inter-American Commission on Human Rights.

The Convention drew a lot of inspiration from the European Convention of 1950.\textsuperscript{112}

Similar to the preparations of the UDHR, the Covenants and the ECHR, in case of the Inter American Convention also there were different voices for CPRs and ESCRs by the States.\textsuperscript{113} The ECRs could get place in the final Convention for example in Articles like 17 which provides Right to Family, Article 18 which provides for Right to Name etc. The drafts of the Convention were considered at the second special Inter-American Conference at Rio De Janeiro, 1965, the third conference at Buenos Aires in 1967, while the Convention was still in the pipeline, in 1959 the OAS Charter was amended to make the Inter American Commission a statutory organ of the OAS.\textsuperscript{114} The main objective of this organ

\textsuperscript{110} A.H. Robertson and J.G. Merrills, 2005, p. 198. \\
\textsuperscript{111} It led to the Inter-American Treaty of Reciprocals Assistance adopted on 2 September 1947. \\
\textsuperscript{112} A.H. Robertson and J.G. Merrills, 2005, p. 199. \\
\textsuperscript{113} ibid., p. 200. \\
\textsuperscript{114} Also known as the Declaration of Santiago. For further details, see: http:// www. cidh. oas. Org / Basicos / English / Basic1. % 20Intro. htm. Visited on 19 July 2010.
was to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.\textsuperscript{115}

The Commission worked on all the drafts of the Convention and in a special Conference on Human Rights, San Jose, Costa Rica, in November 1969 the final draft of the Inter American Convention on Human Rights (I-ACHR) was finalized and adopted on 22 November 1969. The I-ACHR entered into force on 18 July 1978 after eleven ratifications. The OAS Charter has been amended from time to time to adapt to the I-ACHR for examples in 1985 when Protocol of Cartagena de Indian, in 1992 by Protocol of Washington and in 1993 by Protocol of Managua, which included the Inter-American Commission on Human Rights as the organ of the OAS.

The American Convention has peculiar derogation clauses unlike the regional and international counterparts. For example, Article 27 allows derogation of rights if the independence or security of a State Party is threatened, however, there are several checks imposed on this unique provision in Article 30 by way of Inter American Courts advisory opinions.\textsuperscript{116}

Some scholars are of the view that the institutional framework of the OAS to promote and protect human rights is similar to the Council of Europe\textsuperscript{117} and its Charter’s System is similar to the UN’s\textsuperscript{118} which reiterates that the regional human rights mechanisms are not only connected to each other but also are equally connected to the international monitoring of human rights.

The Inter American System of Human Rights can be divided into two parallel regimes as the UN’s. The American system of human rights is carried out at two levels; first under the OAS Charter as the UN Charter based human rights system discussed in the chapter two and second the American Convention based system similar to the UN’s Treaty based system, also discussed in the second chapter. The overview of the Inter-American Human Rights System is discussed in the section of

\textsuperscript{115} Available at: http://www.cidh.oas.org/Basicos/English/Basic1.%20Intro.htm. Visited on 19 July 2010.
\textsuperscript{117} Javaid Rehman, 2003, p. 204.
\textsuperscript{118} ibid., p. 205.
this chapter ahead.

3.3.1 The Inter-American OAS Charter Based Human Rights Mechanism

The OAS came into being in 1948 as a result of the Bogota Conference as mentioned earlier. At the time of its inception the OAS had only two documents, the OAS Charter and the Declaration on Rights and Duties of Man. However, the OAS Council drafted the Statute of the Inter-American Commission on Human Rights between 10 September 1959 and 25 May 1960.119

The OAS Charter also has some South Asian reflections for example, Article 18 of the revised OAS Charter provides for the ‘principle of non intervention’.120 Interestingly, the Article 16 of the OAS Charter provides for respect for human rights and can be expected to come in conflict with the Article 18. In that case the OAS gives preference to the principle of non-intervention. It reflects the approach of SAARC since non intervention is one of the basic principles of this regional organization also. The OAS Charter also has some similarities with the Statue of the Council of Europe for example the OAS Charter also focuses on democracy like the Statute of the Council of Europe.121

The Commission as mentioned before was not an original Convention organ since it was created in 1959 by the OAS Resolution VIII as an OAS organ and in 1960 the Statute of the Commission was adopted. As the OAS organ the Commission had to see State compliance to the Declaration of Rights and Duties of Man, 1948.122 However, the growth of the Commission as a human rights organ of the OAS was gradual. The Commission was recommendatory body and could recommend all the OAS member States. As an organ of the OAS it developed in three phases.

In the first phase the Statute for the Commission came up 1960 under which it had power to examine human rights conditions in OAS member States, to hold

information from the governments and in extreme case to visit the country with
the prior consent of the State. This feature is similar to the fact finding missions
of the UN and the onsite procedures under the ECHR. The Commission could
make recommendations and prepare reports. The second phase of development of
the Commission began in the Rio De Janeiro Conference in 1965 when the Statute
was amended and the Commission was empowered to examine communications
from individuals as well as groups.\textsuperscript{123} Despite all the growth the Commission
remained a part time body of the OAS. In the third phase of its growth the OAS
Charter was amended by way of the Protocol of Buenos Aeries and converted the
Commission into a full-fledged organ of the OAS.

Also, it was decided to have an American Convention on Human Rights and to
lay out the structures competence and procedure of the Commission in as Inter-
American Convention as Human Rights,\textsuperscript{124} thus attaching dual status to the
Commission. The American Convention and the Protocol of Buenos Aeries were
adopted in 1969.\textsuperscript{125} One; of being an OAS organ and second; being a Convention
organ like the ECOSOC of UN as well as Committee of Ministers of Council of
Europe. In 1978, the American Convention came into force and divided the OAS
members into three groups those who had signed the Convention and those who
did not. The latter had no contentious jurisdiction of the Inter-American Court of
Human Rights upon them and to the State parties to the Convention the
compulsory jurisdiction could apply only after their consent.

\textbf{3.3.2 The Inter-American Convention Based Human Rights Mechanism}

Like the UN system the Inter-American System is also having parallel system:
one under the Charter of the OAS and the other under the I-ACHR. The I-ACHR
included twenty six rights mostly included in the UDHR and the ICCPR and a few

\textsuperscript{123} Harmen van der Wilt and Viviana krticevic, Rajja Hanski and Markku, (eds.) \textit{An Introduction to the
International Protection of Human Rights: A Textbook}, II Edition, Abo Akademi University,

\textsuperscript{124} A.H. Robertson and J.G. Merrills, p. 201

\textsuperscript{125} Harmen van der Wilt, Viviana krticevic, Rajja Hanski and Markku, (eds.), 2002, pp. 371-386 at p.
373.
exclusive ones.\textsuperscript{126} Also as compared to ECHR, the I-ACHR contains more basic rights,\textsuperscript{127} and the latter is also the first regional Convention to incorporate ESCRs in Article 26. Later these rights were further supplemented by the Protocol on Economic, Social and Cultural Rights also known as the Protocol of San Salvador in 11 November 1988. In addition to this there are some organs of the Charter based system which are playing the dual role of the Convention based organs as well for example the Inter-American Commission on Human Rights. The Commission is discussed ahead as a Charter organ.

3.3.2.1 \textit{The Inter-American Commission on Human Rights as an OAS Charter Organ}

The 1948 OAS Charter provided for the Inter American Commission on Human Rights as one of its autonomous organs\textsuperscript{128} in Part two, Chapter eight Article 53 (e).\textsuperscript{129} According to Article 91(f) it had to report to the Permanent Council of the OAS. The functions of the Commission were explained in Article 106 of the 1948 OAS Charter which included promotion of human rights.\textsuperscript{130} In 1960 there was a Statute of the Inter-American Commission adopted by the OAS\textsuperscript{131} wherein it was mentioned that the Commission is to promote the rights mentioned in the American Declaration of the Rights and Duties of Man, 1948. Article 9 of the Statute also elaborated upon the promotional functions of the Commission including country studies.

In 1965 there was a second Inter-American conference which added individual petitions to the realm of the Commission. In the third special conference Inter-American

\begin{footnotesize}
\begin{enumerate}
\item The rights not included in the UDHR and the ICCPR but included in the I-ACHR are right to property, (Article 23 of the I-ACHR) Freedom from Exile, (Article 24 of the I-ACHR), Right of Reply (Article 25 of the I-ACHR) and the Right of Asylm (Article 26 of the I-ACHR). However, the I-ACHR does not refer to rights of minorities as provided in the Article 27 of the ICCPR.
\item A.H. Robertson and J.G. Merrills, 2005, p. 203.
\item Thomas Buergenthal, 1995, p. 181.
\item Thomas Buergenthal, 1995, p. 181.
\end{enumerate}
\end{footnotesize}
American Conference held at Buenos Aeries, 1970 the OAS Charter was amended and the Commission was converted into a formal organ of the OAS. In 1969 the Inter-American Convention was adopted which was enforced in 1978. Hence after 1978 the Commission started playing the dual role. For the Commission as convention organ the human rights mentioned in the Convention were applicable for the States parties to it and for others it had to comply with the human rights mentioned in the American Declaration on the Rights and Duties of Man, 1948. The Convention itself provided for the Commission which is discussed ahead.

3.3.2.2 The Inter-American Commission on Human Rights as the Convention Organ

The I-ACHR discussed the Commission from Article 34-40. The constitution of the Commission was kept at seven according to 1959 decision.\(^{132}\) All the members serve the Commission in personal capacity\(^{133}\) which a similar feature to the European Commission. Interestingly are the OAS members States may be elected only once.\(^{134}\) The general secretariat of the OAS assists in all the technical works of the Commission. The Convention retains all the ‘old functions’ of the Convention Articles 41-43 and lists ‘new functions’ in Articles 44-47. The Commission may receive individual or NGO complaints against States, however, unlike the European Convention; it is not optional but mandatory for all the State parties to accept this provision. The Commission has jurisdiction over all the members of the OAS and the members are elected by the General Assembly of the OAS. The Commission entertains oral hearing unlike the UN’s Human Rights Committee and also accepts individual as well as NGOs representations as a distinct feature.\(^{135}\)

Some scholars are of the opinion that the Inter-American Commission is more successful than the European counterpart since the latter was abolished after the Protocol 11 as mentioned earlier in this chapter. The Commission acts upon the complaint procedures provided for in the American Convention in Article 44-55. When the same organ acts as an organ of the OAS the complaints are taken under the OAS Charter Article 51-54. Also the Commission can refer a case to the

\(^{132}\) Article 34 of I-ACHR, 1959.
\(^{133}\) Article 36 of I-ACHR, 1959.
\(^{134}\) Article 37 of I-ACHR, 1959.
Inter-American Court of Human Rights in the capacity of Convention organ. However, it cannot do so when it acts as an organ of the OAS, since the court’s jurisdiction of the court requires a separate declaration by the Convention members. The Commission enjoys only limited reporting functions as compared to the UN’s treaty bodies. Article 48 of the American Convention provides for fact finding and Article 50 provides for friendly settlement between the parties. A feature which is similar to UN system of human rights

The Convention provides for the individual as well as the State Communication system only that to utilize the second provision both the States at dispute must have accepted the Commission’s jurisdiction. A feature which is unlike the European arrangement and similar to the UN’s International Court of Justice (ICJ) where both the States at dispute must agree to the jurisdiction of the ICJ. Article 29(b) of the American Convention is called the most favourable to the individual clause as it ensures that no clause of Convention is to be interpreted to abridge any other national international rights conferred on individuals of the States parties to the Convention. On the other side in case of the individual communications the Article 44 of the Convention restricts the right to use it by providing that only a victim may file a complaint. The criterion for the admissibility of the petitions, provided for in the Article 46-47 of the American Convention, are more or less similar to those mentioned in the ECHR.

The Commission has developed some distinct features of its own for example, the precautionary measures in case to avoid irreparable damage to an individual and can also request the Court for the same if its own efforts have failed. Like the European Court of Human Rights the Inter-American Commission also favours a friendly settlement under Article 48 (1), a feature which is similar to UN system

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139 Harmen van der Wilt and Viviana Krsticevic, 2002, pp. 371-386 at p. 381.
of human rights. In case of no friendly settlement reached the Commission sends a preliminary report to the states concerned and is not published similar to the UN’s 1235 Procedures mentioned in the second Chapter. If the non compliance persists then the Commission forwards the case to the Inter-American Court of Human Rights. Like the African Convention on Human and Peoples’ Rights the American Convention also provides for Duties aspect of Rights in Article 32 of Chapter V of the original Convention.

3.3.2.3 The Inter-American Court of Human Rights, 1979

Considering the political background of the American region which was marked by a variety of political regimes, there were a lot of apprehensions over having a human right court as proposed in the San Jose Conference, 1969. It is evident from the fact that the Court for human rights could come up in American system only after ten years of the proper functioning of the Commission. The Court consisted of seven Judges and the election of these judges was to be done by all the members of the OAS, irrespective of the fact that they have accepted the jurisdiction of the court or not.

Unlike the European counterpart the inter American Convention specifies the legal qualifications of the judges in Article 52. The judges are elected for the tenure of six years and only for once as per Article 54 of the Convention. The seat of the court is at Costa Rica. The Article 57 is very important as far as the inter relationship between the two organs of the Inter American system is concerned as it lays down that ‘the Commission shall appear in all cases before the court’ whereas in case of the European system this relationship is not possible since the European Commission is no more in existence after the Protocol 11.

The Court has two Jurisdictions, one Advisory and the second Contentious. Article 64 (1) provides that all the members of the OAS may seek advisory opinion of the Court. Article 64 (2) also provides for the OAS States to seek

140 Christina M. Cerna, 1993, pp. 135.-229, at pp. 145-146.
opinion of the Court on the question of compatibility between the international and municipal laws. The Inter-American Court also welcomes debates on the legal matters wherein Professors, NGOs etc. are allowed to participate. This argument can be of use for the South Asian proposal in chapters to come since in this region also the NGOs are quite active even if there is no formal mechanism for the promotion and protection of human rights. The Inter-American System for the protection of the ESCRs is discussed ahead.

3.3.2.4 The Inter-American Protection of the Economic, Social and Cultural Rights

The Declaration on the Rights and Duties of the Man, 1948 also provided for the ESCRs and all the OAS States are still bound by it. The Convention Articles 26 and 42 refer to the economic, social and cultural rights. The Article 26 puts the onus of the promotion and protection of the ESCRs on the States, whereas the Article 42 provides for the Commission’s role to ‘watch over’ the promotion of these rights. However nor definite mechanism for the ESCRs was not there in the Inter American till 1988 when the Additional Protocol of San Salvador was adopted.

The Articles 1-5 of the Protocol provide for the State obligations, Article 6-9 relate to the rights of the labour class, Article from 10-13 provide for basic rights like health, food and education respectively. Article 14 provides for the Right to Culture and in the Articles from 15-18 several rights related to family and society have been included. The Article 19 provides for the periodic State reports for the compliance of Protocol and to be submitted to the Inter-American Economic and Social Council, like the ECOSOC of the UN. And there is also one Inter-American Council for Education, Science and Culture. The Protocol comes under the jurisdiction of the Inter American Commission as well as the Inter American Court also and three rights of the Protocol are to be considered under

143 Article VI of the Declaration on the Rights and Duties of Man, 1948 reads: Every person has the right to establish a family, the basic element of society, and to receive protection therefore. Article VII of the same Declaration reads: All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.


145 South Asian Human Rights Documentation Centre, 2008, pp. 120-121.
the individual petitions provided for in the American Convention\textsuperscript{146} which is indeed a strong feature of the Inter-American System of Human Rights.

Re-emphasising the importance and growing relevance of the Inter-American Human Rights Mechanism, the OAS decided on 22 March 2013 to fully finance all the activities of the Inter-American Commission. To quote the words of appreciation and pride in the Commission was expressed as follows:

... is pleased to welcome last night's resolution, adopted by consensus, of the Organization of American States (OAS) General Assembly to reaffirm the importance of strengthening the Inter-American Human Rights System.

The independent and respected Inter-American Commission on Human Rights – a founding pillar of the Western Hemisphere’s human rights architecture – is stronger and more capable as a result of the decision of all OAS member states to seek full financing for its operations and to strengthen its rapporteurships.\textsuperscript{147}

After having discussed the European and the Inter-American human rights regimes I will now discuss the first non-western human rights regime; that is, the African human rights mechanism. This regional mechanism is unique for several reasons and all these features have been highlighted throughout this discussion ahead.

3.4 The African Regional Human Rights Mechanism

The African regional human rights mechanism, to be discussed ahead is very important part of this work for its own reasons. Firstly, that Africa as a region has had a colonial history\textsuperscript{148} which brings it closer to the history of South Asia. This region has had a distinct history of community life and social norms considered as laws which is again a similarity between the above mentioned two

\textsuperscript{146} Para 5 of the Article 19 of the Protocol, which provides for the ‘Means of Protection’ reads: Any instance in which the rights established in Para (a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.


regions. Like all other human rights mechanisms the African System has also been inspired by the efforts of the United Nations.\textsuperscript{149} It is the youngest treaty based human rights system. The history and development of this system is discussed ahead. This regional system is the outcome of the efforts of the UN, the States of Africa and the Organisation of African Union (OAU) as we will see in the discussion ahead.

3.4.1 The Organisation of African Union

Africa was driven by regional integration in the 1960s. There emerged several groups of African States which later merged into the OAU.\textsuperscript{150} The OAU was founded in 1963 on the principles of State sovereignty and noninterference.\textsuperscript{151} The OAU Charter was signed in Addis Ababa, Ethiopia, on May 25, 1963.\textsuperscript{152} As mentioned earlier the main focus of the OAU was focused on conflict resolution in which it could not achieve much of a success and the economic needs of the region also needed some improvements in the OAU system. The deliberations to overhaul the OAU system went on for four Summits,\textsuperscript{153} The Sirte Extraordinary Session, 1999 decided to establish an African Union adopted the Sirte Declaration


\textsuperscript{151} Available at: http://www.cfr.org/publication/11616/african_union.html#p2. Visited on 13 July 2010.


The AU Charter in its Article VII provided for four principal institutions, namely: The Assembly of Heads of Government (AHSG) as the principle organ to meet at least once a year, the Council of Ministers constituted of the Foreign Ministers and to meet at least twice a year and the General Secretariat at Addis Ababa to assist in routine works. The fourth proposed organ the Commission of Mediation, Conciliation and Arbitration was never established in practice. The creation of AU also expanded the structure of the AU.

The main organs of the AU are the AHSG which comprised of heads of the States and Governments and was the highest and also the most political organ of the organization. The AHSG elected one chairman of the AU for the tenure of one year. The next in the hierarchy was the Executive Council of the AU which consisted of the Foreign Ministers of the State members, assisted by ten Commissions. An organ called the Peace and Security Council (PASC) was established in 2004 under the AU the role of this organ is similar to that of the Security Council of the UN. The PASC has to have a permanent force and also standby forces to tackle security problems in the region. In 2004 the AU also

established the Pan African Parliament (PAP).  

Like the Council of Europe, the PAP also is led by the principles of human rights and democracy and the members of the PAP are selected from the State legislatures and they enjoy the tenure of the State legislatures only. It is assisted by the Committee on Justice and Human Rights. The main function of this organ is to harmonise and coordinate the laws of Member States and to promote respect for human rights. In 2005 the AU established the Economic, Social and Cultural Council (ECOSOC) similar to the ECOSOC of the UN.

Generally the scholar consider the year 1999 to be the year of change of AU into AU probably because the process began in the same year. For the demand of history of the organisation I will be using the term OAU and for the events till 1999 and after the year 1999 I will use AU.

3.4.2 Evolution of the African Human Rights Mechanism

The idea of establishing a regional human rights Commission for the African continent was conceived by an African Non-Governmental Oragnisaton (NGO) in

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159 By Article 17 of The Constitutive Act of the African Union, as one of the nine organs provided for in the Treaty Establishing the African Economic Community signed in Abuja, Nigeria, in 1991 and seated at Midrand, South Africa. For further details, see: http://www.Pan–Africanparliament.org/. Visited on 4 August 2010.


1961 at Lagos, Nigeria during the first Congress of African jurists.\textsuperscript{164} The Declaration of this Congress read: “... in order to give full effect to the Universal Declaration of Human Rights of 1948, this conference invited the African governments to study the possibility of adopting an African Convention on Human Rights in such a manner that the conclusions of this conference will be safeguarded by the creation of a Court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States”.\textsuperscript{165}

The next year in a conference at Addis Ababa the Charter for the Organisation for African Unity was adopted with its head quarters at Addis Ababa. Article 2 of the Charter clearly mentioned due regards to the Charter of the UN and the UDHR.\textsuperscript{166} The AU had the Assembly of Heads of States and Governments (AHSG) as the supreme organ, the Council of Foreign Ministers, the General Secretariat and the a Commission for Mediation, Conciliation and Arbitration which was added to by way of a Protocol on 21 July 1964 by way of AHSG of the AU Resolution 22 (j).\textsuperscript{167}

There after the UN promoted deliberations on the prospects of a regional Commission on human rights in Africa at several of the seminars.\textsuperscript{168} At the Seminar on Human Rights in Developing Countries held in Dakar, 1966,\textsuperscript{169} some participants declared themselves in favour of the idea. During this seminar the points of Lagos conference were reiterated and an Inter-African Commission for Human Rights was also proposed.\textsuperscript{170} The seminar concluded with a Dakar

\textsuperscript{165} Available at: http://www. chr. up. ac. za/hr _ docs/ african/ docs/ other/ other 22. doc. Visited on 23 July 2010.
\textsuperscript{166} A. H. Robertson and J.G. Merrills, 2005, p. 242.
\textsuperscript{167} Fatsah Ouguergouz, 1993, at p. 689.
\textsuperscript{170} Germain Baricako, 2008, pp. 1-19, at p. 2.
Declaration. The proposal for the establishment of the regional Commission on human rights was further reinforced at the Cairo Seminar, 1969.\textsuperscript{171} The conclusions of the Cairo Seminar were as follows:

The participants at the United Nations seminar on the establishment of regional Commissions on human rights with special reference to Africa agreed unanimously to:

(i) Request the Secretary-General of the United Nations to... (take) appropriate steps, including the convening of a preparatory committee representative of OAU membership, with a view to establishing a regional Commission on human rights for Africa, taking into account the deliberations of the seminar;

(ii) Appeal to all Governments of member States of the OAU to give their support and co-operation in establishing a regional Commission on human rights for Africa.

(iii) Request the Secretary-General of the United Nations to offer all assistance under the program of advisory services in the field of human rights established by General Assembly resolution 926 (X) in any effort towards establishing a regional Commission on human rights for Africa, such as by providing experts and fellowships;

(iv) Request the Secretary-General to draw the attention of the Commission on Human Rights to the report of the seminar, particularly in connection with the deliberations of the Commission on the question of the establishment of Commissions on human rights at the regional level;

(v) Request the Secretary-General to arrange for full consultation and exchange of information between the Commission on Human Rights and OAU concerning the establishment of a regional Commission on human rights for Africa, within the terms of Economic and Social Council resolution 1159 (XLI) of 5 August 1966”.

The above points highlight that the African human rights system drew a lot of inspiration from the UN as an organization and from the post of the UN Secretary General in particular. It is important to mention here that in case of South Asia also I intend to draw lessons for the UN’s system in the same way as the African and other regional human rights systems have done.

It was unanimously agreed that such a Commission for Africa should carry out essentially promotional functions in the field of human rights. These were to include “(a) educational and information activities, (b) holding research and studies, (c) performance of advisory services, (d) holding seminars and awarding scholarships”.

There was disagreement, however, that whether the Commission should carry out fact-finding and conciliation functions as well as consideration of communications States individuals and groups of individuals and the kind of action to be taken thereon. These provisions probably posed a threat to the guarded sovereignty of African States.

In the view of some participant States, fact finding involved very sensitive issues and it might be unacceptable to the newly independent countries, since there the national sovereignty and non-intervention were very important principles. This is also applicable in case of South Asia as the States of this sub-region are also very sensitive towards their Sovereign status since most of the States have attained freedom after a long colonial period and are conscious of the security of their Sovereignty in every regional and international activity.

As a way out it was suggested that provisions on fact-finding as well as complaints be kept optional. It is noticeable here that even under the UN system the fact-finding procedures are applicable only after the consent of the State in question, explained in the chapter two.

Apart from the conferences organized by the United Nations mentioned above, the International Commission of Jurists organized at Dakar, Senegal in collaboration with the Association Sénégalaise d'Etudes et Recherches Juridiques, two conferences, the Francophone African Congress of Jurists of 5-9

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January, 1967, on the “Rule of Law in the Evolution of Human Communities”, and the Dakar Seminar of September 1978 on “Development and Human Rights”. The 1967 congress had called upon the International Commission of Jurists to examine, in co-operation with the competent African organizations, the advisability and possibility of creating a system for the protection of human rights, functioning within an African framework. It had considered that an inter-African Commission on human rights, endowed with powers of consultation and recommendation could constitute a first step. The Dakar Seminar of September 1978, in its general conclusions, had “requested the Organization of African Unity and all African States to do everything possible to establish a system of guarantees and verification of human rights in Africa”; in particular it had called for:

(i) the establishment at the Pan-African level of a Convention on human rights;

(ii) the creation of sub-regional institutes of human rights for their promotion by information, documentation, research and the awakening of public opinion;

(iii) the creation of one or several inter-African Commissions on human rights composed of independent judges authorized to examine complaints concerning violations of human rights;

(iv) the creation within African States of mass organizations capable of effectively defending human rights.\(^{174}\)

It may be mentioned that the third Biennial Conference of the African Bar Association had also made a recommendation in 1978 for the establishment of regional machinery to promote and protect human rights in Africa.\(^{175}\) The question of an African regional Commission was again considered at the Conference of African Jurists on African Legal Process and the Individual held in


\(^{174}\) id.

\(^{175}\) Held at Freetown, Sierra Leone, in August 1978.
Addis Ababa, in 1971. The Conference endorsed the recommendations of the Cairo Seminar and recommended specifically:

(i) that an African Commission on Human Rights be established and charged with the responsibility of collecting and circulating information relating to legislation and decisions concerning human rights in annual reports devoted to the question of civil rights in Africa;

(ii) that an African Convention on Human Rights be concluded;

(iii) that every effort be made to harmonise legislation in the different African countries in this regard;

(iv) that an Advisory Body be established to which recourse may be had for the interpretation of the terms of the African Convention on Human Rights and;

(v) that the various African States be urged to take speedy measures to acceed (sic) to or ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of all Forms of Racial Discrimination and the OAU Convention governing specific aspects of refugee problems in Africa.

The last recommendation is important for this study since in case of South Asia I intend to build up my argument for human rights concerns of the region by emphasising on a similar argument.

Two years later the Tanzanian Seminar on the Study of New Ways and Means for Promoting Human Rights with Special Reference to Problems and Needs of

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177 See: U.N. Doc. HR/Liberia/1979/BP/3, page 14. The Conference noted, however, that as at April, 1971, no action had been taken by the OAU with respect to the recommendations of the Cairo Seminar, and that, in fact, no member State of the OAU (including those States represented at the Cairo Seminar) had placed the recommendations of the Seminar on the Agenda of the OAU's Conference of the Council of Ministers.
Africa, 1973\textsuperscript{178} accepted in principle the need for the creation of an African Commission to promote and protect human rights and agreed with the recommendation of the Cairo Seminar that the OAU might consider appropriate steps, including the convening of a preparatory committee of representatives of the OAU membership with a view to establishing such a Commission. There was no indication as to what would comprise human rights protection for the regional Commission.

In September 1976 there was a seminar held at Dar-e-Salam, Tanzania which concluded that in case of single party governments there is much less scope for freedoms. It added to the movement towards the human rights in the region\textsuperscript{179} and also hinted upon the need for more democratic political regimes in the region, although indirectly. A similar focus was shown by the Council of Europe for Europe as well, which supported the regional system for human rights. Till 1978 the jurists kept studying the human rights potential of African and the conclusions of these studies were seen during two important conferences. First one was held at Butare, Rwanda, 3-7 July 1978, on Human Rights and Economic Development in Francophone Africa. In this conference the idea of an African Human Rights Commission was also proposed for the first time, however, was seen with great inhibition.\textsuperscript{180} In December 1978, in the same city there was held a Dakar Colloquim on Human Rights and Economic Development, and pronounced development as a right.

It is noteworthy that the African States was consistently on developmental rights and the ESCRs which is another similarity between the stakes of the African region and the South Asia since the latter in order to get its due for its market and human resources potential needs a platform to promote its developmental rights. There was committee constituted for the follow-up of the Colloquim which

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\textsuperscript{179} Fatsah Ouguergouz, 1993, at pp. 22-23.

\textsuperscript{180} \textit{ibid.}, pp. 23-24.
\end{footnotesize}
visited Africa several times.\textsuperscript{181} It can be seen as similar to the follow ups of the Vienna mechanism and its follow up the proposals made their, however, the latter was after the ECHR was in place in Council of Europe and in case of Africa these activities are before the adoption of the African Convention on Human And Peoples’ Rights.

In 1979 an important step forward was taken within the framework of the AU by the Assembly of Heads of State and Government with the adoption of a ‘Decision on Human Rights and People’s Rights in Africa it also became a reference in the preamble of ultimate African Charter for Human and Peoples’ Rights also.\textsuperscript{182} In that decision the Assembly called on the Secretary-General of the AU to prepare a preliminary draft of an African Charter on Human Rights including the establishment of bodies to promote and protect human rights. The decision also stated that human rights are not confined to civil and political rights but cover economic, social and cultural problems as well and hence special attention must be given to the latter. This idea was also emphasized in the second World Conference on Human Rights held at Vienna in 1993.

In September 1979 the United Nations in accordance to its Resolution 33/167, organized another seminar on “The Establishment of Regional Commissions on Human Rights” in Monrovia, Liberia, with particular reference to Africa.\textsuperscript{183} During this seminar another feature was highlighted and that was the African States do not have political homogeneity\textsuperscript{184}, which also a feature of South Asian States. It was also mentioned that such variety of political regimes blocks the development of region as a whole and also hampers the image of a region. Participants of the Monrovia Seminar agreed that African conditions and realities should be taken into consideration when setting up an African Commission on

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{181} Germain Baricako, 2008, p. 5.
\item \textsuperscript{182} Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979. Available at: http://www.achpr.org/english/_info/charter_en.html. Visited on 23 July 2010.
\end{enumerate}
\end{footnotesize}
human rights.

Similar ideas were articulated in the Bangkok Declaration which will be discussed in the subsequent chapter which mentioned that the Asian perspective of human rights has to be included in case an Asian human rights regime is to be panned.\textsuperscript{185} Attention of the seminar was also drawn to the existence in Africa of political systems such as the one-party State, the limited-party State, military regimes and minority governments, as factors to be borne in mind in discussing the role of regional institutions in the promotion and protection of human rights in Africa. It is a situation which is seen in South Asia as well.

It was recognized that while any regional human rights machinery in Africa should take into account the need to promote as well as to protect human rights, greater emphasis should be placed on the promotional function in the beginning. This is partly due to political realities, but mainly to the fact that a complaint system can only function effectively when people have a reasonable level of education and are made aware of their rights.

It was pointed out that an African Commission on Human Rights could play a role in promoting and protecting not only CPRs, but also ESCRs, including the right to development. As regards the functions of the proposed African Commission various types of function were mentioned, including promotional functions, advisory and consultative functions, good offices, conciliatory functions: Protection functions, and fact-finding and investigative functions. Most of these functions were a replica of the UN’s functions of similar nature as explained in the second chapter.

There was broad agreement on the functions like to undertake or encourage educational activities in the field of human rights; to undertake research and studies in the field of human rights; to disseminate Information to the African public, and invite suggestions from them as to the content of the proposed African Convention or Charter of human rights; to sponsor seminars and training courses; to co-ordinate and co-operate with other African and international institutions and

bodies concerned with human rights; etc. etc. However, the proposed functions like State complaint system was taken with a great deal of doubts by almost all the States. In case of Individual complaint system the response was mixed. Such a response was similar to the responses of the international community when similar complaint mechanisms were being proposed under the UN’s human rights system as highlighted in the second Chapter.

On the question of whether or not the Human Rights commission is to be given a role for mediation and conciliation was overshadowed by the failure of the OAU body specially created for this purpose. Considering the dictatorial and absolute nature of the States of Africa there was general agreement that the Council of Ministers or the Assembly of Heads of State and Government of the OAU might assign the Commission with fact-finding functions. The seminar worked out a Monrovia proposal for establishing an African Commission on Human Rights of sixteen members. In December 1979, African experts met in Dakar, to prepare the first draft of the proposed African Charter. The draft Charter had 65 Articles preceded by a Preamble.

The AU Ministerial Conference considered the draft Charter at its two sessions in 1980 and 1981. The Charter was finally approved at the Eighteenth Assembly of the Heads of State and Government held in Nairobi in June 1981. The African Charter has sixty eight articles and has been divided into four chapters namely, Human Rights, Duties, Procedures of the Commission and Applicable Principles.

3.4.3 The African Union Charter and Human Rights


Unlike its counterpart in Europe and America human rights protection was not on the main objectives of the OAU. Instead the organization focused on conflict resolution among the States of the region who had a lot of issues related to sovereign and territorial integrity. Yet the Charter of the organization does make reference to some human rights. For example, the Preamble to the AU Charter mentions the Universal Declaration of Human Rights as containing the principles to which the States parties reaffirm their adherence.

For those States, the Charter of the United Nations and the Universal Declaration of Human Rights “provide a solid foundation for peaceful and positive cooperation” among them.

The first paragraph of the Preamble reaffirms that “it is the inalienable right of all people to control 'their own destiny’”; the second paragraph recognizes that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples”; the third establishes for the member States the “responsibility to harness the natural and human resources” of the continent “for the total advancement of our peoples in all spheres of human endeavor.” The word People mentioned in the Preamble of the OAU Charter also has reference in the Charter of the SAARC, analysis of which has been done in a subsequent chapter.

In addition to these principles of human rights which permeate the preamble, the purposes assigned to the AU by its member States contain an explicit reference to human rights. According to Article 2 (1) (e), one of the objectives of the organization shall be “to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.” Paragraph (b) of the same Article provides that one of its purposes shall be “to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa.” Paragraph (d) outlaws colonialism. The ACHPR also reflects the internal aspect of self determination stating that the People’s

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It is observable from the above discussion that the OAU intended to make it an obligation for its members to protect human rights as guaranteed by the UN Charter and especially those set forth in the UDHR. Probably it was done with regards to the emphasis on UN’s Human rights documents during various seminars discussed above.

As a contrast to the objectives of the AU, the Charter does not mention any human rights in its Principles apart from the right of peoples to self-determination. It does not even mention of the question of cooperation among States. The prominence of State interests for example, respect for national sovereignty, territorial integrity, and noninterference in the internal affairs of another State - necessarily resulted in the relative relegation of the question of human rights. The same is the case of the SAARC’s Charter. However, despite all the criticism of the AU in 1981 it adopted a Human Rights Charter for the region which was very original to the African needs and had several unique features to it. The Charter is discussed in the paragraphs ahead.

\textbf{3.4.4 The African Charter on Human and Peoples’ Rights, 1981}

The African Charter on Human and Peoples’ Rights (ACHPR) was adopted in 1981 by the AHSG of the AU and came into force in 1986. As mentioned above the ACHPR is a unique document on human rights as it is the only regional charter which includes the word Peoples’ in its name, it includes the CPRs and the ESCRs, the Rights as well as duties, the individual rights and the group rights, it includes all the three generations of human rights and has not created a regional court in the main Charter of human rights. I will try to highlight all these points in the discussion ahead.

Article 1 of the ACHPR provided for the rights and the duties. Form the Article 3-13 the Charter provides the CPRs which are mostly individual rights and the first generation rights as well. Articles 14-18 include the ESCRs and are second generation rights. Article 14 mentions the right to property as a human right like
the American Convention under Article 21. Articles 19-24 mention Group rights or Peoples’ rights.

Article 20 provides that Peoples have the ‘unquestionable and inalienable’ rights to self-determination. Para 2 of the same Article provides that it is right of the colonized peoples of Africa to free themselves from the bonds of domination. This Article signifies the real African character of the Charter as it represents the centuries old subjugation of the continent to foreign rule and oppression. This African character adds to the uniqueness of the African Charter. Article 24 speaks for ‘satisfactory environment for the development’ which is a human right of the third generation. Article 25-26 mention the State obligation ‘to promote’ and ‘to guarantee’ the rights as well as the duties mentioned in the Charter. Article 26 also speaks for the ‘independence of the courts’ and appropriate ‘national institutions’ to promote and protect human rights and duties. Articles 27-29 include the duties of an individual. This feature is similar to the Article 29 of the UDHR which also hints upon the duties aspect of human rights.

The African Charter does not provide for any derogation clauses, however, there are some ‘Claw back Clauses’ in the Charter which limit the scope of these rights. For example Article 8 of the Charter grants freedom to conscience, profession and religion ‘subject to law and order’. Under Article 13(1) the citizens have a right to participate freely in government ‘in accordance with the provisions of law’. Article 10 says that an individual has a right to free association ‘provided he abides by law’. By way of such clauses the Charter restricts the rights and also passes on the responsibility of the protection of these rights on the respective States since the States made the laws and may also amend them to oppress the people. This is a grave criticism of the ACHPR. All the rights are kept in the first of the three parts of the ACHPR. Form the overview of the first part itself it is clearly seen that the African Charter is rightly known for its unique features. The second part of the ACHPR mentions the Measures of Safeguard and discusses various provisions for the African Commission for the Human and Peoples’ Rights.

3.4.4.1 The African Commission of Human and Peoples’ Rights

Chapter one of the Part-II of the ACHPR provides for the ‘Protection’ related role of the Commission. The African Commission on Human Rights is not a formal
part of the AU since it was created separately by way of ACHPR. Articles 30-44 provide for the establishment of the Commission. The number of the members of the Commission was kept eleven and all the members were to act in their personal capacity under Article 31. Article 32 further stated that only one national could be a member of the Commission at a time and the election of the members is to be done by the AHSG of the AU from amongst the two nominations by the State members of the ACHPR under Article 34. The members enjoy six year of term and were eligible for re-election as well as per Article 36.

The part II of the Chapter two of the ACHPR begins with Article 45 which mentions the Mandate of the Commission. This part highlights the various functions of the Commission which include the promotion of the rights, interpretation of the charter, and to perform any function as assigned by the AHSG of the AU. As far as the Advisory jurisdiction of the Commission is concerned Article 45 (3) attaches the interpretative role to the Commission under which any member State of the AU or the AU organ or recognized institutions may seek an interpretation of the ACHPR by the Commission. This function is also analysed to be an Advisory function of the Commission.193 In order to perform the promotional functions the Commission came up with a journal of human rights in October 1991.194

The Commission in its promotional functions appoints Special Rapporteurs195 like the UN and On-Site visits as the European and Inter-American counterparts.196

The enforcement of the recommendations of the Commission rests with the AHSG of the AU.

Chapter three of the Part II of the ACHPR mentions the Procedure of the


195 For further details, see: Rachel Murray, 2008, pp. 22-23.

Commission. Article 46 entrusts the Commission with the role of investigations to the Commission. Article 47 provides for the State to State Communication System, as provided under the Article 41 of the ICCPR. In case of the latter in Article 42 there is a provision of a Conciliation Commission in case the case does not get resolved a similar provision is found in the Protocol on African Court to the ACHPR under Article 9. The Article 55-59 provide for Other Communications in the ACHPR. Article 56 of the ACHPR provides for the other communications including communications from individuals, NGOs and groups. Chapter four of the Charter mentions the Applicable principles from Articles 60-63. Articles 64-68 include General provisions of the Charter.

Article 64 of the ACHPR provides for the State Reporting after every two years under the Charter. Although not provided in the Charter the Commission reviews the reports by the approval of the ASHG of the AU.\textsuperscript{197} It is referred to as the ‘backbone of the mission of the Commission’\textsuperscript{198} and there were guidelines adopted for the National Reports by the AU in late 1990’s.\textsuperscript{199} To further strengthen the system the Commission took initiative to launch ‘early warning system, to the States to enhance compliance.’\textsuperscript{200}

As clearly seen the Commission was not having much effect due to the absence of a regional human rights courts and the due to the same reasons the role of the commission was essentially of promotional nature rather than protective. In 1998 the AHSG of the AU adopted a Protocol to the ACHPR on the establishment of the African Court of Human and Peoples’ Rights.\textsuperscript{201} For a diversified and backward region like Africa it was thoughtful to have a Commission first so that the promotion of human rights culture could be done and the States and the people be made adapted to the protection of human rights in a more formal and legal level as a court. I support similar strategy for the South Asian human rights

\textsuperscript{197} \textit{ibid.}, p. 1068.
\textsuperscript{198} Rachel Murray, 2008, p. 16.
\textsuperscript{199} \textit{ibid.}, p. 25.
\textsuperscript{200} \textit{ibid.}, pp. 24-25.
system to evolve.

3.4.4.2 The African Court of Human and Peoples’ Rights, 1998

The efforts towards an African Court of Human Rights began in early 90s. The AU adopted a Resolution to improve the effectiveness of the Commission which triggered the developments towards the deliberations on the establishment of an African Court.\(^{202}\) A meeting was held at Cape Town South Africa from 6-12 September 1995 and it prepared the first draft of the Protocol to the ACHPR for the establishment of the Court,\(^{203}\) which was named as the Cape Town draft. This draft was presented to the OAU in its 64\(^{th}\) Session and was reconsidered at the 65\(^{th}\) session. It was followed by three meetings of the governmental legal experts.\(^{204}\) The last meeting held at Addis Ababa, Ethiopia, in December 1997\(^{205}\) was followed by a ministerial conference of the Ministers of Justice or Attorney Generals made some minor changes in the draft\(^{206}\) and the final draft for the Protocol was accepted unanimously and presented before the AHSG of the AU in the 67\(^{th}\) Session in July, 1998 at Yaounde, Cameroon.\(^{207}\) The protocol was adopted in 1998 and entered into force in January 2004.\(^{208}\) The Protocol provided for an African Court of Human and Peoples’ Rights in its very first Article. The same Article also clarified that the court was to complement the protective functions of the Commission. The constitution of the court was kept similar to that of the Commission. It was to have eleven members


\(^{203}\) The meeting was a follow up of another meeting of the International Commission of Jurists, an NGO held at the same Venue from 4-5 September. Also in 1993 Karl Vasak, a Czech Jurist had prepared the draft for the African Human Rights and peoples’ Court on the request of the same NGO the International Commission of Jurists, based in Geneva. Hence, adding a European link to the African Court.

\(^{204}\) Vincent O. Orlu Nmehielle, 2001, p. 255.


and the rest of the qualifications were also kept same to the Commission. The judges
could get re-elected however, only once as per Article 15 of the Protocol. It was also
provided in the protocol that the court will offer Advisory opinions under Article 4,
to all the AU States, the AU organs or recognized institutions. For the Court’s
Contentious Jurisdiction, under the Article 5, the Commission, the States as well as
the NGOs and groups could submit a case. The individuals could do so under Article
34 (6).

The African system is also made up of other sub regional efforts like the
European system. The African Court for Human and People’ Rights is not the
only judicial organ of Arica. There is a Court of Justice of the AU which is also a
treaty organ which carries out human rights protection under the Treaty of
African Economic Community, 1994.\textsuperscript{209} In another revision of an economic treaty
of sub regional level; the revised Economic Community of West African States
(ECOWAS), 1975, there is a Court of Justice of the Common Market for Eastern
and Southern Africa.\textsuperscript{210} In Article 18 of the Constitutive Act which created the
AU also provided for a Court of Justice as One of the principle organs of the
AU.\textsuperscript{211} Like the economic organizations of Europe in Arica also economic laws
are made conceptuality to human rights an important lesson for South Asia as
well. It also replaced the AEC Court of Justice. In July 2004 the AU decided to
integrate the AU court with the African Court of Human and Peoples’ Rights.\textsuperscript{212}
On the other hand the Court of ECOWAS has maintained the inter-link with the
latter.\textsuperscript{213}

\textsuperscript{209} Article 3(g) AEC Treaty mentions, recognition, promotion and protection of human and peoples’
rights as one of its principle. Article 7 provides for a Court of Justice.
\textsuperscript{211} Konstantinos D. Magliveras and Gino J. Naldi, “The African Court of Justice”, \textit{ZaöRV}, Vol. 66,
\textsuperscript{212} It should be noted that Executive Council Decision EX/CL/58 (III) of 8 July 2003, which determined
that the African Court of Human and Peoples’ Rights would remain a separate and distinct
institution from the AU Court, was thus overruled.
\textsuperscript{213} Tall el Mansour, “The Relationship between the ECOWAS Court of Justice and the Future African
Org / content _ files / files / Relationship between ECOWAS Court and African Court.doc.
Visited on 2 August 2010.
3.4.5 The African Human Rights Mechanism: The Latest Developments

The year 1999\textsuperscript{214} proved an important year for the African human rights regime for more than one reasons. In the first Ministerial Conference on Human and peoples’ rights, 12-16 April, Mauritius, 1999 the Grand Bay Declaration and Plan of Action was adopted. It added human rights dimension to all the AU policies, it also provided for strengthening of the commission\textsuperscript{215} emphasis that the African states should ratifies the international documents on human rights and focused on the role of NGOs in the African Human rights System etc.\textsuperscript{216} it also put into limelight the collaborative roles of the African Commission and the National Human Rights Institutions.\textsuperscript{217} A similar feature of attaching the importance to the

\textsuperscript{214} The Organisation of African Union was renamed as the African Union in the same year in the month of September.

\textsuperscript{215} The Declaration in its Para 16 emphasised the state reporting system by the States. Para 20 requested “the Secretary General of the OAU and the African Commission on Human and Peoples’ Rights to develop appropriate strategies and take measures to sensitize and raise the awareness of African populations about Human Rights and International Humanitarian Law through formal and non formal educational processes comprising among others, a special module in school curricula.” Para 23 mentioned that “the working of the African Commission on Human and Peoples’ Rights is critical to the due observance of Human Rights in Africa, believes that there is a need to evaluate the structure and functioning of the Commission and to ascertain the extent to which it is implementing the Mauritius Plan of Action during the period of 1996-2001, and to assist it to remove all obstacles to the effective discharge of its functions. There is also an urgent need to provide the Commission with adequate human, material and financial resources.” Available at: http://www.achpr.org/english/declarations/declaration_grand_bay_en.html. Visited on 2 August 2010.

\textsuperscript{216} For further details, see: Gino J. Naldi, 2004, p. 17-31

National Human Rights Institutions is found in the South East Asian plan for human rights discussed in one of the next chapters.

It was also proposed in the Declaration that like the Council of Europe, “the Assembly would consider delegating this task to the Council of Ministers”. Strengthening of the African Commission was repeated in the Kigali Declaration of the first AU meeting on Human Rights, Kigali, Rawanda, 8 May, 2003. As a new dynamic of the African system of human rights the African Peer Review Mechanism (APRM) was established within the framework of the New Partnership for Africa's Development (NEPAD), the APRM is a system of "self-monitoring" based on peer pressure principle similar to ‘peer Review’ of the social charter’s monitoring of Council of Europe.

On 6 December 2012, the AU adopted the first regional treaty on internal displacement named as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. The convention is popularly known as the Kampala Convention. It is said that the Convention ‘…breaks new ground in articulating the rights of internally displaced persons (IDPs), and the responsibilities of states, regional organizations, and other actors to uphold


219 The 37th Summit of the OAU in July 2001 formally adopted the strategic framework document for the NEPAD.

All these developments symbolize that the African System is still evolving and is adapting to the needs of the region. As I tried to highlight throughout the overview of the three regional systems there are a lot of similarities between the three regional systems and in South Asian prospects of human rights mechanism.

Before I move on to the next chapter of this work there is one more regional human rights system to discuss however, cursorily since this system is not yet functioning. This is the Arab System of human rights which came up in 2004 under the aegis of the League of Arab States (LAS).

More than the actual functioning of the System and its organs I will focus on the LAS as an organization, the features of the Arab region and the Arab Charter of Human Rights. The importance of the Arab Charter is that it is partially based on the Islamic values of human rights. And in South Asia there is huge population of Muslims. There might be some lessons to be drawn for the proposal of South Asian system which can help in making the proposal a truly South Asian one.

3.5 The League of Arab States and Human Rights

Like all other regional systems the Arab System of human rights works under the aegis of a regional organization; the League of Arab States (LAS). The LAS was formed as a follow-up of the Alexandria Protocol adopted in 1944 by the Arab States and was established in March 1945, four months before the United Nations to serve the interests of the region. The seven founder member States were: Jordan, Syria, the Lebanon, Egypt, Saudi Arabia, Yemen and Iraq.

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224 The founder member States were: Jordan, Syria, the Lebanon, Egypt, Saudi Arabia, Yemen and Iraq.
have risen to twenty two members by 2010. The LAS has its Headquarters in Cairo Egypt which was shifted to Tunis in 1979. Egypt was readmitted to the league in 1989 and the league's headquarters was moved back to Cairo. India has been given the observer status in LAS since 2005. The Arab human rights system is based on the LAS Charter, the Pact of the League of Arab States, having a Preamble, 20 Articles and 3 Appendices. The main objective of LAS was to coordinate regional unity and to strengthen political policies.

So that the post World War political and cultural subjugation of the region at the hands of colonial powers and the Jews respectively could be fought against. The Council is the highest organ of the LAS and all the member States are represented in this body. The Council is assisted by a number of special committees working for particular human interests like labour rights, environment etc. The LAS has a General Secretariat to upkeep the daily work of the organization.

In addition to these organs the LAS also has a number of specialized Agencies for example, the Arab league Educational, Cultural and Scientific Organization, 1964, the Arab Health Organization, 1970, the Arab Bank for Economic Development in Africa, 1973 etc. The last agency hints upon the closeness of the regional interests of the Arab and the African region. Like the Council of Europe and AU the LAS also has a Court of Justice. The Arab Court of Justice was adopted by way of a Statute. According o the Article 1 of the Statute it was principal judicial organ of the Las. Composed of a body of independent judges as

228 Jacqueline Anne Braveboy-Wagner, 2009, at p. 6.
229 id.
The court follows procedures of Written as well as oral as mentioned in Article 17 (1) of the Statute. The focus was more on the advisory opinions of the court rather than the Contentious jurisdiction which is mentioned only in Article 23 (4).

3.5.1 The Evolution of Arab Human Rights Mechanism

The LAS had created specialized agencies to cater to specific human rights concerns in 1950s. In 1964 the LAS created an Arab educational, Scientific and Cultural Organisation. The Arab region also had preference for the collective rights like all other non western regions. The international debate over these rights also captured the attention of Arab region.

In 1966 when the International Covenants on human rights were adopted by the UN the interest of the LAS in human rights was converted into efforts. In the same year the LAS established a Committee to explore the prospects of the Arab world in the UN’s ‘Year of Human Rights’ since the UN urged the four regional organizations namely the Council of Europe, the OAS, the AU and the LAS to support the cause of human rights by way of celebrating the Human Rights Year, 1968.

In 1967 acting upon the UN’s recommendations and also acting according to the Chapter VIII of the UN Charter the LAS formed another Committee by way of

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238 A.H. Robertson and J.G. Merrills, 2005, p. 239.

Resolution 2443, in 1968, established *al-Lajnah-al-Twajehiya* for the same purpose.\(^{240}\) The UN Commission on Human Rights also launched a project to explore the potential of the regions for human rights which do not have any such system existing.\(^{241}\)

The First International Conference on Human Rights was organised in Tehran from 22 April to 13 May 1968\(^{242}\) in which the Arab countries participated. In the same year the first Arab regional conference on human rights was conducted in Beirut, 2-10 December which was also attended by India and Pakistan other than the Arab Countries.\(^{243}\) It was followed by the establishment of Permanent Commission on Human Rights in 1968\(^{244}\) with all the LAS members represented therein.\(^{245}\) By this time the Arab region had taken note of the fact that all the other regional organization had established human rights mechanism except the LAS. The Commission presented a proposal to the Council of the LAS in September 1969 regarding its powers, mentioning therein that all human rights concerns would fall within the competence of the Commission. It also suggested that the region should promote the national human rights institutions a feature similar the South East Asian initiatives of human rights.

The Arab consciousness for human rights is also backed by the NGOs of the region\(^ {246}\) as a similarity between the other regional human rights developments. An Arab NGO the Union of Arab Lawyers proposed the LAS in their meeting in Damascus to draft an Arab Human Rights Charter.\(^ {247}\) To consult the Arab NGOs

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\(^{241}\) A.H. Robertson and J.G. Merrills, 2005, p. 239.


\(^{246}\) Jill Crystal, 1994, pp. 113-123, at p. 114.

on the human rights issues the first conference was held in Amman, the second in Sana, the third in Cairo, the fourth in Geneva and the last in Beirut, organized by the Cairo Institute for Human Rights Studies and ended with the Beirut ‘declaration’ for regional protection of human rights.\(^{248}\)

In 1974 the Arab Inter-parliamentary Union (AIPU) is an Arab parliamentary organization composed of parliamentary groups representing Arab Parliaments was established.\(^{249}\) The AIPU has three main organs, namely, The Conference, The Council and the General Secretariat. The functions of these organs are explained as below:

The Conference is composed of delegations representing the member groups (5-10) deputies for each. The Conference meets once every two years and is presided by the speaker of the host parliament, The Conference deals with common pan-Arab issues, adopts and amends the Union’s statutes.

The Council is composed of two members representing each member group. The Council normally holds one session a year. It takes all measures entitled to realize the Union’s objectives i.e. adopts the budget, appoints the secretary General, fixes the agenda of the Conference, accept new affiliations...etc.

The General Secretariat is the Union’s Executive Organ, and is headed by the Secretary General. It facilitates contacts between the member groups and the Union, prepares the subjects to be discussed by the Union's Councils and Conferences, runs administrative and financial questions ...etc.\(^{250}\)

The AIPU takes not of every development in the region for example, it is drafting a regional Convention on AIDS, it has recently called for a session with the LAS to discuss the crises in Libya. \(^{251}\) The AIPU also works with the UN to promote regions interests.\(^{252}\)

Later in 1979 the Arab jurists met in Syracuse and approved the Draft Charter on Human and Peoples’ Rights in the Arab World. The name given to the Charter

\(^{248}\) Available at: http://www.cihrs.org/English/News System/Articles/106.aspx. Visited on 17 September 2011.

\(^{249}\) Available at: http://www.arab-ipu.org/english/. Visited on 17 September 2011.

\(^{250}\) Available at: http://www.arab-ipu.org/english/. Visited on 17 September 2011.


\(^{252}\) For more details, see: http://www.Arabparliaments.org/about/index.aspx. Visited on 17 September 2011.
reminds us of the uniqueness of the ACHPR which was shared by the proposed Arab Charter. This Charter had no recognition till 1994 when the LAS adopted its own Arab Charter on Human Rights.

3.5.2 The Arab Charter on Human Rights, 2004

The work towards the drafting of the Arab Human Rights Charter was prepared in 1971 and was adopted in 1994\textsuperscript{253} which was not ratified by any member State. Between these periods the LAS kept working on particular human rights issues for example in 1990s it adopted a Convention on Terrorism, proposed a common market for the Arab region and a Court of Justice was also introduced.\textsuperscript{254} The Charter was based on Shari’a Law and Cairo Declaration on Human Rights, 1990. The Charter was revised in 2004 and presented in the Summit of LAS and was ratified by seven member States.\textsuperscript{255} The Charter entered into force on 14 March 2008.\textsuperscript{256}

Article 2 of the Arab Charter begins with the words that ‘All the Peoples’ is very similar to the second article in both the International Covenants of 1966 as it is concerning the rights of the People, a feature which is also found very strongly in the ACHPR.\textsuperscript{257} The Rights of the Arab Charter can be divided in the following categories. The first category concerns individual rights from Articles 5-10, 14 and 18, 20. The second category concerns rules of justice Articles 12-13, 15-17 and 19, the third category concerns civil and political rights, articles 21, 24-33, the fourth category concerns economic, social and cultural rights Articles 34-37, 41-42. Like the ACHPR the Arab Charter also has incorporated all kinds of rights

\textsuperscript{254} Jacqualine Anne Braveboy-Wagner, 2009, p. 97.
including the right to development in Article 37.\textsuperscript{258}

The organs mentioned in the 2004 Arab Charter was the Arab Committee on Human Rights as mentioned in Article 45 of the Arab Charter. The Committee was provided to receive State reports through the General Secretary of the LAS as per Article 48 of the Charter. State reports from the members provided under Article 48 (1) of the Charter. The Reports are to be submitted after one year of the enforcement of the Charter and thereafter after the gap of three years as per Article 48 (2). The Article 48 (6) provides that the committee shall give recommendations and concluding observation based on the State Reports.

It is interesting to note the contrast between the Inter-American Commission which was established before the American Convention but was attached a role under the Convention, however, in case of the Arab Commission there was no role given to it as the Charter organ and rather was replaced by a Committee.

I would also like to highlight a critical point here that the Arab Charter opted for a Committee instead of a Commission like in all other regional Charter/Conventions because the role of a Human Rights Commission is much more.\textsuperscript{259} The Arab Charter did not mention of the Arab Court like the ACHPR and not established one till August 2010. However, the debate on the establishment of an Arab Court of Human rights has been simmering in the Arab region for quite some time. The overview of these debates has been discussed ahead.

\textbf{3.5.3 The Arab Court of Human Rights}

The Draft Charter on Human and People's Rights in the Arab World 1978 had provided for the Arab Court of Human rights however, the final human rights Charter of 2004 did not. In the Section two of the of this draft is about the Arab Court of Human Rights. The Article 56 mentions that “the Court shall be composed of seven judges”. The State party “nominate two persons” and “the bar association therein shall nominate a third person”.


The Court was assigned with two functions: contentious jurisdiction and jurisdiction for “Interpretation of the Charter and determination of the obligations of parties” in Article 53 (3). Under the contentious jurisdiction the Court could receive the cases of State Communication, and could cater to the individual communications referred to it by the Arab Commission on Human Rights under Article 58(1) and (2).

One of the major lacunas in this draft was that the individual communications should have been directly presented to the Court.\(^{260}\) The Human Rights Information & Training Center, Yemen, the Arab Institute of Human Rights, Tunisia, and the Arab Center for International Humanitarian Law & Human Rights Education, France organized a meeting in October 2004 in Aden, Yemen to discuss about the creation of an Arab Court of Human Rights.\(^{261}\) The same discussion was carried on during the second meeting in March 2004 in Sana'a, Yemen which produced the Sana’a Declaration.\(^{262}\)

The Charter of 2004 was lacking a lot of essential features for example, it did not provide for the monitoring system of the Charter and it did not include the individual complaint mechanism.

The following excerpt from shows the dynamics for growth in the Arab system of human rights.

From 16 to 18 February 2013, the International Federation for Human Rights (FIDH) in cooperation with the Arab Organization for Human Rights (AOHR), the Cairo Institute for Human Rights Studies (CIHRS) and the Egyptian Initiative for Personal Rights (EIPR), held a regional conference in Cairo entitled “The League of Arab States (LAS), human rights and civil society: challenges ahead” to which top representatives of the LAS participated, together with around 50 representatives of national, regional and international non-governmental organisations (NGOs). The presence of human rights experts from the African Union, Organisation of American States, Council of Europe and United nations systems allowed for a comparative legal and practical


\(^{261}\) ibid.

analysis with the LAS.

During three days in this unprecedented format, participants discussed the challenges faced by the LAS to enhance the protection and promotion of human rights in the region. They urged the LAS to reform and strengthen the organs in charge of human rights issues and demanded effective interaction with independent civil society organizations at all levels of the LAS.²⁶³

The news extract mentioned above highlights a number of significant things. Firstly, it shows the interconnection between the international human rights regime under the United Nations and the regional human rights system under the Council of Europe and the young regional system of Arab region. It further strengthens the ideas that all the human rights regimes work in unison for one greater goal. This also emphasises the eminent role of the NGOs in the regional human rights mechanisms. It is the idea which I have used in the final proposal for South Asia as well. The Arab region has recently seen revolutions and still is suffering from such upheavals, however, it must be considered as a chance for the Arab human right system to give lessons to the political leaders of the region to adopt more democratic and human rights friendly governance.²⁶⁴

Also, the LAS is striving to establish an Arab Court of Human Rights to match up to the universal standards.²⁶⁵

3.6 Conclusion

The Arab countries have an approach which is clearly non western and the Arab approach somewhat accepts the Asian approach as was seen during the Vienna Conference in 1993. Yet, the Islamic element of the Arab human rights perspective makes it unique and distinct from both the non western as well as the


While proposing a South Asian human rights Mechanism I would keep in mind all the existing regional systems for their good features and bad features as well. At the same time I am also aware of the fact that every region is unique and different and the issue at hand; human rights is one of the most sensitive issues of contemporary times, hence there is little scope of borrowing human rights setups from these regions.

It is primarily for this reason that I would like to give an overview of the region of South Asia, the regional organization and the human rights concerns, before beginning with the proposal of human rights system of South Asia. In the next chapter I have discussed the region of South Asia.

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