

# Legal Protection of human rights

"The law does not change the heart, but it does restrain the heartless."

*Martin Luther King*

We already know that human rights are inalienable rights possessed by every human being, but how can we access these rights? Where can we find evidence that these rights have been formally recognised by states? And how are these rights implemented?

## Human rights are recognised by agreements

At international level, states have come together to draw up certain agreements on the subject of human rights. These agreements establish objective standards of behaviour for states, imposing on them certain duties towards individuals. They can be of two kinds: legally binding or non-binding.

A binding document, often called a Treaty, Convention or Covenant, represents a commitment by states to implement rights at national level. States must individually show their willingness to be bound and this can be done through ratification or accession. (Simply signing the document does not make it binding.) States are generally allowed to make reservations or declarations which exempt them from certain provisions in the document, the idea being to get as many of them as possible to sign. After all, it is better to have a state promising to comply with some human rights provisions than with none! This mechanism, however, can sometimes be abused and used as a pretext for denying basic human rights, allowing a state to 'escape' international scrutiny in certain areas.



**Why do you think that even states with a very poor record on human rights are ready to sign international human rights treaties?**

By contrast, a non-binding instrument is basically just a declaration or political agreement by states to the effect that all attempts will be made to meet a set of rights but without any legal obligation to do so. This usually means, in practice, that there are no official (or legal) implementation mechanisms.



**What is the value in a mere 'promise' to abide by human rights standards, when this is not backed up by legal mechanisms? Is it better than nothing?**

A United Nations declaration or non-binding document is usually the result of a meeting of the United Nations General Assembly or a conference held on a specific issue. All states, by simply being members of the United Nations or by taking part in the conference, are considered to be in agreement with the declaration issued. The recognition of human rights can also be, at national level, the result of an agreement between a state and its people. When human rights are recognised at national level, they become primarily a commitment of a state towards its people.

## Key international documents

The importance of Human rights is increasingly acknowledged, and are receiving ever wider protection. This should be seen as a victory not only for human rights activists, but for all people in general. A corollary of such success is the development of a large and complex body of human rights texts (instruments) and implementation procedures.

Human rights instruments are usually classified under 3 main categories: the geographical scope (regional or universal), the category of rights provided for and the specific category of persons or groups to whom protection is given.

At UN level alone, there are more than a hundred human rights related documents, and if we add in those at different regional levels, the number increases further. We can not consider all these instruments here, so this section will only deal with those that are most relevant:

- documents which have been widely accepted and have laid the ground for the development of other human rights instruments
- the major European documents
- documents which touch on the global issues explored in the manual.

## The International Bill of Rights

The most important global human rights instrument is the Universal Declaration of Human Rights (UDHR), adopted in 1948 by the General Assembly of the UN. This is so widely accepted that its initial non-binding character has altered, and it is now frequently referred to as legally binding on the basis of customary international law.

The UDHR consists of a preface and 30 articles setting forth the human rights and fundamental freedoms to which all men and women everywhere in the world are entitled, without any discrimination. It guarantees both civil and political as well as social, economic and cultural rights.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both came into force in 1976 and are the main legally binding instruments of worldwide application. Together with the UDHR, they form the International Bill of Rights. Each of them, as their names indicate, provides for a different category of rights.

Whereas the rights included in the ICCPR apply as soon as a state has agreed to be bound by it, the rights of the ICESCR may be implemented gradually. (This puts states under an obligation to develop policies and legislation that will assist the full realisation of the rights). The covenants are treated differently because, generally speaking, economic, social and cultural rights cannot be realised instantly.



**Do you think it is right that civil and political rights are supposed to be implemented straight away, and social and economic rights only gradually?**

## European instruments

Four of the five world regions have established human rights systems for the protection of human rights. In the Americas, there is the Organization of American States, and the main binding document is the American Convention on Human Rights of 1969. In Africa, we find the African Charter on Human and Peoples' Rights, adopted in 1986 within the African Union (formerly known as the Organisation of African Unity). On the Asian continent, no real system

## Charter of Fundamental Rights

This is the first human rights document of the European Union. It combines in a single text the civil, political, economic, social and societal rights already laid down in a variety of international, European and national sources. It was jointly proclaimed by the European Council, together with the European Parliament and the European Commission in Nice, between December 7 and 9, 2000. Unlike the Council of Europe's conventions, it is not legally binding and it covers only the European Union.

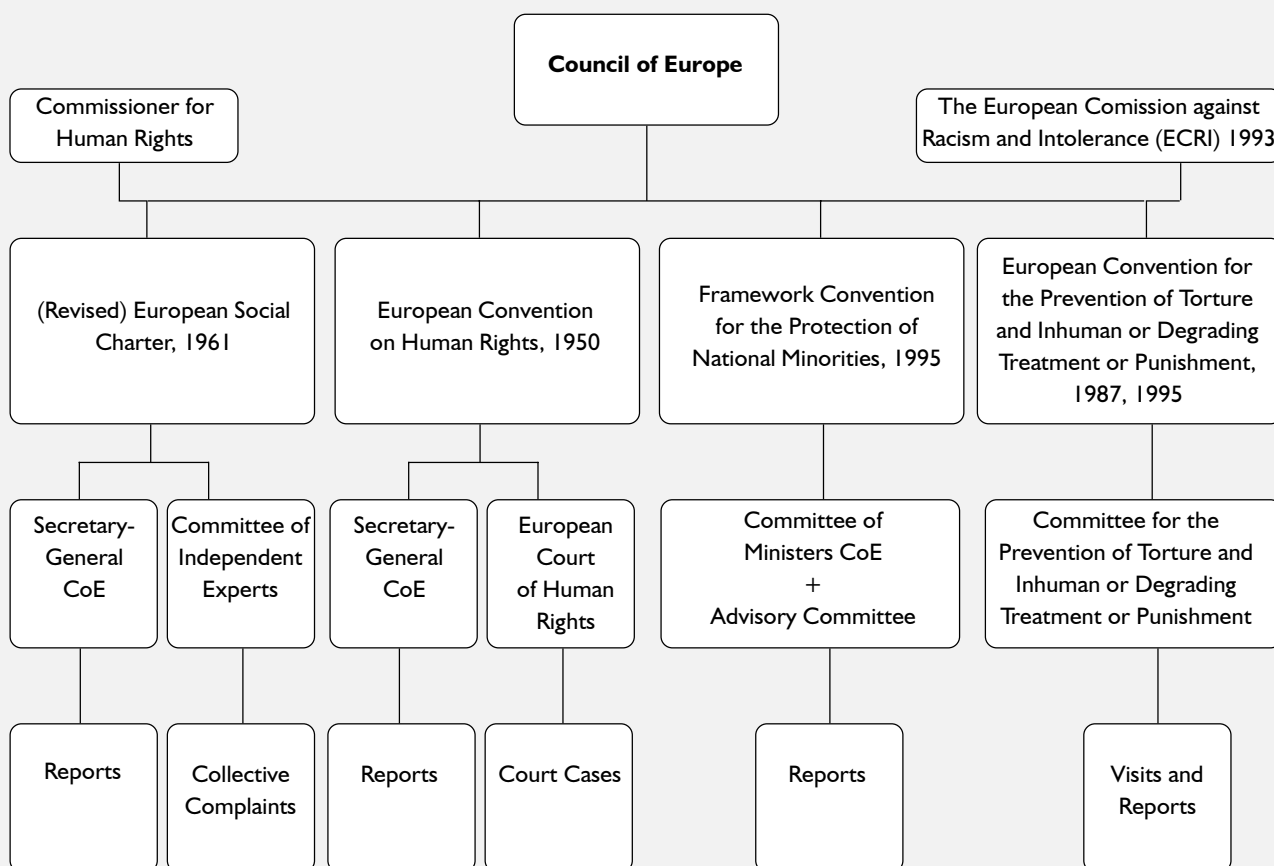
has been developed to date and the only regional human rights instrument is a non-binding declaration - the Asian Declaration on human rights. And Europe? Europe, of course, has a well-established system within the Council of Europe for the protection of human rights.

**? Why do you think different regions have found it necessary to establish their own human rights systems?**

The main human rights instrument is the European Convention on the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights - ECHR). This has been accepted by all the member states in the Council of Europe, since it is a requirement for membership. It was adopted in 1950 but only came into force three years later. It provides for civil and political rights and its main strength is its implementation machinery - the European Court of Human Rights. This court and its jurisprudence are admired throughout the world and are often referred to by the UN and by constitutional courts of numerous countries and other regional systems.

Just as at the UN level, social and economic rights in Europe are provided for in a separate document. The (Revised) European Social Charter is a binding document that covers rights to safeguard people's standard of living in Europe. The charter has been signed by 32 member states and, by the end of 2001, it had been ratified by 12 of them.

### Main human rights instruments and implementation mechanisms of the Council of Europe



## Protection of specific groups

As well as recognising the fundamental rights of individuals, some human rights instruments recognize the rights of specific groups. These special protections are in place because of previous cases of discrimination against groups and because of the disadvantaged and vulnerable position that some groups occupy in society. Examples of groups that have received special protection are:

"I see myself in every stranger's eyes."

Roger Waters

### Minorities

These are protected:

- at UN level by a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted in 1992 and a Sub-Commission on the Prevention of Discrimination and the Protection of Minorities
- at European level by a binding instrument - the Framework Convention for the Protection of National Minorities, which created a monitoring body of independent experts: the Advisory Committee on the Framework Convention.
- by having a special place in the Organization on Security and Co-operation in Europe (OSCE) by the High Commissioner on National Minorities, and by relevant OSCE documents.

### Children

Their main protection is given at UN level with the Convention on the Rights of the Child (CRC) of 1990, the most widely ratified convention (not ratified only by the United States and Somalia). At the African level, the African Charter on the Rights and Welfare of the Child provides basic children's rights, taking into account the unique factors of the continent's situation. It came into force in 1999.

### Refugees

The rights of refugees are specially guaranteed in the Convention relating to the Status of Refugees of 1951 and by the United Nations High Commissioner on Refugees (UNHCR). The only regional system with a specific instrument on refugee protection has been Africa with the adoption, in 1969, of the Convention Governing the Specific Aspects of Refugees, but in Europe the ECHR also offers some additional protection.

### Women

In an attempt to promote worldwide equality between the sexes, the rights of women are specifically protected by the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.

### Others

Groups such as workers and detained persons are also given special protection because of their vulnerable positions, which are easily open to abuse. Other groups, for example indigenous peoples, have not been lucky enough to receive specific protection and have been fighting for years for their rights as groups.



**Can you think of groups in your society that are in need of special protection?**

### Protocol 12 of the ECHR

A new protocol to the ECHR was adopted in 2000: Protocol 12. At the moment it has been signed by 27 states and ratified by one. It will enter into force after 10 ratifications. Its main focus is the prohibition of discrimination. The ECHR already guarantees the right not to be discriminated against (Article 14) but this is thought to be inadequate in comparison with those provisions of other international instruments such as the UDHR and the ICCPR. The main reason is that article 14, unlike the others, does not contain an independent prohibition of discrimination; that is, it prohibits discrimination only with regard to the 'enjoyment of the rights and freedoms' set forth in the Convention. When this protocol comes into force, the prohibition of discrimination will have an 'independent life' from other provisions of the ECHR.

## Fighting racism and intolerance

The European Commission Against Racism and Intolerance (ECRI) is a mechanism which was established by the first Summit of Heads of State and Government of the member States of the Council of Europe in 1993. ECRI's task is to combat racism, xenophobia, antisemitism and intolerance at the level of Europe as a whole and from the perspective of the protection of human rights. ECRI's action covers all necessary measures to combat violence, discrimination and prejudice faced by persons or groups of persons, notably on grounds of race, colour, language, religion, nationality and national or ethnic origin.

ECRI's members are designated by their governments on the basis of their in-depth knowledge in the field of combating intolerance. They are nominated in their personal capacity and act as independent members.

ECRI's main programme of activities comprises:

- a country-by-country approach consisting of carrying out in-depth analyses of the situation in each of the member countries in order to develop specific, concrete proposals, matched by follow-up.
- work on general themes (the collection and circulation of examples of good practice on specific subjects to illustrate ECRI's recommendations, and the adoption of general policy recommendations).
- activities in liaison with the community, including awareness-raising and information sessions in the member states, co-ordination with national and local NGOs, communicating an anti-racist message and producing educational material.

## Enforcing human rights

How can we ensure that these protection mechanisms work? Who, or what compels states to carry out their obligations? The main supervisory bodies are commissions or committees and courts, all of which are composed of independent members - experts or judges - which do not represent a single state. The main mechanisms used by these bodies are:

1. Complaints (brought by individuals, groups or states)
2. Court cases
3. Reporting procedures.

Since not all human rights instruments or regional systems use the same procedures for implementing human rights, a few examples will help to clarify.

### Complaints

Complaints against a state are brought before a commission or committee in what is usually referred to as a quasi-judicial procedure. The supervisory body then takes a decision and States are expected to comply with it, though no legal enforcement procedure exists. Often a state needs to give an additional declaration or ratification of an optional protocol to signify its acceptance of the complaints system. The Human Rights Committee and the Committee on the Elimination of Racial Discrimination (within the United Nations system), and the Inter-American Commission on Human Rights (within the Organisation of American States) are examples of bodies dealing with complaints.



**Should there be a legal mechanism for enforcing compliance with human rights standards? What sanctions could exist?**

## Legal cases

There are only two permanent courts which exist as supervisory bodies specifically for the implementation of human rights: the European Court of Human Rights and the Inter-American Court of Human Rights. However, a new international court is due to be established, once the Statute has been ratified by 60 countries. This court, the International Criminal Court (ICC), will exist to try individuals accused of crimes against humanity, genocide and war crimes. In this respect, it is different from, and complementary to, the European and Inter-American Courts, which consider complaints against states.

## Reports and reviews

The majority of human rights instruments require states to submit reports. These are compiled by states themselves, following the directions of the supervisory body, and contain general information on how rights operate at national level. The reports are publicly examined and NGOs usually play an active role at this stage, developing shadow reports alongside the states' reports. The ICCPR, ICESCR, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are examples of instruments requiring the submission of reports.

Most of these enforcement mechanisms are there to remedy the violation of a particular human right. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) is of a different kind. It is based on a system of visits by members of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to places of detention - for example, prisons and places of youth detention, police stations, army barracks and psychiatric hospitals. Members of the CPT observe how detainees are treated and, if necessary, recommend improvements in order to comply with the right not to be tortured or to be inhumanly treated.

## The European Court of Human Rights

The European Court in Strasbourg is famous for a number of reasons, but perhaps above all, because it gave life and meaning to the text of the ECHR. One of its main advantages is the system of compulsory jurisdiction, which means that as soon as a state ratifies or accedes to the ECHR, it automatically puts itself under the jurisdiction of the European Court. A human rights case can thus be brought against the state party from the moment of ratification.

Another reason for its success is the force of the Court's judgement. States have to comply with the final judgement. Their compliance is supervised by the Committee of Ministers of the Council of Europe.

In every case brought before the European Court, the procedure also includes the possibility of having a friendly settlement based on mediation between the parties.

The Court has also been able to develop over time. When it was initially set up in 1959, it was only a part-time court working together with the European Commission of Human Rights. With the increase of cases, a full-time court became necessary and one was set up in November 1998. This increase in the number of cases is clear evidence of the Court's success. People know that the Court is there and able to step in when they feel their fundamental rights are being infringed.

### The European Committee for the Prevention of Torture (CPT)

CPT delegations periodically visit states that are party to the Convention but may organise additional ad hoc visits if necessary. During 2001, the CPT conducted 18 visits, including visits to Switzerland, the Russian Federation (Chechen Republic), Malta and Spain. An important function of the CPT's work was seen in the case of the hunger strikes in Turkish prisons. When the Turkish government was drawing up changes to the prison system, a number of prisoners used hunger strikes to protest against some of the reforms. Their demonstrations became violent. The CPT became actively involved in negotiations with government and hunger strikers, investigating the events surrounding the hunger strikes and looking at how the draft laws could reform the Turkish prison system. The CPT visited Turkey 3 times in 2001 in connection with hunger strikes in Turkish prisons. The reports of the CPT are usually public: [www.humanrights.coe.int](http://www.humanrights.coe.int)

"Neither in men's hearts  
nor in the ways of society  
will there be peace  
until death has been outlawed"

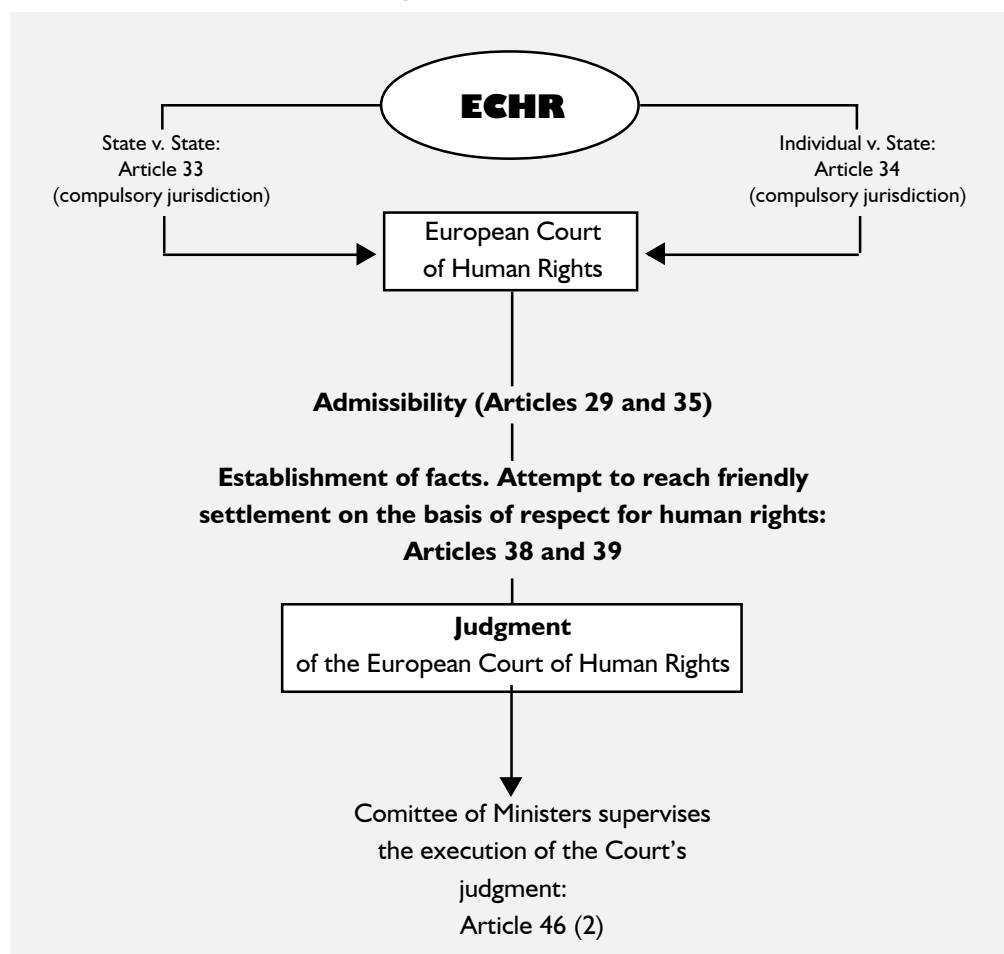
Albert Camus

## Important cases of the European Court of Human Rights

Below are some important cases, which have been consulted by the European Court.

- **Soering v. the UK (June 1989):** This was a case involving a man who was to be extradited to US to face charges of murder, where the crime was punishable by the death penalty. The Court took the view that to send him back to the US would be against the prohibition of torture, inhuman or other degrading treatment or punishment (Article 3, ECHR). One consequence of this decision was that the protection of individuals within a member state of the Council of Europe went beyond European borders. This principle has already been followed in other cases, such as *Jabari v. Turkey* (July 2000), and has protected asylum seekers from being sent back to a country where they would have their lives endangered.
- **Tyrer v. the UK (March 1978):** In this case, the Court considered that corporal punishment as a punishment for juvenile offenders was against the ECHR because it violated the right not to be tortured or to have degrading and inhuman treatment or punishment, as guaranteed under article 3. In the Court's words: "his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 (Art. 3) to

## European Convention on Human Rights Control Mechanism



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protect, namely a person's dignity and physical integrity". This case is a good example of the living nature of the ECHR, where the Court keeps pace with the changing values of our society.

- *Kokkinakis v. Greece* (April 1993): This was an interesting case, which dealt with the conflict between the rights of different people. It was based on the issue of proselytising and whether the teaching of a religion (guaranteed under article 9 of ECHR) violates another person's right to freedom of religion. The court thought it necessary to make a clear distinction between teaching, preaching or discussing with immoral and deceitful means to convince a person to change his/her religion (such as offering material or social advantages, using violence or brainwashing).

The European Court hears cases concerning any of the rights guaranteed in the ECHR, such as the right to life, a fair trial and freedom of expression. However, since it stems from the period immediately after the Second World War, it focuses exclusively on civil and political rights, and as a result, it lacks the capacity to consider cases concerning economic, social and minority rights. In spite of these limitations, it is widely revered for its registry record.

**? Have there been any cases against your country at the European Court?**

### ECJ, ECHR, ICJ: What's the difference?

There is often confusion surrounding the roles of the European Court of Human Rights (ECHR), the European Court of Justice (ECJ) and the International Court of Justice (ICJ). In actual fact, the three bodies are very different in terms of their geographical jurisdiction and the types of cases they examine. The ECJ is a body of the European Union. This is a court whose main duty is to ensure that Community law is not interpreted and applied differently in each member state. It is based on Community law and not human rights law; but sometimes Community law may involve human rights issues. A famous case decided by the ECJ was the *Bosman* case, which concerned transfer rules between football teams. These were judged to be incompatible with the Treaty of Rome rules on competition and the free movement of workers.

The International Court of Justice (ICJ) is the principle judicial organ of the United Nations. It has a dual role: to settle in accordance with international law the legal disputes submitted to it by states, and to give advisory opinions on legal questions. Only states can bring a case against another state and usually the cases are to do with treaties between states. These treaties may concern basic relations between states, (for example commercial or territorial) or may relate to human rights issues.

**? How do these different legal mechanisms help the ordinary citizen?**

### The Commissioner for Human Rights

The office of the Council of Europe Commissioner for Human Rights was first approved at the Summit of Heads of State and Government held in Strasbourg in October 1997. The purpose of this independent institution is both to promote the concept of human rights and to ensure effective respect for and full enjoyment of these rights in Council of Europe member States. The Commissioner is elected by the Parliamentary Assembly for a non-renewable term of office of six years.

#### The European Court of Human Rights in numbers

- There are 43 judges.
- An average of 180 phone calls and 800 letters were received daily in 2001.
- 19 815 cases were waiting to be considered by early January 2002 ('pending applications').
- Applications have increased by 523% per year from 1990 to 2000; in 1990 the Court received 1657 applications, in 2000 it received 10 486.
- There were 889 judgements delivered by the court in 2000, which means more than 2 cases per day (including weekends and holidays!).



The Commissioner is a non-judicial institution whose action is to be seen as complementary to the other institutions of the Council of Europe which are active in the promotion of human rights. The Commissioner is to carry out its responsibilities with complete independence and impartiality, while respecting the competence of the various supervisory bodies set up under the European Convention on Human Rights or under other Council of Europe human rights instruments.

The fundamental objectives of the Commissioner for Human Rights are:

- to promote education in and awareness of human rights in the member States;
- to identify possible shortcomings in the law and practice of member States with regard to compliance with human rights;
- to help promote the effective observance and full enjoyment of human rights, as embodied in the various Council of Europe instruments.

The Commissioner can deal ex officio with any issue within its competence. Although it may not take up individual complaints, the Commissioner may act, within the context of its function of promoting human rights, on any relevant information concerning general aspects of the protection of human rights, as enshrined in Council of Europe instruments.

Such information and requests to deal with it may be addressed to the Commissioner by governments, national parliaments, national ombudsmen or similar institutions, as well as by individuals and organisations.

### ***Is this sufficient?***

Many people would argue that the poor human rights record in the world is a result of the lack of proper enforcement mechanisms. It is often left up to individual states to decide whether they carry out recommendations. In many cases, whether an individual or group right will in fact be guaranteed depends on pressure from the international community and, to a large extent, on the work of NGOs. This is a less than satisfactory state of affairs, since it can be a long, wait before a human rights violation actually reaches the ears of the UN or the Council of Europe.

Can anything be done to change this? Firstly, it is essential to ensure that states guarantee human rights at national level and that they develop a proper mechanism for remedying any violation. At the same time, pressure must be put on states to commit themselves to those mechanisms that have enforcement procedures.

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