Part V Institutions and Actors, Ch.28 Universality and the Growth of Regional Systems

Christof Heyns, Magnus Killander

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1. Introduction

INTERNATIONAL human rights law has, in the course of the last sixty years, grown into the closest approximation the world has to a globally accepted and enforced code of ethics. Violations clearly continue to occur, but those who depart from human rights standards in exercising power must increasingly justify themselves and come under pressure to change their behaviour to conform to the adopted norms. Human rights could perhaps be seen, then, as a universal language on the acceptable use of power. Whether this metaphor is accurate or not (some comments thereon will be made in the course of this contribution), it is clear that human rights has become a central organizing principle of the modern era.

The main argument for the legitimacy of human rights lies in its universality, reflected, for example, in the name of the Universal Declaration of Human Rights. The appeal of human rights is widely understood to derive from the universality (p. 671) of norms that it posits—broadly speaking, it sets the same standards for everyone. This uniform application, however, is qualified by the fact that human rights law sets only minimum standards in respect of a number of core interests; it does not present a comprehensive normative system. In fact, one of the reasons for its wide acceptance is that, unlike eg religion, it claims space for people to pursue freely their own conceptions of what constitutes a good life.[2] Human rights also holds out the promise of norm enforcement, in the sense that 'something will be done' to protect the values that it recognizes, in the form of legal remedies or other forms of pressure and accountability. Such an idea will have an obvious appeal to people from all backgrounds, who are looking for common ground while retaining their own identities.

By promising to treat everyone alike, human rights is an idea that is highly 'communicable'—it is imminently suitable to spread through communication and persuasion. In a world largely constituted by the easy flow of communication across the globe, it is understandable that the concept of human rights gained rapid acceptance. Universality of norms, however, has its limitations.[3] The mere fact that the same norms are formally applicable to everyone does not necessarily imply that they resonate with the values of the people to whom they apply. While some of the core interests that human rights protect clearly enjoy protection in terms of the higher values of the main normative systems of the world (such as the right to life and the dignity of all people), other values (for example, freedom of expression or non-discrimination on the basis of gender or sexual orientation) may lack the same support at present. Moreover, consensus does not necessarily exist on how to interpret these values in practice, how and why to limit the exercise of rights, or on their relative importance when they come into conflict. Disagreement also attends the issue of norm enforcement: on how to apply them in particular cases. Perceived 'external' ideas may offend local custom.

Legitimacy requires foundations. Where consensus is not possible, meaningful participation by all parties in the process to determine the standards, institutions, and procedures adopted provides at least a starting point—not a panacea, but probably the strongest point of departure—for a sense of ownership of and commitment to human rights. Thus, for human rights to make a credible claim to legitimacy in the world community, universality of participation is required, in respect of both norm recognition and norm enforcement.

Participation will remain a central challenge—and credential—for human rights in the future, if it is to retain its relevance.

A scan of the human right environment today shows that human rights is driven by formal or legal, as well as informal or extra-legal, actions alike. A multiplicity of (p. 672) state and non-state actors engage in and contribute to the setting and enforcement of authoritative standards in the field of human rights.[4]

On the global level, the United Nations (UN) largely drives the human rights law system, supplemented by international humanitarian law and international criminal law. The United Nations has seen a significant expansion in the number of its active participants since it foundations were laid at the end of the Second World War. This has included a considerable expansion in the number and geographical representation of the UN member states, as a result of the independence of former colonies. These newly formed states in many respects changed the balance of power in the UN's human rights work, or at least have the potential to do so.[5] Active participation by non-state actors, such as non-governmental organizations (NGOs), in the work of the UN and beyond, is also a central feature of the global human rights project. It has been argued that the system as it exists today only emerged during the 1970s, due to the formation of the leading human rights NGOs.[6]

Parallel to the global human rights structures, regional initiatives form part of the international human rights system. In fact, even before the main components of the United Nations human rights machinery were set up, the Council of Europe and the Organization of American States established regional systems. In the 1980s, a system for Africa was established by the then Organization of African Unity. These three systems add an important feature to international human rights law that the global or universal system—the United Nations—does not provide: they give individuals access to international courts that make legally binding decisions in respect of human rights.

Other regional (including sub-regional) inter-governmental organizations around the world have also started incorporating human rights into their objectives in recent years. Some have created human rights initiatives, if not fully equipped human rights systems. These include initiatives in Asia and the Arab-speaking world, as well as sub-regional bodies in Europe, the Americas, and Africa that have also taken human rights on board.

The emergence of regional systems and initiatives constitutes an important dimension of broader participation in the international human rights project. These systems provide platforms to states and civil society, where people from all parts of the world can potentially make their voices heard in the global human rights discourse, often with greater likelihood of success than if they were to compete among themselves and with others in the conference rooms of the UN. Regional systems are in a position to play an important role in ensuring that the international human (p. 673) rights project is more responsive to local needs and concerns, and as such they can add to the legitimacy of international human rights. This potential has only been realized to a limited extent.

A common lament about the UN human rights system is that 'Geneva is very far away'. Regional systems help to cross this distance and benefit from their position closer to the ground. This proximity accounts in large part for the feasibility of establishing supervisory mechanisms that take legally binding decisions; there are regional human rights courts, but not a world human rights court. Regional mechanisms are generally closer to the people they serve—the governments involved, the complainants, those who act on their behalf, and the sources of information. It is, in many cases, easier to gain a working consensus about the specific norms to protect and how to interpret them in a particular region than on the global level. The same applies to ensuring compliance with the decisions of such courts through the ties between these societies. It has also been noted that in some cases,

repressive regimes are more willing to accept regional than global human rights supervision.[7]

As a result, regional human rights mechanisms can serve to make the international human rights project as a whole more responsive and more democratic. The opportunities for participation that the regional systems offer can help bridge the gap between the universality of human rights norms, on the one hand, and the cultural-rootedness of norms, on the other. Human rights develop as a response to specific historical circumstances and should be understood primarily not as the pursuit of abstract notions of justice, but rather as a reaction to concrete experiences of injustice.[8] The inclusion of regional human rights systems in the broader body of international human rights law can therefore serve to ensure that the global system more closely reflects the historical, and often localized, concrete experiences of humanity as a whole.[9] This is not to prioritize the regional over the global, but rather to say that both play important roles.

There are also limits to regional initiatives, necessary in order not to undermine the global human rights project. The UN began to support the formation of regional systems only after the Covenants were in place in the 1970s; it previously viewed them as 'breakaway movements' that could weaken the claim of universality.[10] Even (p. 674) now, there is a danger that the emergence of regional systems and initiatives might undermine the standards set at the global level. Precisely because human rights language is so dominant, states may pay lip service to it in regional systems, while undercutting the system from the inside. Such regional initiatives, taken under the banner of human rights, and established institutions may in fact be so-called 'pretenders', rather than 'protectors' of human rights that aim to shield states from global supervision.[11]

The first Arab Charter on Human Rights of 1994, for example, was widely considered to represent a retreat from global norms, and as a result it did not gain international traction. The Arab League later requested some Arab members of UN treaty bodies to prepare a new draft of the Charter, more in line with international standards. Adopted in 2004, even the new Charter has been criticized for not being fully in line with international human rights law.[12] In another example, in late 2012 the African Union has been pursuing the establishment of a regional criminal court that could potentially undermine the global system of personal accountability for some of the most egregious crimes and violations of human rights.[13] It is noticeable that the draft protocol does not refer to the International Criminal Court and does not present its role as complementary to the global institution.

Initiatives in Asia are also being monitored. The Association of South-East Asian Nations (ASEAN) established an Intergovernmental Commission on Human Rights that drafted a Declaration on Human Rights adopted by the ASEAN Summit in November 2012.[14] The UN High Commissioner, in commenting on this development, has noted that regional instruments 'should complement and reinforce international human rights standards'.[15] She further stated that '[t]he process through which this crucial Declaration is adopted is almost as important as the content of the Declaration itself', and called for extensive civil society engagement before adoption of the Declaration.[16](p. 675)

The challenge lies in expanding the reach of international human rights, while avoiding devolution of the concept to the point that it becomes everything to everyone and therefore ceases to set substantive standards, or that regions create human rights mechanisms that pose lower standards than those the UN sets, in order to protect themselves from global scrutiny. Standards can be adopted and used to evaluate the extent to which emerging regional systems contribute to or undermine the global system. While there are challenges, regional systems are important access points for participation in the global human rights

project. A brief overview of the current status of regional protection provides a basis for assessing its role in the human rights project as a whole.

2. The Three Established Regional Systems

The regional human rights systems of Europe, the Americas, and Africa were each developed as part of the activities of regional intergovernmental organizations (IGOs): respectively, the Council of Europe, the Organization of American States, and the Organization of African Unity/African Union. Each system developed in response to its own unique set of circumstances.

2.1 Europe

After the Second World War, the focus in Western Europe was to prevent further conflict on the continent, to avoid a recurrence of dictatorships, and to provide an ideological alternative to communism, based on individual freedoms. The Council of Europe was established in 1949 to pursue these aims, chief among which was the pursuit of human rights. In 1950, ten 'like-minded' governments adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) in Rome, taking 'the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.[17] The European initiative can be seen as a response to the lack of agreement on an implementation framework for the Universal Declaration within the United Nations, inter alia, because of the paralyzing effect of the Cold War. This (p. 676) is an example of the benefit of diversity in the system—where when the one level (here, the global) falters, the other (the regional) can take over.

The European Convention on Human Rights established two supervisory institutions to ensure enforcement of the rights: a European Commission on Human Rights and a European Court of Human Rights. Initially, these institutions had limited jurisdiction, with both the right of individual petition and the jurisdiction of the Court made optional for states parties. Nonetheless, they were the first international bodies to provide remedies to persons whose rights, recognized under the Convention, a state party had violated. These remedial powers, which would also become the hallmarks of the enforcement mechanisms of the two regional systems in the Americas and Africa, had significant implications for traditional international law. The individual would become a subject of international law, capable of lodging complaints and holding states accountable, through the binding decisions of an international court, in respect of what would earlier have been seen as a domestic matter. Space was opening up for much broader participation in shaping the human rights project, which would also find resonance in the other regional and UN mechanisms.

The European system evolved by gradually strengthening its institutions and procedures. Initially, the European Commission was very cautious and placed emphasis on friendly settlement,[18] but it developed its complaints procedure over the years. In 1998, Protocol 11 to the European Human Rights Convention[19] entered into force; it reformed the system by abolishing the European Commission and providing for a full time Court. The new Court was given compulsory jurisdiction over all state parties to the European Convention, and individual victims were given direct access to the Court. The system thus was initially, and remains largely, litigation-orientated, as the central role of the European Court of Human Rights and the fact that the Commission did not have a general promotional mandate comparable to that of its counterparts in the other regions, exemplify.

The European Committee on Social Rights, established under the European Social Charter, adopted in 1961 and revised in 1991, provides for a state reporting system similar to that adopted under the UN human rights treaties. A committee to monitor conditions in places of detention was established through the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which was adopted in 1987

and entered into force in 1989. In 1999, the Council of Europe created the post of Commissioner for Human Rights, with a promotional and monitoring mandate.(p. 677)

The European system traditionally covered a relatively homogenous group of countries and did not generally deal with large-scale human rights violations. A few cases dealing with massive violations in Greece, Turkey, and Cyprus were exceptions, confirming the general rule. This changed in the early 1990s, when Russia and other countries from Eastern Europe joined the system, bringing challenges that were more reminiscent of those faced in the other regional systems. In addition, and tied to the problem of widespread violations, a major challenge to the European Court is keeping up with the ever-increasing number of individual complaints submitted to the Court. Many of these cases deal with systemic violations, such as excessive delays in judicial proceedings.[20]

2.2 The Americas

The Organization of American States (OAS) pursues a wide range of objectives in the Americas, which includes human rights. From its establishment in the late 1800s, the Pan-American Union, the predecessor to the OAS, took a number of initiatives with regard to the rights of members of various groups, for example women and children.[21] The American Declaration of the Rights and Duties of Man was adopted on 2 May 1948, simultaneously with the Charter of the OAS. The Declaration was one of the documents that the drafters of the Universal Declaration of Human Rights, adopted a few months later, considered. It should also be noted that Latin American states had been instrumental in promoting the inclusion of references to human rights in the UN Charter, which had been adopted three years earlier.[22]

The OAS did not immediately put in place an implementation framework for the American Declaration. However, in 1959 the OAS General Assembly created the Inter-American Commission on Human Rights (IACHR) as an autonomous body. The IACHR became a Charter body when the Protocol of Buenos Aires, which amended the OAS Charter, entered into force in 1970.

In 1969, the American Convention on Human Rights (ACHR) was adopted in San José, Costa Rica. Before it was adopted, the Inter-American Commission and OAS member states scrutinized the Convention to ensure that it was compatible (p. 678) with the two UN Covenants. The IACHR noted that the ACHR ‘could coincide in certain respects with the United Nations Covenants...with such additions as are necessary and it could, in addition, include other rights...the international protection of which is demanded because of conditions peculiar to the Americas’.[23]

On the advice of the IACHR,[24] socio-economic rights were only included with reference to the progressive realization of the ‘basic goals’ set out in the OAS Charter.[25] The ACHR was thus left essentially devoted to the protection of civil and political rights. More detailed protection of socio-economic rights came in 1988, with the adoption of the Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). This Protocol adds trade union rights and the right to education to the individual petition system,[26] but both the IACHR and the Inter-American Court of Human Rights have dealt with socio-economic rights more broadly.[27] While the American Declaration on the Rights and Duties of Man recognized duties, the ACHR did not repeat this.

Other human rights treaties that the OAS has adopted deal with torture,[28] the death penalty,[29] forced disappearance,[30] violence against women[31] and disabilities.[32] The conventions concerning forced disappearances and violence against women were the first in the world on these topics and led the UN and other regions to adopt similar instruments.

The OAS has also adopted important political declarations, for example the Inter-American Democratic Charter of 2001.

When it entered into force in 1978, the ACHR made the IACHR its treaty-based mechanism (it also continues to function as an OAS Charter body) and created an Inter-American Court of Human Rights. The time when the Convention entered into force, however, coincided with the heyday of gross human rights violations in large parts of Latin America. The regional human rights system had to combat a (p. 679) 'regional network of repression' epitomized by Operation Condor, through which the leaders of countries in the Southern Cone helped each other to eliminate opponents.[33] The IACHR played a leading role in exposing the atrocities that the juntas of the Western hemisphere committed.[34]

Challenges to the Inter-American system include a lack of political will from OAS member states, both with regard to funding the system and to putting pressure on states to comply with the findings of the Commission and the Court. The system has also been under pressure because of the unwillingness of some states to accept precautionary measures[35] and of others to acknowledge the findings that they have engaged in systematic human rights violations. A number of states have threatened to renounce the system (and in the past some have attempted to do so).[36] Another concern is the fact that the Inter-American Court effectively functions as a Latin American human rights court, as very few of the Anglophone states of the hemisphere have accepted its jurisdiction.

2.3 Africa

When the Charter of the Organization of African Unity (OAU) was adopted in 1963, it did not explicitly recognize the pursuit of human rights as one of its objectives. However, in 1981 the member states adopted the African Charter on Human and Peoples' Rights (AfCHPR).

Despite being the first of the regional instruments adopted with the active encouragement of the UN, the text of the Charter differs more from the Universal Declaration and the Covenants than is the case with the earlier established systems. In addressing the drafters of the Charter, President Senghor of Senegal implored them to:

> [N]either copy, nor strive for originality, for the sake of originality. We must show imagination and effectiveness. We could get inspirations from our beautiful and positive traditions. (p. 680) Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.[37]

Recognizing that the Charter was not intended to limit the rights set out in the UN human rights instruments, in the preamble to the Charter, the member states of the OAU reaffirmed their commitment to the human rights instruments of the United Nations. The Charter explicitly tasks the expert body established to monitor compliance with the Charter to 'draw inspiration from international law on human and peoples' rights', including instruments that the UN adopts.[38]

The fact that Africa established a regional system when it did may be attributed in part to the desire of the recently independent former colonies to establish themselves as part of the world community. Moreover, the OAU Charter included the 'eradicat[ion of] all forms of colonialism from the continent' as one of the organization's objectives.[39] In the pursuit of this objective in international fora and due to the opposition to apartheid in Southern Africa, the use of human rights language was inevitable. It was also the time when a central tenet of US President Jimmy Carter's foreign policy was human rights. Closer to home, and perhaps more directly linked, was the fact that the process to draft the African Charter was initiated against the background of the fall of some particularly murderous regimes on the

continent, including that of Idi Amin in Uganda.[40] An invasion of troops from neighbouring Tanzania brought about the downfall of the latter.[41]

Against the backdrop of the Ugandan experience, it is perhaps not surprising that the Charter largely focused on the possibility of interstate communications regarding human rights violations, a mechanism which could (at least in aspiration) serve to prevent or diffuse interstate conflict. However, in practice the individual complaints system has played a much more important role, with only one interstate communication submitted and decided by the African Commission.[42] A protocol on the rights of women supplemented the Charter in 2003.[43] The 1990 African Charter on the Rights and Welfare of the Child entered into force in 1999, (p. 681) following which the Committee of Experts on the Rights and Welfare of the Child was established in 2001.[44]

The African Charter recognizes a wide range of norms additional to those that other regional systems recognize; it upholds not only individual rights, but also peoples' rights; not only rights, but also duties; and not only civil and political rights, but also socio-economic rights and so-called solidarity rights (such as a right to development,[45] peace,[46] and a satisfactory environment[47]). The sole supervisory body that the African Charter foresaw was the African Commission of Human and Peoples' Rights, which held its first session in 1987.

In 2002 the African Union (AU), which recognizes human rights as one of its objectives, replaced the OAU.[48] In 2004, a protocol establishing the African Court on Human and Peoples' Rights, designed to 'supplement' the work of the Commission, entered into force; its first judges were elected in 2006.[49] The Court is scheduled to merge with the African Court of Justice when a new protocol enters into force.[50] After the merger, the Court would have two sections: one to deal with general affairs and one with human rights.

The AU has launched a subsequent initiative to add individual and corporate criminal jurisdiction to the jurisdiction of the merged court, against the background of the disquiet of many African leaders about the focus of the International Criminal Court (ICC) on Africa. None of the other regional courts have such jurisdiction, and it is doubtful whether the Court is well placed to deal with this expansion of its role.[51] The question may also be asked whether such an initiative will not undermine the role of the global ICC.

One of the flagship projects of the AU has been the establishment of the African Peer Review Mechanism (APRM), a voluntary process that involves African heads of state in mutual scrutiny of the human rights records of and other governance issues in the thirty African states that have signed up for the process.[52](p. 682)

The main challenges that the African system faces include the deep levels of poverty on the continent, the weakness of many of its states, little domestic commitment to the rule of law and human rights in the region, lack of a proper administrative system for either the Commission or the Court, constant changes to the composition and jurisdiction of the Court, and inadequacies in the Charter itself.[53] Some of those who work inside the system also sketch a gloomy picture about competition between the Commission and the Court (something also perceived in the Inter-American system).

3. Thematic Comparison

A number of the features of the systems dealt with above are best understood by thematically comparing the position of the three regions.[54]

3.1 Institutional functioning

In all three cases, there is a wide level of participation among states that are members of the parent IGOs in the regional human rights systems, at least on a formal level. All forty-seven members of the Council of Europe are state parties to the European Convention and thus are subject to the jurisdiction of the Court; indeed, this is de facto required of all members. In the Americas, twenty-five of thirty-five member states of the OAS have ratified the American Convention. However, Trinidad and Tobago and Venezuela have denounced the Convention. All member states of the OAS are subject to supervision by the IACHR in terms of the American Declaration of the Rights and Duties of Man. Twenty-one states have accepted the jurisdiction of the Inter-American Court of Human Rights.[55] In Africa, fifty-three of fifty-four AU member states have ratified the African Charter and as such are subject to supervision by the African Commission.[56] A total of twenty-six African states have accepted the jurisdiction of the African Court of Human and Peoples' Rights.(p. 683)

The European system, as it is today, contains the fewest obstacles for individuals to access the Court; anyone claiming to be a victim of a violation may approach the Court directly, provided the admissibility criteria (which are to a large measure the same for all three systems) are met. In the Americas, the way to the Court is through the Commission. Although the Commission used to submit few cases to the Court, since 2001 there has been a general rule of referral.[57] Moreover, the Court has amended its rules to provide separate representation for victims and their representatives during its proceedings. In Africa, as a general rule, the Commission or states have the power to refer cases to the Court. States have to make a special declaration to allow individuals to take their cases directly to the Court, thereby bypassing the Commission.[58] Only a small number of states have done so.[59]

In Europe, only the victim of an alleged violation (including legal persons) has standing to bring a case to the Court.[60] The African and American systems recognize *actio polularis*, and anyone may bring a case to the Commission in the Americas or Court in Africa (against the states which have made the declaration).[61] However, in the Americas a victim or victims must be named.

A difference between the European system, on the one hand, and the Inter-American and African systems, on the other, is that a judge from the state under scrutiny will always be on the bench of the European Court,[62] while commissioners and judges in the two other systems must recuse themselves when a case is against a state of which they are a national.[63]

All three systems provide for advisory jurisdiction by their courts. While the Inter-American Court has delivered more than twenty advisory opinions on a variety of topics,[64] the European Court has only delivered two advisory opinions, both (p. 684) dealing with lists of candidates for election to the Court. Only the Committee of Ministers may bring requests to the European Court for advisory opinions.[65] The African Court has wide advisory jurisdiction, but as of May 2013 it had not delivered any advisory opinion.

The role the commissions play in the various systems can be described as follows. In all three cases, the Commissions have (or in the case of Europe, had) a quasi-judicial function in respect of individual and interstate complaints. While the African Commission is unique in also requiring the states to submit regular reports, a substantial part of the work of the Inter-American Commission consists of considering the country and thematic reports that it prepares at its own initiative. Both systems also have rapporteurs, and the African system has working groups. The European Court of Human Rights obviously does not fulfil such functions. However, the European Commissioner for Human Rights does have a promotional function.

The remedies the three systems provide in respect of individual complaints differ. In Europe, the focus has traditionally been on judgments that declare whether a violation has occurred in the particular case and, if so, compensatory damages. In the Americas, the power of the human rights court is much wider, and states may be ordered to take specific remedial steps, such as changing the law or engaging in symbolic actions such as apologies. The African Court is also granted wide powers in this regard. The Inter-American and African Commissions similarly indicate a wide variety of remedies.

The use of provisional measures, also known as interim or precautionary measures, to prevent irreparable harm varies among the systems. The European Court has a dedicated fax line to quickly respond to requests for interim measures. However, the Court is restrictive in granting such measures and in 2011 only granted 342 out of 2,778 requests for interim measures it received.[66] The Inter-American Commission issues about one in seven requests for precautionary measures. In addition, the American Convention allows the IACHR to request provisional measures from the Inter-American Court; in practice, it generally does so only after the state has failed to implement recommended precautionary measures. The African Commission has given itself the power in its Rules of Procedure to issue interim relief and has done so in several cases.[67] The African Court issued its first order for provisional measures in 2011.[68] In the European and African systems, a request for provisional (p. 685) measures must be linked to a petition, which the Inter-American system does not require because of its more pro-active stance in regard to preventing violations.

The European system is generally recognized as having the highest level of compliance with decisions on individual complaints, in particular with regard to monetary compensation. For general measures, in particular in the context of massive or systemic violations, compliance has been harder to achieve.[69] Of course, it is much harder to comply with and to evaluate compliance with the mandated implementation of these measures, which usually require legal and other reforms, than other forms of implementation.[70]

Compliance with the orders of the Inter-American Commission and Court has been rather mediocre, though this fact should not detract from the influence of the Court's jurisprudence in the development and application of international human rights law.[71] By May 2013, the African Court had not handed down any substantive judgment. A study of compliance with the recommendations of the African Commission indicates that full compliance is rare.[72] Compliance with the African Court's judgments may in theory be higher, as the Protocol establishing the Court foresees a system where the political bodies of the AU play a major role in ensuring compliance, but the recent experience with the South African Development Community (SADC) Tribunal discussed below suggests that some caution may be warranted.

The systems vary greatly in terms of the scale of their operations and their capacity. This is evident from the case loads. The European Court hands down more than 1,500 judgments each year,[73] while the Inter-American Court delivered thirteen judgments on the merits in 2011,[74] although it should be noted that the number of victims in each case before the Inter-American Court can reach into the hundreds, something not seen in the European Court. The African Commission only decided one case on the merits in 2010 and one in 2011. The African Human Rights Court has delivered only a few judgments, all dealing with the same procedural issue, namely submission of a case against a state or international organization not party to the Protocol that established the Court. There do not seem to be many cases heading to the Court at the moment.(p. 686)

The comparative budgets are as follows. The European Court's budget for 2011 was almost 59 million euros (USD 74 million), more than a quarter of the total Council of Europe budget.[75] The financial resources provided to the two Inter-American human rights bodies are clearly inadequate in relation to their workload, in particular the processing of an ever-increasing number of individual complaints. In 2011, the Inter-American Commission received USD 4.3 million from the OAS (5 per cent of the OAS budget) and USD 5.1 million from other donors.[76] The Inter-American Court received USD 2 million from the OAS. This can be compared to the African Commission, which received USD 3 million from the AU (less than 3 per cent of the AU budget) and USD 2 million from donors in 2010, while the African Court received more than USD 6 million from the AU budget and USD 1.7 million from donors in 2010.[77] When the budgets of the Inter-American and African systems are compared, a huge discrepancy seems to appear between their outputs. In particular, the allocation to the African Court is inexplicably high considering the small number of cases before the Court even six years after it started functioning. Judged on a cost per case basis, it must be one of the most expensive courts in the world.

The point was made earlier that proximity can play a role in allowing international human rights mechanisms, and in particular regional systems, to be more interactive with the affected population, for example through the participation in its activities by local NGOs and lawyers, news coverage, etc. The European Court is based in Strasbourg and does not convene in other parts of Europe. The Inter-American Commission is based in Washington, DC, but occasionally meets elsewhere, and individual members of the Commission travel frequently to make on-site visits to member states. The Inter-American Court has its seat in San José, Costa Rica, but has also held sessions elsewhere. The African Commission has been the most mobile and regularly has meetings in capitals other than Banjul, The Gambia, where its headquarters are located, though in recent years it has held most sessions in (the rather inaccessible) Banjul. The African Court, based in Arusha, Tanzania, and the African Children's Committee, based in Addis Ababa, had held one session each outside of their headquarters by May 2012.[78]

In addition to location, time in session is also an indicator of opportunities for interaction and participation. The European Court is a permanent body; the Inter-American Commission sits around six to seven weeks, in three regular sessions per year,[79] and the Inter-American Court is in session around seven weeks (p. 687) per annum.[80] The African Commission convenes for four weeks of regular sessions per year. The Rules of the African Court provides that it should hold four ordinary fifteen-day sessions per year,[81] an excessive amount considering the Court's current caseload.[82] The Rules should rather provide that the Court will decide at each session when, and for how long, it should next meet, as the rules of the Inter-American Court provide.[83]

Participation in the proceedings of the respective systems takes different forms. The European Court decides cases on the basis of written submissions, though it does hold hearings in exceptional cases. The Inter-American Commission holds one-hour hearings in some, but not all, cases. The African Commission can hold hearings in private session at the request of one of the parties or at the initiative of the Commission.[84] The Inter-American and African Courts hold public hearings.

Diversity in the ranks of decision-makers could serve to facilitate participation, even if the various 'constituencies' do so indirectly. As of May 2013, a majority of the members of the African Commission and Inter-American Commission were women, and there was racial diversity, as well. However, at the judicial level, the situation is different. Only two of eleven judges on the African Court are women, in 2013 none of the seven judges on the Inter-American Court were women, and in 2012 only eleven of the more than forty-five judges on the European Court were women. The European Court has a member from each state party, while the political organs that elect the members of the Inter-American and African bodies

are supposed to ensure geographical diversity in the membership (though some sub-regions, such as Arabic- or Portuguese-speaking Africa, have lacked representation).

NGO participation in the three systems also differs. NGOs are involved in a much smaller percentage of cases before the European Court than before the Inter-American and African Commissions.[85] This is linked to the possibility of *actio popularis* in the latter systems. The African Commission arguably provides for the greatest level of engagement of the system with civil society.[86] A clear difference is (p. 688) the NGO accreditation system at the African Commission, which has no parallel in the other institutions.

Considering the importance of the role of public awareness as a precondition for participation, it is instructive to look at the websites of the different systems. The website of the Council of Europe is highly organized and accessible.[87] New websites of the Inter-American Commission[88] and African Commission[89] were launched in early 2012 and Inter-American Court in 2013. These are generally great improvements, when compared with the past, and make information about the work of these commissions available to a wider audience.

In the larger perspective, the three systems are similar in that they are all part of the inter-governmental bodies of the particular region, aimed at regional integration in one form or another. Member states have the option—and in practice are expected—to become state parties to the central human rights treaties that the IGOs accepted. The success of the human rights mechanisms seems to be closely tied to the overall level of integration in the region concerned.

Standing in the IGO, and the benefits that this entails, is one of the main motivations for states to comply with the human rights standards set within the system. Membership in the parent IGO may be tied to human rights in two ways. In the first place, states could be expected to reach a certain level of human rights compliance before they are allowed to join the IGO.[90] Secondly, states that are members of the IGO may be expelled, or find themselves subject to other sanctions, based on a poor human rights record.[91]

3.2 Jurisprudence

The jurisprudence of the European and, to some extent, the Inter-American system has become part and parcel of international human rights jurisprudence.

There has been a remarkable convergence in the jurisprudence of the three systems, despite some differences in the texts of the treaties. They have all endorsed the (p. 689) idea that politicians are less protected against robust free speech than other members of the public, that military courts should not try civilians, that corporal punishment is inhuman, and that the rights the treaties enshrine not only require states to abstain from violating them, but also obligate states to take certain positive measures to ensure their realization.[92] The rules on and exceptions to the exhaustion of local remedies pre-condition to filing a complaint have also converged. Differences remain, however, in the recognition and scope of certain rights. For example, while the European jurisprudence focuses largely on civil and political rights, the African system and the Inter-American system give recognition to other rights, as well. Sexual orientation and gender identity remain contested issues in the work of the African system, while the regional systems of Europe and the Americas have made substantial progress towards ending discrimination on this ground.[93]

Sometimes a change in approach spreads from one system to the other, both vertically (from the global to the regional) and horizontally (between the regional systems). The UN Human Rights Committee and European Court initially did not recognize conscientious objection to military service as protected under the right to freedom of conscience. The Human Rights Committee changed its stance on this issue in 1993,[94] and the Grand Chamber of the European Court followed suit in 2011.[95] The case law of the Inter-American

Commission still reflects the old position.[96] It remains to be seen whether the Commission will change its position should a case of conscientious objection again come before it.

The African system's ground-breaking inclusion of, and jurisprudence on, environmental rights has been echoed increasingly in the case law of the other systems, while in turn the Inter-American jurisprudence on indigenous peoples has marked the development of human rights law in the African system.

The European system has gone further towards the abolition of the death penalty than the global system or the other regional systems.[97] Moreover, the European Court of Human Rights has held that the death row phenomenon can constitute inhuman treatment,[98] while the UN Human Rights Committee has held that the (p. 690) death row phenomenon in itself does not constitute a violation of the International Covenant on Civil and Political Rights (ICCPR).[99]

This also raises the question of the formal relationship between the regional systems and the UN. The first and obvious point is that they are not part of the same hierarchical structure. As a general rule, once regional courts have adjudicated a case, the complainants may still approach UN treaty bodies, but complaints that are pending before the UN system may not be brought to the regional level.[100] At the request of the Council of Europe, however, many European countries have entered reservations to the ICCPR, under the terms of which they will not allow cases to go to the Human Rights Committee after the European Court of Human Rights has given a judgment.

There is considerable collaboration and cross-referencing between the different levels. In light of the persistence of torture, ill-treatment, and inadequate conditions of detention, the Inter-American Commission and relevant UN bodies, such as the Special Rapporteur on Torture, the Committee against Torture, and the Office of the High Commissioner for Human Rights (OHCHR) have joined forces to promote a more effective implementation of recommendations.[101] Such collaboration is particularly important in light of the OHCHR's field presence in many countries. The Office of the High Commissioner for Human Rights is currently actively involved in engagement with the regional systems.[102]

In general, it would be fair to say that the global system has led the way in terms of norm recognition, but there are exceptions where the regional bodies have innovated in ways that the global institutions later followed. Regional systems are well placed to put specific human rights concerns from their part of the world on the international agenda. An example in this regard would be the issue of disappearances, which rose from being a matter of specific concern in Latin America, reflected in the 1994 Inter-American Convention on Forced Disappearance of Persons, to being taken up by the UN, where it is now reflected in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

The African Charter is the only treaty to include such peoples' rights as the right to a safe and healthy environment and the right to development. The Arab Charter is the only international legal instrument to explicitly discuss rights of the elderly.[103] In light of the absence of explicit provisions on violence against women, (p. 691) the OAS adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in 1994. The Protocol to the African Charter on the Rights of Women in Africa also included provisions on violence against women.

Progress is, however, sometimes quicker at the global level than the regional level. For example, the OAS has been negotiating an American Declaration on the Rights of Indigenous Peoples for many years now, while the UN General Assembly adopted the

Declaration on the Rights of Indigenous Peoples in 2007, albeit after two decades of negotiations.

4. Other Regional Human Rights Initiatives

Put together, the three established regional systems provide more than a billion people with the possibility of individual recourse to regional courts, and hundreds of millions more are given the protection of a commission or other mechanism.[104] This still leaves around 5 billion people, mainly in Asia, without such a layer of international protection. In many states that fall outside the areas that the systems discussed above cover, some regional and sub-regional intergovernmental organizations are including human rights in their lists of aims and objectives. The UN General Assembly and the Human Rights Council now regularly welcomes new regional initiatives.

4.1 Asia and the Pacific

During the period leading up to the 1993 World Conference on Human Rights, the notion of a so-called 'Asian exception' to human rights gained prominence.[105] However, recent years have seen the emergence of regional human rights initiatives in this region, and less emphasis will presumably be placed on this variety of (p. 692) exceptionalism in future. The UN has been active in helping to establish regional human rights mechanisms in Asia. The most progress has been achieved in South East Asia, where ASEAN has adopted a number of human rights instruments.[106]

In 2007, the ASEAN Charter was adopted. Its article 14 calls for the establishment of an ASEAN human rights body for the 'promotion and protection of human rights and fundamental freedoms of peoples in ASEAN'.[107] The Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (AICHR) were adopted in 2009. As the name indicates, AICHR is an inter-governmental body that is fundamentally different than that of the three established systems. AICHR is made up of representatives of ASEAN member states who are not independent experts as in the case of the other regional systems. It is largely a promotional body and has a mandate which includes 'promot[ing] the full implementation of ASEAN instruments related to human rights'.[108] The Terms of Reference does not provide AICHR explicitly with the power to consider individual communications.

The first Commissioners were appointed in 2009. They then embarked on drafting an ASEAN Human Rights Declaration which was finally adopted by ASEAN in November 2012. The Terms of Reference for the Drafting Group on the ASEAN Human Rights Declaration noted that the Declaration should 'reflect ASEAN peculiarities and specificities and accommodate different political, religious, historical and cultural backgrounds from ASEAN Member States', but at the same time 'not be less or go lower than international human rights standards, including the Universal Declaration of Human Rights'.[109] The process of drafting the Declaration has been criticized for a lack of transparency.

In 2004, the South Asian Association for Regional Cooperation (SAARC) adopted a Social Charter[110] with commitments to eradicate poverty; improve health services; foster educational access; and promote the status of women and children, population stabilization, and drug addiction rehabilitation. However, the institutional framework for implementation is limited to the participating national coordination committees.

The Pacific Islands Forum has taken steps to establish a regional human rights mechanism for the Pacific island states.[111](p. 693)

4.2 The Arab League and the Organization of Islamic Cooperation

In the Arab world, the revised Arab Charter on Human Rights of 2004 entered into force in 2008.[112] The Charter elaborates a catalogue of rights and makes provision for the appointment of an expert Committee. The first members were appointed in March 2009. States are required to submit reports to the Committee, but there is no complaints mechanism. It remains to be seen whether the Arab Spring will invigorate the Arab human rights system.

Despite some defects, the Arab League system probably bears more promise than the initiatives of the broader-based Organization of Islamic Cooperation (previously known as the Organization of the Islamic Conference), which has adopted instruments that restrict universally agreed upon norms.[113] The Organization of Islamic Cooperation (OIC) Independent Permanent Commission on Human Rights held its first session in Jakarta, Indonesia, in February 2012.[114] The Commission is virtually powerless and seems to have been established to defend a particular view of human rights. This is illustrated by the fact that one of the objectives of the Commission is to 'support the OIC's position on human rights at the international level'.[115] Saudi Arabia, Iran, and Indonesia are competing to host the Commission.[116]

4.3 Other regional and sub-regional bodies

Within Europe, the Council of Europe institutions are joined in taking up human rights issues by the Organization for Security and Cooperation in Europe and the European Union (EU), which in some respects overlap with the work of the European Court of Human Rights. The EU has adopted the Charter of Fundamental Rights of the European Union, which includes civil, political, economic, social, and (p. 694) cultural rights. The Charter is binding on member states and EU institutions, and national courts, as well as the European Court of Justice, can enforce it.[117]

In the Americas, sub-regional organizations have in general deferred to the work of the regional human rights bodies. The most active sub-regional human rights body is the Human Rights Public Policy Institute of the Mercado Común del Sur (MERCOSUR).[118] In addition, there is the Caribbean Court of Justice, established in 2006 to replace the Judicial Committee of the Privy Council as the final court of appeal for the independent countries of the Commonwealth of the Caribbean. So far, its jurisprudence has served to amend, but not to upset in any dramatic way, that of the Privy Council.[119]

At the sub-regional level in Africa, the Economic Community of West African States (ECOWAS), the East African Community, and the SADC have all been involved in the human rights standard-setting and enforcement of sub-regional courts, although with regard to the latter, only the ECOWAS Community Court of Justice has an explicit human rights mandate.[120] The ECOWAS Court is unique among human rights tribunals in that it does not require the exhaustion of local remedies. The SADC Tribunal's judgments on human rights cases against Zimbabwe eventually led to the tribunal's suspension by SADC,[121] setting a worrying precedent for the continental African Court of Human Rights.

5. Conclusion

The preceding overview demonstrates the depth and the breadth of the work of the regional dispensations, as well as their important role in ensuring wider participation in the human rights project and in making human rights more responsive and effective. There can be little doubt that the regional human rights systems now are an integral part of the global human rights system and an avenue for the effective participation of millions of people.(p. 695)

It seems that the dangers of the fragmentation of international human rights law by breakaway movements have not come to pass. On the contrary, there has been a considerable amount of convergence in the approaches the different regional systems have followed and between them and the United Nations. The threat regional systems pose to the coherence of human rights may thus be more feared than real.[122] Nevertheless, the overview above suggests that this convergence has been achieved not by coincidence, but rather through constant vigilance. The coherence may also provide support for the contention that human rights are universal.

Given the convergence in terms of norms, it is clear that an important aspect of the work of regional systems lies in norm enforcement. It is a feature of the modern human rights approach across these systems that remedies, in one form or another, are tied to rights, either through judicial proceedings or through other forms of pressure. In this context, regional systems are playing an important role in advancing a world-wide conception of human rights wherein respecting human rights norms is expected, and people have a right to human rights enforcement.

The active human rights systems and initiatives described above are all located within IGOs as part of a wider integrative project within the region concerned. This serves as an indicator against the attempts to establish regional human rights initiatives in areas where such IGOs do not exist—for example, in Asia as a whole.

In the same way that the norms the different regions recognize reflect regional particularities, the mechanisms for norm enforcement are also regionally specific. Calls have been made for the abolition of the Commissions in the Americas and in Africa and the retention merely of a Court, as is the case in Europe. Such an approach appears to ignore the fact that commissions are often the best way of dealing with gross and systematic violations of human rights, as the Inter-American system has so vividly illustrated. Likewise, the African Court of Human and Peoples' Rights still needs to show a practical impact on the continent.

Courts and commissions, and those who shape them, need to be attuned to the environment in which they operate. Within the context of the Inter-American system, it has been remarked that decision-makers, and even judges, need to take cognizance of the environment in which they function on a continuous basis, in order to ensure the maximum impact of their decisions, inter alia, through the opportunities that they create for further engagement by other actors, especially on the domestic level.[123]

Promoting engagement by all role players in human rights initiatives appears to be particularly important where legitimacy is in question. In the African context, (p. 696) the low level of domestic enforcement of human rights norms likely suggests that the legitimacy of the African human rights system may be under pressure. On a number of fronts, there is evidence of an awareness of the need to ensure greater participation in the system, to enhance the system's legitimacy. Great care is taken, for example, to achieve gender diversity in the composition of the Commission. The central role of NGOs in the same system is another example, as is the Commission's tradition of holding its sessions in different parts of the continent. On the other hand, the cases that the African Court has heard so far have not captured the imagination about the future of the Court, compared, for example, to the lasting impact of the cases of *Velásquez-Rodríguez v Honduras* or *Lawless v Ireland* in the other regional systems. It must, however, be noted that it took the Inter-American and European Courts some years before they started to hand down such seminal judgments.

The strength of the regional contribution to international human rights jurisprudence is evident from the number of individuals who seek its protection, the NGOs who focus their attention on these institutions, and—to a varying degree—the collaboration of states. But perhaps the best illustration of their vibrancy was alluded to earlier: the fact that each of the three regional systems has a court that makes legally binding decisions, at its apex. The idea that the UN treaty bodies would make legally binding decisions similar to those of a court—or that the UN would create a world court of human rights—has so far failed to gain wide support and is not about to be implemented.[124]

The proximity that regional human rights systems have to the people they serve while still forming part of international law, places them in a uniquely strong position to promote and protect universal human rights, understood here to entail a universality of norms, as well as a universality of participation.

The shortcomings of some of the emerging systems and initiatives cannot be denied. However, they provide potentially valuable entry points in the quest to make the human rights project more responsive. The ASEAN and Arab League initiatives may currently be limited and limiting in their focus, but it is clear that this was the case, for example, with the European and Inter-American systems in their early years, as well. The history of human rights has incorporated the stories of people from all walks of life—members of civil society, in some cases officials and judges—who have engaged with the opportunities that such entry points offer, however limited, and who have enabled the systems to live up to their promise.(p. 697)

For human rights to be successful as a universal project, it has to be rooted in the daily lives of people—universality has to be participatory; it has to grab people's imagination and therefore their actions and commitment. Geneva, for all its importance, is indeed very far from where most people live. Human rights may truthfully be seen as an international language for the use of power, which finds expression and is claimed in many tongues. It is a language that is all the more compelling and vibrant because of its regional dialects.

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Footnotes:

[1] We thank Frans Viljoen and Dinah Shelton for their comments on an earlier draft.

[2] See eg Amartya Sen, *Development as Freedom* (OUP 1999).

[3] For a discussion of various critiques of human rights, see eg David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton UP 2005).

[4] See in this regard, Janet Levit, 'Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law' (2007) 32 Yale J Int'l L 393.

[5] See further Lynn Hunt, *Inventing Human Rights: A History* (Norton 2007); Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton UP 2009).

[6] See Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard UP 2010).

[7] See eg in respect of the willingness of the Pinochet government in Chile to accept an Organization of America States (OAS), but not a UN, fact-finding mission, Thomas Buergenthal 'International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction' (1977) 12 Tex Int'l LJ 321, 326.

[8] Christof Heyns, 'A "Struggle Approach" to Human Rights' in Christof Heyns and Karen Stefiszyn (eds), *Human Rights, Peace and Justice in Africa: A Reader* (Pretoria University Law Press 2006).

[9] According to Helen Stacy, 'regions are also communities of memory'. Helen Stacy, *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture* (Stanford UP 2009) 146.

[10] UNGA 'Regional Arrangements for the Promotion and Protection of Human Rights' (20 March 2009) UN Doc A/Res/63/170. See Karel Vasak and Philip Alston (eds), *The International Dimension of Human Rights* (Greenwood Press 1982) 451.

[11] See Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (Human Rights Watch 2001).

[12] Louise Arbor, 'Statement by the UN High Commissioner for Human Rights on the Entry into Force of the Arab Charter on Human Rights' (Geneva, 30 January 2008) <http://www.unhchr.ch/huricane/huricane.nsf/view01/6C211162E43235FAC12573E00056E19D?opendocument> accessed 5 January 2013.

[13] The Draft Protocol extending criminal jurisdiction to the African Court was deferred at the AU Summit in July 2012. The Draft Protocol is further discussed below.

[14] <http://aichr.org/documents/> accessed 24 May 2013. See also I Gede Ngurah Swajaya, 'ASEAN Declaration Should Be "Equally Powerful" to UN's' *The Jakarta Post* (28 June 2012) <http://www.thejakartapost.com/news/2012/06/28/asean-declaration-should-be-equally-powerful-un-s.html> accessed 5 January 2013.

[15] 'Pillay Urges ASEAN to Set the Bar High with Its Regional Human Rights Declaration' *United Nations Human Rights News* (Geneva, 11 May 2012) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12142&LangID=E> accessed 5 January 2013.

[16] 'Pillay Urges ASEAN to Set the Bar High' (n 15).

[17] Convention for the Protection of Human Rights and Fundamental Freedoms, preamble (European Convention on Human Rights).

[18] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 260.

[19] Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby.

[20] See European Court of Human Rights, 'Violation by Article and by State 1959–2011' (31 December 2011) <http://www.echr.coe.int/NR/rdonlyres/2B783BFF-39C9-455C-B7C7-F821056BF32A/0/TABLEAU_ VIOLATIONS_EN_2011.pdf> accessed 5 January 2013; European Court of Human Rights, 'Statistics on Judgments by State: Statistics 1959–2010' (September 2011) <http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique_violation_en.pdf> accessed 5 January 2013 (showing that article 6 violations constitute the largest category of subject matter judgments).

[21] On the early history of the Inter-American system, see Anna P Schreiber, *The Inter-American Commission on Human Rights* (Sijthoff 1970).

[22] Mary Ann Glendon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea' (2003) 16 Harv Hum Rts J 27.

[23] IACHR, 'Comparative Study of the United Nations Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights and the Draft Inter-American Convention on Human Rights' (1968) OEA/Ser.L/V/II.9, para v, reprinted in IACHR, 'Report on the Work Accomplished during Its Eighteenth Session, 1–17 April 1968' (12 September 1968) OEA/Ser.L/V/II.19, Docs 30, 31.

[24] IACHR, 'Comparative Study' (n 23) para vi.

[25] American Convention on Human Rights, Art 26. See also Charter of the Organization of American States, Arts 34, 45.

[26] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Art 19(5).

[27] Tara J Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008).

[28] Inter-American Convention to Prevent and Punish Torture.

[29] Protocol to the American Convention on Human Rights to Abolish the Death Penalty.

[30] Inter-American Convention on Forced Disappearance of Persons.

[31] Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

[32] Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.

[33] Sonia Cardenas, *Human Rights in Latin America: A Politics of Terror and Hope* (University of Pennsylvania Press 2010) 67.

[34] Tom J Farer, 'The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox' (1997) 19 Hum Rts Q 510.

[35] See eg Conectas, 'Condemnation of the Government's Response to the Precautionary Measures Issued by the IACHR in the Belo Monte Case' (Public Statement, São Paulo, 15 April 2011) Public Statement 1/2011 <http://www.conectas.org/en/institutional/condemnation-of-the-government undefineds-response-to-the-precautionary-measures-issued-by-the-iachr-in-the-belo-monte-case?tipo=AUDIO> accessed 5 January 2013.

[36] Trinidad and Tobago denounced the American Convention on Human Rights in 1998, but it remains subject to the IACHR as a Charter-based organ. See Natasha Parassram Concepcion, 'The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights' (2001) 16 Am U Int'l L Rev 847. Alberto Fujimori purported to withdraw Peru from the jurisdiction of the Court without denouncing the Convention; the

Court rebuffed this effort. Venezuela denounced the ACHR in September 2012, effective one year later.

37 Leopold Senghor, President of the Republic of Senegal, 'Address' (Meeting of African Experts preparing the draft African Charter, Dakar, Senegal, 28 November–8 December 1979), reprinted in Christof Heyns (ed), *Human Rights Law in Africa 1999* (Kluwer Law International 2002) 79.

38 African Charter on Human and Peoples' Rights, Art 60.

39 Article 2(d).

40 Amin was elected Chairman of the OAU at the height of his murderous regime in 1975, a post which he held for a year, in line with OAU practice.

41 For the history of the adoption of the African Charter, see Olusola Ojo and Amadu Sesay, 'The OAU and Human Rights: Prospects for the 1980s and Beyond' (1986) 8 Hum Rts Q 89, 89–95; Frans Viljoen 'The African Charter on Human and Peoples' Rights: The *Travaux Préparatoires* in the Light of Subsequent Practice' (2004) 25 HRLJ 313.

42 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda*.

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45 AfCHPR, Art 22.

46 AfCHPR, Art 23.

47 AfCHPR, Art 24.

48 Constitutive Act of the African Union, Art 3(h).

49 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

50 Protocol on the Statute of the African Court of Justice and Human Rights. The African Court of Justice was provided for in a protocol adopted in 2003 but has not been established.

51 See eg Chacha Bhoke Murungu 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 JICJ 1067; Frans Viljoen, 'AU Assembly Should Consider Human Rights Implications before Adopting the Amending Merged African Court Protocol' (*AfricLaw*, 23 May 2012) <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol> accessed 5 January 2013.

52 See Magnus Killander, 'The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward' (2008) 30 Hum Rts Q 41.

53 Such as Art 59, which requires the Assembly's authorization to publish certain Commission reports and makes the complaints procedure confidential. See Magnus Killander 'Confidentiality Versus Publicity: Interpreting Article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 AHRLJ 572.

54 See also Dinah Shelton 'The Promise of Regional Human Rights Systems' in Burns H Weston and Stephen Marks (eds), *The Future of International Human Rights* (Transnational Publishers 1999).

[55] 'Multilateral Treaties—American Convention on Human Rights' <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> accessed 24 May 2013.

[56] The exception is South Sudan, which seceded from the Sudan in July 2011 and by July 2012 had not yet ratified the Charter. Arguably, the Charter applies to South Sudan even absent ratification.

[57] IACHR, 'Rules of Procedure of the Inter-American Commission on Human Rights' (adopted 13 November 2009, modified 2 September 2011) Art 45 (IACHR Rules of Procedure) <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp> accessed 8 January 2013.

[58] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art 34(6).

[59] As of May 2013, six of the twenty-six states that had ratified the Protocol establishing the Court, had made the required declaration in terms of Art 34(6).

[60] European Convention on Human Rights, Art 34.

[61] AfCHPR, Art 55. See also *Social and Economic Rights Action Centre (SERAC) v Nigeria*, para 49; IACHR Rules of Procedure (n 57) Art 23; Laurence Burgorgue-Larsen and Amaya Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (OUP 2011) 47.

[62] European Convention on Human Rights, Art 43.

[63] IACHR Rules of Procedure (n 57) Art 17(2)(a); IACHR, 'Rules of Procedure of the Inter-American Court of Human Rights' (adopted 31 January 2009) Art 19 (national judges may participate, or an *ad hoc* judge may be appointed in interstate complaints) (IACtHR Rules of Procedure); African Commission on Human and Peoples' Rights, 'Rules of Procedure of the African Commission on Human and Peoples' Rights' (entered into force 18 August 2010) rule 101 (AfCHPR Rules of Procedure); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Art 22.

[64] Inter-American Court of Human Rights, 'Opiniones Consultivas' ('Advisory Opinions') <http://www.corteidh.or.cr/index.php/16-juris/22-casos-contenciosos> accessed 24 May 2013.

[65] Protocol No 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Conferring upon the European Court of Human Rights Competence to Give Advisory Opinions.

[66] European Court of Human Rights, 'Interim Measures—Practical Information' <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Interim+measures/Practical+information/> accessed 7 January 2013.

[67] See rule 98.

[68] In terms of the Court Protocol Art 27(2). See Judy Oder, 'The African Court on Human and Peoples' Rights' Order in Respect of the Situation in Libya: A Watershed in the Regional Protection of Human Rights?' (2011) 11 AHRLJ 495.

[69] See Gisella Gori, Chapter 37, in this *Handbook*.

[70] David C Baluarte and Christian M De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundations 2010) 21.

[71] Fernando Basch and others, 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to Its Functioning and Compliance with Its Decisions' (2010) 7(12) SUR Int'l J Hum Rts 9.

[72] Frans Viljoen and Lirette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1993–2004' (2007) 101 AJIL 1.

[73] Council of Europe, *The European Court of Human Rights in Facts and Figures 2011* (Council of Europe 2012).

[74] Inter-American Court of Human Rights, 'Casos Contenciosos' ('Contentious Cases') <http://www.corteidh.or.cr/index.php/16-juris/22-casos-contenciosos> accessed 27 May 2013.

[75] The budget for the Council of Europe as a whole was 217 million euros for 2011.

[76] OAS, 'Financial Resources' (2011) <http://www.cidh.oas.org/recursos.eng.htm> accessed 8 January 2013.

[77] African Union Executive Council, 'Decision on the Budget of the African Union for the 2010 Financial Year' (1 February 2010) EX.CL/Dec.524 (XVI).

[78] In 2011, the Committee held a session in Algiers, Algeria, and in 2012, the Court held a session in Accra, Ghana.

[79] OAS, 'IACHR Session' <http://www.oas.org/en/iachr/activities/sessions.asp> accessed 8 January 2013.

[80] Inter-American Court of Human Rights, 'Comunicados de Prensa' <http://www.corteidh.or.cr/index.php/comunicados> accessed 29 May 2013.

[81] African Union, 'African Court on Human and Peoples' Rights: Rules of Court' (adopted 2 June 2010) r 14.

[82] The Court has just a handful of cases on the docket, see African Court on Human and Peoples' Rights, 'Pending Cases' <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/pending-cases> accessed 15 January 2013.

[83] IACtHR Rules of Procedure (n 63) Art 11.

[84] African Union, 'Rules of Court' (n 81) r 99.

[85] Lloyd Hitoshi Mayer, 'NGO Standing and Influence in Regional Human Rights Courts and Commissions' (2011) 36 Brook J Int'l L 911, 913.

[86] Nobuntu Mbelle, 'The Role of Non-Governmental Organisations and National Human Rights Institutions at the African Commission' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice: 1986–2006* (CUP 2008) 289.

[87] Council of Europe, 'Home Page COE' (2012) <http://www.coe.int> accessed 8 January 2013.

[88] OAS, 'Inter-American Commission on Human Rights' <http://www.oas.org/en/iachr> accessed 8 January 2013.

[89] AfCHPR, 'Home' (2013) <http://www.achpr.org> accessed 8 January 2013.

[90] The Council of Europe required far-reaching legal reform, also in the area of human rights, and ratification of the European Convention of Human Rights, before allowing former communist countries to join the Council.

[91] The Council of Europe has never used suspension, though its Parliamentary Assembly has suspended Greece (1967–74), Turkey (1980–84), and Russia (2000–01). Suspension for an unconstitutional change of government has occurred in both the OAS and AU. Syria was suspended from the Arab League in November 2011. See David Batty and Jack Shenker, 'Syria Suspended from Arab League' *The Guardian* (12 November 2011) <http://

www.guardian.co.uk/world/2011/nov/12/syria-suspended-arab-league> accessed 8 January 2013.

92 See Magnus Killander, 'Interpreting Regional Human Rights Treaties' (2010) 7(13) SUR Int'l J Hum Rts 145.

93 The European Court of Human Rights has adopted numerous judgments dealing with discrimination based on sexual orientation, starting with *Dudgeon v United Kingdom*, which prohibited the criminalization of homosexual acts between consenting adults. The Inter-American Commission recently handed down its first decision dealing with sexual orientation and child custody in *Atala and Daughters v Chile*.

94 Human Rights Committee, 'General Comment No 22: The Right to Freedom of Thought, Conscience, and Religion (Art 18)' (30 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4, para 11.

95 *Bayatyan v Armenia*.

96 *Sahli Vera et al v Chile*, para 100.

97 Article 6(2) of the ICCPR provides that states may retain the death penalty under certain closely defined circumstances. In the European system, Protocol 13 (ratified by all but five states, of which three have signed it) provides for the complete abolition of the death penalty.

98 *Soering v United Kingdom*, para 111.

99 *Johnson v Jamaica*, para 8.1.

100 AfCHPR, Art 56(7); European Convention on Human Rights, Art 35(2)(b).

101 IACHR, 'International Mechanisms against Torture Agree to Elaborate Joint Report in Light of High Level of Non-Compliance with Their Recommendations' (30 November 2011) Press Release 124/11 <http://www.cidh.oas.org/Comunicados/English/2011/124-11eng.htm> accessed 8 January 2013.

102 UN Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights on the International Workshop on Enhancing Cooperation between International and Regional Mechanisms for the Promotion and Protection of Human Rights' (9 August 2010) UN Doc A/HRC/15/5.

103 Article 38. See also Paul De Hert and Eugenio Mantovani, 'Specific Human Rights for Older Persons? The Inevitable Colouring of Human Rights Law' (2011) 4 EHRLR 398.

104 As noted below, individuals in many African states have access to sub-regional courts with a human rights mandate, while they lack access to the African Court.

105 UNGA, 'Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights' (7 April 1993) UN Doc A/CONF.157/ASRM/8A/CONF.157/PC/59 (Bangkok Declaration). See also Amartya Sen, 'Human Rights and Asian Values' *The New Republic* (14 July 1997) 33–40; Vitit Muntarbhorn, 'Human Rights Monitoring in the Asia-Pacific Region' in Gudmundur Alfredsson and others (eds), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Möller* (2nd edn, Brill 2009) 641–48.

106 Eg ASEAN Declaration against Trafficking in Persons Particularly Women and Children; The Declaration on the Elimination of Violence against Women in the ASEAN Region; The Declaration on the Protection and Promotion of the Rights of Migrant Workers.

107 See Yung-Ming Yen, 'The Formation of the ASEAN Intergovernmental Commission on Human Rights: A Protracted Journey' (2011) 10 Journal of Human Rights 393.

108 ASEAN, 'Terms of Reference of ASEAN Intergovernmental Commission on Human Rights' (20 July 2009) art 4.6.

109 ASEAN, 'Terms of Reference (TOR) AICHR's Regional Seminar on the ASEAN Human Rights Declaration' (December 2011) (on file with authors).

110 SAARC Social Charter. For the full text of the Charter, see: SAARC, 'SAARC Charter' <http://www.saarc-sec.org/SAARC-Charter/5> accessed 8 January 2013.

111 Asia Pacific Forum, 'Pacific Islands Forum Secretariat' <http://www.asiapacificforum.net/working-with-others/project-partners/pacific-islands-forum-secretariat> accessed 8 January 2013; Asia Pacific Forum, 'Concept Note: Regional Consultation on Advancing a Pacific Regional Human Rights Mechanism' (21–24 November 2011) (on file with authors).

112 See Mervat Rishmawi, 'The Arab Charter on Human Rights and the League of Arab States: An Update' (2010) 10 HRL Rev 169.

113 See Kamran Hashemi, 'Muslim States, Regional Human Rights Systems and the Organization of the Islamic Conference' (2009) 52 Germ Yrbk Intl L 75.

114 The Statute of the OIC Independent Permanent Commission on Human Rights is available at: OIC, 'Statute of the OIC Independent Permanent Commission on Human Rights' (7 June 2012) <http://www.oicun.org/75/20120607051141117.html> accessed 8 January 2013.

115 Statute of the OIC Independent Permanent Commission on Human Rights (n 114) Art 13.

116 Human Rights in Islamic Countries, 'Indonesia Wants to Be Host of OIC Human Rights Commission' *Tempo Interactive* (Jakarta, 23 February 2012) <http://oichumanrights.wordpress.com/ 2012/03/15/indonesia-wants-to-be-host-of-oic-human-rights-commission> accessed 8 January 2013.

117 For a further analysis, see Wolfgang Weiß, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon' (2011) 7 EU Const 64.

118 OAS, 'IACHR and MERCOSUR Coordinate Joint Efforts' (21 October 2011) Press Release 109/11 <http://www.cidh.oas.org/Comunicados/English/2011/109-11eng.htm> accessed 8 January 2013.

119 See Derek O'Brien, 'The Caribbean Court of Justice and Its Appellate Jurisdiction: A Difficult Birth' [2006] Public Law 344; Derek O'Brien, 'Attorney General of Barbados v Joseph and Boyce: The Caribbean Court of Justice Answers Its Critics?' [2007] Public Law 189.

120 See Solomon Ebobrah, 'Litigating Human Rights before Sub-Regional Courts in Africa: Prospects and Challenges' (2009) 17 AJICL 79.

121 Human Rights Watch, 'SADC: Q&A on the Tribunal' (11 August 2011) <http://www.hrw.org/news/2011/08/11/sadc-qa-tribunal> accessed 8 January 2013.

122 For a discussion of the dynamics that lead members of IGOs to converge their interests and approaches, see David H Bearce and Stacy Bondanella, 'Intergovernmental Organizations, Socialization, and Member-State Interest Convergence' (2007) 61 International Organization 703.

123 See James L Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 AJIL 768.

124 On the global level, the International Court of Justice deals with human rights issues only in a peripheral way. The work of the International Criminal Court, for its part, does have concrete implications for some rights, such as the right to life, but its jurisdiction is confined to individual criminal responsibility in respect of those rights. On the idea of a world human rights court, see Manfred Nowak, 'The Need for a World Court of Human Rights' (2007) 7 HRL Rev 251.