THE ROLE OF REGIONAL SYSTEMS IN ENFORCING STATE HUMAN RIGHTS COMPLIANCE: EVALUATING THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS AND THE NEW AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS WITH COMPARATIVE LESSONS FROM THE COUNCIL OF EUROPE AND THE ORGANIZATION OF AMERICAN STATES

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Abstract

The African Commission on Human and Peoples' Rights and the future African Court of Justice and Human Rights may gather lessons from other regional human rights supervisory bodies. The investigation will primarily address how other regional judicial and quasi-judicial organs, such as the European Court of Human Rights and its precursor, the European Commission on Human Rights, as well as the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, may provide relevant and appropriate lessons for the African Commission and the African Court of Justice and Human Rights.

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Resumen

La Comisión Africana de Derechos Humanos y de los Pueblos y la futura Corte Africana de Justicia y de Derechos Humanos podrían aprender de otros órganos regionales de supervisión de derechos humanos. La investigación primordialmente analiza la forma como otros órganos judiciales y cuasi judiciales regionales, tales como el Tribunal Europeo de Derechos Humanos y la desaparecida Comisión Europea de Derechos Humanos, así como la Corte Interamericana de Derechos Humanos y la Comisión Interamericana de Derechos Humanos, pueden proporcionar lecciones pertinentes y apropiados para la Comisión Africana de Derechos Humanos y de los Pueblos y la Corte Africana de Justicia y Derechos Humanos.

1. INTRODUCTION

One of the major limitations of the international human rights system has been its general inability to enforce international human rights standards.[1] While states have the primary task of protecting human rights they have been the major perpetrator of human rights violations.[2] At the same time it is these states that determined what international law is and what mechanisms should exist to determine whether they have complied with their obligations under international law. As a result, while a few institutions have been created at the international level, these bodies cannot enforce compliance, and have largely not been allowed to permit individuals to complain to them about what violations states have committed. The international community has largely relied upon voluntary compliance to ensure that states adhere to their human rights and other obligations. Obviously, voluntary compliance has limitations. Therefore, this has not been a very effective means to ensure the obedience of states in this regard. The commission of gross human rights abuses by states, never mind other types of human rights violations, continues unabated around the world.[3] While the twentieth century had the highest number of gross human rights violations committed generally and by states in particular, there are indications that levels of human rights

1 See further D. Donoho, "Human Rights Enforcement in the Twenty-First Century", 35 *Georgia Journal of International and Comparative Law* (2006), p. 1.

2 See J. Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904–1908* (Santa Barbara, Praeger Security International 2009).

3 See J. Sarkin "The Role of the United Nations, the African Union and Africa's Sub-Regional Structures in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect" 53 *Journal of African Law* (2009).

abuse, particularly by states, are on the decline.[4] Yet, while there may be a decrease overall, many states continue to commit atrocities.[5]

While the human rights system has improved enormously, especially since World War II, in developing and codifying a huge amount of human rights norms,[6] enforcement of these norms at international, regional, and domestic levels has been generally limited. This is especially true in regards to holding states accountable for the human rights abuses they have committed within their own borders. Issues relating to state sovereignty, and sovereign immunity in other countries, have almost absolved states of liability for their human rights violations. As states are seldom held accountable in their countries, and in their own courts for such atrocities, the international community has sought alternative mechanisms for centuries.[7] Accountability at the international and regional levels is thought to be far more possible, and more likely to lead to positive results. However, few international tribunals have been available, and those that are available have mostly denied individuals jurisdiction to hold states accountable. To overcome this, a new trend has emerged allowing regional structures, especially regional courts, to play a greater role. Regional systems are holding states accountable and crucially giving individuals access even if indirectly. As these systems grow in number, and as they develop in stature and importance, so they are widening their jurisdiction to permit individuals and other non-state actors to bring complaints before them.

Beyond courts, a number of mechanisms have been developed, especially by the United Nations (UN), to provide some level of accountability. These include structures emerging from both the UN Charter and multilateral treaties.

The world has seen an explosion of international and regional courts and tribunals. Indeed, the twentieth century has experienced dramatic growth in the number of such courts[8], although there are several examples from the nineteenth century, and even prior to that.[9] This growth is especially true over the last 20 years or so.[10] In fact,

4 See J. Sarkin, "Atrocity, Punishment and International Law", 30 *Human Rights Quarterly* (2008), p. 1028, 1029.

5 J. Sarkin, "Humanitarian Intervention and the Responsibility to Protect in Africa", in D. Zimbler and J. Okopari (eds.), *The African Human Rights Architecture* (Sunnyside, Jacana Media 2008), p. 45.

6 On the development of international human rights law at least in the nineteenth century see J. Sarkin, "The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and International Law: Their Application From at Least the Nineteenth Century", 1 *Human Rights and International Legal Discourse* (2007), p. 125–172.

7 Ibid., p. 125–172.

8 Th. Buergenthal, "Proliferation of International Courts and Tribunals: Is It Good or Bad?", 14 *Leiden Journal of International Law* (2001), p. 267.

9 Sarkin, *supra* n. 7, p. 125–172.

10 R.P. Alford, "The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance", 94 *American Society of International Law Proceedings* (2000), p. 160.

the world has had altogether more than 43 international or regional courts of which at least 16 are still functioning.[11] Together with these international institutions another 82 entities and mechanisms, referred to as 'Quasi-Judicial, Implementation Control and other Dispute Settlement Bodies' are at work.[12] Thus, a total of 125 international institutions have been developed at the international and regional levels alone. Some see this increase in institutions as the globalization of courts, or judicial globalization.[13]

Many of the newer institutions are criminal courts used to hold individuals accountable. This speaks volumes of the reluctance of states to add mechanisms that can hold them liable. Therefore, holding a state legally responsible for human rights claims is still a difficult matter, despite the availability of a variety of bodies to deal with such matters, such as the International Court of Justice (ICJ) and various UN bodies. Crucially, the ICJ is available only to states and the decisions of UN mechanisms are not enforceable. They also provide little in the way of remedy.

In the recent past the number of cases decided by these international courts has increased dramatically. During the 12 years prior to 2002, sixty-three percent of the total number of all cases heard by these structures occurred (5598 out of 8895 cases).[14] Some years later it was found that these institutions delivered sixty-nine percent of their more than 15,000 decisions, opinions and rulings since 1990.[15]

These developments have given rise to much debate on the proclivity of having so many, and so many different types of, courts.[16] Although one would expect differences in the outcome of these courts, especially in the regional context, Charney finds that in "core areas of international law, the different international tribunals of the late twentieth century do share relatively coherent views on those doctrines of international law."[17] In 2000, Judge Gilbert Guillaume, then President of the International Court of Justice (ICJ), did however note that "[t]he proliferation of international courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be

11 C.P.R. Romano, "The International Judiciary in Context", <www.pictpcti.org/publications/synoptic_chart/synop_c4.pdf>.

12 Ibid.

13 A.M. Slaughter, "Judicial Globalization", 40 *Virginia Journal of International Law* (2000), p. 1103.

14 K.J. Alter, "Do International Courts Enhance Compliance with International Law?", 25 *Review of Asian and Pacific Studies* (2003), p. 51-52.

15 K.J. Alter, "Agents or Trustees? International Courts in their Political Context", 14 *European Journal of International Relations* (2008), p. 33.

16 See for example B. Kingsbury, "Is the Proliferation of International Courts and Tribunals a Problem?" *New York University Journal of International Law and Politics* (1999), p. 679.

17 See further G. Guillaume, "The Future of International Judicial Institutions", 44 *International and Comparative Law Quarterly* (1995), p. 848; J.I. Charney, "The Impact on the International Legal System of the Growth of International Courts and Tribunals", 31 *Journal of International Law & Policy* (1999), p. 699.

given different interpretations in different cases."[18] This does not seem to be the case so far, and in fact there appears to be a great deal of coherence especially in the various regional systems. In this regard Dinah Shelton has noted:

> "As the systems have evolved, the universal framework within which they began, together with their own interactions, have had surprisingly strong influence, leading to converging norms and procedures in an overarching interdependent and dynamic system. In many respects they are thinking globally and acting regionally. Each uses the jurisprudence of the other systems and amends and strengthens its procedures with reference to the experience of the others."[19]

One example of divergence in outcome in different systems concerns abortion in Ireland. In this instance the European Court of Justice (ECJ) of the European Union came to a different conclusion than the European Court of Human Rights (ECtHR) in the Council of Europe (COE). However, it is important to note that while the ECtHR[20] examined the issues from a human rights perspective, the ECJ examined the issues on the basis of service availability in community law.[21] The ECJ did not address the case through the lens of the European Convention on Human rights, which the ECtHR did. This discrepancy is not likely to occur in the African context where the two courts are melded into one institution: the African Court of Justice and Human Rights (ACtJHR).

What is clear is that there is greater resort to these institutions than ever before[22] and the work rate of many of these institutions is increasing. What seems to be occurring is the acceptance by many states around the world of a willingness to subject themselves to supra-national institutions. In some cases, however, this has not been completely on a voluntary basis, but has occurred as a requirement for joining regional institutions. In other cases, states have been willing to sacrifice a portion of their sovereignty[23] believing that the new institutions will have neither the teeth nor the resources to make much of an impact on them.

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18 G. Guillaume, *Statement to the U.N. General Assembly* (26 October 2000). See further M. Koskenniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties", 15 *Leiden Journal of International Law* (2002), p. 553–579.

19 D. Shelton, "The Promise of Regional Human rights Systems", in B. Weston and S. Marks (eds.), *The Future of International Human Rights* (Ardsley, Transnational Publishers 1999), p. 356.

20 ECtHR (Judgment) 29 October 1992, Case Nos. 14234/88 and 14235/88, *Open Door and Dublin Well Woman* v. *Ireland*.

21 ECJ (Judgment) 4 October 1991, C–159/90, *The Society for the Protection of Unborn Children Ireland Ltd.* v. *Stephen Grogan and Others*.

22 Ph. Sands, R. Mackenzie and Y. Shany (eds.), *Manual on International Courts and Tribunals* (London, Butterworths 1999), xxvi.

23 See generally T.E. Aalberts, "The Future of Sovereignty in Multilevel Governance Europe", 42 *Journal of Common Market Studies* (2004), p. 23.

Certainly, there has been much debate about why states have been willing to establish such mechanisms and subject themselves to the jurisdiction of such institutions. Winston Churchill, in 1946, said that "[o]ur constant aim must be to build and fortify the strength of the United Nations organisation. Under and within that world concept we must recreate the European family in a regional structure called – it may be – the United States of Europe and the first practical step will be to form a Council of Europe."[24] Some, however cynically, believe that states are willing to subject themselves to such systems assuming that they can join and then avoid compliance. Others believe that states do not subject themselves voluntarily to these institutions but reluctantly join after much coercion.[25] Thus, at times states join such systems in spite of the political, economic and other costs[26] involved. They are given direct or indirect incentives to do so. Some states have no choice whether to subscribe to a regional human rights process; it is a necessity for membership to a given organisation. Thus, 47 states in Europe, members of the Council of Europe, are automatically subject to that system's compliance procedures. The COE now makes it mandatory for all its members, and all new members, to adhere to the European Convention of Human Rights and subject themselves to the competence of the European Court of Human Rights.[27] States that have a choice decide by weighing the benefits versus the costs of membership. They make the same decisions when choosing whether to comply with the decisions of the regional institutions.[28] Although it often seems that there is general compliance with decisions of regional bodies, there are a number of problems in this regard. Firstly, because follow up is limited and in many systems compliance is often difficult to determine. Some have weakly argued that because, in the European system for example, due to the sheer number of decisions, a state is not always aware that it is non-compliant. In this regard it has been argued that "[d]espite [a few examples] it would appear that parliaments in very few states exercise regular control over the effective implementation of Strasbourg Court (ECtHR) judgments."[29]

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24 Winston Churchill, 19 September 1946, <www.coe.int/T/E/Com/About_Coe/DiscoursChurchill.asp>.

25 A. Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe." 54 *International Organization* (2000), p. 219.

26 D. Beach, "Why governments comply: an integrative compliance model that bridges the gap between instrumental and normative models of compliance", 12 *Journal of European Public Policy* (2005), p. 113.

27 However, on the levels of human rights commitment after membership see P.A. Jordan, "Does Membership have its Privileges? Entrance into the Council of Europe and Compliance with Human Rights Norms", 25 *Human Rights Quarterly* (2003), p. 660–688.

28 Beach, *supra* n. 26, p. 116.

29 PACE Legal Affairs & Human Rights Committee, "Role of national parliaments in verifying State obligations to comply with the ECHR, including Strasbourg Court judgments: an overview", 23 May 2008, cited by M-L Bemelmans-Videc, "The effectiveness of the European Convention on Human Rights at national level: the parliamentary dimension", in *Towards stronger implementation of the*

The three developed regional arrangements, in Africa, the Americas and Europe (but only the system under the Council of Europe and not the other European systems) will be the central focus of this article. The lessons that the African Commission on Human and Peoples' Rights (ACommHPR) and the about-to-be-formed African Court of Justice and Human Rights (ACtJHR) can gather from the European Court of Human Rights (ECtHR), and its precursor, the European Commission on Human Rights (ECommHR), as well as the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACommHR), will be explored. The investigation here will primarily address how other regional commissions and courts may provide relevant and appropriate lessons for the African Commission and the African Court of Justice and Human Rights. It is important to remember that before the 1998 merger of the European Commission and the European Court of Human Rights into the single European Court, a separate Commission and Court existed. Through an historical perspective, issues for the African Court and Commission will be considered. The different human rights instruments in Europe[30], the Americas or Africa[31] will not be discussed in this article specifically.

Undoubtedly, comparative research on similar institutions is constructive. However, many aspects, including but certainly not limited to the context, origins, politics, cultures, economics, geography, religions, and languages certainly account for the many differences that exist between systems. Regional particularities ensure that institutions and instruments reflect regional differences. While comparative research has its limitations, it also has benefits. Regional comparative institutional analysis contrasts similar institutions and allows lessons, pitfalls and dangers to be learnt. This is truer when the institutions have similar histories and have followed similar paths. Thus, the fact that the African system has followed a similar path to that of the Council of Europe makes the comparative assessment of the institutions particularly useful. Similarly, the fact that the African and American systems both have a Commission and a Court based in two different locales makes their comparison very useful. Therefore, the younger African institutions can glean a number of lessons from the older institutions. However, there will inevitably be discrepancies in these institutions due to the differences in institutional histories, and the disparate evolution of the political systems that they are found in. Thus, the rules for regional human rights institutions are devised in politically dissimilar regimes and in differing

European Convention on Human Rights at national level. Colloquy organised under the Swedish chairmanship of the Committee of Ministers of the Council of Europe. Stockholm, 9–10 June 2008. Proceedings, Strasbourg, Directorate General of Human Rights – Council of Europe, 2008, p. 47. See also Th. Buergenthal, "The Evolving International Human Rights System", 100 *American Journal of International Law* (2006), p. 792.

30 A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (Oxford, Oxford University Press 2007).

31 See further for example J. Rehman, "African Charter on Human and People's Rights", in *International Human Rights Law. A Practical Approach* (Harlow, Longman-Pearson Education 2003).

political contexts and therefore will emerge different. For example, the dual focus function of the ACtJHR is a major difference since the Court will not operate as solely a human rights institution. Separated into two parts, the ACtJHR will have both an international law and human rights focus. In practice, this means that only one part of the ACtJHR will be a human rights court and therefore the institution will be unlike the other two developed mechanisms.

2. REGIONAL SYSTEMS

As there are few places to go to enforce human rights compliance it is not surprising that regional human rights systems have come to the fore. As has been noted by Moravcsik: "Unlike international institutions governing trade, monetary, environmental, or security policy, international human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities."[32] Slaughter and Helfer note that: "It should hardly be surprising that the majority of international tribunals created in the last three decades have been regional in scope. Proximity may itself impose tighter binds than geographical remoteness. But it also functions as a rough proxy for 'cultural and political homogeneity', a glue that binds states together to achieve shared objectives."[33]

2.1. GROWTH OF REGIONAL SYSTEMS

Regional systems above all others have grown most noticeably over the last sixty years and most dramatically in the twenty-first century. Although the role of human rights institutions in those systems (both courts and commissions) has rapidly increased recently, regional systems have a much older vintage. In 1889, the International Conference of American States[34] began holding regular meetings. The Conference agreed to establish the International Union of American Republics and to create the Commercial Bureau of American Republics to represent the 18 nations that founded the organization.[35] The Conference changed the names of the institutions in 1910 to the Union of American Republics and the Pan American Union.[36] In 1907, the first

32 Moravcsik, *supra* n. 25, p. 217.

33 A.M. Slaughter and L. Helfer, "Why States Create International Tribunals: A Response to Professors Posner and Yoo", 93 *California Law Review* 2005, footnote 38.

34 At the ninth International Conference of American States held in Bogotá in 1948 it was agreed to establish the OAS.

35 J.F. Vivian, "The Commercial Bureau of American Republics, 1894–1902: The Advertising Policy, the State Department, and the Governance of the International Union", in *Proceedings of the American Philosophical Society* (27 December 1974), Vol. 118, No. 6, p. 555.

36 Ibid., p. 555.

regional court was established: the Central American Court of Justice, which involved Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. A variety of actors, including individuals, were authorized to bring complaints against states other than their own country between 1908 and 1918.[37]

It was the legacy of World War II-era human rights abuse[38] and the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 as well as the threat communism posed that compelled the development of regional systems and human rights instruments in Europe.[39] For the European Union/European Community, however, much of the impetus – at least initially – was economic. Thus, both the past heritage of massive human rights violations that occurred during World War II, as well as fears about possible future threats that might come from communist countries across the globe caused regional systems to emerge. These issues also impacted the extent to which regional systems would become major sites for holding states accountable for human rights abuse.[40]

2.2. ASIAN AND ARAB SYSTEMS

While the Americas, Europe and Africa have developed their own regional human rights systems, each with its own idiosyncrasies, over a period of 60 years or more, it is the formal emergence of the Asian and Arab systems (and even a system in the Caribbean[41] and sub-regional systems in Africa[42]) that have occurred most recently. Initially, there was enormous reluctance by some of these systems to develop formal human rights processes; thus, the emergence of such systems has taken some time. As with the development of the African system, there has been enormous pressure on the Association of Southeast Asian Nations (ASEAN)[43] and the Arab League to develop formalized approaches.

37 Sarkin, *supra* n. 6, p. 125–172.

38 Shelton, *supra* n. 19, p. 351, 354.

39 D.P. Forsythe, *Human Rights in International Relations* (Cambridge, Cambridge University Press 2000). See also S. Marks, "The European Convention on Human Rights and its 'Democratic Society'", *British Yearbook of International Law* (1995), p. 210.

40 A.H. Robertson, *Human Rights in the World* (Manchester, Manchester University Press 1982), p. 81.

41 The Caribbean Community (Caricom) comprises Antigua & Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; Suriname and Trinidad & Tobago, Dominica and St. Vincent & The Grenadines. Caricom established the Caribbean Court of Justice in 2001.

42 See further J. Sarkin, "The Role of the United Nations, the African Union and Africa's Sub-Regional Structures in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect", 53(1) *Journal of African Law* (2009).

43 H. Hashimoto, *The Prospects for a Regional Human Rights Mechanism in East Asia* (London, Routledge 2003).

In 2007, ASEAN introduced a Charter[44] which will eventually establish a regional human rights body.[45] All 10 member states are required to ratify the instrument for the Charter to enter into force. All have agreed to do so: the last being Indonesia when its Parliament agreed to ratify the Charter on 21 October 2008. 30 days after the last instrument of ratification is received by ASEAN the Charter will enter into force.

While the ASEAN Charter aims "to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms"[46] it is countered by the principle of non-interference into member states' domestic affairs.[47] This may severely hamper the ability of ASEAN to deal with issues in member states.[48] Nonetheless, the Charter is the first authoritative step taken to develop a formal system with a human rights structure that will deal with human rights issues in Asian states. Article 14 of the ASEAN Charter establishes a human rights body.[49] The Working Group for an ASEAN Human Rights Mechanism has encouraged ASEAN to draw up the terms of reference, which would "concretely state the powers, functions, mandate, as well as details of the ASEAN human rights body."[50] A panel established by ASEAN began working in July 2008 to create the framework for the human rights institution. The panel will submit the framework to a summit of ASEAN leaders supposedly in December 2008. There are, however, fears that the institution will not be as robust as it could be and that assurances had to be given to some of the states before they would ratify the Charter, which will leave the institution without a very strong mandate or powers.

The process to develop an Arab human rights system is also a post–World War II development. The League of Arab States emerged in 1945, initially with only six members.[51] In 1968, the League created its Permanent Arab Commission on Human Rights. The Arab Charter of Human Rights was drafted in 1971 while the Arab Covenant on Human Rights was created in 1979.[52] States only adopted the Charter,

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44 Amnesty International, *ASEAN: Human Rights in the Charter and Beyond*, AI Index: ASA 01/009/2007 (Public) (21 November 2007), <www.amnestyusa.org/document.php?id=ENGASA 010092007&lang=e>.

45 J. Sarkin, "Toothless Charter will Hurt Asean Credibility", *Bangkok Post*, 19 November 2007.

46 Asean Charter, <www.aseansec.org/ASEAN-Charter.pdf>.

47 See further E. Kuhonta, "Walking a tightrope: Democracy versus sovereignty in ASEAN's illiberal peace", 19 *The Pacific Review* (2006), p. 337–358.

48 See for example J. Gomez, "Myanmar Opposes Investigative Powers of ASEAN", *Associated Press*, 22 July 2008.

49 The Working Group for an ASEAN Human Rights Mechanism, Statement on the ASEAN Charter, 21 November 2007, <www.aseanhrmech.org/news/working-group-statement-on-asean-charter.html>.

50 Ibid.

51 Egypt, Iraq, Jordan, Lebanon, Saudi Arabia and Syria.

52 J.J. Waardenburg, *Islam: Historical, Social and Political Perspectives* (Berlin, de Gruyter 2002), p. 180.

however, in 1994.[53] The Charter only began receiving the necessary ratifications after the Arab Summit held in Tunis in May 2004 adopted a 'modernised' version of it.[54] The Charter entered into force on 15 March 2008[55] when the sufficient number of states (7 out of the 22 member states) ratified the instrument.[56] There has been great controversy over whether the Arab Charter is compatible with universal human rights norms and can peacefully handle issues involving neighbouring states.[57] Occurring around the 60th anniversary of the Universal Declaration of Human Rights (UDHR), this controversy has re-introduced the question of whether human rights are universal. Equally important, this controversy touches upon whether regional systems may diverge from human rights protections found in other parts of the world. The establishment of different regional systems in the world, their functions, and how they carry out their human rights mandates are all additional questions implicated by this debate.

2.3. WHY REGIONAL SYSTEMS?

While many see the benefits of establishing regional systems, others have argued that regional human rights systems are a "step in the wrong direction", as they decentralize human rights enforcement away from the United Nations[58] and focus on region-specific needs that can vary, rather then focusing on the universality of human rights.[59] Robbins argues that the original purpose behind international human rights law was to bind all the nations of the world together to protect the rights of individuals, and that regional systems draw 'arbitrary boundaries' between people, thus undermining this focus.[60] While this may be true to some extent, it is also true that regional systems

53 J. Mahoney, *The Challenge of Human Rights: Their Origin, Development, and Significance* (New York, Blackwell Publishing 2007), p. 54.

54 M. Sepúlveda, Th. van Banning, G.D. Gudmundsdottir, Ch. Chamoun and W.J.M. van Genugten, *Human Rights Reference Handbook* (San José, University of Peace 2004), p. 75.

55 Revised Arab Charter on Human Rights, adopted on 22 May 2004, entered into force on 15 March 2008, <www1.umn.edu/humanrts/instree/loas2005.html>.

56 Algeria, Bahrain, Jordan, Libya, Palestine, Syria and the United Arab Emirates. See C. Vann, "The Arab Charter on Human Rights Courts Controversy", *Human Rights Tribune*, 4 February 2008, <www.humanrights-geneva.info/Arab-Charter-on-human-rights>, 2715 (Translated from French by Claire Doole).

57 A. Lessard and M. Lebuis, "The Arab Charter of Fundamental Rights is Inconsistent with International Standards, Louise Arbor", 30 January 2008, <www.pointdebasculecanada.ca/spip.php?article238>.

58 It has been noted that the UN, until at least the 1960s, was not predisposed to the idea of regional arrangement for this very reason. See K. Vasak and P. Alston (eds), *The International Dimension of Human Rights* (Paris, Unesco 1982), Vol. 2, p. 451.

59 M. Robbins, "Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement", 35 *California Western International Law Journal* (2005), p. 275.

60 Ibid., p. 276.

are a far more attractive option for a variety of reasons. This includes the fact that they are easier to create, as fewer states are involved. Consensus is easier to achieve because regions are often relatively homogenous.[61] As far as their processes are concerned, regional systems for many reasons are more accessible, cheaper for litigants, and more effective in the work they do than international courts. They are more likely to achieve greater enforceability of their decisions partly because of the political will, at least in some regions, to do so by the regional system itself.[62] As Bederman notes, regional human rights systems are "only as strong and effective as the region's underlying unity and commitment to democracy and individual rights."[63] Thus, various states in the Americas have been opposed to the Inter-American human rights institutions and blocked efforts to strengthen the Court, including efforts to make the Court a full-time institution.[64] States have also limited the effectiveness of these courts in other ways. Thus, the limiting provisions establishing these institutions, and providing for limited jurisdiction, further undermine the effectiveness of the institutions. Problematically, according to Donoho, outside of Europe, almost all international institutions "suffer from politicized appointment process, lack of financial resources, poorly defined legal authority, failure to utilize full-time professional judges, and flawed fact-finding processes."[65] However, most of these issues effect the European system to differing degrees as well, although the European system does have full-time judges.

2.4. STATE COMPLIANCE

The debate about whether, in general, states comply with the decisions of international bodies, and regional bodies specifically, continues to flourish. Thus, it has been noted that "national compliance was no better, and in some respects worse, at the national

61 Homogeneity is however relative and, as Stemmet has noted, even Europe has states with diverse backgrounds and catholic, protestant, orthodox and muslim traditions. A. Stemmert, "A future African Court for Human and Peoples' Rights and domestic human rights norms", 23 *South African Yearbook of International Law* (1998), p. 233. Padilla has noted that both Africa and the Americas "cover enormous geographic areas with extremely diverse populations that speak numerous languages. Both continents have histories marked by repressive governments and military dictatorships." D. Padilla, "An African Human Rights Court: Reflections from the Perspective of the Inter-American System", 2 *African Human Rights Law Journal* (2002), p. 186.

62 R. Smith, *Textbook on International Human Rights* (Oxford, Oxford University Press 2007), p. 81–82.

63 D.J. Bederman, "Diversity and Permeability in Transnational Governance", 57 *Emory Law Journal* (2007), p. 226.

64 Th. Buergenthal, "New Upload – Remembering the Early Years of the Inter-American Court of Human Rights", 39 *Journal of Internationall Law and Politics* (2005), p. 262.

65 D. Donoho, "Human Rights Enforcement in the Twenty-First Century", 35 *Georgia Journal of International and Comparative Law* (2006), p. 24.

compared to the supra-national and international levels."[66] However, there seems to be different levels of compliance depending on the regional system in question.

Regarding the European system, it has been argued that it is the "most successful system of international law for the protection of human rights."[67] In 1996, Buergenthal and Shelton found that "the decisions of the European Court are routinely complied with by European governments. As a matter of fact, the system has been so effective[68] in the last decade that the Court has for all practical purposes become Western Europe's constitutional court."[69] In 2003 Beach found that the decisions of the ECtHR enjoy "considerable normative power, with the Member States almost always respecting the rulings of the ECtHR."[70] Similarly, in 2003 Shelton also found that many states had taken very specific actions to rectify their law as a result of decisions of the ECtHR.[71] Bederman has also noted that enforcement has been less of a problem in Europe as European nations regard the decisions of the Court as 'self-executing', meaning that decisions automatically become a part of domestic law.[72]

As regards the Inter-American system, there have been attempts to limit the role of the Court in various ways. When the Court began, the OAS initially failed to adopt a budget for the Court. Financial assistance from the Government of Costa Rica, and an emergency appropriation from the OAS, allowed the Court to begin to function.[73] Reluctance towards the Court is also reflected in the fact that states have complied with few decisions of the Court. Thus, in 2000 Kimberly King-Hopkins found little compliance with IACHR decisions.[74] In 2004, Posner and Yoo noted: "We have found only one case in which a nation has fully complied with an Inter-American Court decision."[75] Donoho cites three factors for why states have found it easy to ignore these decisions: "1) ambiguous mandates and limited legal authority, 2) lack of meaningful or practical incentives to induce state compliance, and 3) insufficient institutional

66 Alter, *supra* n. 15, p. 39. See further M. Zurn and Chr. Joerges, *Governance and Law in Postnational Constellations: Compliance in Europe and Beyond* (Cambridge, Cambridge University Press 2005).

67 M. Janis, R. Kay and A. Bradley, *European Human Rights Law* (New York, Oxford University Press 1995), p. 3.

68 Donoho, *supra* n. 65, p. 9.

69 Th. Buergental and D. Shelton, *Protecting Human Rights in the Americas* (Kehl am Rhein, Engel Verlag 1996), p. 36, cited in D. Shelton, "The Boundaries of Human Rights Jurisdiction in Europe", 13 *Duke Journal of Comparative and International Law* (2003), p. 152.

70 D. Beach, *Between Law and Politics: the relationship between the European Court of Justice and the EU Member States* (Copenhagen, DJØF Publishing 2001), p. 144.

71 Shelton, *supra* n. 69, p. 147.

72 Bederman, *supra* n. 65, p. 227.

73 Buergenthal, *supra* n. 64, p. 263.

74 K. King-Hopkins, "Inter-American Commission on Human Rights: Is Its Bark Worse Than Its Bite in Resolving Human Rights Disputes?", 35 *Tulsa Law Journal* (2000), p. 432–443.

75 E.A. Posner and J.C. Yoo, *A Theory of International Adjudication* (John M. Olin Law and Economics Working Paper No. 206 2004), p. 37.

legitimacy to induce voluntary compliance."[76] Problematically, compliance seems to be left largely to the discretion of the state, which is in many cases the perpetrator.[77]

The African system has suffered from the same problem of limited compliance. Part of the reason for this is that Africa has not had a court until recently and a number of factors have undermined the role of the Commission, as will be discussed elsewhere. However, it seems as though the African Union intends to make compliance a priority and to put mechanisms in place to monitor compliance and ensure that states do comply.

While state compliance seemingly varies across region, it is relevant that the regional terrain is very different. While the European Court decides more than 20,000 cases annually, the Inter-American Court hands down decisions in only about 15 cases each year. Similarly, while the African Commission decides about 10 cases per year, the Inter-American Commission decides about 100 cases per annum.[78] Thus, compliance levels need to be examined in the context of the number of decisions emerging in each region.

However, it is important to see regional court processes as not simply about state compliance with specific decisions concerning themselves, but in a much broader fashion. Thus, regional courts interpret regional instruments and standards are set for all countries in the region when such a court decides a matter.[79] This is not to argue that all states apply such decisions, but these decisions do have broad reach and become matters that are taken up by others, including civil society across the region and in individual states.

3. AFRICA'S HUMAN RIGHTS SYSTEM

Africa started to implement its own regional system in the 1960s, when many African states started gaining independence from colonial rule. The need was clear for an organization so that African countries could work together to solve common problems.[80] Human rights promotion was, however, not a core reason for the

76 D. Donoho, "Human Rights Enforcement in the Twenty-First Century", 35 *Georgia Journal of International and Comparative Law* (2006), p. 22.

77 Ibid., p. 23–24.

78 C. Heyns, D. Padilla and L. Zwaak, "A schematic comparison of regional human rights systems: An update", *Sur- International Journal on Human Rights* (2006), p. 166.

79 G. Cuniberti, "The Recognition of Foreign Judgments Lacking Reasons in Europe: Access to Justice, Foreign Court Avoidance, and Efficiency", 57 *International and Comparative Law Quarterly* (2008), p. 27.

80 F. Mukwiza Ndahinda, "Human Rights in African Political Institutions: Between Rhetoric, Practice, and the Struggle for International Visibility", 20 *Leiden Journal of International Law* (2007), p. 699.

development of a regional system. It took a long time and much prodding and encouragement for human rights promotion to become an important agenda item.[81]

While the 1960s marked the Organization of African Unity (OAU) initiation of the process of developing a human rights system, it took many years for Africa to develop its human rights system. In 1981, the African Charter of Human and People's Rights was opened for signature. After delays, the Charter entered into force on 21 October 1986.

It was, however, the shift from the Organisation of African unity (OAU) to the African Union (AU) in 2002 that marked the most significant change in human rights promotion and protection on the continent. Yet there was tension in the development of the system. Some saw such a system as aiding the promotion and protection of human rights, while others saw it as a means to dilute the universality and indivisibility of human rights. Undoubtedly, both of these approaches are correct and are applicable in the African context. Still today there are those that see the international human rights system, and the rights that exist under it, as western liberal phenomena. Even at the United Nations, until at least the 1960s there was suspicion about these systems having the potential to undermine the universality of human rights.[82] In the African context there was certainly the perspective by some that having a regional human rights system would allow an African conceptualisation of human rights to come to the fore. Thus, African perspectives, which were seen to differ markedly from those perceived by western scholars, would be the focus. In the 1960s and 1970s, African scholars went to great lengths to point out that African values differed from the values of others.[83] Thus, the preamble to the African Charter considers its goal to embody the virtues of (African) historic tradition and the values of African civilization which should inspire and characterize (Africa's) reflection on the concept of human and people's rights.

Certainly, the African Charter preamble serves as a guide for the significant themes that run throughout the entire Charter. First, the African Charter relies heavily upon African documents and traditions as well as United Nations declarations and covenants. Secondly, while individuals enjoy certain rights under the Charter, they are also obligated to fulfil certain duties toward other individuals as well as toward the state of their citizenship. Finally, economic, social and cultural development is a top priority.[84] Thus, many argue that the preamble and parts of the African Charter essentially deny the legitimacy of the western vision of human rights in a non-western

81 G. Bekker, "The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States", 51 *Journal of African Law* (2007), p. 151.

82 Vasak and Alston, *supra* n. 58, p. 451.

83 See B. Ibhawoh, "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State", 22 *Human Rights Quarterly* (2000), p. 838-360.

84 R. Gittleman, "The African Charter on Human and People's Rights: A legal analysis", 22 *Virginia Journal of International Law* (1982), p. 677.

context. In fact, the pillars of western rights philosophy, i.e. individualism and the abstract existence of inalienable rights, were renounced by some African scholars. To some of these scholars 'Westernization' more accurately depicts 'universalization'. Ihonvhere, for example, maintains that one cannot judge human rights outside the "social equation of specific societies".[85] In this way, these scholars refer to the communitarian ideal as evidence of a system of human rights indigenous to Africa, which aids others in understanding the continent. This view also suggests that whereas westerners tend to invoke human rights as the individual's protection against abuses by the state, African thought centres upon social relationships. Further, in their approach to human rights, Africans have preferred the culturally relative approach in contrast to western liberal standards. Africans perceive human rights to be based on two arguments, namely that of communitarian idealism and world systems analysis. One of the main criticisms directed at the Charter, other than issues such as claw back clauses, was its failure to provide for a court to enforce its rights. Naldi and Magliveras note that the "lack of a judicial remedy has been considered as undermining the effective application of human and peoples' rights in Africa."[86] Similarly, it has been noted by Mochochoko that "[n]o other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity."[87]

Nowadays, the African Union features several institutions to protect and promote human rights. Such institutions include the African Court of Justice and Human Rights, the African Commission on Human and Peoples' Rights, and the African Committee on the Rights and the Welfare of the Child, which began operating in 1999. A number of sub-regional arrangements also offer human rights mechanisms, including courts to adjudicate on such matters. These include the East African Court of Justice (EACJ), the Court of Justice of the Economic Community of West African States (ECOWAS), and the Southern African Development Community (SADC) Tribunal. The African Commission has also appointed several Special Rapporteurs and Working Groups focusing on human rights issues.[88] The Commission created a

85 J.O. Ihonvhere, "Under development of Human Rights Violations in Africa", in G.W. Shepherd Jr. and M.O.C. Anikpo (eds.), *Emerging Human Hights: The African Political Economy Context* (New York, Greenwood Press 1990), p. 56.

86 G.J. Naldi and K. Magliveras, "Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights", 16 *Netherlands Quarterly of Human Rights* (1998), p. 431.

87 P. Mochochoko, "Africa and the International Criminal Court", in E. Ankumah and E Kwakwa (eds), *African Perspectives on International Criminal Justice* (Ghana, Africa Legal Aid 2005), p. 249.

88 See J. Harrington, "Special Rapporteurs of the African Commission on Human and Peoples' Rights", 1 *African Human Rights Law Journal* (2001), p. 247; M.N. Evans and R. Murray, "The Special Rapporteurs in the African system", in M.N. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge, Cambridge University Press 2002).

Special Rapporteur on the Rights of Women in Africa, a Special Rapporteur on Freedom of Expression in Africa, a Working Group on the Death Penalty, a Working Group on Specific Issues Relating to the Work of the African Commission on Human and Peoples' Rights, a Working Group on Indigenous Populations/Communities in Africa, a Special Rapporteur on Human Rights Defenders in Africa, and a Special Rapporteur on Prisons and Conditions of Detention.

The last few years have shown signs that there is cause for hope for human rights on the African continent. However, recurring instances of flagrant human rights abuse, and the debilitating violence that often accompanies the abuse, continues to afflict large swaths of the continent. Some improvement in the human rights situation is partly the result of the transformation of the OAU into the AU, with its various human rights and peace structures.[89] The situation has, however, experienced some setbacks very recently. Freedom House noted in their 2008 World Report that: "The year 2007 was marked by a notable setback for global freedom. The decline, which was reflected in reversals in one-fifth of the world's countries, was most pronounced in South Asia, but also reached significant levels in the former Soviet Union, the Middle East and North Africa, and sub-Saharan Africa."[90] Thus, the decline is not a specifically African problem but a global one. However, it was also noted that: "While in the last several years the sub-Saharan region has made incremental if uneven progress, the year 2007 saw the deterioration of freedom on the continent. Fifteen countries in sub-Saharan Africa registered reversals of sufficient magnitude to be noted in the survey, while six countries registered improvements."[91] The 15 countries with declines were Kenya, the Democratic Republic of Congo (DRC), Nigeria, Chad, the Central African Republic, Mali, Niger, Somalia, Malawi, Cameroon, the Comoros, the Republic of Congo (Brazzaville), Guinea-Bissau, Lesotho and Madagascar. The six countries deemed to have improved were Togo, Mauritania, Cote d'Ivoire, Sierra Leone, Mozambique and Rwanda.[92] Thus, the African continent still possesses many states that continually violate human rights with relative impunity.

4. THE COUNCIL OF EUROPE'S HUMAN RIGHTS SYSTEM

Europe has a number of regional systems that deal with human rights, including the European Union (EU), the Council of Europe (COE) and the Organisation for Security and Cooperation in Europe (OSCE).[93] This article only focuses on the COE, which

89 Sarkin, *supra* n. 5, p. 45–67.

90 A. Puddington, "Findings of Freedom in the World 2008 – Freedom in Retreat: Is the Tide Turning?", <www.freedomhouse.org/template.cfm?page=130&year=2008>.

91 Ibid.

92 Ibid.

93 See further J.H. Matlary, *Interventions for Human Rights in Europe* (Basingstoke, Palgrave 2002).

came into being in 1949. While within the COE there are a number of human rights structures, including the Commissioner for Human Rights, the European Committee for the Prevention of Torture (CPT), the European Commission for Democracy through Law, and the European Commission against Racism and Intolerance (ECRI), only the European Court of Human Rights (ECtHR) will be the focus here. Three stages of development mark the Court's advancement: firstly, only a Commission, secondly, a Commission and a Court, and thirdly, only a Court.[94]

The Council of Europe member states decided to draft the European Convention on Human Rights[95] because it was apparent that the United Nations' efforts to produce a binding international treaty along the lines of the non-binding Universal Declaration of Human Rights (UDHR) could take many years.[96] This was a relatively easy process as at that time only ten western European member States were involved.[97] In this context achieving agreement was comparatively simple.

The COE has maintained relatively great institutional flexibility. It has proven itself willing to amend and adapt the institutions and the rules of the institutions to deal with the needs of the time. In their beginnings, both the European and the Inter-American system possessed similar visions about what their human rights system were meant to accomplish. The similarities between each system's origins also extend to the concept of optional membership. The European system eventually made membership mandatory for all states,[98] an important requirement which should also ultimately occur in Africa.

The European Court of Human Rights is seen as the "world's most advanced international system for protecting civil and political liberties."[99] It is one of the most highly cited foreign courts in the United States (not known for their use of foreign law). According to David Zaring, between 1945 and 2005, US Federal Courts cited the ECtHR a number of times.[100] However, it has also been argued that the European Court "shows more deference to states than the Inter-American Court."[101]

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94 See further L. Pratchett and V. Lowndes, *Developing Democracy in Europe – An Analytical Summary of the Council of Europe's Acquis* (Strasbourg, Council of Europe Publishing 2004).

95 See further A.H. Robertson and J.G. Merrills, *Human Rights in Europe. A Study of the European Convention on Human Rights* (Manchester, Manchester University Press 2001); F.J. Jacobs, R. White and C. Ovey, *The European Convention on Human Rights* (Oxford, Oxford University Press 2006).

96 Buergenthal, *supra* n. 29, p. 792.

97 Shelton, *supra* n. 19, p. 356; Buergenthal, *supra* n. 29, p. 792.

98 Article 3 Statute Council of Europe makes adherence to the ECHR and its protocols a condition for membership of the COE.

99 L.R Helfer, "Redesigning the European Court of Human Rights: Embeddedness as a Deep Structured Principle of the European Human Rights Regime", 19 *European Journal of International Law* (2008), p. 125.

100 D. Zaring, "The use of Foreign Decisions by Federal Courts: An Empirical Analysis", 3 *Journal of Empirical Legal Studies* (2006), p. 297.

101 Th.M. Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond", 46 *Columbia Journal of Transnational Law* (2008), p. 411.

While enjoying widespread respect, the European system has faced many difficulties. The number of applications filed each year with the European Commission ballooned from 404 in 1981 to 4,750 in 1997 (prior to its merger with the Court).[102] While there were 404 cases before the Court in 1981, by 1997 the number was 4750. By 2005 the number reached 35,400 and the backlog had grown to 81,000.[103] Although the number of cases filed before the ECtHR increased by 465 percent from 1993 to 1998[104], admissible cases comprise only between 4 and 10 percent of the total.[105] Thus, the vast majority of the thousands of applications is inadmissible.[106] One reason for the low number of admissible cases is a lack of knowledge about the admissibility requirements. However, these issues may be of less importance in the African context, at least during the initial stages of development, because the Court is not very well-known to many, if not most, Africans, and thus the Court's existence may escape the knowledge of potential litigants. However, if the African Court wishes to make a greater impact in promoting human rights, it must reach out and proactively publicize its role. This will allow the Court to receive an increased number of a diverse array of cases, yet retain a caseload limit to only hear cases falling within its ambit and mandate. Adding judges and meeting more regularly and in smaller panels may therefore become a necessity. The African Commission can also assist in reducing the possibility of overloading the Court by educating Africans about the Court's role and function and by itself taking on more responsibilities to deal with complaints.

Repeat cases comprise many of the cases before the ECtHR. More than half of these cases are fair trial rights related.[107] A claim of a violation of the right to a speedy trial is the basis for well over half of the fair trial cases. To deal with this issue, some argue that the Court should issue "pilot judgments" that provide guidance to a multitude of cases that have application in a whole host of states[108] and meanwhile the Court has indeed rendered such judgments. The unstructured approach to adjudicating

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102 European Court of Human Rights – Information document on the Court September 2006, <www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/ENG_Infodoc.pdf>.

103 G.S. Weber, "Who killed the friendly Settlement? The Decline of Negotiated Resolutions of the European Court of Human Rights", 7 *Peperdine Dispute Resolution Law Journal* (2007), p. 221.

104 C.G. Hioureas, "Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights", 24 *Berkeley Journal of International Law* (2005–2006), p. 718.

105 The ECHR main admissibility issues are: "timeliness, exhaustion of domestic remedies, anonymity, substantial identity with a prior matter, manifest illfoundedness, incompatibility with the Convention and its Protocols and abuse of the right of appreciation." Weber, *supra* n. 103, p. 220, footnote 31.

106 Hioureas, *supra* n. 104, p. 726.

107 See further R.P. Barnidge Jr., "The African Commission on Human and Peoples' Rights and the inter-American Commission on Human rights: Addressing the right to an impartial hearing on detention and trial within a reasonable time and the presumption of innocence", 4 *African Human Rights Law Journal* (2004), p. 108–120.

108 S. Greer, "What's Wrong with the European Convention on Human Rights?", 30 *Human Rights Quarterly* (2008), p. 680.