# Regional Judicial and Non-judicial Bodies

## An Effective Means for Protecting Human Rights?

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### Abstract

*Regional human rights systems consisting of regional bodies, instruments and mechanisms play an important role in the promotion and protection of human rights. If one's rights are not protected on the domestic level, the international system comes into play and protection can be provided either by the regional or global (UN) system. Regional mechanisms of human rights today cover five parts of the world, namely: Africa, the Americas, Europe, Arab countries and the Asia-Pacific. They differ in their origin, resulting from different concepts of human rights and the need of interested states to establish a regional framework for human rights protection. The level and scope of their human rights protection is obviously uneven, although this protection is generally higher in regions with democratic states that have constitutional and rule of law regimes in which human rights are considered an integral part of their constitutional architecture. However, current practice confirms that the creation of judicial systems for the protection of human rights within the context of concrete regions does not automatically guarantee the right of direct access of individuals to them. The regional particularities of locus standi result from a set of factors having historic, religious, ethnic and other nature. In the institutional system of protection of human rights, these particularities manifest also through the optional (non-compulsory) jurisdiction of regional judicial bodies, the preventive 'filtering' systems before non-judicial bodies (commissions) combined with the right to bring the case before a judicial body, the systems where different entities are entitled to bring the case before a judicial body but the individual has no such right etc. Nevertheless, the existing practice generally confirms the increasing role of the judicial segment of the regional human rights systems as well as the strengthening of position of individuals within the proceedings before regional human rights judicial and non-judicial bodies. A specific factor in the developing world represents the concept of a 'strict' interpretation of sovereignty preventing external control of the respect for human rights before a regional judicial body on the basis of an individual complaint by a concerned person. The specificities of regional systems are without detriment to their widely accepted advantages and benefits. Regional systems allow for the possibility of regional values to be taken into account when human rights norms are defined (e.g. so-called collective rights and duties within the African system), provided that the idea of the universality of human rights is not compromised. The regional systems*


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*are located closer to the individual human rights subjects and offer a more accessible forum in which individuals can pursue their cases, and states tend to show stronger political will to conform to decisions of regional human rights bodies. The existence of the regional human rights systems finally allows for the existence of proper enforcement mechanisms, which can better reflect local conditions than a global (universal) system of enforcement.*

**Keywords:** Direct access, human rights protection, judicial bodies, non-judicial bodies, direct access of individuals.

## 1. Regional Human Rights Protection Systems

Regional human rights systems, which consist of regional bodies, instruments and mechanisms, play an important role in the promotion and protection of human rights. Regional human rights instruments help to identify international human rights norms and standards, reflecting the particular human rights concerns of concrete regions, and to implement these instruments on the ground. If rights are not protected on the domestic level, the international system comes into play and protection can be provided by the regional or global (UN) system. With respect to the latter, the regional systems have been developed to reflect mainly regional values and offer a more specific framework than the universal UN system. The United Nations, however, has long encouraged the development of regional human systems, and these complement the UN universal system of human rights protections.

Regional mechanisms of human rights cover five parts of the world: Africa, the Americas, Europe, Arab countries, and Asia-Pacific. The mechanisms naturally differ due to their origin, which results in different concepts of human rights and the need of interested states to establish a regional framework for human rights protection. The aim of the article is both to assess the legal and institutional structure of the existing regional systems of human rights protection in terms of their effectiveness and access of individuals and to identify some features of their heretofore evolution. Their effectiveness as a whole, and the extent of their practical 'everyday' efficiency for the protection of human rights, can be briefly structured as follows:

– Europe and the Americas – An advanced regional system of the human rights protection. These systems have a whole set of regional human rights treaties with the respective supervisory, expert and judicial systems. The Inter-American system is followed to a large extent by the European system; although some problems still prevent its future development because the system is not universal due to the absence of the USA as a state party to the Inter-American Convention of Human Rights, and the lack of direct access of individuals to the Inter-American Court of Human Rights (obligatory through the Commission on Human Rights).



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- Africa – An emerging regional system requiring further consolidation. Some of the greatest problems are: the absence of political will of some states to fully cooperate and participate in the regional system, the structural 'overlapping' between Pan-African and sub-regional courts, the lack of direct access of individuals to regional judicial bodies and objections against the supranational nature of regional judicial bodies.
- Arab Countries – An emerging regional system *in statu nascendi* with respect to the initial stage of standard setting and implementation machinery, a lack of institutional practice and an operational human rights regional court, and the inconsistency of regional human rights documents with international human rights standards.
- Asia-Pacific – A region without an effective regional institutional structure of human rights protection. Taking into account the great cultural and political diversities among the states, a lack of homogeneity currently prevents any foreseeable regional integration project. It therefore seems more realistic to expect sub-regional human rights mechanisms.[1]

As regards the characteristic of the states that established a regional structure for the protection of human rights, it should be pointed out that

> [i]t is true that the most used and arguably most effective adjudicatory mechanisms tend to be in the more democratic Europe and the Americas, but African supranational courts are a puzzling contrast.[2]

If concrete human rights are not sufficiently protected at the domestic level, the international system of human rights comes into play at the level of either global or regional judicial and non-judicial structures. The treaties that obviously create regional human rights system have, in principle, the same structure; the first part contains the list of individual rights and, in some cases, also the duties of the states that have joined the regional system. The second part of these treaties obviously creates either specific non-judicial mechanisms for monitoring compliance with human rights, or judicial or quasi-judicial bodies for the cases of violations of the rights, and eventual combinations and 'cohabitations' of these mechanisms within regional human rights systems.

Institutional structures charged with the protection of human rights can be divided into a pan-regional (or continental) grouping, comprising: in the case of Africa, the African Union (AU); in the Americas, the Organization of American States (OAS); in Europe, the Council of Europe (CoE); among Arab states, the League of Arab States (LAS); and a number of sub-regional systems. Each of the pan-regional systems noted above has its own judicial body: the European Court of Human Rights (ECtHR-1959), the Inter-American Court of Human Rights (IACHR-1979), the African Court of Peoples and Human Rights (ACPHR-2004),

1 The Role of Regional Human Rights Mechanisms, European Parliament, Directorate General for External Policies-Policy Department, Doc.EXPO/B/DROI/2009,25, pp. 11, 19-20.

2 K. J. Alter & L. Hooghe, 'Regional Dispute Settlement Systems', *in* T. A. Börzel & T. Risse (Eds.), *Oxford Handbook of Comparative Regionalism*, 2016, Oxford, Oxford University Press, p. 549.

and the Arab Court of Human Rights (ACHR-2014). The key feature of each of these systems (except in Arab states), consists of a complaint mechanism through which relevant subjects can seek justice and ask for reparation for human rights violations. Within these systems, only states may be held responsible for human rights violations, so prosecution or individual responsibility for human rights violations is excluded. The practice confirms that judicial bodies within some of the originally economic regional organizations gradually acquired human rights jurisdiction as a consequence of the adaption and/or enlargement of their constituent instruments or adoption of special protocols (Court of Justice of the EU-2009, ECOWAS Court of Justice-2005). These bodies are not generally considered to be human rights courts because their principal mandate is not human rights protection, but they may be authorized to consider individual complaints concerning human rights violations or directly apply human rights treaties. With respect to the SADC and EACJ, these courts of justice are able to review human rights issues through the interpretation of, and within, the good governance principle. The nature and duties of each judicial body for the protection of human rights are embodied both in the constituent instrument and each body's statutes or rules of procedure.[3]

Not all of the pan-regional organizations have established only judicial bodies with the mandate to promote and protect human rights. Special commissions and/or committees have also been charged with the powers in the area of human rights (African Commission on Human and Peoples' Rights, Inter-American Commission of Human Rights, Arab Human Rights Committee). These bodies in particular prepare reports on human rights practices, carry out country visits and monitor emerging human rights themes and the rights of vulnerable groups by appointed experts ('rapporteurs and/or special rapporteurs'). Comparing the commissions with human rights courts, only the latter receive complaints and render binding decisions, and they do not engage in monitoring or promotion activities.

It is, however, worth noting that human rights commissions do not strictly have an autonomous position within regional human rights systems because under certain circumstances they are authorized to initiate concrete proceedings before human rights courts with specific locus standi. It should also be pointed out that even

> [i]n Asian sub-regions where there has been a strong sense of informal regionalism and where allusion to politically charged and sensitive matters such as human rights have been eschewed in the past, there is now an embryonic (albeit strong) inclination to embrace the institutionalization of human rights.[4]

3 In order to ensure the legitimacy and effectiveness of the international judicial process and to enhance public confidence in the international judiciary, some regional and other courts newly adopted their own ethical codes: Code of the Judicial Conduct of the Court of Caribbean Community; Resolution on Judicial Ethic – ECtHR (2008); Code of Judicial Ethics – International Criminal Court (2005); Code of Conduct of the ECJ (2016).

4 S. Kingah, 'Regional Courts and Human Rights in the Developing World', UNU-CRIS Working Paper-W/2013/11, p. 4.



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These different kinds of regional institutionalization reflect the specificity and importance of human rights protection both on the national level of the member states and, consequently, within the concrete regional organization. Taking into account the absence of a world human rights court, the legal writing, however, confirms some advantages of regional systems (compared with a possible global human rights system) whereby

> [c]ountries from a particular region often have a shared interest in the protection of human rights in that part of the world and the advantage of proximity in terms of influencing each other's behaviour and ensuring compliance with common standards. Regional systems also allow both the possibility of regional values to be taken into account when human rights are defined and a regional enforcement mechanism which can resonate better with local conditions than a global universal system.[5]

The Vienna Declaration adopted by the World Conference on Human Rights (1993) also expressly emphasized the fundamental role of the regional arrangements in the promotion and protection of human rights.[6]

## 2. Regional Protection of Human Rights in Europe

As has been noted above, the European human rights system belongs to the most advanced of its kind, and its origins, rooted in the beginning of the 1950s, reflect the reaction to the great human rights violations committed during World War II and the defence against all forms of totalitarianism. The founding states of this system believed that human rights needed to be respected to secure democracy and prevent conflict between East and West Europe.[7] The European Convention on Human Rights and Fundamental Freedoms (ECHR) is the central European human rights instrument, which was gradually complemented by the 16 Additional Protocols concerning both the new human rights and gradually subjected to the judicial control of the ECtHR (Protocols 1, 4, 6, 7, 12 and 13) and the improvement of the procedural mechanism of the ECtHR (mainly Protocols 11 and 14). The Convention is focused mainly on civil and political rights and its Article 15 stipulates the right of derogation under special circumstances.

5 C. Heyns, D. Padilla & L.Zwaak, 'A Schematic Comparison of Regional Human Rights Systems: An Update', *African Human Rights Journal*, Vol. 5, 2005, p. 308.

6 Article 37 of the Vienna Declaration states, "Regional Arrangements play a fundamental role in the promoting and protection of human rights. They should reinforce universal human rights standards as contained in international human rights instruments and their protection. The World conference on Human Rights reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist." Available at: www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx (last accessed 20 March 2018).

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

The ECHR does not contain provisions relating to self-determination, rights of minority groups, children, refugees and aliens. Social, economic and cultural rights are embodied in the European Social Charter (1961), and the control of these rights is in the hands of a non-judicial body of the European Committee of Social Rights (hereinafter the ECSR). This committee, composed of independent and impartial experts, monitors the compliance of states with the European Social Charter. The supervisory mechanism is based on a system of collective complaints and national reports, indicating how European states implement the Charter in practice.

As regards the structural and institutional mechanism of the human rights protection in Europe during the first 50 years of the ECtHR activity (until 1998), the system comprised two bodies: the Commission of Human Rights, which has a quasi-judicial and screened function; and the European Court of Human Rights of a non-permanent nature, which has a judicial function in the affairs referred to by the Commission.[8]

Protocol No. 11 of the ECtHR (1998) substantially changed this procedural mechanism in three important areas: it established the ECtHR as a permanent judicial body, it abolished the Commission of Human rights, and it allowed all alleged victims of violations of human rights (regardless of their nationality) to lodge their complaints directly to the ECtHR after exhausting local remedies within the concerned state party.[9] As regards the latter, it should be pointed out that "[t]his represents a crucial development since individual complaints have been the means by which the great majority of Convention violation have been identified throughout the ECtHR history."[10]

It is, therefore, worth noting that the ECtHR is the only international court to which any individual, NGO or group of individuals has access for the purpose of enforcing their rights under the Convention and where "[t]he right of individual application is today both an essential part of the system and a basic feature of European legal culture in this field."[11] The inter-state complaints are still possible but for different political and other reasons they are used only rarely.

Within the European human rights system, Protocol No. 11 reinforced its judicial nature by making it compulsory and transformed the existing supervisory system creating a single full-time court to which individuals have direct access. The ECtHR through its jurisprudence reviews the compliance of the state parties

8 The following text confirms that this kind of human system is still operational in the Americas and Africa having, however, their own specificities.

9 The Preamble of Protocol No. 11 emphasized *inter alia* that: "Considering the urgent need to restructure the control machinery established by the Convention in order to maintain and improve the efficiency of its protection of human rights and fundamental freedoms, mainly in view of the increase in the number of applications and the growing membership of the Council of Europe"; and "Considering that it is therefore desirable to amend certain provisions of the Convention with a view, in particular, to replacing the existing European Commission and Court of Human Rights with a new permanent Court."

10 G. Sadlier, 'The ECHR – A Victim of Its Own Success', *Cork Online Law Review*, 2007, 7, p. 68. Available at: https://docs.wixstatic.com/ugd/724adb_ea74827679c74122910aa2dde834f312.pdf (last accessed 12 March 2018).

11 Report of the Group of Wise Persons to the Committee of Ministers, Doc.CM(2006) 203, p. 3.


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of the Convention with their obligations issuing from Convention, interprets the Convention using the evolutive interpretation of referring to its nature as a 'living instrument' and renders advisory opinions on legal questions arising from the interpretation of the Convention and its Protocols.[12]

The right to request the advisory opinion of the Court on a question of principle (and on pending cases before domestic courts) related to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto has been granted to the highest national courts and tribunals of a High Contracting Party by Protocol No. 16 of the ECHR (2013).[13]

The main goal of this advisory procedure (similarly to the preliminary ruling procedure before the ECJ) is clarifying the provision of the Convention and the Court's case law and, thus, providing guidance in order to assist states parties in avoiding future violations of the ECHR. The procedure is optional and advisory opinions are not binding. Judgments of the ECtHR are legally binding and may provide financial compensation for damages suffered to individuals whose human rights or freedoms have been violated. The ECHR is, however, not entitled to proceed *ex officio* and only on its own initiative.

The efficiency of the European system of human rights is guaranteed through its supervisory mechanism, although it has no specific means to force member states to comply with the judgments of the ECtHR. There is a Committee of Ministers charged with the power to supervise the execution of the Court's decisions. Within this context, the execution of the ECtHR judgments is regarded as an integral part of the 'trial' for the purposes of Article 6 of the Convention, and the Court infers the right of execution from 'the principle of the rule of law'.[14] Within the larger context, a full execution of judgments helps to enhance the Court's prestige and the effectiveness of its action, and has the effect of limiting the number of applications submitted to it.

Since its creation at the beginning of the 1950s, this European system has permanently expanded and gradually become the most successful regional project of human rights protection:

> It is no exaggeration to state that the Convention and its growing and diverse body of case law have transformed Europe's legal and political landscape, qualifying the ECtHR as the world's most effective human rights tribunal.[15]

Unlike the other regional courts, however, the ECtHR has become a victim of its own success because since the early 1980s it has been permanently confronted with the exponential increase of individual complaints and the need to adopt the

12 According to Article 1, para. 1 of the Protocol No. 2 to the Convention on Human Rights and Fundamental Freedoms).

13 Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms, Strasbourg 2013, Council of Europe Treaty Series, No. 124.

14 *Hornby v. Greece*, ECtHR, judgment of 19 March 1997, para. 40.

15 L. R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness a Deep Structural Principle of the European Human Rights Regime', *European Journal of International Law*, Vol. 19, No. 1, 2008, p. 126.

necessary procedural and structural reforms in order to reduce a chronic backlog and to make this judicial body more effective. Legal writing confirms that a combination of different factors caused this adverse situation, including

> the Court's positive public reputation, its expansive interpretations of the Convention, and the distrust of domestic judiciaries in some countries and the entrenched human rights problems in others, have attracted tens of thousands of new individual applications annually. The huge volume of cases shows no sign of abating and threatens to bury ECtHR judges and Registry lawyers in paper.[16]

In comparison with other regional human rights courts, one can therefore share the view that

> [t]here is a fundamental conflict between the size of the population who have access to the Court with the right to lodge an individual application and the Court's responsibility as the final arbiter in human rights matters for so many different states. No other international court is confronted with a workload of such magnitude while having at the same time such a demanding responsibility for setting the standards of conduct required to comply with the Convention.[17]

Nevertheless, Protocol No. 11 has simplified the proceedings before the ECtHR and when it came to reinforcing their judicial character in practice, it proved inadequate to cope with the continuous rise in the number of individual applications as a result (among other things) of the enlargement of the Council of Europe. As a consequence, the urgent need has arisen to adjust the existing mechanism and, particularly, to guarantee the long-term effectiveness of the ECtHR so that it can continue to play its principal role in the protection of human rights in Europe.

The legislative result of the effort to adapt the mechanism of the ECtHR to the situation seriously endangers the whole effectiveness of the system and the credibility and authority the ECtHR represents Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the Control system of the Convention.

The states parties in its preamble took *inter alia* into account

> the urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the Euro-

16 L. Caflish, 'The Reforms of the European Court of Human Rights: Protocol No.14 and Beyond', *Human Rights Law Review*, Vol. 6, No. 2, 2006, p. 404. The ECtHR, with 47 judges and 250 registered lawyers, has an annual working capacity of around 28,000 cases. The practice confirms that the number of individual complaints permanently and considerably exceeds this capacity because over 50,000 new complaints are lodged every year. In 2016, 53,500 applications were adopted to a judicial formation, which was an overall increase of 32% compared to 2015 (40,550).

17 Report of the Group of Wise Persons to the Committee of Ministers, Doc.CM (2006) 203, p. 4.


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> pean Court of Human Rights and the Committee of Ministers of the Council of Europe.

Unlike Protocol No. 11,

> Protocol No. 14 makes no radical changes to the control system established by the Convention. The changes relate more to the functioning than to the structure of the system. Their main purpose is to improve it, giving the ECtHR the means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination.[18]

To achieve this goal, the Protocol concentrated on three areas: the reinforcement of the Court's capacity to filter unmeritorious applications, a new admissibility criterion concerning cases in which the applicant has not suffered a significant disadvantage, and measures for dealing with repeating cases. The main goal of these measures is

> to reduce the time spent by the Court on clearly inadmissible applications and repeating applications so as to enable the Court to concentrate on those cases that raise important human rights issues.[19]

The principal aim was to increase the Court's capacity by introducing smaller judicial formations with specific competences (single judge formation for assessing the admissibility of petitions and a three-judge committee to give judgments in cases coming within well-established case law) and to have more time to deal with cases of greater legal importance or urgency.

This goal is fully compatible with the Convention because if its purpose is to protect the rights and freedoms, it must not merely vindicate them but do so relatively quickly and efficiently. It should be noted that the situation of the ECtHR has significantly improved thanks to the effectively implemented reforms of Protocol No. 14 and, above all, as a result of new working methods, particularly the effective filtering of new applications. Therefore, the president of the ECtHR could state with satisfaction at the beginning of 2003, "[t]o adapt the phrase so often used in relation to this Court, it is no longer a victim of its own success."[20]

18 In: Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the Control system of the Convention, p. 7, para. 35. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f.

19 Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms amending the Control system of the Convention, p. 8, para. 37. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f (last accessed 28 March 2018).

20 Speech given by Mr Dean Spielmann, president of the ECtHR, on the Occasion of the Opening of the Judicial Year, 25 January 2013. Annual Report of the ECJ, 2013, Council of Europe, European Court of Human Rights, 2013, p. 26. Available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-06/qdag14001enc.pdf (last accessed 28 March 2018).

Also, the last Annual Report of the European Court of Human Rights (2016) states that "[t]he single judge cases have been virtually eliminated and this is a welcome development… ."[21]

## 3. Regional Protection of Human Rights in the Americas

With the end of military dictatorships in a number of South and Central American countries, it became possible for an Inter-American Human Rights system to start working at the beginning of the 1980s. Its main goal was to provide an ideological framework for a coalition against communist-inspired threats and to defend effective political democracy. In April 1948, the American states adopted a Charter of the Organization of American States and established the Organization of American States (OAS), referring to Article 52 of the UN Charter. The Charter inter alia contains some articles related to fundamental human rights. In the same year (and even before the approval of the UN Universal Declaration of Human Rights on December 1948), the American Declaration on the Rights and Duties of Man was adopted by American states as an impetus for the creation of the regional American system of human rights. A set of civil, political, economic, social and cultural rights are embodied in the declaration. Among other instruments of the American normative human rights system, one can mention the American Convention on Human Rights (1969), complemented by two protocols: the Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights (1988), and the Protocol to the American Convention on Human Rights to abolish the Death Penalty (1990). The American Convention contains mainly civil and political rights, except in Article 2 and in one general provision on economic, social and cultural rights.

A number of specialized international conventions related to torture, violence against women, and the forced abductions of people were signed and ratified during the 1990s by the member states of the OAS. By the adoption of these international instruments, the American states have created the Inter-American system for the promotion and protection of human rights.

As regards the Inter-American institutional structure, the Inter-American Commission on Human Rights (established 1959) and the Inter-American Court of Human Rights (established 1979), are the main institutions in charge of the promotion and protection of human rights within the Americas. Both bodies can review individual complaints concerning alleged human rights violations and may issue emergency protective measures. As for the Commission, it is one of the main organs of the OAS and its function is to promote the observance and protection of human rights. In order to fulfil this function, it is entitled to make recommendations to member states, publish reports, and since 1966 it has acquired the competence to examine individual petitions for alleged violations of human

21 Annual Report of the ECJ, 2017, Council of Europe, European Court of Human Rights, 2017, p. 7. Available at: www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf (last accessed 28 March 2018).



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rights. All such petitions must, however, pass through the Commission before being submitted to the Court.

One of the specifics of the Inter-American system lies in the fact that the Commission deals with individual complaints through two legal procedures. The first of them is based on the OAS Charter and on the American Declaration on the Rights and Duties of Man, and it is binding for all member states of OAS, irrespective of their ratification of the American Convention on Human Rights. This individual complaint procedure based on the OAS Charter results in a conclusion and/or recommendation from the Commission, which does not have the character of a legally binding decision. The second procedure concerns the states that ratified the American Convention on Human Rights. According to the relevant article of the Convention (Article 44), any person or group of persons or any NGO may lodge a complaint objecting to an alleged violation of the American Convention to its state party. The complainant must exhaust all domestic remedies and the complaint must be lodged within 6 months after the final decision of the domestic proceeding. The Commission as a 'filter body' decides on the admissibility of each complaint and prepares a report on the facts of the case and its conclusion. Only the state concerned and the Commission can decide to refer the case to the Court, an individual does not have this right.[22]

Direct participation, pleadings, motions and evidence in the Court Proceedings were granted to alleged victims and/or their representatives in 2001 with the amended Rule of Procedure of the Court, although individuals still have no right to bring their case directly to the Court. (Article 61 of the American Convention on Human Rights).[23] The court judgment can decide on the violation of the right or freedom protected by the Convention. Its judgment shall be final and subject to appeal, and the states parties to the American Convention are obliged to comply with the judgments in any case to which they are parties. Apart from complaints procedures, the Inter-American Court performs an evolutionary interpretation of the American Convention, following the idea that human rights treaties

22 A similar model existed in the European System until 1998, until the moment of the entry into force of Protocol No. 11 of the European Convention on Human Rights and Fundamental Freedoms. Protocol No. 11 established the European Court on Human Rights as a full-time, permanent body, overtaking the task of the former Commission, which was abolished. The right to direct access of the individuals to the ECHR has been granted as compulsory.

23 For more details on the Inter-American System of Human Rights, *see* European Parliament, Directorate General for External Policies-Policy Department, 'The Role of Regional Human Rights Mechanisms', Doc. EXPO/B/DROI/2009, 25, pp. 75-81.

are living instruments whose interpretation must take into account changes over time and current conditions.[24]

## 4. Regional Protection of Human Rights in Africa

It is useful to note at the outset that some of the main goals of the African system of human rights included safeguarding independence, collective security, territorial integrity and the promotion of solidarity among African states. The comparison of its system with other regions confirms that Africa became the third region (continent) after Europe and the Americas to put in place a pan-regional intergovernmental system for human rights protection. It is, however, to be noted that there is a great difference between the scope of the normative acts dealing with human rights in Africa, on the one hand, and a real possibility to ask for their judicial protection before pan-regional or sub-regional judicial bodies, on the other.

The main source of the normative nature is represented by the African Charter on Human and Peoples' Rights (1981), which was gradually completed by other pan-regional regulations, including the Charter of the Rights and Welfare of the Child (1990), the Protocol to the African Charter on Human Rights on the Rights of Women in Africa (2003), etc. Apart from traditional individual human rights, the African Charter recognizes some collective rights and so-called third generation rights, and within the legal traditions of the continent special responsibility is borne by every person to his family, community and mankind. Also, there are a number of instances where the African regional and sub-regional treaties make specific reference to human rights, referring mainly to the African Charter of Human Rights either as an objective or as a fundamental principle. In this context, it can be concluded that

24 Inter-American Court of Human Rights, Advisory Opinion OC-16/99, Series A. No. 16, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, 1 October 1999: "115. The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.

114. This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989), 79, and the European Court of Human Rights, in *Tyrer v. United Kingdom* (1978), 80 *Marckx v. Belgium* (1979), 81 *Loizidou v. Turkey* (1995), have held that human rights treaties are living instruments, whose interpretation must consider the changes over time and present-day conditions."



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> [t]here exists a clear conceptual linkage between regional economic trade rules in Africa and human rights rules in Africa. In particular, specific reference to the provisions of the African Charter implies that all three generations of human rights are considered fundamental in the formulation and implementation of trade rules.[25]

As regards the institutional structure for the protection of human rights, its foundation starts with the African Commission of Human and Peoples' Rights established by the African Charter in order "...to promote human and peoples' rights and ensure their protection in Africa" (Article 30 ). Its mandate and function as well as procedures, however, confirm that the intention of its parties has been concentrated mainly on the different kinds of promotion of human rights in Africa at the level of states and among states. Although the Commission may also decide on the complaints (communications) of individuals, organizations and states concerning alleged violations of the African Charter by the member states of the AU, it is not competent to render binding decisions.[26] Its recommendations are not binding, and there is no effective mechanism for their enforcement. Since 1987, when the African Commission was created,

> [i]t has been severely criticized as a toothless bulldog that only barks but cannot bite because the decisions of the Commission are not binding on State Parties. Secondly, African States are still tied to the apron string of the much-vaunted principles of state sovereignty and reserve domain.[27]

The first Pan-African judicial body was established by the Constitutive Act of the African Union (Art.18-2000)[28] and their 'functional' legal basis lies in the Protocol to the Court of Justice of the African Union (2003). Without going into details, it is sufficient to say that this Court has no relevance for the effective protection of human rights in Africa because its competences are formulated too generally and are concentrated mainly on the disputes related to the interpretation and application of different legal regulations (Constitutive Act of the AU, AU Treaties, all subsidiary legal instruments adopted within the Union, any questions of international law, all acts, decisions regulations and directive of the organs of the Union, Article 19 of the Protocol).

The first judicial body vested with the charge to protect human rights in Africa was created by the Protocol to the African Charter on Human and Peoples'

25 S. F. Musungu, 'Economic Integration and Human Rights in Africa: A Comment on Conceptual Linkage', *African Human Rights Journal*, Vol. 3, No. 1, 2003, p. 92.

26 According to its Preamble, the parties of the African Charter take into consideration '[t]he virtues of their historical tradition and the values of African civilisation which should inspire and characterize their reflection on the concept of human and peoples rights'. Available at: www.achpr.org/files/instruments/achpr/banjul_charter.pdf (last accessed 28 March 2018).

27 T. Fwa Yerima, 'Comparative Evaluation of the Challenges of African Regional Human Rights Courts', *Journal of Politics and Law*, Vol. 4, No. 2, 2011, p. 120.

28 Available at: www.achpr.org/files/instruments/au-constitutive-act/au_act_2000_eng.pdf (last accessed 28 March 2018).

Rights on the Establishment of the African Court on Human Rights and People's Rights (1998). The Protocol came into force in 2004, and the first case was decided in 2009.[29]

To reach its main mandate, the Court's jurisdiction is extended to all cases and disputes submitted to it concerning the interpretation and application of the African Charter; this Protocol and other Human Rights instruments are ratified by the states (Article 3). The Court is entrusted with the power to provide advisory opinions on any legal matters relating to the Charter or any relevant human rights instruments (Article 4). With respect to the access to the Court, it is available to the Commission, the state party against which the Commission lodges a complaint, and the African Intergovernmental Organizations (Article 5). A complaint concerning an alleged violation of the Human Rights Charter can be brought before Court either by the state whose citizen was a victim of such a violation or directly by the persons that suffered the violation, provided that the state party at the time of ratification of the Protocol makes a declaration accepting the competence of the Court to receive cases from individuals (Article 5, para. 3 of the Protocol). To exercise these competences properly, the Court should complement and reinforce the protective mandate and functions of the African Commission and enhance its efficiency. Thus, the entire responsibility of human rights protection is really imposed on the African Commission.

As a result of this development, two distinct Pan-African courts were established in a relatively short period (2000-2005). Against this promising background, there has been a surprising further development in the fates of these courts. Despite this fact, or perhaps because of this fact, at the initiative of the president of AU Conference (Nigerian President of the Conference Mr. Obasanjo), the heads of states and governments decided in July 2004 to merge the African Court of Human Rights and Peoples' Rights with the African Court of Justice. The formal Protocol on the statute of a merged African Court of Justice and Human Rights was adopted in July 2008. The reason for this decision was of an economic nature because the African Union could not afford two distinct judicial institutions. In January 2005, the heads of states then decided to activate the African Court of Human Rights and Peoples' Rights regardless of the previous decisions to merge. Until the Protocol on the African Court on Human Rights and Justice comes into force (ratification of 15 states parties is required), the African Court on Human and People's Rights will continue to exist in its full and complete form. Article 2 of the Statute of the African Court of Justice and Human Rights[30] confirms that the court shall be the main judicial organ of the African Union. According to one of its goals, it should "[c]omplement and strengthen the mission of African Commission on Human and Peoples' Rights as well as the African Committee of Experts on the Rights and Welfare of the Child."

29 Available at: www.achpr.org/files/instruments/courtestablishment/achpr_instr_proto_court_eng.pdf (last accessed 28 March 2018).

30 Protocol on the Statute of the African Court of Justice and Human Rights. Available at: www.peaceau.org/uploads/protocol-statute-african-court-justice-and-human-rights-en.pdf (last accessed 28 March 2018).


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As regards its institutional structure, the merged Court has two sections: the General Affairs Section and the Human Rights Section. The first of them includes all cases and legal disputes relating to the interpretation and application of different legal regulations (the Constitutive Act of the AU; AU Treaties; all subsidiary legal instruments adopted within the Union; the interpretation and application of the African Charter of Human Rights; the Charter on the Rights and Welfare of the Child; any questions of international law; all acts and decisions, regulations and directives of the organs of the Union; Article 28 of the Protocol).

The entities entitled to bring cases to the Court for the interpretation and application of legal instruments are: the states parties of the Protocol, the Assembly, the Parliament and other organs of the Union, as well as staff members of the African Union (Article 29). Within the Human Rights section, the Court deals with cases of any alleged violation of the rights guaranteed by the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human Rights on the Rights of Women in Africa. Cases can be referred to the Court by states parties of the Protocol, the African Commission on Human and People Rights, African Intergovernmental Organizations, the African National Human Rights Institution and the African Committee of Experts on the Rights and Welfare of the Child. As regards individuals and relevant NGOs (accredited to the AU), they have access to the Court only when the relevant state at the time of signature, ratification, accession or at any time thereafter make the declaration accepting the competence of the court to receive cases submitted by individuals or relevant NGOs (Articles 8 and 30 of the Protocol).

From the brief analysis of the Pan-African judicial bodies carried out above, the following conclusion can be made. First of all, concerns remain regarding the denial of the individual's direct access to the Courts, which confirms the lack of effective legal protection of human rights in Africa that would be available to victims of the alleged violations of human rights. In this context, it is pertinent to share a current opinion:

> [o]nly a few African states are willing to make Special Declarations allowing individuals to have direct access to the Court. The implication of this is that individuals and NGOs of states ratified the Protocol, but are yet to make a declaration that would allow access to the Court (and later the merged Court) through the African Commission and the State itself. A true denial of direct access to the individual is a 'step' back in access to justice for all in Africa.[31]

If the states will be hesitant in making special declarations, the African system will be similar to that of the Inter-American system[32] because the Court will receive most of the cases from the Commission. This situation is not desirable

31 Fwa Yerima, 2011, p. 123.

32 Within the Inter-American system, all communications to the Inter-American Court of Human Rights must pass through the Inter-American Commission before being submitted to the Court. The Commission decides on the admissibility of the communication and prepares report on the facts of the case and its own conclusion.

because it deprives the Court of its purpose, which was to grant individuals and NGOs an effective judicial remedy for the protection of their human rights.

Provided conditions for the proceedings on the human rights Court related to the African Human Rights Charter have been met, some legal problems can still arise. First and foremost, problems result from the unique characteristic of the Charter because it protects not only civil and political rights (following the example of other regional human rights conventions) but also the social, economic and cultural rights. In addition to these individual rights, the Charter also recognizes collective or group rights or peoples' rights. The African Charter guarantees socio-economic rights and gives them the same status as civil and political rights. The states parties in the Preamble of the Charter state that

> [c]ivil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.

The main difficulty results from the fact that social and economic rights are normally not justiciable, neither before national nor before international courts, due to their specific 'programmatic' nature and their dependence on the material and financial level of the national economy of each state.[33] International practice also confirms that only the reporting (and not complaints) procedure is considered the most pertinent for the area of social and economic rights. It is, therefore, possible to agree with the following opinion,

> "[t]he yardstick of the African Human Rights Court will adopt to determine whether or not a state has violated socio-economic rights (and) will be more problematic because African states, like other countries, have different economic policies. It will be difficult for the court to decide that such violations have occurred where resources are not available. It is therefore worth noting that socio-economic rights in the African Charter is to be realized progressively, due to the underdevelopment of African countries."[34]

Another problem lies with the judicial enforcement of socio-economic rights before domestic courts in Africa.[35] Additionally, critical opinion with respect to the African Charter concerns rather broad 'clawback clauses' related to civil and political rights (Articles 6, 8, 9) because it is sufficient that restrictions of these rights will be in accordance with the national legal orders (without necessity to identify some of the reasons of public interest – e.g. national security, public

33 In the International Covenant of Economic, Social and Cultural Rights (1966), each state party merely commits "to undertake steps … to the maximum of its available resource with a view to achieving progressively the full realisation of the rights recognized."

34 Ch. Mbazita, 'Enforcing the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights: Twenty Years of Redundancy, Progression and Significant Strides', *African Human Rights Journal*, Vol. 6, No. 2, p. 361.

35 Fwa Yerima, 2011, p. 121.



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safety, public health, public order, etc.). Such limitations have been criticized because they subject rights guaranteed by the Charter to domestic laws, thus, weakening their content, scope and effectivity. This approach permits the national laws of African states to take precedence over generally recognized human rights standards embodied in the sources of general international law. This is one of the reasons for emphasizing the need to review the text of the Charter in order to reflect the current international human rights standards more adequately.

The above-mentioned facts, confirming a certain weakness of the African Union's Human Rights system, contributed to the granting of human rights jurisdiction to the sub-regional ECOWAS Court and to the EACJ, and the SADC Court's willingness to entertain human rights cases invoking the vague 'good governance' provisions. This situation, however, generates another problem of a procedural nature, whereby

> [a] brief examination of these Treaties and of the African Court of Human Rights Court Protocol clearly indicate the existence of a rich zone of overlap, potential competition and possible complementarity. It also presents rich possibilities of forum shopping in the enforcement of regional human rights.[36]

With respect to the ECOWAS, its primary function still remains the examination of disputes arising from the interpretation and application of the ECOWAS treaty. Its revised version, however, pointed out that the respect, promotion and protection of human rights of the African Charter remains one of the fundamental principles of the Treaty. The Supplementary Protocol to the Protocol of the Community (ECOWAS), Court of Justice (2005),[37] greatly expands its jurisdiction because "[t]he court has jurisdiction to determine a case of violation of human rights that occurs in any Member States" (Article 5 para. 4), allowing the individual to apply for the relief of a violation of their human rights (Article 9 para. 4), provided that such application is not anonymous and not made while some matter is pending before another international court. Unlike Europe and the Americas' systems of human rights, there is no obligation for individuals to first exhaust local remedies before bringing the cases to the ECOWAS Court.

The positive aspects of this regulation consist of the fact that the ECOWAS Court of Justice acquired compulsory jurisdiction and that individuals have been granted (for the first time) the right to direct access to the judicial body charged with the protection of human rights on the sub-regional basis. Although it makes no direct reference to the African Charter, the SADC Treaty also commits members to the fundamental principles of human rights, democracy and rule of law. Similarly, the COMESA treaty also established the recognition, promotion and

36 C. A. Odinkalu, 'Contemporality, Competition or Contradiction: The Relationship between the African Court of Human and Peoples' Rights and Regional Economic Court in East and South Africa', Paper Presented at a Conference of East and Southern States, Botswana, 2003, p. 21.

37 ECOWAS Court of Justice was established in 1995 being operational since 2001. Supplementary Protocol, Doc. A/SP.1/01/05, January 2005.

protection of human rights as a fundamental principle of the system in addition to liberty, fundamental freedoms and rule of law, and similar provisions that may be identified also within the EAC Treaty.

## 5. The Emerging Regional Human Rights Protection of Arab States

The Charter of the League of Arab States (hereinafter the LAS, Charter) was adopted in 1945 by seven states, and today the LAS represents one of the oldest regional organizations founded before the UN and before the end of World War II. Taking into consideration the specificity of the international and regional situation in the middle of the 1940s, there is, however, no mention of human rights in the Charter, and it established neither a non-judicial institution for the protection of human rights, nor a judicial body. The first regional instrument that was related to human rights was represented by the Arab Charter of Human Rights (1994), but it had a number of problematic provisions because it does not meet international norms and standards (the application of the death penalty to children, the unacceptable treatment of women and non-Arab citizens).[38]

One of the main weaknesses of the Charter lies in the lack of any procedural human rights mechanisms. Under the increasing pressure of the criticism towards these formulations and common efforts of the representatives of different NGOs – as well as the gradually changing approaches of the member states of LAS – a new version of the Arab Charter of Human Rights was adopted in 2004 in Tunisia.[39] A new 'modern' version of the Arab Charter contains the following four main categories of human rights: traditional individual rights (right to life, right to be free from slavery, interdiction of inhuman and degrading treatment, etc. – first category); rights related to judicial proceeding (the equality of all persons before the law, the rights to due process and a fair trial – second category); civil and political rights (freedom of movement, respect for private and family life, the right of private property, the right to information, freedom of opinion, etc. – third category); and economic, social and cultural rights (right to work, right to form trade unions, right to social protection and education etc. – fourth category).

The new and progressive articles of the Arab Charter confirm equality between men and women in the Arab World (Article 3 para. 3), protection of children's rights (Article 34 para. 3) and the rights of handicapped people (Article 40).[40] But unlike its equivalent in Africa, Europe and the Americas, the Arab Charter has no court to interpret and enforce it, therefore it remains without any real value for human rights protection. Another international instrument 'completing' the Arab normative system was the Arab Declaration on the Rights of the Child (1983).

38 M. Amin Al-Midani, 'The League of Arab States and the Arab Charter on Human Rights', available at: https://www.acihl.org/articles.htm?article_id=6 (last accessed 28 March 2018).

39 Arab Charter of Human Rights entered into force in 2008.

40 Amin Al-Midani, 2018.


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As regards the regional institutional structure of human rights protection, it is relatively exiguous and does not provide effective remedies for the victims of the alleged violations of human rights in Arab states, as well as not contributing effectively to improving the standards of human rights protection. There are some factors that led to this not very optimistic conclusion. Among the first to be mentioned is the nature and competences of the bodies entrusted with the power to deal with human rights issues. Despite the Arab Charter establishing an Arab-Human Rights Committee (Article 45), its system is concentrated on the monitoring of the compliance of states with their obligations issuing from the Arab Charter. The Committee receives a periodic report (every third year) from each state party, but a state party can make neither individual nor state petitions to the Committee if there is reasonable suspicion of an alleged violation of any right guaranteed by the Charter. After analysing the concrete report, the Committee prepares a non-binding recommendation as deemed appropriate. The Committee, however, lacks the mandate and competencies to receive and adjudicate individual complaints, to receive and consider alternative reports, and to address urgent human rights situations in the LAS member states. The practice confirms that, as in other fields, a lot more could be done to enhance the protection mandate of the Committee; namely, in terms of developing expertise, interpreting the provisions of the Arab Charter and developing a proper jurisprudence that could be used by judicial bodies at the national levels of member states.

The member states of the LAS have, therefore, attempted to improve the human rights situation through the first Arab regional judicial body. In September 2014, a ministerial meeting of the LAS approved the statutes of a future Arab Court for Human Rights (hereinafter the Court).[41] According to its Statutes, the Arab Court of Human Rights is an independent Arab judicial organ, whose task is to reinforce the desire of states parties to implement their obligations regarding human rights and freedoms and help to achieve the purposes and objectives of the Arab Charter on Human Rights. It is worth noting that from the moment that the Statutes were approved, the Court has been subjected to criticism from various sources and levels. The prominent Arab lawyer and war crimes expert Cherif Bassiouni dismissed the court as being little more than a 'Potemkin Tribunal', and according to another opinion its author is not sure "[w]hether the court is likely to be a part of the human rights solution in the Arab-World or part of the problem."[42] The jurisdiction of the court is formulated in a general way, referring to

> [a]ll suits and conflicts resulting from the implementation and interpretation of the Arab Charter of Human Rights or any other Arab Convention in the field of human rights involving the member state. (Article 16)

41 English Version of the Statute of the Arab Court of Human Rights. Available at: https://www.acihl.org/texts.htm?article_id=44&lang=en-GB (last accessed 28 March 2018).

42 J. Stork, 'New Arab Human Rights Court is Doomed from the Start', *International Business Times, Human Rights Watch*, November 2014, pp. 1-5. Available at: https://www.hrw.org/news/2014/11/26/new-arab-human-rights-court-doomed-start (last accessed 28 March 2018).

As regards the admissibility of a case, the requirements demand: the exhaustion of the local remedies, only one jurisdiction of a regional human rights court, resulting from a ban to bring the same case before another regional human rights court, and a 6-month period for bringing the case after a final decision of the domestic court (Article 18).

With respect to the access of the Court, the state parties have chosen the model that is most unfavourable for the real judicial protection of human rights. Article 19 of the Statutes restricts access to the state party, whereby citizens who claim to be victims of human rights violation have the right to access the Court provided that both the claimant state and the defendant state are parties to these Statutes and to NGOs that are accredited and working in the field of human rights in the state whose subject claims to be a victim of human rights violations. It must be noted that decades of experience of existing human rights courts and UN human rights bodies, typically for diplomatic and political reasons, almost never make use of inter-state complaints procedures regarding human rights issues. By denying individual victims the right to have direct recourse to the Court, the Statutes of the Arab Court of Human Rights defeat the very purpose and *raison d'être* of a regional human rights court.[43]

## 6. Human Rights Protection in Asia-Pacific

Unlike Europe, Africa and the Americas, Asia-Pacific remains the only region without a specific pan-regional human rights treaty and a judicial and/or non-judicial mechanism for the promotion and protection of human rights. During the last quarter of the twentieth century, progress was achieved on the sub-regional level, as some regional entities were established with greater or lesser emphasis on human rights. A few mentionable ones are, for example, the South Asian Association for Regional Cooperation (SAARC-1985), which adopted the Social Charter, including the protection of children and vulnerable groups, and the Pacific Island Forum (PIF-1971), which also supports the ideas of promoting human rights. The most active one in the field of human rights was undoubtedly the ASEAN, which adopted various non-legally binding declarations related to human rights in the first decade after the turn of the millennium, including: the Declaration concerning the elimination of violence against women in the ASEAN region (2004), the Declaration against trafficking of persons particularly women and children (2004), and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007). The first attempt at a precise 'codification' of human rights was represented by the ASEAN Human Rights Declaration, adopted in November 2012, representing sui generis "[a] road map for regional human rights development."[44]

43 'The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court', Publication of the International Commission of Jurists, 2015, pp. 5-6.

44 Available at: www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf (last accessed 28 March 2018).



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It is, however, pertinent to note that the adoption of these declarations has had mainly a symbolic value and reflected only the intention of Asian states to improve the human rights situation in the region rather than accept any binding obligations in this area. The protection of human rights is, though, embodied among one of the purposes of the ASEAN Charter in order "[t]o promote and protect human rights and fundamental freedoms with due regards to the rights and responsibilities of the members states of ASEAN" along with democracy, rule of law and good governance (Article 1 para. 7 of the Charter).

As regards institutionalization in the area of human rights protection, at this moment it is possible to identify mainly the ASEAN Intergovernmental Commission on Human Rights (AICHR,) established in 2009 on the basis of Article 14 of the ASEAN Charter.[45] The ASEAN Foreign Ministers endorsed its Terms of Reference in July 2009 and October 2010, and the latter is recognized as the official 'date of birth' of the AICHR. The Terms of Reference limit the Commission's role (as an intergovernmental body forming an integral part of the ASEAN organizational structure) to the promotion and protection of human rights as a consultative body of the ASEAN (Article 3 of the Terms of Reference) without binding powers.

In order to comply with its main task, the AICHR is empowered *inter alia* to develop strategies for the promotion and protection of human rights and fundamental freedoms, to develop the ASEAN Human Rights Declaration, to provide the ASEAN with advisory and technical assistance on human rights, to develop common approaches and positions on human rights matters, etc. Its decision-making is by consensus. The mandate of the AICHR, however, does not contain an explicit provision for receiving individual complaints of human rights violations.[46] The scope and specificities of its mandate today confirm its position as an overreaching body mainly for the promotion of human rights in the ASEAN.

It should be noted that the institutional structure of the ASEAN related to human rights has been gradually completed by two sectoral bodies: the ASEAN Commission on the Rights of Women and Children (ACWI-2010) and the ASEAN Committee on Migrant Workers (ACMW-2007). Like the AICHR, neither the ACWI nor the ACMW has a specific mandate to receive and investigate complaints of human rights violations from women, children or migrant workers.

45 Article 14 of the ASEAN Charter states that: '1) In conformity with the purposes and principles of ASEAN Charter relating to promotion and protection of human rights and fundamental freedoms the ASEAN shall establish an ASEAN human rights body. 2) This ASEAN human rights body shall operate in accordance with the Terms of Reference to be determined by the ASEAN Foreign Ministers Meeting.'

46 In March 2012 human rights advocates attempted to bring some complaints of human rights violation to the AICHR but they were refused because the Commission had neither competence nor any other mechanism to receive individual complaints. Complaints are now submitted to the AICHR via the ASEAN Secretariat and the Secretariat passes them on to the AICHR Chair. The Chair is consequently responsible for circulation the complaints among the AICHR members and the discussion of complaints takes place during a closed meeting. So far the AICHR has not taken any public action in regard to any alleged violation of human right undertaken by an individual complainant.

Finally, a growing informal ASEAN network of human rights currently includes various civil society groupings, NGOs and national coalitions on human rights in some of the member states, etc.[47]

This brief institutional and normative overview confirms that the ASEAN approach to human rights is clearly different from the regional systems in Europe, the Americas and Africa highlighted above. These systems are based on the key instruments (including the treaties with shorter or longer lists of guaranteed human rights) and other legal instruments set up by the commissions and/or courts, which can pressure states to respect human rights. These systems clearly provide access and redress for individuals to a regional judicial or non-judicial body, where there are no remedies at the national level, and the regional courts render binding judgments, which can lead to compensation for injured persons. The existing ASEAN structure, however, does not contain these crucial elements and prefers the 'modest' gradualist process building of the ASEAN regional human rights system through a systematic step-by-step approach.

It should be, however, taken into account that a number of obstacles of different natures prevent the ASEAN and its bodies from building a strong and effective mechanism for the protection of human rights. Some of them result from the so-called Asian way of regionalism, which emphasizes the principles of independence, sovereignty, and non-interference in the internal affairs of ASEAN member states,[48] the principle of full consensus also for adopting the non-legal documents, the different attitudes of ASEAN member states towards human rights (Indonesia, the Philippines and Thailand are supporters, while Singapore and Malaysia belong to the 'wait-and see' category), the democratic deficit in some of the ASEAN member states, and the purely intergovernmental nature of the ASEAN. As regards other problems at the Asian level, the variety of languages, religions, political systems, ethnic compositions and differences in economic performance, as well as an absence of a similar cultural heritage prevents further attempts to build a Pan-Asian system of human rights.[49]

To sum up, the above allows one to conclude that there is a low probability for Asia to have a single, unified human rights system that enjoys a comprehensive membership of the states across the Asian region. However, it is not impossible to induce and encourage states to accept the regional human rights system by increasing the benefit of membership. The first step might be developing a human rights mechanism under the existing regional cooperative mechanism. It might be desirable to recognize human rights concerns as a crucial component of the overall cooperative mechanism by imposing an obligation such as accepting

47 'These measures symbolize the commitment of ASEAN leaders to recognizing human rights as an integral part of ASEAN's path towards a cohesive regional community' – Y. Wahyuningrum, *The ASEAN Intergovernmental Commission on Human Rights: Origins, Evolution and the Way Forward*, 2014, p. 6.

48 These principles are expressly confirmed in the AICH Terms of Reference (Article 2.1 paras. a and c). The ASEAN Intergovernmental Commission on Human Rights (Terms of Reference), ASEAN Secretariat, 2009, p. 4.

49 J. Kim, 'Development of Regional Human Rights Regime: Prospects for the Implication to Asia',*Human Rights and Creative Membership*, Vol. 58, 2009, p. 60.



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human rights standards and the undertaking of legal reforms for any states, who wish to remain a respected member.

## 7. Conclusions

The analysis of regional systems of human rights protection allows drawing a few conclusions concerning, first, the level and scope of the protection granted. The first conclusion confirms the uneven level of regional protection, which has specific reasons in various regions of the world. A general feature, however, is that the level and scope of the human rights protection is generally higher in regions with democratic states that have constitutional and rule of law regimes in which human rights are considered an integral part of their constitutional architecture. Such states, in principle, do not have problems with setting up and activities of regional systems of human rights protection and allow individuals direct access to the 'external' judicial authorities to protect them. In this regard, the previous obligation of exhausting domestic remedies cannot be considered to be a limitation of the right to direct access to an international judicial body. This applies, in particular, to the setting and part of the European and American systems of human rights protection. The current practice of other regions, however, confirms that the creation of the judicial systems for the protection of human rights within the context of concrete regions automatically does not guarantee the right of direct access to individuals. The regional particularities result from a set of various factors of a historic, religious, ethnic or eventually other nature. In the institutional system of the protection of human rights, these particularities manifested, e.g. in the optional (non-compulsory) jurisdiction of a regional judicial body. With respect to other procedural particularities, one can mention the preventive 'filtering' systems before non-judicial bodies (commissions) combined with their right to bring the case before a judicial body, the systems when different entities are entitled to bring the case before judicial body but the individual has no such right, etc. Nevertheless, the existing practice confirms the increasing role of the judicial segment of the regional human rights systems, as well as the strengthening of the position of persons within the proceeding before regional human rights judicial and non-judicial bodies. A specific factor in the developing world represents the concept of a 'strict' interpretation of sovereignty, preventing external control of the human rights respect before a regional judicial body on the basis of the individual complaint of a concerned person.

The above-mentioned specificities of regional systems are, however, without detriment to the widely accepted belief about their advantages and benefits. Regional systems allow for the possibility of regional values to be taken into account when human rights norms are defined (the so-called collective rights and duties to society within the African system), provided that the idea of the univer-

sality of human rights is not compromised.[50] It should be noted that regional systems are located closer to the individual human rights subjects and offer a more accessible forum in which individuals can pursue their cases, and where the states tend to show stronger political will to conform to decisions of regional human rights bodies. The existence of the regional human rights systems allows for proper enforcement mechanisms, which can better reflect local conditions than a global (universal) system of enforcement that is more effective than the system of sanctions of general international law.

50 'Countries from particular regions often have a shared interest in the protection of human rights in that part of the world and the advantage of proximity in terms of influencing each other's behaviour and ensuring compliance with common standards which the global systems does not have' – C. Heyns, D. Padilla & L. Zwaak, 'A Schematic Comparison of Regional Human Rights Systems: An Update', *African Human Rights Law Journal*, Vol. 3, 2003, p. 76.



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