19

Legitimacy, cost and benefit of international human rights monitoring

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Introduction

This contribution to the book in memory of my doctoral supervisor and mentor Professor Christof Heyns is a reflection on the current state of international human rights protection in light of two book chapters Christof and I wrote a decade ago, 'Toward minimum standards for regional human rights systems' (2011, *Minimum standards*)[1] and 'Universality and the growth of regional human rights systems' (2013, *Universality*).[2]

Despite spending the last decade of his career largely in the United Nations (UN) human rights system, Christof was a big proponent of regional human rights systems. He was often called upon as an expert to advise on new initiatives and was in particular actively engaged in expanding collaboration between the UN and regional systems.

In *Universality* we argued that 'the main argument for the legitimacy of human rights lies in its universality, reflected for example, in the name of the Universal Declaration of Human Rights'.[3] We highlighted the role of regional human rights systems in generating legitimacy by providing participation of various views in determining standards, institutions and procedures.

With regard to standards there are some regional variation. Since international human rights law is built around consensus, sometimes regional human rights law has gone further than what is the situation at the UN level. For example, the death penalty is outlawed by regional human rights law in Europe, while at UN level Human Rights Committee general comment 36 notes that where the death penalty has not been

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1 C Heyns and M Killander 'Towards minimum standards for regional human rights systems' in MH Arsanjani and others (eds) *Looking to the future - Essays on international law in honor of W Michael Reisman* (Brill Nijhoff 2011) 527-558.

2 C Heyns & M Killander 'Universality and the growth of regional human rights systems' in D Shelton (ed) *The Oxford handbook of international human rights law* (OUP 2013) 670-697.

3 Heyns & Killander (n 2) 670.

abolished it ' must not be applied except for the most serious crimes, and then only in the most exceptional cases and under the strictest limits.'[4] Child marriage is outlawed by regional human rights law in Africa,[5] while there is no similar treaty provisions in the UN human rights system.[6]

Institutions and procedures also differ. In *Minimum standards* we set out common features and best practices among the regional human rights systems of Africa, the Americas and Europe and applied the proposed minimum standards we came up with to the fledgling human rights system of the Association of South East Asian Nations (ASEAN) and the Arab League.

In this chapter I link the legitimacy discussion in *Universality* to themes we discussed in *Minimum standards,* such as membership of inter-governmental organisations (IGOs), membership of monitoring bodies, supervision of implementation of judgments and available resources. I also attempt to link resources allocation to a modest attempt at a cost and benefit analysis of international human rights monitoring.

While the focus in *Universality* and *Minimum standards* was regional protection of human rights, in this chapter I consider the UN human rights system in addition to the three main regional human rights systems under the African Union (AU), the Council of Europe (CoE) and the Organization of American States (OAS). The important role of the European Union (EU) and the Organisation of Security and Cooperation in Europe (OSCE), with a geographical scope that includes the former Soviet republics in Central Asia, and sub-regional organisations in Africa such as the Economic Community of West African States (ECOWAS) and the East African Community (EAC) must also be noted. Reference is made to the practices of these organisations where relevant in the chapter. Other regional organisations of relevance with fledgling human rights organs include the ASEAN with its Inter-Governmental Commission on Human Rights. Not all inter-governmental organisation are based on geographic proximity. The League of Arab States is a language-based organisation, which was established already in 1945 but only has a fledgling human rights system with a Arab Human Rights Committee and a yet to be established Arab Court of Human Rights, for which the League adopted a statute in 2014. There are also inter-governmental organisations which are largely built on colonial links such as the Commonwealth, mainly consisting of former British colonies,

4 UN Human Rights Committee General Comment 36 (2018) para 5.

5 African Charter on the Rights and Welfare of the Child art 21(2); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art 18.

6 However, see Joint general recommendation 31 of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on harmful practices (2014).

and the Francophonie. Finally we have religious-based organisations such as the Organisation of Islamic Cooperation, which established the Independent Permanent Human Rights Commission in 2011.

This chapter starts with an overview of participation of states in intergovernmental organisations before considering the composition of monitoring bodies. It then considers the role of monitoring bodies in interpreting human rights instruments before considering the issue of implementation and impact. It finally discusses financial resources allocated for international human rights monitoring.

State participation

International law is built on the consent of states. Without state participation no human rights system can function effectively. In *Minimum standards* we proposed that '[m]embership of the IGO should be conditioned upon observance of human rights and democracy criteria, in terms of the admission and possible expulsion of member states or lesser forms of sanction.'[7] In this section I explore membership criteria of the UN and regional IGOs as well as the potential sanctions IGOs may impose against member states. I also discuss how states have broken loose from the human rights supervisory system.

The UN has a near universal membership. According to article 4 of the UN Charter, membership of the organisation is open to 'peace-loving states which accept the obligations contained in the present Charter, and in the judgment of the Organization, are able and willing to carry out these obligations'. In practice widely recognised new states have automatically been granted UN membership, whether 'peace-loving' or not. A newly formed state may fail to gain membership of the UN because the state of which it used to form part maintains that it still form parts of its territory and other states are not interested in changing the *status quo*. Taiwan, Kosovo and Somaliland are examples of *de facto* states which are not members of the UN, nor of regional intergovernmental organisations. No state has ever been expelled from the UN.

The AU has a member, the Sahrawi Arab Democratic Republic (Western Sahara), which is not a member of the UN. When Western Sahara was admitted as a member of the OAU in 1984, Morocco left the continental organisation. Morocco was allowed to re-join the AU in 2017, even though Western Sahara remains occupied by Morocco. Although readmitting Morocco was questioned by some AU member states,[8] its readmittance is in line with the AU Constitutive Act having

7 Heyns & Killander (n 1) 544.

8 S Allison 'Analysis: Morocco's big African Union win comes at the expense of Western Sahara and South Africa', *Daily Maverick*, 31 January 2017, https://www.

no membership criteria apart from a state being African.[9] No state has ever been expelled from the OAU/AU, but suspension of membership due to non-payment of financial contributions and as a result of military coups have been common. Thus, in 2021 Mali, Guinea and Sudan were suspended from the AU following military coups.[10] Sudan had previously been suspended from the AU from June to September 2019, following the toppling of President al-Bashir.

The OAS Charter only provides for 'independence' as a criteria for membership. All states in the Americas are members of the OAS. However, article 9 of the OAS Charter provides for suspension of states where a democratically elected government has been overthrown by force. Honduras was suspended from the OAS from 2009 to 2011 following a military coup. A 1962 suspension of Cuba from the Organization of American States was revoked in 2009.[11]

Article 3 of the CoE Statute provides:

> Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

Membership is by invitation. Almost all European states are members, although Belarus and Kosovo have not been invited to join the organisation. In the case of Belarus, the failure of the state to live up to minimal protection of human rights standards, and its retention of the death penalty, is the reason for non-membership. Not all CoE member states have recognised Kosovo as an independent state. The CoE Committee of Ministers can suspend member states in cases of serious violations of article 3. A member state can then withdraw or the Committee of Ministers can expel the state if the violation persist. Greece withdrew its membership after a military coup in 1967 and was readmitted when democracy returned. No state has been suspended from the CoE but in 2014 the Parliamentary Assembly of the CoE suspended the voting rights of the Russian delegation.[12] The Russian reaction to the suspension was to not pay its fees to the CoE.[13]

dailymaverick.co.za/article/2017-01-31-analysis-moroccos-big-african-union-win-comes-at-the-expense-of-western-sahara-and-south-africa/ (accessed 23 November 2021).

9 AU Constitutive Act art 29.

10 P Fabricius 'African coups are making a comeback' *ISS Today* 15 October 2021 https://issafrica.org/iss-today/african-coups-are-making-a-comeback (accessed 23 November 2021).

11 Heyns & Killander (n 1) 531-532.

12 G Reilhac 'Council of Europe readmits Russia, five years after suspension over Crimea', *Reuters*, 25 June 2019, https://www.reuters.com/article/us-europe-rights-council-russia-idUSKCN1TQ1VL (accessed 24 November 2021).

13 Netherlands Helsiniki Committee 'Russia's Continuation in the Council of Europe: Challenges and Chances for Human Rights', 23 December 2019, https://www.nhc.nl/russia-and-council-of-europe-challenges-chances/ (accessed 23 November

The EU has an elaborate process for prospective members which include measuring progress in relation to rule of law developments before membership negotiations start. The EU may also take action against existing members that fail to adhere to agreed principles. In recent years there has been much discussion around the failure of Hungary and Poland to adhere to basic democratic principles. However, actions such as limiting economic transfers could backfire as sanctioned member states could in turn exercise their veto over important policy developments.

The Commonwealth is an intergovernmental organisation made up mainly of former British colonies. Four member states have been suspended: Nigeria (1995-99), Pakistan (1999-2004, 2007-2008), Fiji (2000-01, 2006-2014), and Zimbabwe (2002-03).[14] Zimbabwe left the Commonwealth in December 2003.

For the first time in its history, ASEAN took action against one of its member states when the southeast-Asian bloc banned the military leader of Myanmar from attending the ASEAN summit in October 2021 for failure of implementing a plan agreed with ASEAN leaders in April 2021 for a 'peaceful solution in the interests of the people' following the military coup in February 2021.[15]

Separate from their membership of the intergovernmental organisation, states become members of treaties adopted by the organisation, including human rights treaties and sign up to be monitored by human rights bodies established under such treaties. States have committed themselves to normative instruments more widely than to optional mechanisms put in place to monitor their implementation. For example, there are 173 state parties to the International Covenant on Civil and Political Rights (ICCPR), but only 116 states are party to the Optional Protocol to the ICCPR, which allows individuals to submit complaints to the Human Rights Committee alleging violations of the ICCPR after exhaustion of local remedies. North Korea sent a notification of withdrawal from the ICCPR in 1997, leading to the Human Rights Committee issuing general comment 26 stating that withdrawal from the ICCPR is not possible.[16] Following cases finding violations in relation to

2021).

14 Commonwealth Network 'Withdrawals and suspension' https://www.commonwealthofnations.org/commonwealth/commonwealth-membership/withdrawals-and-suspension/ (accessed 23 November 2021).

15 'Chairman's statement on the ASEAN leaders' meeting' (2021) https://asean.org/wp-content/uploads/Chairmans-Statement-on-ALM-Five-Point-Consensus-24-April-2021-FINAL-a-1.pdf (accessed 28 October 2021); 'ASEAN summit begins without Myanmar after top general barred https://www.aljazeera.com/news/2021/10/26/asean-summit-begins-without-myanmar-after-top-generals-exclusion (accessed 28 October 2021).

16 E Evatt 'Democratic People's Republic of Korea and the ICCPR: denunciation as an exercise of the right of self-defence' (1999) 5(1) *Australian Journal of Human Rights* 215; LR Helfer 'Terminating treaties' in DB Hollis (ed) *The Oxford guide to treaties*

the death penalty in Caribbean states by the Human Rights Committee Jamaica, withdrew from the First Optional Protocol to the ICCPR in 1997, Trinidad and Tobago in 1998 and Guyana in 1999. Trinidad and Tobago and Guyana immediately reacceded with reservations to the Optional Protocol while Jamaica remains a non-party to the Protocol, thus no longer allowing for individual complaints to the Human Rights Committee.[17]

All AU member states except Morocco have ratified the African Charter but only 32 have ratified the Protocol establishing the African human rights court.[18] Of these only eight states have made a declaration under article 34(6) of the Protocol allowing for direct access to the court, after exhaustion of local remedies, which still stands: Burkina Faso, The Gambia, Ghana, Guinea-Bissau, Malawi, Mali, Niger and Tunisia.[19] Four other states, Rwanda (2017), Tanzania (2019), Benin (2020) and Côte d'Ivoire (2020), have withdrawn their article 34(6) declarations. In its annual report for 2020 the African Court noted that '[n]ot depositing the Declaration, let alone, withdrawing therefrom, deprives citizens of the ability to seek effective remedies for alleged human rights violations.'[20] However, it should be noted that cases against Rwanda and Tanzania can be submitted to the East African Court of Justice (EACJ) and cases against Benin and Côte d'Ivoire to the Court of Justice of the Economic Community of West African States (ECCJ). Cases against six of the eight states which still have article 34(6) declarations in place can also be submitted to the ECOWAS Court. The EACJ and the ECCJ courts even provide access without exhaustion of local remedies, though access to the EACJ is limited in relation to human rights cases and there are a number of procedural hurdles that have been put in place to limit access. These hurdles were put in place as a result of backlash against decisions of the court.[21] However, as opposed to the tribunal of the Southern African Development Community (SADC), the EACJ survived.

The most extreme form of backlash is the dismantling of the existing system for human rights protection, thus removing international protection not only from individuals in countries withdrawing from the

(OUP 2012).

17 N Schiffrin 'Jamaica withdraws the right of individual petition under the International Covenant on Civil and Political Rights' (1998) 92 *American Journal of International Law* 563.

18 'The African Court in brief', https://www.african-court.org/wpafc/basic-information/ (accessed 13 November 2021).

19 As above.

20 Activity report of the African Court on Human and Peoples' Rights – 1 January – 31 December 2020 para 40 https://www.african-court.org/wpafc/activity-report-of-the-african-court-on-human-and-peoples-rights-1-january-31-december-2020/ (accessed 12 October 2021).

21 K Alter, JT Gathii & L Helfer 'Backlash against international courts in West, East and Southern Africa: causes and consequences' (2016) 27 *European Journal of International Law* 293.

system but for everyone belonging to the system. The only example of this so far is the abandonment of the SADC Tribunal in southern Africa following a campaign against it led by Zimbabwe.[22] It is noticeable that while the African Commission held that removing the Tribunal did not violate the African Charter,[23] national courts in South Africa and Tanzania has held that these two states violated national constitutional law in participating in the dismantling of the Tribunal.[24]

Only 23 of the 35 member states of the OAS are party to the American Convention. The United States, Canada and a number of Caribbean states have never ratified the Convention. Trinidad and Tobago withdrew from the Convention in 1998 and Venezuela in 2013. In 2019 Venezuela's opposition leader deposited an instrument of ratification which was accepted by the OAS but has been rejected by the Inter-American Court which considers Venezuela's withdrawal in 2013 still valid.[25] In 2020 the Inter-American Court delivered an advisory opinion dealing with withdrawal from the American Convention.[26] Other challenges to the Inter-American system include the reaction of Brazil following the Inter-American Commission's call on the country to stop the licensing process related to the Belo Monte dam hydroelectric project threatening indigenous communities. As a result of the Commission's decision, Brazil withdrew its ambassador to the OAS and stopped paying its dues to the organisation.[27] In November 2021 Nicaragua announced that it was withdrawing from the OAS following its criticism of the Nicaraguan elections.[28]

22 L Nathan 'The disbanding of the SADC Tribunal: a cautionary tale' (2013) 35 *Human Rights Quarterly* 870.

23 Communication 409/12, *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others*, adopted at the 54th Ordinary Session of the African Commission on Human and Peoples' Rights, 22 October to 5 November 2013.

24 *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018); *Tanganyika Law Society v The Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania & The Attorney General of the United Republic of Tanzania*, Miscellaneous Civil Cause No 23 of 2014, High Court of Tanzania at Dar es Salaam (4 June 2019).

25 S Steininger, 'Don't leave me this way: regulating treaty withdrawal in the Inter-American Human Rights System' (*EJIL: Talk!*, 5 March 2021) https://www.ejiltalk.org/dont-leave-me-this-way-regulating-treaty-withdrawal-in-the-inter-american-human-rights-system/ (accessed 24 October 2021).

26 Inter-American Court of Human Rights Advisory Opinion OC-26/20 of November 9, 2020 requested by the Republic of Colombia - The obligations in matters of human rights of a state that has denounced the American Convention on Human Rights and the Charter of the Organization of American States.

27 TM Antkowiak 'The Americas' in D Moeckli, S Shah & S Sivakumaran (eds) *International human rights law* (OUP 2018) 438.

28 'Nicaragua confirms withdrawal from OAS', MENAFN, 22 November 2021 https://menafn.com/1103226126/Panama-Nicaragua-confirms-withdrawal-from-OAS (accessed 22 November 2021).

Membership of monitoring bodies and staffing

In *Minimum standards* we suggested criteria for membership of regional human rights.[29] These criteria are equally applicable to UN human rights treaty bodies. We suggested a public, transparent system for appointment of members but this has not been adopted by regional human rights bodies nor in relation to UN treaty monitoring bodies. The national nomination procedure and the election by the Parliamentary Assembly of the CoE of judges of the European Court of Human Rights remains the most transparent procedure.[30] However, as discussed below, gender inequity remain a challenge for the European Court. ECOWAS in 2006 established an ECOWAS Judicial Council composed of Chief Justices of the member states, which recommends candidates for appointment to the ECCJ to the Authority.[31] However, the nomination process for membership of the African Commission and African Court lacks transparency and interest from member states to nominate members.[32] Boeglin commenting on the election of new members of the Inter-American Court in 2021 noted:[33]

> One might assume that the choice of persons to be appointed to the highest human rights body in the region would be subject to careful selection, in order to find the most suitable people, with the best preparation and commitment to the cause of human rights; and that in this selection process, a way would be sought to involve civil society organisations, universities and specialised human rights centres to present a final shortlist of candidates to the political decision-makers. Nothing could be further from the truth.

It is noticeable that the UN does not have any independence criteria for membership of monitoring bodies. Thus, for example, serving ambassadors are members of the UN Human Rights Committee.[34] In

29 Heyns and Killander (n 1) 545.

30 International Justice Resource Center 'ECtHR: Composition and election process', https://ijrcenter.org/wp-content/uploads/2020/07/ECtHR-EC-mini-guidefinal-1.pdf (accessed 22 November 2021). In 2010 the CoE established an Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights, see https://www.coe.int/en/web/dlapil/advisory-panel

31 Supplementary Protocol A/SP.2/06/ 06.

32 Amnesty International 'The State of African Regional Human Rights Bodies and Mechanisms 2019-2020' (2020) 14–16.

33 N Boeglin 'The election of new members of the Inter-American Court of Human Rights in 2021: some reflections', 27 October 2021, https://www.pressenza.com/2021/10/the-election-of-new-members-of-the-inter-american-court-of-human-rights-in-2021-some-reflections/ (accessed 30 November 2021).

34 'Human Rights Committee - Membership' https://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx (accessed 13 November 2021). The member from Egypt is a retired ambassador, the Ugandan member is the legal adviser to the permanent mission of Uganda to the UN, the Chilean member is a retired member of the Chilean foreign affairs department, the Togolese member is a senior civil servant in the ministry of justice of Togo.

contrast, government officials are precluded from serving as members of the African Commission or African Court. Also, '[m]embership on the InterAmerican Commission on Human Rights is incompatible with engaging in other functions that might affect the independence or impartiality of the member or the dignity or prestige of his post on the Commission.'[35]

Equitable regional representation is a concern in the UN bodies. When Christof joined the Human Rights Committee in 2017, it had five members from Africa, one member from the Asia Pacific Region, two members from Latin America and the Caribbean, eight members from the Western Europe and others group and one member from the Eastern Europe Group. Clearly there was a regional imbalance. This regional imbalance was not unique to this year or to this treaty monitoring body.

Members of monitoring bodies are elected based on nationality, not where a person is based. Thus, some members of UN treaty monitoring bodies and special procedure holders are based outside their country of nationality. This is more common in relation to nationals of states in the Global South who are based at institutions in the Global North, making the geographical distribution of membership of UN bodies even more skewed than it appears on paper.[36] This bias towards the Global North becomes even more apparent when one considers where members of monitoring bodies were educated, with educational institutions in the Global North featuring prominently in the CVs of members of monitoring bodies from the Global South.[37] While education in the Global North is a prominent feature also among members of the regional human rights bodies in Africa and the Americas, members of the regional monitoring bodies are generally based in their regions.

One membership criterion in terms of which some improvement has been made over the years is the number of women on monitoring bodies. The first woman on the UN Human Rights Committee, established in 1977, was elected in 1984, the second in 1986 and the

35 Statute of the Inter-American Commission on Human Rights art 8.

36 For example, in relation to thematic special rapporteur mandates with country of nationality in parenthesis: based in the US: right to Food (Lebanon), toxics (Chile), international solidarity (Nigeria), racism (Zambia), sexual orientation and gender identity (Costa Rica); based in Europe: SR on freedom of expression (Bangladesh); SR on peaceful assembly (Togo); SR religion (Maldives); based in Australia: SR on extrajudicial executions (Chile)

37 Postgraduate study destinations outside of their home countries for members of the Human Rights Committee: Canada (members from Guyana, Tunisia) France (members from Chile, Greece Paraguay, Tunisia), Germany (member from Chile) Netherlands (members from Albania, Morocco, Slovenia) Spain (member from Paraguay), Sweden (member from Canada), (Switzerland (members from Egypt, Morocco, Slovenia), UK (members from Ethiopia, Guyana), US (members from South Korea and Uganda). Only the members from France, Japan, Portugal, Spain and Togo only have education from their home countries. Most members from the Global South undertook no postgraduate studies in their home countries and none of them in any other country in the Global South.

third in 1992. By the time Christof joined the Committee in 2017, eight of 18 Committee members were women. This number has dropped to seven as of November 2021.[38]

As of November 2021, five of the seven Commissioners on the Inter-American Commission on Human Rights are women. From 2016 to 2021 only one of the seven judges of the Inter-American Court of Human Rights was a woman.[39] However, the gender composition of the Court was significantly improved in the election announced in November 2021 for four new judges taking office from 2022 to 2027.[40] Four of the seven judges will now be women. As of November 2021, only 14 of 47 judges on the European Court of Human Rights are women.[41] This is despite Parliamentary Assembly of the CoE not considering national nomination lists with only men.[42]

The inequity in relation to geographical balance in membership of monitoring bodies is also evident in the staffing of the UN. Recruitment is organised according to a system of 'desirable ranges' in which nationals of states which makes the largest contribution to the UN's general budget are the ones who hold most professional posts with the organisation.[43]

Interpretation

In *Minimum standards* we noted:[44]

> The human rights systems of a regional IGO, in respect of countries that are also subject to other international human rights supervisory systems, should be geared towards complementarity. The general rule should be in favour of deference to global standards as minimum requirements. A regional system should not consider cases that have already been decided on the global level.

Elsewhere I have considered the approach of regional human rights bodies to interpretation and how there is a movement towards convergence

38 'Human Rights Committee - Membership' (n 34); For an overview of the issue of gender representation in the UN human rights system see: Human Rights Council Advisory Committee, 'Current Levels of Representation of Women in Human Rights Organs and Mechanisms: Ensuring Gender Balance' (2021).

39 'Composiciones Corte Interamericana de Derechos Humanos 1979-2019' https://www.corteidh.or.cr/docs/composiciones/composiciones.pdf (accessed 30 November 2021).

40 'Verónica Gómez Elected as One of the Judges of the Inter-American Court of Human Rights (2022-2027)' (*GlobalCampus of Human Rights - GCHR*) https://gchumanrights.org/news-events/latest-news/news-detail-page/veronica-gomez-elected-as-one-of-the-judges-of-the-inter-american-court-of-human-rights-2022-2027.html (accessed 14 November 2021).

41 European Court of Human Rights 'Composition of the Court', https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c (accessed 22 November 2021).

42 International Justice Resource Center (n 30).

43 A/73/372/Add.3

44 Heyns & Killander (n 1) 544.

driven by institutional dialogue.[45] This dialogue clearly also involves the UN human rights system and national courts and quasi-judicial bodies such as national human rights institutions (NHRIs). However, it is noticeable that, while UN treaty monitoring bodies may be influenced by developments elsewhere, they very rarely explicitly refer to such developments in the 'views' adopted on individual communications. National engagement with the interpretation by international human rights bodies varies significantly and is of course not only relevant in a judicial setting but also in development of legislation, policy and institutional frameworks.

Arguably policy guidance provided by international human rights law, whether UN or regional, is more important than outcomes in individual cases, though as noted below even when it comes to individual relief, a favourable judgment is but one of the tools in the national mobilisation for change.

All states should seriously considered the guidance that monitoring bodies provides. The International Court of Justice in *Diallo* noted as follows in relation to the interpretation of the ICCPR by the Human Rights Committee:[46]

> Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments".
>
> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

The Court continued in relation to the relevance of the jurisprudence of the African Commission in relation to the interpretation of the African Charter on Human and Peoples' Rights:[47]

> Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.

45 M Killander 'Interpreting regional human rights treaties' (2010) 7 *Sur International Journal on Human Rights* 145.

46 *Affaire Ahmadou Sadio Diallo (République de Guinée c République Démocratique du Congo): arrêt du 30 novembre 2010* para 66.

47 Diallo (n 46) para 67.

Follow up on implementation

Implementation of judgments of international courts and decisions of quasi-judicial bodies remain a challenge. The 2020 Activity Report of the African Court notes:[48]

> One of the major challenges facing the Court at the moment is the perceived lack of cooperation from Member States of the African Union, in particular, in relation to the poor level of compliance with the decisions of the Court. Of the over 100 judgments and orders rendered by the Court, as at the time of writing this Report, only one State Party, that is, Burkina Faso, had fully complied with the judgments of the Court, one other State, the United Republic of Tanzania, has complied partially with some of the Judgments and orders against it, the Republic of Cote d'Ivoire has filed its compliance report but the Applicants dispute the facts, while the other States such as Benin, Libya and Rwanda, have not complied at all, with some openly indicating that they will not comply with the orders and judgments of the Court.

As noted by Stafford in relation to the European Court, '[i]f the system is to function effectively, judgments from the Strasbourg Court need to result not just in justice for the individual, but in the legal or practical reforms necessary to ensure that the same violation does not happen again in the society as a whole.'[49]

The CoE has an elaborate supervision procedure, with most judgments following the 'standard procedure' and an 'enhanced procedure' being 'used for cases requiring urgent individual measures or revealing important structural problems (in particular pilot-judgments) and for inter-state cases.'[50] It is notable that the CoE allocates a significant budget for effective implementation of the judgments of the European Court of Human Rights. For 2020, the budget for this was Euro 19,3 million compared to a budget of Euro 74 million of the operations of the European Court.[51] While serious concerns around implementation of judgments of the European Court remain, this focus on implementation and ensuring for example that compensation is paid out is one likely reason for the popularity of submitting cases to the Court.

48 African Court (n 20) para 37.

49 G Stafford 'The implementation of iudgments of the European Court of Human Rights: Worse than you think – part 2: The hole in the roof' (*EJIL: Talk!*, 8 October 2019) https://www.ejiltalk.org/the-implementation-of-judgments-of-the-european-court-of-human-rights-worse-than-you-think-part-2-the-hole-in-the-roof/ (accessed 23 October 2021).

50 'Supervision of execution of judgments of the European Court of Human Rights' (*Committee of Ministers*) https://www.coe.int/en/web/cm/execution-judgments (accessed 23 October 2021).

51 'Council of Europe Programme and Budget 2020-2021' https://rm.coe.int/1680994ffd (accessed 13 October 2021).

Similarly to the European Convention, the Protocol establishing the African Court on Human and Peoples' Rights provides that the AU Executive Council shall monitor the implementation of the Court's judgments. The African Court provides information on the implementation of judgments in its annual reports. However, the AU Executive Council seemingly has taken little action to ensure implementation, not even calling for compliance with the judgments of the courts in its annual adoption of the activity reports of the Commission since its decision on the 2017 Activity Report in 2018.[52] This silence contrasts with the Executive Council's call for the implementation of the African Commission decisions in its 2020 activity report.[53] However, a framework for implementation of the judgments of the African Court is currently being considered by the AU political bodies and the Court is set to establish a Compliance Monitoring Unit.[54]

In the Inter-American human rights system, the Court itself plays an important role in monitoring compliance with its judgments, while the political bodies of the OAS are not involved in ensuring compliance.[55]

Of course impact is much broader than compliance. For example, Palacios Zuloaga has shown in relation to the Inter-American Court 'how civil society organizations value the declarative justice provided by the Court, how they mobilize around human rights litigation and how adept they are at deploying rulings in such a way as to produce impact beyond compliance and even in the absence of any compliance at all.'[56] This is in line with the importance 'to harness the treaty system to domestic forces – "domestic constituencies" – that will ensure its realisation' as highlighted by Christof and Frans Viljoen in their study on the impact of the UN human rights treaty monitoring bodies.[57]

52 Decision on the Activity Report of the African Court on Human and Peoples' Rights, Doc EX.CL/1258(XXXVIII). The last time the Executive Council called for compliance with the judgments of the Court was when it adopted the 2017 Activity Report of the Court: Decision on the 2017 Activity Report of the African Court on Human and Peoples' Rights, Doc EX.CL/Dec.994(XXXII)Rev.1, para 9.

53 Decision on the Activity Report of the African Commission on Human and Peoples' Rights (ACHPR), Doc EX.CL/1259(XXXVIII), para 8.

54 African Court (n 20) para 43.

55 Inter-American Court of Human Rights 'Learn about the monitoring compliance with judgment' https://www.corteidh.or.cr/conozca_la_supervision.cfm?lang=en (accessed 23 November 2021).

56 P Palacios Zuloaga 'Judging Inter-American human rights: the riddle of compliance with the Inter-American Court of Human Rights' (2020) 42 *Human Rights Quarterly* 392.

57 C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (Kluwer Law 2002) 6.

Resources

One common criticism expressed by international human rights monitoring bodies is the slow pace of national judicial/quasi-judicial processes. This criticism is equally valid for the monitoring bodies themselves. For example, in October 2021, the African Commission published a decision delivered in March 2020 finding no violation in relation to political participation of refugees in elections in Zimbabwe.[58] The complaint had been submitted in 2012 and the Commission refers to no procedural hurdles after the submissions of the parties on the merits in 2015. Why it took another five years to decide the complaint and another year and a half to make it public remains a mystery, especially considering that the Commission has a modest case load. However, regrettably, the long time to decide the complaint is in line with the Commission's established practice.

The European Court is drowning in applications. In 2020 the Court received 41,700 applications, which were allocated for judicial decision and 39,190 decisions made.[59] A significant number of 14,150 applications were disposed of administratively. Pending decisions stood at 62,000 at the end of the year. In comparison, the Inter-American Court received 23 new contentious cases in 2020 leaving it with a balance of 48 cases to decide at the end of the year. The African Court received 40 contentious cases in 2020 and one request for an advisory opinion.[60] At the end of the year it had 210 contentious cases and two requests for advisory opinion pending before it.

The slow moving machinery of international human rights monitoring is not only evident in relation to petitions. State reporting is a procedure under the African and UN human rights systems. Under the African Charter a state should submit a report on steps it has taken to implement the provisions under the Charter every second year. Hardly surprising, no state has submitted reports according to this timeline. The reason the Commission can consider the reports relatively soon after they have been submitted is that states combine reports so that most states submit a report every 6 to 10 years, although six parties to the African Charter have never submitted a report.[61] State reporting also poses a challenge for the UN treaty monitoring bodies. To cope

58 Communication 430/12, *Gabriel Shumba and Others (represented by Zimbabwe Lawyers for Human Rights) v Zimbabwe*, adopted at the 27th extraordinary session, 19 February to 4 March 2020.

59 European Court of Human Rights, 'Analysis of Statistics 2020' (2020).

60 African Court (n 20) para 10.

61 African Commission on Human and Peoples' Rights 'State reports and concluding observations https://www.achpr.org/statereportsandconcludingobservations (accessed 30 November 2021).

most UN treaty monitoring bodies have adopted simplified reporting procedures where they request states to submit reports focusing on a specific list of issues and the Human Rights Committee has introduced a 'predictable review cycle … based on an eight-year cycle, which includes periods for the submission of reports and constructive dialogue with the Committee.'[62] Of course state reporting is not only a burden on the monitoring bodies but also on states with limited resources at their disposal.

Lack of resources is often singled out as the reason for the slow moving wheels of international justice, whether deciding on cases or considering state reports. One of the reasons for the resource constraint is the high cost of human resources for international human rights monitoring. This is linked to that international civil servants are more costly than most of their national equivalents. In the UN Secretariat the salaries of professional staff is determined according to the *Noblemaire* principle, that the salary of a UN professional staff member is set according to the highest pay level of a member state. This has so far been determined to be the federal civil service of the United States.[63] Remuneration in regional IGOs is similarly high compared to most national civil services.

With the exception of the judges of the European Court of Human Rights, members of monitoring bodies are generally not full time employees but are paid honoraria per day they are attending sessions.[64]

Comparing resources dedicated to human rights work between different IGOs is difficult. Here I will only provide a simplistic comparison between the regional courts based on the number of judgments delivered in 2020 and the budget provided for the respective court. The Inter-American Court delivered 23 judgments and had a budget of US$ 7,1 million, the African Court delivered 21 judgments (including one advisory opinion) with a budget of US$ 10,5 million (reduced from US$ 13,5 million US$ due to Covid-19) and the European Court delivered 872 judgments (381 chamber, 480 committee, 10 grand chamber, 1 advisory opinion) with a budget of 74 million Euros, corresponding to approximately US$ 85 million.[65] The cost per judgment was

62 Human Rights Committee 'The predictable review cycle' https://www.ohchr.org/EN/HRBodies/CCPR/Pages/PredictableReviewCycle.aspx (accessed 30 November 2021).

63 International Civil Service Commission, 'United Nations Common System of Salaries, Allowances and Benefits' (2021) 2 https://icsc.un.org/Resources/SAD/Booklets/sabeng.pdf (accessed 14 November 2021).

64 For example the honoraria per day for members of the Inter-American Commission and Court is US$ 300 per day. OAS 'Approved budget' http://www.oas.org/budget/2020/Approved Budget 2020.pdf (accessed 14 November 2021).

65 African Court (n 21) para 13 (judgments on jurisdiction, admissibility, merits, reparations and review); Inter-American Court *Annual Report 2020* 43 (19 judgments on preliminary objections, merits, reparations and costs; 4 judgments on interpretation); European Court of Human Rights *Annual Report 2020* 149. On

approximately US$ 10,000 for the European Court, US$ 300,000 for the Inter-American Court and US$ 500,000 for the African Court.

Of course there are many activities of the courts outside delivering substantive judgments. The number of judgments above leaves out both provisional measures decisions which is much more common at the Inter-American Court and African Court than the European Court and the extensive number of cases thrown out by the courts each year on jurisdiction and admissibility grounds. In 2020, the European Court struck out or declared inadmissible 36,261 applications.

In the African and European human rights systems less resources are provided for the wider mandates of the African Commission (6 million US$, compared to 13 million US$ for the African Court for 2020)[66] and the Council of Europe Commissioner of Human Rights (3,8 million Euro) than for the respective regional courts. The OAS on the other hand provides more resources for the Inter-American Commission than the Inter-American Court (5,3 million US$ for the Court and 10,6 million US$ for the Commission for 2020).[67] Despite this, the Inter-American Commission has experienced serious financial difficulties.[68]

Despite the seemingly high costs set out above, it is noticeable that the cost of the human rights mechanisms are relatively low compared to other aspects of the organisations. For 2020 the human rights work of the UN was allocated US$ 116,4 million,[69] or 3.7% of the UN budget. The 2020 budgets for the main regional IGOs were US$ 647,3 million for the AU, US$ 82,7 million for the OAS in 2020, and Euro 254 million for the CoE. The higher percentage allocated to the human rights bodies in the Inter-American system illustrates the more narrow mandate of the OAS as an IGO in the Americas compared to other regional IGOs. In the African context the political bodies have highlighted the importance that the human rights bodies are financed from internal resources. However, project funding by international donors remain common.

In *Minimum standards* we noted that '[t]he commissioners and judges should control the appointment of key staff.'[70] At its September 2020 meeting the Executive Council finally granted the African Commission 'the mandate to recruit its own critical staff with the assistance of the

the budgets see African Court (n 20) paras 23-24; OAS (n 64); CoE (n 51).

66 Amnesty International (n 32) 47.

67 OAS (n 64).

68 Antkowiak (n 27) 437.

69 UN Office of the High Commissioner for Human Rights 'OHCHRs funding and budget' https://www.ohchr.org/en/aboutus/pages/fundingbudget.aspx#:~:text=The%20initial%20regular%20budget%20appropriation,US%24105.6%20million%20in%202019 (accessed 17 December 2021).

70 Heyns & Killander (n 1) 545.

R10 Committee of Experts'.[71] In contrast, the OAS Secretary General in August 2020 refused to renew the contract of the Executive Secretary of the Inter-American Commission despite the Commission unanimously supporting an extension of his mandate.[72]

Conclusion

Legitimacy in the context of international organisations relates to how the organisation and its organs are viewed by government representatives, national courts, civil society and the general population of that state. Clearly not all of these would have the same views. However, the lack of even basic knowledge of the human rights systems on the part of most of these stakeholders may be a considerable legitimacy challenge. UN and regional human rights bodies are not well known beyond experts who are themselves engaged with the system. An exception is the European Court of Human Rights, which is well known among the general population of many European states, and among legal practitioners in particular. This level of knowledge may to some extent explain the big discrepancy in cases submitted to the European Court compared to other human rights bodies.

States' engagement with human rights bodies start with membership of intergovernmental organisations. Sanctions for failure to live up to membership criteria in relation to human rights are rare and mainly limited to military coups. A worrying trend is states disengaging with international human rights bodies following adverse decisions or criticism, with the dismantling of the SADC Tribunal as the most extreme example.

Monitoring bodies and their staff should be representative in terms of nationality and gender and measures taken to ensure that members of monitoring bodies are independent and committed to human rights. The overrepresentation of the Global North in UN human rights bodies and staffing is a matter of concern. The increasing number of women on human rights bodies is encouraging, but much remains to be done to fully ensure gender equality. Procedures for selection of members of human rights bodies could generally be improved.

Legitimacy further entails acceptance. Few states have fully accepted international human rights bodies as being the authoritative source on interpretation of the treaties they have been put in place. The

71 'African Commission on Human and Peoples' Rights 'Activity reports' (2021) para 9 https://www.achpr.org/activityreports/viewall?id=52 (accessed 13 October 2021).

72 Human Rights Watch 'OAS leader undermining rights body', 27 August 2020, https://www.hrw.org/news/2020/08/27/oas-leader-undermining-rights-body (accessed 23 November 2021).

judgments of international courts are binding but compliance is not automatic.

International human rights monitoring bodies have built an important corpus of normative standards. National legislators, policy makers and judges have engaged with these normative standards so that they are often reflected in national legislation and policy. In many instances national institutional frameworks have been put in place and resources allocated to make such legislation and policy a reality. In some countries these international norms have had little impact. There is no national legislation and policy reflecting them or where there is, no institutional framework or budgetary resources have been availed to ensure their implementation. However, the international norms are there and can be used by national civil society, supported by international NGOs, other states, and other actors, to push for change. Of course there would sometimes be disagreement on the details of the norms and there is room for different approaches between different states and also within states.

From the above it should be clear that there are benefits to international human rights law. The question is, do these benefits outweigh the significant costs, specifically the financial costs, of the international human rights system? States have limited resources but arguably their investment in international human rights monitoring is merited from the perspective of the policy guidance they receive. For individual victims of human rights violations international human rights bodies provide a last recourse to attain justice. Of course, even the most elaborate system for ensuring compliance with judgments will meet resistance where the state considers it in its interest not to comply. This is no different from when judgments that would go against the state are handed down at the national level.

There have been many initiatives to reform both UN and regional human rights protection. It is clear that international bodies cannot decide all cases but play an important role in guiding states that are interested in being given guidance and for civil society to engage the state. The international community should focus on strengthening what is in place. This may in some instances require additional financial resources, but much more importantly, may require a sincere engagement of states with the institutions they have created and introspection within the institutions themselves on steps they can take to improve their functioning within available resources.