Why should we obey you? enhancing implementation of rulings by regional courts

Katrin Nyman-Metcalf and Ioannis Papageorgiou***

ABSTRACT: 'Regionalization' of human rights protection means an increase in regional instruments: continent-wide and sub-regional courts develop in Africa and the Americas in an interesting and dynamic interplay. However, the courts do not possess enforcement mechanisms but rely on the member state for enforcement. Studies on regional human rights protection often focus on substantive rights rather than institutional issues. The aim of this article is to discuss the role regional courts can play in the protection of human rights, given the challenges to enforcement of their rulings. By using a comparative method, the article analyses what the impact can be for regional rights protection. Based on the study of various courts, the study concludes that although regional courts cannot replace national ones in protecting citizens, regional judicial oversight of rule of law in regions with fragile democracies constitutes a useful addition to national protection by setting limits on states and making citizens aware of their rights. The article thus demonstrates how regional courts can have a significant impact on the protection of human rights, while highlighting the risk of courts losing respect if their rulings are not implemented, thus setting in process a vicious circle: rulings not being implemented lead to courts being underused, further reducing respect, and so on. The article finally advocates for strong commitment by member states and increased legitimacy of the regional systems, specifically focussing on the role of courts, and thus contributes to the debate on how to enhance the impact of regional human rights protection systems.

TITRE ET RÉSUMÉ EN FRANÇAIS:
Pourquoi devrions-nous vous obéir? améliorer l'exécution des décisions des juridictions régionales

RÉSUMÉ: La 'régionalisation' de la protection des droits de l'homme signifie une augmentation des instruments régionaux: les juridictions continentales et sous-régionales se développent en Afrique et dans les Amériques dans une intéraction intéressante et dynamique. Cependant, les juridictions ne disposent pas de mécanisme d'exécution mais dépendent des Etats pour l'exécution. Les études sur la protection régionale des droits de l'homme mettent souvent l'accent sur les droits fondamentaux plutôt que sur les questions institutionnelles. Le but de cet article est de discuter du rôle que les tribunaux régionaux peuvent jouer dans la protection des droits de l'homme, étant donné les défis que connaît l'application de leurs décisions. En utilisant une méthode comparative, l'article analyse l'impact potential de cette situation sur la protection régionale des droits. Basée sur une étude de différentes

* Visiting Professor of Law, Institute of Law, School of Business and Governance, Tallinn University of Technology; LLM (Uppsala), PhD (Uppsala); katrin.nyman-metcalf@ttu.ee

** Assistant Professor of Politics, University of Thessaloniki; DEA (Paris), PhD (Brussels); ipapageo@polsci.auth.gr

K Nyman-Metcalf & I Papageorgiou 'Why should we obey you? enhancing implementation of rulings by regional courts' (2017) 1 *African Human Rights Yearbook* 167-190
http://doi.org/10.29053/2523-1367/2017/v1n1a9

juridictions, l'article conclut que les juridictions régionaux ne peuvent pas remplacer les juridictions nationales dans la protection des citoyens mais que le contrôle judiciaire régional de l'état de droit dans les régions où il y des démocraties fragiles renforcement utilement la protection nationale en fixant des limites aux Etats et en sensibilisant les citoyens sur leurs droits. L'article démontre ainsi comment les tribunaux régionaux peuvent avoir un impact significatif sur la protection des droits de l'homme, tout en soulignant le risque que ces juridictions perdent en légitimité si leurs décisions ne sont pas appliquées, créant ainsi un cercle vicieux: si les décisions ne sont pas appliquées, les juridictions seront sous-utilisées, réduisant davantage le respect et ainsi de suite. L'article plaide enfin pour un engagement fort des Etats et une légitimité accrue des systèmes régionaux, en se concentrant spécifiquement sur le rôle des tribunaux, et contribue ainsi au débat sur la manière d'améliorer l'impact des systèmes régionaux de protection des droits de l'homme.

KEY WORDS: regional integration, Africa, the Americas, human rights, regional courts; enforcement

CONTENT:

1 INTRODUCTION

For the past several decades, we have witnessed an increasing 'regionalization' of human rights protection, evidenced by the proliferation of regional human rights instruments and the establishment of judicial or quasi-judicial mechanisms for the promotion and protection of human rights in several regional integration systems. This takes place at the level of continent-wide human rights organs as well as via courts of sub-regional integration organisations. Although Europe is the continent with the oldest and furthest reaching integration in the shape of the European Union (EU), as well as the oldest human rights court, the European Court of Human Rights, recent developments in, especially, Africa and South and Central America are dynamic. These regions provide interesting examples of the impact of regional systems, often projected against a background of less than perfect democratic systems in their member states. Regional human rights courts can provide support for organs within states in ongoing processes of democratisation and improved protection of rights, where different national bodies may be pulling in different directions. We also see how the interaction between sub-regional and continent-wide organisations creates a dynamic for the protection of rights, often despite that the relationship between sub-regional and continent-wide bodies is not specified.

Regional courts show a variety of competences. At times, their powers appear surprisingly wide, in particular given that the level of integration within the regional system in question may not be so high.

Their powers usually include the right to interpret the regional integration rules and solve disputes arising therefrom. In addition, some courts are entrusted with quasi-constitutional competences, for instance, upholding principles of democracy and rule of law and resolving conflicts between the various branches of State power. Contrary to Europe, where there has been a relatively clear distinction between regional integration courts and regional human rights protection courts, in other continents although there are specialised regional human rights courts, other courts also deal with human rights or more widely with the protection of the rights of individuals, either as explicitly included in the court's competence or derived from interpretation of general principles. Nevertheless, one common feature in all these schemes is how decisions of the courts can be and are enforced against member states. This question is less well developed than substantive rights although it is a major one and there is a danger that failure to enforce decisions leads to an erosion of the respect for the regional courts.

The objective of this analysis is to highlight how regional systems of political and judicial oversight, especially in weak or fragile democratic systems, can be a useful addition to national judicial or other mechanisms of protection of human rights and rule of law and control of the executive. The article analyses if and how decisions of regional courts can have a real impact, even in the absence of effective regional enforcement systems. We examine the various courts in Africa and in the Americas to draw conclusions through a comparative analysis as to the validity of the article's hypothesis: Is it possible to use regionalisation of human rights to enhance their protection and promote rule of law at national level? And if yes, how can enforcement of decisions of courts of regional integration organisations be ensured and enhanced? [1]

2 REGIONAL INTEGRATION AND COURTS OF JUSTICE

2.1 Europe

This article will not go into any detail on the European regional courts. However, as both the Court of Justice of the European Union and the European Court on Human Rights have served as models for many regional courts, some salient European issues will be briefly touched upon as a background. The matter of enforcement is interesting in this context, as even these far-reaching regional integration systems with powerful courts lack designated enforcement mechanisms. Responsibility for enforcing decisions by both the Court of Justice of

[1] Reflections in this article are based on interviews by the authors at the mentioned courts in Africa and the Americas, during study visits in February 2015 (the Americas) and February - April 2016 (Africa), supported by a travel grant from the Folke Bernadotte Academy as part of the latter's Rule of Law programme.

the European Union and the European Court of Human Rights lies with member states, which are not only obliged to ensure adherence to the rulings of the courts in the specific cases but also to modify laws and practices in line with any decision. The systems include various guarantees and mechanisms to ensure that enforcement takes place – making member states the tools for the common policy.

When the EU was created, it did not have a mandate for human rights. However, as integration deepened as well as widened, it became clear that human rights issues were intertwined with such matters that were in the EU competence, as free movement, trade and others. In recent years, there has been a dynamic development of human rights protection in Europe, with the EU and the Court of Justice of the European Union assuming competence over human rights to the extent that these rights are linked to EU areas of competence;[2] this tendency was enhanced with the adoption in 2000 of the Charter of Fundamental Rights of the EU that became binding in 2009[3] and with the ongoing debate of the EU as an organisation adhering to the European Convention of Human Rights (European Convention).[4] After the fall of communism and the discussion of enlarging the EU, adherence to the Council of Europe (CoE) and its human rights instruments became a prerequisite for EU membership through the so-called Copenhagen criteria.[5]

Mattli calls organs of the EU like the Court of Justice of the European Union (and the European Commission) 'commitment institutions'. The powers of these organs mean that implementation of rights is not only in the hands of the member states.[6] The institutions can ultimately decide on suspension of member states and limitations of their rights, but their daily monitoring of the application of EU law is normally more important than any strong action to sanction member states.

In addition to the Court of Justice of the European Union, Europe has the most powerful regional human rights court, the European Court of Human Rights, which implements the European Convention in the context of the CoE. Enforcement is formally in the hands of the CoE Committee of Ministers, but member states are under strong pressure

2 T Kerikmäe 'EU Charter: Its nature, innovative character, and horizontal effect' in T Kerikmäe (ed) *Protecting human rights in the EU* (2014) 6.

3 http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (accessed 6 July 2017).

4 The first explicit reference in EU law of the ECHR was in the Maastricht Treaty 1992. Similar standards of human rights had also earlier been implemented by the CJEU.

5 The Copenhagen criteria were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. They include three main sets of conditions, the first of which (the so-called political criteria) require from a membership candidate to fulfill the conditions of "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en (accessed 7 July 2017).

6 W Mattli *The logic of regional integration* (1999) 13-15. See also D Webber 'Regional integration in Europe and Asia' in B Fort & D Webber (eds) *Regional Integration in East Asia and Europe: convergence and divergence* (2006) 302.

both from their peers and from public opinion to implement rulings. It is not a genuine 'name and shame' policy but, to a large extent, acts as such. Furthermore, the Committee of Ministers possesses the 'nuclear option' of suspension and expulsion of a state as a reaction to its failure to meet human rights requirements.[7] This measure has never been fully used, although it was close to being applied in 1969 against Greece,[8] then a military dictatorship.[9] With a larger and a more diverse membership in the Council of Europe, with states such as Russia, Turkey and Azerbaijan that are not or no longer democratic, one could imagine more instances of use of the suspension possibility although this has not been the case in practice. A 'nuclear option' also exists in the EU after the Treaty of Nice[10] in the form of suspension of membership for violations of values of the Union.[11] Again, this option has not been used although it has been aired recently vis-à-vis Hungary and Poland following a number of government interferences with the principles of separation of powers, media freedom and freedom of education.[12]

Nowadays, the EU has become such an important player on the global stage that the human rights commitments that member states have via other organisations or treaties could be affected by EU membership. Already in 2000, the Court of Justice of the European Union stated that measures incompatible with human rights are not acceptable in any conflict between EU law on specific matters (like free movement) and human rights provisions.[13] This was stressed again in the *Kadi* case, which found that human rights obligations supersede even other international obligations (like commitments of member states as UN members to institute sanctions).[14]

7 Article 8 of the Statute of the CoE (ETS No 001, London 3 August 1949) provides for the suspension of rights of representation and, eventually, the expulsion of 'any member of the Council of Europe which has seriously violated Article 3 [of the Statute, namely principles of rule of law and of human rights and fundamental freedoms]'.

8 Applications 3321/67 (*Denmark v Greece*), 3322/67 (*Norway v Greece*), 3323/67 (*Sweden v Greece*), and 3344/67 (*Netherlands v Greece*).

9 The Greek government declared that it did not intend to respect the rights enshrined in the ECHR and eventually the country withdrew from the CoE and denounced the Convention before it could be expelled. See C Ovey & RCA White *Jacobs & White: The European Convention on Human Rights* (2006) 504.

10 In force since 2003.

11 Article 7 of the Treaty of the European Union (Treaty of Lisbon) provides that the EU member states, 'acting by unanimity' (without the participation of the member state concerned) 'may determine the existence of a serious and persistent breach by a member state of the values referred to in Article 2' (namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities) and suspend the participation and rights of this state.

12 In July 2016, the Commission adopted a Rule of Law Recommendation on the situation in Poland (see relevant press release in http://europa.eu/rapid/press-release_IP-16-2643_en.htm) which is still pending. Concerning Hungary, the European Parliament, in a resolution adopted in May 2017, requested from the Commission "to launch a formal procedure to determine whether there is a clear risk of a serious breach" of EU values by Hungary (see European Parliament resolution of 17 May 2017 on the situation in Hungary P8 TA (2017)0216).

13 Case C-112/00 *Schmidberger*.

14 Cases C/402/05P and 415/02P *Kadi v Council*.

From the above, it becomes evident that human rights form part of European law in a wide sense and permeate decisions of regional as well as national organs. What perhaps is the main characteristic of the European legal system is the well-developed interplay between the regional and the national, with national organs being obliged to implement European decisions and having a set framework for doing so, with oversight by the European organs.

2.2 Africa

The African continent is home to many regional integration organisations. The African Charter on Human and Peoples' Rights (also called the Banjul Charter) was adopted in 1981 by the then Organization for African Unity (OAU) and entered in force in 1986.[15] Several regional integration instruments in Africa have been inspired by European counterparts, but the Charter shows examples of both different and more innovative rights.[16] Nevertheless, it has not yet reached the level of impact of the European system and its monitoring system is less innovative than the substantive rights. There still appears to be a significant amount of scepticism among African leaders concerning 'interference' in internal affairs. Reforms of the human rights system have aimed at improving the impact of the human rights provisions, as the history of the regional system shows that this has been the weak point within the system. For instance, the African Commission on Human and Peoples' Rights (African Commission),[17] which was set up in 1987, was vested with many competences but monitoring procedures, reporting requirements, inter-state and individual complaints procedures were not well developed or efficient.[18] Eventually, the African Commission started formulating recommendations in which it urged, requested or appealed to member states to undertake actions in order to enforce its decisions.[19]

The African Court on Human and Peoples' Rights (African Court) was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), adopted by the OAU in June 1998. The Protocol came into force on 25 January 2004 and the Court started operating in 2008. It is based in Arusha, Tanzania. It

15 M Nowak *Introduction to the international human rights regime* (2003) 203-214.

16 For example, the African human rights system was the first to include the right to a satisfactory environment as a human right. This right was interpreted in the *Ogoniland* case (*Communication 155/96 The Social and Economic Rights Action Centre and another against Nigeria*). See M van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication' (2003) 3 *African Human Rights Law Journal* 170.

17 The African Commission on Human and Peoples' Rights was established by the African Charter, and inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission's Secretariat is located in Banjul, The Gambia.

18 Nowak (n 15 above) 203–214.

19 Van der Linde & Louw (n 16 above) 181

issued its first ruling in 2009 and the Rules of Procedure of the Court were adopted in 2010. Until now, only a handful of states[20] have made the declaration recognising the competence of the African Court to receive cases brought by individuals, which was the most significant development in human rights protection in Europe. A feature of the African human rights system with a Commission as well as a Court is that the two organs are quite independent from one another. There is even a certain competition between them, even if the trend is toward greater co-operation, as the Court will hopefully assume a greater role. Work is ongoing[21] concerning the possibility for the Court to deal with international criminal cases, following the criticism – very common in Africa – that the International Criminal Court is prejudiced towards Africa.[22]

Until September 2017, the African Court has issued decisions in 38 cases and given three interpretations of judgements; it has 88 pending cases.[23] This number is very low considering the size of the African continent and we can see that the degree of enforcement varies. For instance, recent decisions by the Court show partial, almost full or no follow-up at all. In the joined Application 9 and 11/2011 *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (13 -14 June 2013), Tanzania was ordered to take constitutional, legislative and other measures within a reasonable time to remedy the violations, as well as to publish the judgment in a specified manner. The judgment was published to some extent but no other measures had been taken by the end of 2016.[24] In other cases against Tanzania,[25] the country had not reported on any measures taken.[26] As for Burkina Faso (*Zongo & others,* Application 13/2011), the country had met with requirements to pay compensation as well as enabled the case in question to be reopened in the national courts, leading to the prosecution for murder of the indicted persons. However, in this case, the country had not adequately published the ruling of the Court.[27] A pattern that has been observed is that states often do abide by the obligations set by the specific decision but do not take actions to deal with the underlying root causes of violations.

The African Union (AU) shows evidence of potential as a regional integration organisation but has until now fewer accomplishments of

[20] Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania, Tunisia.

[21] To this end, the AU Assembly of Heads of State and Government in June 2014 adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), which includes as an Annex an amendment to the Statute of the African Court, 27 June 2014. As of July 2017, 10 countries had signed but none have ratified the Protocol.

[22] http://en.african-court.org/index.php/about-us/jurisdiction (accessed 10 October 2017). This was a common theme brought up by our interlocutors during interviews.

[23] http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court (accessed 10 October 2017).

[24] *African Court Activity Report* 2016 (EX.CL/999(XXX), 22-27 January 2017

[25] *Thomas v Tanzania*, Application 5/2013 (20 November 2015), *Nganyi and 9 Others v Tanzania,* Application 6/2013 (18 March 2016) (n 24 above).

[26] *African Court Activity Report 2016* (n 24 above).

[27] *African Court Activity Report 2016* (n 24 above).

genuine integration to show. It has been said to rather provide parameters for future integration than a proper inter-governmental forum in which to solve concrete issues.[28] The weak implementation possibilities of the AU contributes to its limited role, which although growing has not changed dramatically since its inception. In an effort to enhance enforcement, the African Commission has increased possibilities in its Rules of Procedure to refer communications to the African Court if it considers that the state concerned has not complied with or is unwilling to comply with its recommendations.[29] The Commission can also refer serious and massive human rights violations to the Court.[30] However, like in the European system, the development is toward the political organs of the AU monitoring enforcement.[31] The AU's Human Rights Strategy identifies among its strategic objectives the importance of ensuring effective implementation of human rights instruments and decisions. The Strategy's 2012-2016 action plan called for strengthening the collaboration on the implementation of findings of African human rights bodies.[32]

The African human rights system is interesting in a global comparison as it emphasises the collective rights of peoples as well as those of individuals and it is the strongest on developing *actio popularis* to permit groups to support protection of human rights. Before the establishment of the Court, the Commission was vested with the competence to issue advisory opinions, rule on interpretation and deal with complaints from state parties and individuals, groups and NGOs. In theory, this should allow for a genuine *actio popularis* human rights monitoring system, including the possibility for those not directly concerned to complain about a human rights violation. In practice, there were many obstacles to strong enforcement of rights: The Commission had to reach unanimous decisions, the violation had to be part of a systematic pattern of gross human rights violations and even if a case passed these hurdles, there were no effective enforcement mechanisms to ensure that the guilty state would change its ways.[33] Views on the African human rights system set up through the African Charter vary between it being an expression of taking rights seriously to doubts about any effectiveness of the system. One of the criticisms

[28] T Maluwa 'Fast-tracking African Unity or making haste slowly?' (2004) 51 *Netherlands International Law Review* (2004) 231.

[29] African Commission's Rules of Procedure, rule 118.

[30] African Commission's Rules of Procedure, rule 84.

[31] Article 29(2) of the African Court statute stipulates that the Council of Ministers shall be notified of judgments and monitor execution on behalf of the Assembly of the AU. Article 30 of the statute states that States parties undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution. See M du Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes' *Institute for Security Studies, Paper 235* (June 2012) 2.

[32] Guidelines on the Role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and Peoples' Rights and Judgments of the African Court on Human and Peoples' Rights (2016) 7.

[33] Nowak (n 15 above) 203–214.

levied is that states can join without any questions asked about their previous human rights record.[34]

In Africa, both as regards courts and other co-operation, the sub-regional organs tend to be more active and influential than the pan-regional ones.[35] If the all-African framework faces many challenges, important developments can be observed in the sub-regional integration systems[36], in particular in the East African Community (EAC)[37] and the Economic Community of West African States (ECOWAS).[38] A common trend in them is that they started as regional courts and gradually either implicitly or expressly developed a human rights mandate. The EAC presents an interesting example of how such systems and courts can take an active role for human rights. The EAC consists of few states but includes some of the larger and more developed ones in Africa. It includes a regional court among its institutions, the East African Court of Justice (EACJ) whose mandate is, briefly expressed, to ensure the adherence to law in the application of and compliance with the EAC Treaty. The EACJ (like the EAC) are not new, but rather re-established organs of the defunct East African Community and East African Court of Appeal.[39] However, despite still being only temporarily operational (since 2001, pending that the Council of Ministers of EAC determines if there is need for a full-time court), the Court has become perhaps the most activist of the regional courts.

An interesting example of this activism is how the EACJ assumed the right to deal with human rights issues, despite this not having been explicitly included in its competence.[40] The Court made clear in the 2007 case of *Katabazi and 21 others v Secretary General of the EAC and Uganda*[41] that it was not going to interpret its limited competence over human rights issues in a restrictive manner. It said:

> While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under

34 AK Wing 'Women's rights and Africa's evolving landscape: the Women's Protocol of the Banjul Charter' in JI Levitt (ed) *Africa: mapping new boundaries in international law* (2010) 25-26.

35 M Forere 'Is discussion of the United States of Africa premature? analysis of ECOWAS and SADC' (2012) 56 *Journal of African Law* 36-37.

36 For a historical analysis of the gradual inclusion of human rights into the mandate of sub-regional integration organisations in Africa see LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 7 *SUR International Journal on Human Rights* 119-141.

37 The East African Community (EAC) was established, as a regional intergovernmental organisation, in 2000. It has seven Partner States: Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania and Uganda.

38 ECOWAS members are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.

39 http://eacj.org/?page_id=19 (accessed 6 July 2017).

40 A Possi 'Striking a balance between community norms and human rights: the continuing struggle of the East African Court of Justice' (2015) 15 *African Human Rights Law Journal* 194.

41 http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf (accessed 6 July 2017).

> Article 27(1)[42] merely because the reference includes allegation of human rights violation.[43]

Finding a legal basis for dealing with cases on human rights, democracy and constitutional matters, the judgment set a precedent for the EACJ. The basis lies in the link between human rights and matters such as the rule of law and good governance – matters that are explicitly within the competence of the Court.[44]

Another active African regional organisation is ECOWAS. ECOWAS was formally established in 1975 as an economic co-operation organisation, and subsequently developed into a body with a more political mandate. Gradually, ECOWAS has taken upon itself a right to intervene in case of member states' behaviour that contravenes principles of human rights, creating expectation of such action – as most recently (in January 2017) seen in the case of the Gambia. What is interesting is that such reaction does not necessarily pass through the judicial organ but rather permeates general policy. ECOWAS possesses various instruments based on which it can react to challenges to democracy in any of its members. It has the mandate to deal with human rights and permits individual complaints against states, based on a protocol of 2005.[45] In the words of Adjolohoun, this "brought the regional tribunal from the shadows of hypothetical inter-states human rights litigation into the light of promising international human rights adjudication".[46] In this context, it is interesting that, even if the ECOWAS institutional structure includes a court of justice, whose rulings are binding, this is not necessarily used in situations like the Gambian case. This is furthermore despite that the court has been active not least on cases with a human rights element, stressing that constitutional guarantees for rights must be respected in practice.[47] Still, lately it is seen that ECOWAS states intervene using the political framework of the organisation rather than its court.

Nevertheless, strengthening courts is not a straight-forward matter for Africa. A case to this effect is the Southern Africa Development Community (SADC)[48] Tribunal, which presents an example of the long process to create a court only for it to be side-lined when it starts to act

42 Including interpretation of the Treaty.

43 http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf (accessed 6 July 2017).

44 Possi (n 40 above) 194. Although it is possible – as the practice of the court has shown – to deal with human rights issues in this manner, as Possi explains, an explicit mandate would make the situation clearer and more predictable. Possi (n 40 above) 201 & 203.

45 Supplementary Protocol A/SP.1/01/05 Amending Protocol Relating to the Community Court of Justice, 19 January 2005. Possi (n 40 above) 196.

46 HS Adjolohoun 'The ECOWAS Court as a human rights promoter: assessing five years' impact of the Koraou Slavery Judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 342-371, 343

47 The jurisdiction in human rights cases was extended in Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 of 6 July 1991.

48 SADC members are Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

decisively. The Tribunal was first envisioned in 1992, decided upon in 2000 and officially established in 2005. According to its constitutive documents, the SADC Tribunal should ensure adherence to, and proper interpretation of the provisions of, the SADC Treaty and subsidiary instruments, and adjudicate on disputes referred to it.[49] The problems started soon after its creation, when it ruled on a number of cases against Zimbabwe; as a result, the Zimbabwean government challenged its legitimacy. In August 2010, the SADC Summit announced a review of the role of the Tribunal[50] pending which its operation would be suspended and it *de facto* ceased to exist.[51] Although another SADC Summit decided in 2012 that a new Tribunal with a more limited mandate should be created,[52] this has not yet happened.[53] This illustrates the limits of regional courts if there is an absence of any democracy.

2.3 The Americas

The American continent has a long and gradually evolving system of regional protection of human rights, which provides another interesting analogy for Africa, different to that of Europe and in some respects closer to the African developments with a multitude of organisations. The Charter of the Organisation of American States (OAS) and the American Declaration of the Rights and Duties of Man adopted in 1948 were the first documents to proclaim and promote human rights for the American continent.[54] The Charter provided for an Inter-American Commission on Human Rights, the first specific human rights organ, created in 1959 and functioning from 1960. The protection of rights became more explicit with the American Convention on Human Rights (also known as the San José Pact) adopted in November 1969 in San José (Costa Rica) by the member states of OAS. The Convention which protects classical individual rights and freedoms, inspired from among others the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, entered into force in July 1978, though not all OAS member states, notably neither the USA nor Canada, have ratified it. It established the Inter-American Court of Human Rights (Inter-American Court).[55]

49 http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 7 July 2017).

50 Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government, Windhoek 17-18 August 2010. http://www.sadc.int/files/3613/5341/5517/SADC_Jubillee_Summit_Communique.pdf.pdf. (accessed 16 October 2017).

51 http://www.southernafricalitigationcentre.org/2015/05/11/sadc-tribunal-petition/ (accessed 7 July 2017).

52 http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 7 July 2017).

53 The new draft protocol can be found in http://www.ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf (accessed 7 July 2017).

54 L Henkin, RC Pugh, O Schachter & H Smit *International law: cases and materials* (1982) 823.

55 http://www.corteidh.or.cr/index.php/en (accessed 7 July 2017).

As in Africa, the American human rights protection system is shared between the Commission and the Court, but given the longer period of operation of the latter, the Inter-American Court plays an increasingly significant role, especially in recent years. Many Latin American states today have left behind their post-authoritarian period but have not succeeded in consolidating their democratic systems. In this context, the Inter-American Court can educate and at the same time correct state behaviour.[56] The level of influence it has been able to exert varies, depending on political issues and the willingness of the member states to pay heed to its decisions. However, the Inter-American Court has been more effective than what was presumed by a predominantly rather pessimistic opinion at its creation.[57]

Among states that are willing to permit some influence of the court are Mexico[58] and Colombia[59] and, to some extent, Guatemala.[60] In Colombia, the Constitutional Court and the Inter-American Court showed examples of a "compliance partnership", to quote Huneeus.[61] Parra Vera puts this in the context of a common agenda of the two courts, with the same aims to improve respect for human rights as well as for supranational decisions.[62] He brings forward the situation in Colombia around 2006, when the fight against impunity for crimes committed by paramilitaries, who were very well connected with many politicians, led to a battle between the executive and the judiciary. Some judges turned to the Inter-American Commission for protection and the Commission duly adopted protective measures, for example against illegal surveillance of judges. One may question what such measures practically could achieve, as the planned surveillance and other restrictive measures would in any event be undertaken by national authorities with no tools for the regional one to actively stop it, but lifting the matter to the regional level brought attention to it and may have had a restraining effect on national authorities.[63] The Court (and Commission's) jurisprudence has had a significant impact on national courts allowing for a globalisation of human rights standards. It is important to stress that the rulings of the inter-American system should go beyond the actual case - international case law is used as a

[56] V Abramovich 'De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el Sistema Interamericano de Derechos Humanos' (2009) 63 *Derecho PUCP (Pontificia Universidad Católica de Peru)* 95-138.

[57] O Parra Vera 'El impacto de las decisiones interamericanas: Notas sobre la producción académica y una propuesta de investigación de torno al "empoderamiento institucional"' in HF Fix-Fierro, A von Bogdandy & MM Antoiazzi (eds) *Lus constitutionale commune en América Latina: rasgos, potencialidades y desafíos* (2016) 393.

[58] Parra Vera (n 57 above) 412-413.

[59] Parra Vera (n 57 above) 394.

[60] Parra Vera (n 57 above) 398-399.

[61] A Huneeus 'Courts resisting courts: lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* (2011) 493-533.

[62] Parra Vera (n 57 above) 394.

[63] Parra Vera (n 57 above) 396-397.

guide for domestic court rulings, which try to avoid that member states are condemned for their practices by international courts.[64]

In the case of Guatemala, the Inter-American Court specified in detail what measures the state was supposed to take in examining a forced disappearance (in the context of the civil war). Guatemala was thus faced with a decision that it would be difficult to ignore without highlighting that it was ignoring its obligations - among them to report on what disciplinary, administrative or penal measures it had taken against those implicated in the forced disappearance.[65]

Venezuela represents an opposite example. Although having been denounced and condemned by the Inter-American Court for human rights violations, it has not implemented the Court decisions but chosen a confrontational approach.[66] In 2012, it denounced the Convention and withdrew from the jurisdiction of the Inter-American Court.[67] Earlier, in 1999, Peru also took a decision to leave the Inter-American Court after several rulings against it, in the context of its fight against terrorism. Between 1995 and 2007, there were 22 cases against Peru, which included disappearances, arbitrary killings, torture and other serious human rights violations and made up the majority of Inter-American Court´s contentious jurisdiction.[68] However, after political changes in Peru, the attitude towards the Inter-American Court changed. The Peruvian Supreme Court decided that the Inter-American Court ruling in the *Barrios Altos* case[69] was binding on the domestic judicial system, thus endorsing the fight against impunity. This was further supported by the interplay between the Court and the Truth and Reconciliation Committee.[70]

Central America can compete with Africa as the region outside of Europe with the furthest reaching regional integration, reflected in the rights given to its regional court. The Central American Integration System (*Sistema de la Integración Centroamericana* or SICA)[71] has a judicial organ, the Central American Court of Justice (CCJ), entrusted with supranational powers and, at least in theory, enforceability of its rulings.[72] The Court was set up by the Tegucigalpa Protocol, which established the SICA, in 1994. Article 3 of this Protocol specifies that

64 Abramovich (n 56 above) 95-138.

65 Case *Molina Theissen v Guatemala* (16 November 2009). See also Case *Bamaca Velasquez v Guatemala* (27 January 2009). Parra Vera (n 57 above) 399-402.

66 S Otamendi & PS Alessandri (eds) *Diálogos: El impacto del sistema interamericano en el ordenamiento interno de los estados* (2013) 396-399.

67 The official letter of withdrawal of Venezuela from Inter-American Court http://www.minci.gob.ve/wp-content/uploads/2013/09/Carta-Retiro-CIDH-Firmada-y-sello.pdf (accessed 7 July 2017).

68 C Sandoval 'The challenge of impunity in Peru: The significance of the Inter-American Court of Human Rights' (2008) 5 *Essex Human Rights Review* 6.

69 Inter-American Court *Barrios Altos*, Judgment on the merits, 14 March 2001.

70 Sandoval (n 68 above) 14.

71 Its full members are Belize, Costa Rica. El Salvador, Guatemala, Honduras, Nicaragua and Panamá.

72 KN Metcalf & IF Papageorgiou *Regional integration and courts of justice* (2005) 45-49.

> the fundamental objective of the Central American Integration system is to bring about the integration of Central America as a region of peace, freedom, democracy and development" and that "to that end [it reaffirms] the objective... to consolidate democracy and strengthen its institutions on the basis of the existence of Governments elected by universal and free suffrage with secret ballot, and of unrestricted respect for human rights.[73]

The Court possesses important powers, among them to examine the validity of acts taken by a state when these affect Central American Integration and to rule on conflicts that may arise between the fundamental organs of the state, as well as when judicial rulings are not respected in fact. These powers make CCJ a genuinely supranational judicial institution with almost sovereign powers.[74] Especially the fact that the CCJ may act as a supranational constitutional court at second instance gives it at least in theory an almost unique position globally. This is not necessarily translated into ability to enforce its rulings, though. CCJ obliges states to follow the rulings but does not have many powers to enforce them or to impose sanctions. To obtain such tools requires political will of the member states – to give the requisite powers to the supranational organ. This is not the case now, as only three (Honduras, Nicaragua and El Salvador) of the seven SICA member states have nominated judges to the CCJ. Consequently, currently it does not have the reputation as a powerful body - parties may not turn to a court that is seen as weak, which creates a vicious circle, having further detrimental effect on the respect for its decisions. Representatives of the Court expressed the opinion that, potentially, CCJ could play the role of regional conscience, in which case it could really affect development of democracy in the region, but it does not always appear comfortable in its role.

The CCJ Statute specifically provides that it does not examine human rights violations, which fall exclusively under the Inter-American Court. However, the Court has gradually ruled that, given the fact that the foundations of the Central American integration system include, among others, respect of human rights and fundamental freedoms, it may and can rule on a possible violation of human rights by acts of a state or an integration organ, to the extent that this is taking place in the context of the integration process.[75] In fact, the Court has timidly already made use of this right, most notably in a case against Panama[76] and in the context of the right to vote in the Central American Parliament elections, where it ruled that the right to vote is an individual community right and thus the Court was competent to examine the case.

73 Article 3 of the Tegucigalpa Protocol I 1991.

74 Metcalf & Papageorgiou (n 72 above) 45-49.

75 AG Pérez-Cadalso 'La tutela de los derechos humanos en el proceso de integración regional centroamericano' http://portal.ccj.org.ni/ccj/wp-content/uploads/LTDL DHIE.pdf (accessed 16 October 2017).

76 Case 8-7-05-2012 *Octavio Bejerano Kant v Panama*.

There are also other regional integration systems in the Americas, the Mercado Comun del Sur (Mercosur),[77] the Andean Community of Nations (CAN)[78] and the Caribbean Community (CARICOM)[79] among others. Mercosur has been described as an intergovernmental structure with community objectives.[80] Initially, its institutional structure was very limited, although after some years (in 1996), it was modified to include more organs, still though without a court of justice.[81]

A judicial body was introduced through the Olivos Protocol, adopted in 2002 and in force since 1 January 2004. The Permanent Court of Review of Mercosur (Tribunal Permanente de Revisión – TPR) was created, based in Asunción, Paraguay and operational from August 2004. The TPR has competence over appeals against the rulings of Ad Hoc Arbitration Tribunals within the Mercosur system and can furthermore act as a single jurisdictional instance if so requested by the parties or when member states request an urgency procedure. TRP can give consultative opinions on request of governments, supreme courts or the decision-making organs and parliament of Mercosur. Access to the Court is not granted to individuals or moral persons.[82] The Olivos Protocol provides that the rulings are compulsory for the States Parties in the dispute and will have the force of *res iudicata*.

TPR, like many regional tribunals, is underused. In the words of TPR representatives, this is not necessarily for lack of will, but the relevant parties are not sure (or even not aware of) how to use it. There is a lack of understanding over the kind of role the TPR can and should play. However, they also stressed that the fact of having few cases does not mean that the tribunal has no influence. It can impact other institutions by introducing a rule of law element in discussions that may otherwise remain purely political. Such an effect, though, is hard to measure and any court that is not functioning as a proper court will eventually lose significance. Another aspect of the TPR, that is a common feature for other American regional tribunals, is that the personalities of the judges may play a great role. In the absence of a clear and strong institutional role of the tribunals, the fact that distinguished persons sit on them– the very people who would in any case be asked for advice on integration legal issues – means that the organ will command respect even if its formal role is limited. This is however not sustainable in the long term as it relies on the right kind of

77 Argentina, Brazil, Paraguay, Uruguay and Venezuela.

78 Bolivia, Colombia, Ecuador and Peru. As the Court of Justice of the Andean Community (Tribunal de Justicia de la Comunidad Andina) has mostly dealt with trade and common market issues and for reasons of space, it shall not be examined in this article.

79 Antigua & Barbuda; Barbados; Belize; Dominica; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; St. Vincent & The Grenadines; Suriname; and Trinidad & Tobago.

80 JAE Vervaele 'Mercosur and regional integration in Southern America' (2005) 54 *International and Comparative Law Quarterly* 387-410.

81 M Luna Pont 'Southern American Common Market (MERCOSUR)' in L Levi, G Finizio & N Vallinoto (eds) *The democratization of international institutions* (2014) 261-285.

82 Luna Pont (n 81 above) 267.

persons being in the positions; even if the selection process intends to ensure this, political decisions may thwart such ambitions.

Like in Central America, the states of the Caribbean appear to have a strong incentive for regional co-operation. Most are very small, they come largely from the same colonial background, while most also share a language; there was thus no shortage of reasons to consider regional co-operation or even a federal construction – which was the original scheme of the British colonial power before independence. Eventually, the Caribbean Community (CARICOM) set up in 1973 was not so ambitious, but is still gradually asserting itself.[83]

The decision to establish a CARICOM court was taken in February 2001 when an Agreement Establishing the Caribbean Court of Justice was signed by ten CARICOM States, with two more joining in 2003. This allowed work on establishing the judicial structures to start, first with a Regional Judicial and Legal Services Commission (RJLSC) and in 2004 with the first President of the Caribbean Court of Justice being sworn in. The inauguration was held in April 2005 at the seat of the Court in Port of Spain, Trinidad & Tobago.[84] The Court uses an impressive array of electronic means to hold hearings, to overcome practical problems of the poor physical communications in the region and to be more accessible to all CARICOM citizens.

The Caribbean Court of Justice has an interesting and wide mandate despite that the founding treaties do not say much about the Court or its jurisdiction.[85] There is however a rule of law principle and the court can develop jurisprudence based on this. Accountability and human rights flow from this general principle. The Court can inform about its interpretation of the treaties even in the absence of a fully-fledged preliminary ruling procedure and thus influence interpretation of community law. Decisions are not directly enforceable as CARICOM legislation, in general, is not directly applicable, but the founding treaty does express that CARICOM legislation should be respected at member state level. At the same time, the regional tradition is generally one of strong dualism, with Haiti being the most significant example of this. The influence of the Court is increased by its additional roles, as a supreme court for some CARICOM members and furthermore as it is called upon as an arbiter in commercial disputes involving several states.

83 D Berry *Caribbean integration law* (2014) 23-24.

84 http://www.caribbeancourtofjustice.org/about-the-ccj/ccj-concept-to-reality (accessed 7 July 2017).

85 http://www.caribbeancourtofjustice.org/ (accessed 7 July 2017).

3 ENFORCEMENT

3.1 Background

Enforcement of the rulings of courts is an essential feature of any judicial system, national or international. If rulings are not enforced, this will lead to a loss of respect for the courts and perhaps for the political system in a state. This is even more significant for regional integration systems, where lack of enforcement may lead to questioning the legitimacy of the organisation. Enforcement is therefore perhaps the most crucial parameter in regional integration judicial mechanisms. Thus, we examine here enforcement provisions in regional courts – and more widely in regional organisations - and obstacles to it. We have already seen that there is a problem of enforcement in most regional integration organisations, creating a vicious circle where inability to enforce rulings leads to regional courts being underused, which further reduces respect for them. What is required is a strong commitment by member states and a belief in the legitimacy of the regional systems.

3.2 Obeying or not obeying rules – that is the question

The question why people obey rules in an organised society is a favourite of legal thinkers, from philosophers to more practical oriented lawyers. It is not just because of the fear to be caught and punished, though clearly this risk plays a role – sometimes immediately and sometimes more indirectly. Cultural norms and beliefs play a part and most thinkers would presume this is more important than sanctions as such. The various factors interplay as a possibility to get away with illegal behaviour too easily may alter the perception of what is right and wrong. There is a complex web of reasons, including the legitimacy of the body that issues a ruling or decision, that determines the propensity to act in accordance with it. Consequently, one question for regional integration systems is whether they muster sufficient legitimacy.[86]

Ensuring obedience of rules in a multi-state system is even more complex than in a state because of the lack of immediate effective enforcement. The issue is political rather than practical. If there is political will, ways will be found to enforce decisions. States – just like humans – join in a society to achieve certain goals and for this purpose surrender part of their sovereignty. The main element in enforcement can thus only be the superior interest even of the state adversely affected, at least in the long term. For states as for individuals, sanctions, or fear thereof, is an effective deterrent from disobeying the common rules but it is rarely the main reason for following rules. In

[86] KN Metcalf & IF Papageorgiou *Democracy through regional integration* (2015) 72.

fact, very many rules are obeyed even in situations where it is highly unlikely that non-obedience would ever be established. Still, fear of punishment or at least of a reaction plays a role. In public international law, the notion of 'mobilisation of shame' is an important factor. In Europe, this was a significant element for the general respect and enforcement of European Court of Human Rights rulings. However, contamination by refractory members weakens this behaviour. The increase of cases of blatant disrespect of rule of law provisions by states as different as Russia, Azerbaijan, Hungary and Poland means that the emulation element is less pronounced. Indeed, Knaus sees the adherence of Azerbaijan to the European Convention as being motivated by the end of 'naming and shaming' to make human rights effective, instead showing that states want to join for image purposes and manage to twist the system to allow that. [87]

Most regional integration systems contain rules and mechanisms to ensure enforcement of their decisions, ultimately upheld by their court. Although the strength of these provisions varies and there is room for improvement for several systems, all organisations have some rules. The main issue to analyse in relation to insufficient enforcement are the actual obstacles to giving full force to existing provisions.

Even the advanced regional integration systems in Europe lack their own autonomous enforcement systems. There are many reasons for this. It would be practically difficult to set up a regional body with competences similar to those of national enforcement organs (such as police and bailiffs), as their relationship with any national bodies would need to be carefully considered. Under the rule of law, use of force is a monopoly of the state that has to exercise this right under the law, in a proportional manner and only to the extent that is necessary in a democratic society. Enforcement powers ultimately may include certain levels of use of force against persons, something that states would be reluctant to give up. Psychologically, it would be sensitive to have an organ entitled to use force without being under the direct control of the government. No regional integration system has until now reached the level of legitimacy of states. It is noteworthy that even European agencies such as Europol for police co-operation and Eurojust for prosecutor co-operation are organs for co-operation, rather than independent organs with autonomous powers. The concept of special rapporteurs, as used in the African context, combines country- or issue-specific recommendations with persuasion efforts that fall of short of direct judicial enforcement but is more than general recommendations.[88]

Courts are aware of these limitations and try to deal with this reality: in the absence of firm enforcement mechanisms, there is always a risk that countries dissatisfied with decisions disobey, denounce the

[87] G Knaus 'Europe and Azerbaijan: the end of shame' (2015) 26 *Journal of Democracy* 15-18.

[88] D Long & L Muntingh 'The Special Rapporteurs on prisons and conditions of detention in Africa and the Committee for the Prevention of Torture in Africa: the potential for synergy or inertia?' (2010) 13 *SUR-International Journal of Human Rights* 99.

courts, or even withdraw from their jurisdiction, if such behaviour carries no consequences. Bringing this to the extreme is the abolition of the tribunal in question. What happened to the SADC Tribunal is an example of how leaders of countries in a not too subtle manner can react against a tribunal that is active and independent, even though the review undertaken by these same leaders found that the Tribunal was properly constituted and had acted within its mandate.

Courts tackle this problem in different ways. The Inter-American Court, for instance, not having any powerful tools to enforce its rulings, aims to ally itself with national courts. Parra Vera[89] suggests that Inter-American Court rulings can help to strengthen such institutions in member states that wish to support human rights against other organs within the state. He sees difference in behaviour according to whether the effect of court decisions is direct or indirect.[90] The factors that affect implementation vary depending on the beneficiaries, the rights in question, the relationship between the national and the regional court and the social context.[91]

Authors underline the role that intermediaries like national elites or civil society can play in promoting adherence to decisions of regional courts.[92] In that sense a "compliance partnership" as seen in the case of Colombia and the Inter-American Court[93] could be a strong enhancer for enforcement, not only with civil society but also with the national or other regional judicial authorities. In Africa, the African Court and the African Commission try to build this kind of partnership with civil society and with other courts, in particular, in 'follow-up efforts' to enforcement. Given the absence of any formal follow-up policy to African Commission rulings, NGOs are 'instrumental in applying pressure on and lobbying states at domestic and international levels' to make them comply with rulings.[94]

3.3 The rights of the individual

For international co-operation between states there is a default implementation mechanism in the shape of diplomacy and the rules that have developed over centuries. Regional organisations create special systems, organs and mechanisms or discuss *ad hoc* how problems should be solved. What is different in the kind of regional integration systems that we examine is that they take decisions that directly affect individuals.[95] The person is seen in his or her own

89 Coordinating lawyer of the Inter-American Court and the person interviewed by the authors.

90 Parra Vera (n 57 above) 384.

91 Parra Vera (n 57 above) 387.

92 Parra Vera (n 57 above) 387.

93 Huneeus (n 61 above).

94 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1993-2004' (2007) 101 *American Journal of International Law* 1.

95 J Klabbers *An introduction to international organizations law* (2015) 24-25.

capacity, with rights that are upheld by courts. Even if citizenship or residence may matter as it determines the competence of different regional systems, the person is still seen as an individual and not just a subject of a certain state. The person has human rights because he or she is a human and courts are there to protect these rights. This is an important development in international law, dating approximately to the end of the Second World War. However, such decisions must be implemented as the person lacks the possibility to use diplomatic means to persuade states to do – or refrain from doing – something.

Regional human rights courts can show that respect for inalienable rights of individuals go further than – sometimes opportunistic – political decisions, even if taken in a democratic manner. In this way, the courts are allies of the citizens against their own leaders, if needed. Clearly, this can lead to tensions and it is far from evident that national authorities will support implementation of rulings.[96] Furthermore, it is essential for regional courts to be very clear on what the rights are that they protect, how and why, so that their actions are not seen as alien impositions against the will of the people. The way popular opposition against the European Court of Human Rights has been drummed up by the tabloid press in the United Kingdom shows that even a mature and well-functioning regional human rights system cannot presume support.

Access to the courts is another essential issue. As regional organisations become more important in many fields, they take an increasing number of decisions that affect individuals. There must be corresponding access to justice as there needs to be a tandem between decisions taken at regional level and the possibility to challenge them. If a regional integration system is created without such possibilities, it could rightly be seen as weakening the rule of law. This would be the case also in the event that the system makes access to justice more complicated, even if not totally impossible. For a positive impact of a regional integration system on rule of law and democracy, effective enforcement should be combined with guarantees of legal accessibility (including appealing decisions to a judicial organ).

Legal accessibility is more than just the existence of courts: it includes a real possibility to gain effective access to justice. Its importance is seen for example in the number of European Court of Human Rights cases concerning violation of article 6 of European Convention, on the right to a fair trial and access to legal remedies. Among requirements are demands that processes are not overly complicated or time-consuming, that there are practical as well as

[96] In Uruguay, legislation instituting impunity for serious crimes against human rights (abduction and forcible adoption of babies) was found against human rights and thus illegal, even if it was adopted by democratic vote in referenda. The Inter-American Court ruling concurred with a ruling by the Supreme Court of Uruguay. It has to be noted that the fact that the rulings were implemented are due to support of the President of Uruguay, who stated that adherence to Inter-American Court rulings was a voluntary and sovereign act of the country. Case *Gelman v Uruguay*. See Parra Vera (n 57 above) 408.

formal guarantees for an actual access to courts or other legal bodies and that the cost of a process is not prohibitive.[97]

International protection of human rights can only be subsidiary to the national one: it is national political processes that guarantee enforcement. Regional human rights systems usually require exhaustion of domestic remedies, even if the exact way in which this is done varies. The reasons are both practical – to keep the case load at a reasonable level – and ideological – as regional courts supplement and do not replace national ones.[98] There are also exceptions, like the ECOWAS Community Court of Justice, that does not require exhaustion of national remedies and that through this has managed to influence controversial issues where states have been reluctant to adjudicate.[99] Regional systems should aim to not only provide compensation for victims in particular cases, but also to create a body of principles and standards with the purpose of influencing democratic processes and strengthening mechanisms for the protection of rights at domestic level, recognising the limits of international oversight.

4 IMPROVING ENFORCEMENT

It is generally accepted that regional integration presupposes a minimum of democracy at national level since the enforcement to a large extent depends on the member states. We have stated that regional judicial organs supplement national ones, rather replace them. Blatant cases of generalised disrespect of rule of law and overt dictatorships cannot fall under the cases examined in this article. A certain level of democracy is required for enforcement of regional court decisions.[100] In some events, like for ECOWAS, the enforcement may come about as a consequence of political changes, when a new government complies with decisions the court took regarding actions of a previous regime.[101] Even if the end result may be positive, this is not a viable way to ensure proper enforcement, since the idea should be that all governments recognise the rulings of the courts they have created and ensure their enforcement.

Regional integration organisations support enforcement of decisions, ultimately upheld by their courts. Although the strength of these provisions varies and there is room for improvement in several systems, all organisations have some rules. These include strict reporting mechanisms; special monitoring systems; or ultimately the ability to sanction states by suspension or expulsion from the

97 A Frändberg 'Legal accessibility' in A Frandberg, S Hedlund & T Spaak (eds) *Festskrift till Anders Fogelklou* (2008) 33-47.

98 On the African system, see Van der Linde & Louw (n 16 above) 171.

99 Adjolohoun (n 46 above) 344.

100 Viljoen and Louw in their analysis of cases of noncompliance to rulings of the African Commission demonstrate that out of the '13 cases of clear States noncompliance' with the Commission`s recommendations, the wide majority were characterised as unfree according to the Freedom House index. See Viljoen & Louw (n 94 above) 44.

101 Adjolohoun (n 46 above) 346.

organisation. What has been described by Viljoen and Louw as the indirect effect of human rights law is the 'incremental and less immediate' changes that countries need to establish in order to achieve a higher degree of compliance with human rights rulings.[102]

As a comparative example from the Americas, the Inter-American Court has achieved some success with implementation of rulings that contained detailed requirements for the state to report on what measures it had taken against impunity. If the conditions the state has to meet are set out in detail, it is difficult for it to ignore this, especially if civil society and the victims of the human rights abuse keep up pressure on the government, as we discussed above for Guatemala. The African Commission is an example of how relatively brief references only to the articles infringed without much further explanation were replaced with more motivated decisions and recommendations.[103] If we assume good will of states to enforce rulings, they may need assistance in knowing what this can mean.[104] Protection of human rights may require procedural as well as substantive law changes or changes to the working practices of authorities in member states and this should be made clear in the relevant decision. A clear decision against which to compare measures taken will help both those monitoring enforcement and those actually undertaking it. Treaty bodies can facilitate the enforcement of their decisions through their follow-up procedures.[105] An explicit right to undertake measures, like what OAS adopted in 2001,[106] or what is included in the recommendation by the African National Human Rights Institutes[107] provides tools for follow-up. Thus, the style and content of the decisions of the regional courts is not without importance.

The activities that regional integration organs undertake to follow up enforcement (like requiring annual reports) are also essential. As Possi mentions, if judges are supported by a community of lawyers, experts, academics and others, they are more likely to be expansionist and for example enforce human rights in a wider manner than what the letter of the law, narrowly interpreted, permits.[108] Ultimately, an environment may be created in which the enforcement of rulings becomes natural. An assertive civil society plays an important role in this respect. The use of modern technologies can also help increase the regional court's impact and popularity. As the case with the CARICOM Court shows, this can include not only electronic means of receiving or

[102] Viljoen & Louw (n 94 above) 22.

[103] Van der Linde & Louw (n 16 above) 173.

[104] Van der Linde & Louw (n 16 above).

[105] Sandoval shows how ICHR rulings against Peru went from statements on specific aspects of a situation to more general pronouncements on the wider context of the abuses. See Sandoval (n 68 above).

[106] OAS General Assembly Resolution on 'Evaluation of the workings of the Inter-American system for the protection and promotion of human rights with a view to its improvement and strengthening' (AC/Res. 1828 (XXXI-O/01).

[107] *Guidelines on the Role of NHRIs* (n 32 above) 10.

[108] Possi (n 40 above) 202. This was the case with the EU in the 1950s and 1960s as well as with the EAC in the 2000s.

sending documents, but also holding electronic court sessions, hearing applicants or witnesses remotely and, generally, becoming more accessible to citizens.

A more dramatic and ultimate means to enhance enforcement is the introduction of some form of suspension in the constitutive documents of regional integration organisations.[109] Even if this remains a 'nuclear option' never to be used in practice, it helps obedience to the rules and enhances enforcement of decisions, not only of courts but of regional integration generally.

5 CONCLUDING REMARKS

Regional courts in many parts of the world have surprisingly wide powers, given the level of regional integration that has so far been achieved. The reasons are linked to the internationalisation of human rights, the fact that regional organisations tend to reproduce the institutional structure of more integrated systems, or a desire by states to relegate legal issues, including rights of individuals, to judicial professionals. This may be done without being aware of the long-term impact of such choice on policy, overestimating their capacity to control courts. Such courts, endowed with wide powers, well acquainted with the regional political environment and with relative independence from any specific state, may become a natural mechanism of control of national political behaviour in support of the rights of individuals. Through the activities of these courts, states gradually become aware of the limits they have themselves set and citizens of their possibilities to challenge political power beyond the national context. Though this picture is far from uniform and depends on the implicit acceptance by states and governments, regional courts have become an important feature of the global judicial structure. This includes both specialised regional human rights courts and general courts of regional integration systems.

The authority of the decisions of the international judicial organs depends in part on the social legitimacy they achieve and on the existence of a community of stakeholders that accompanies and disseminates their standards. Many regional courts have managed to build up a considerable legitimacy through their independence and professionalism. At the same time, their capacity to enforce implementation of their decisions remains precarious. As shown, even as the regional court system is increasingly well developed and active, the courts in many instances lack efficient mechanisms to enforce their rulings. In most cases, the enforcement system relies on member state organs. Regional courts cannot replace national ones in terms of protecting citizens: and their impact as well as that of the regional organisations constantly needs to be reaffirmed and they have to demonstrate – through their commitment and results – that they merit loyalty from citizens. If the rulings of courts are not enforced, this will

[109] Metcalf & Papageorgiou (n 86 above) 129.

lead to a loss of respect for the courts and perhaps for the regional systems as such.

As we have shown, inadequate enforcement leads to a vicious circle where regional courts are underused, as ineffective, leading to further reduction of their use. What is required is a strong commitment by member states and a belief in the legitimacy of the regional systems. The protection of individual rights is an important element in conferring legitimacy. Thus, if a regional integration structure involves itself actively in the protection of rights of the citizens in member states, it will acquire an independent relationship with persons and can contribute to integration of peoples, rather than just of states. The international, regional enforcement of rights means that a standard of human rights is established that is wider than the national interpretation. For regional integration organisations, having independent courts or other judicial organs, which enable a legalistic interpretation of the tasks of the organisation lifts the organisation to a different level than just a vehicle for inter-state co-operation. Courts can play a positive role both directly and indirectly, through the correct and specific implementation of decisions or in a more symbolic manner. However, their role and impact must be visible. Thus, if the significance of courts is evident, it is easy to see that they cannot be the only strong institution. Decisions must always be enforced.