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Keynote Lecture: International Human Rights: Need for Further Institutional Development

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INTERNATIONAL HUMAN RIGHTS: NEED FOR FURTHER INSTITUTIONAL DEVELOPMENT

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I imagine that when you saw the title of my talk, you were tempted to exclaim that “we have enough international human rights institutions, what we need is more compliance.” I agree, of course, that we need much greater compliance by states with their international human rights obligations. But I also believe that there is an urgent need for additional international human rights institutions in order to bring about greater compliance by states with their human rights obligations. That is what I hope to demonstrate here this morning.

Neither the Charter of the United Nations, which gave birth to modern international human rights law, nor the International Bill of Rights, which proclaims the basic norms of that law, provide for a human rights court to enforce the rights these instruments proclaim. That is surprising, especially since the Bill of Rights, which consists of the Universal Declaration of Human Rights and the two UN Covenants of Human Rights, proclaims an almost universally recognized basic list of civil and political rights as well as economic, social, and cultural rights.¹ On further reflection, though, the failure of the states which drafted the International Bill of Rights to provide for a human rights court should not surprise. It reflects the traditional fear and opposition of states to international courts in general and international human rights courts in particular.

Of course, failure to establish such a human rights court would not prevent one state party to the Covenants to bring cases to the International Court of Justice, charging another state party with a breach of one or more provisions of the Covenants, provided of course both parties had accepted the Court’s jurisdiction.² Although the Universal Declaration is not a treaty, I believe at least some, if not all, provisions of the Declaration have become general international law, making them justiciable in the ICJ. Let us not forget, however, that individuals cannot bring cases to the ICJ and it may only deal with a case if both states parties thereto have accepted its

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1. See The International Bill of Rights, Dec. 10 1948 - Dec. 18 2002. (collection of UN conventions regarding human rights).
2. *Id.* at 15.

jurisdiction. To date, only some 40 UN member states have accepted the Court's jurisdiction.³ These realities do not make the ICJ a very inviting tribunal for dealing with human rights disputes.

In addition to the International Bill of Rights, the major normative contribution of the United Nations to international human rights law consists of an important group of treaties that proclaim the basic principles of contemporary international human rights law. Most important among these treaties are the UN's Racial Convention⁴, the Convention on the Elimination of Discrimination against Women⁵, the Torture Convention⁶, and the Convention on the Rights of the Child⁷. Also belonging to this important group of treaties is the Genocide Convention⁸. The UN adopted this convention on December 9, 1948, one day before the proclamation of the Universal Declaration by the UN General Assembly and many years before the adoption of the above-mentioned conventions.

Each of these treaties, except for the Genocide Convention, operates with its own treaty body or so-called Committee⁹. The Committees do not, however, function as human rights courts. They monitor compliance by the States Parties with their obligations under the aforementioned human rights treaties by reviewing the required reports the States Parties submit periodically to their Committees.¹⁰

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3. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/en/declarations> [<http://permacc/7KTY-AW5H>] (last visited Nov. 11, 2017).
 4. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 212 [hereinafter *Racial Convention*].
 5. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter *Women Convention*].
 6. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, [hereinafter *Torture Convention*].
 7. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter *Child Convention*].
 8. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].
 9. Racial Convention, *supra* note 4, at art. 8; Women Convention, *supra* note 5, at art. 17; Torture Convention, *supra* note 6, at art. 17; Child Convention, *supra* note 7, at art. 43.
 10. *Human Rights Committee*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> [<https://perma.cc/P4QZ-MF9R>] (last visited Nov. 11, 2017).

Unlike most other UN organs and sub-organs, these treaty Committees are supposed to be composed of experts elected in their individual capacities and not as state representatives.¹¹ Whether and to what extent Committee members are truly independent depends on the States Parties that nominate them for these positions. Some certainly are and others are not. It is clear, nevertheless, that the presence on these Committees of at least some truly independent experts has led over the years to more thorough reviews of State reports, forcing the States Parties to be more forthcoming in explaining their human rights practices and at times even remedying failures to comply with their treaty obligations.¹² In making their findings, the Committees have to interpret the applicable treaty provisions.¹³ They thus contribute to the corpus of international human rights law.

The Covenant on Civil and Political Rights, the Torture Convention, and the Racial Convention authorize their Committees to deal with interstate communications and individual petitions charging violations by the States Parties of their obligations under these treaties.¹⁴ The Racial Convention and Torture Convention also specifically permit the States Parties to refer their disputes for adjudication to the International Court of Justice, if they are not settled by negotiations or arbitration.¹⁵ The Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women provide only for a reporting system administered by their respective Committees.¹⁶

Over the years, the UN has adopted many other human rights treaties and declarations.¹⁷ Most of them deal with specialized human

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11. *Id.*
 12. See Gerald L. Neuman, *Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members*, in Human Rights Program Research Working Paper Series 1, 2-3 (discussing effects of UN human right committees).
 13. *Id.* at 4.
 14. *Human Rights Bodies - Complaints Procedures*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> [https://perma.cc/38TJ-Y9U7] (last visited Nov. 11, 2017).
 15. Racial Convention, *supra* note 4, at art. 22; Torture Convention, *supra* note 6 at art. 30.
 16. Child Convention, *supra* note 7, at art. 44; Women Convention, *supra* note 5, at art. 18.
 17. *The Foundation of International Human Rights Law*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> [https://perma.cc/3MHU-FFNC] (last visited Nov. 11, 2017).

rights topics that supplement or amplify subjects already addressed in one of the previously identified UN human rights treaties.¹⁸ Taken together, the UN has promulgated a vast body of treaty-based human rights law that has laid the foundation for contemporary international human rights law. That is the UN's most important contribution to contemporary international human rights law. Also, not to be forgotten are various specialized agencies of the UN, among them in particular UNESCO and the ILO, which have also adopted various treaties dealing with the human rights relevant to their spheres of competence.

The principal differences between the UN human rights system and the existing regional systems are the much stronger enforcement mechanisms of the regional systems, whose specialized judicial tribunals are empowered to render binding decisions.

Currently, there exist only three regional human rights courts: the European, Inter-American, and African courts. These courts operate within the institutional framework of their regional organizations, the Council of Europe, the Organization of American States, and the African Union, respectively.¹⁹ Each tribunal applies its respective regional human rights treaties: the European Convention of Human Rights,²⁰ the Inter-American Convention on Human Rights,²¹ or the African Charter of Human and Peoples' Rights. The States Parties to these treaties have standing to file inter-state complaints with these tribunals.²² Individual victims of violations have standing to submit cases to these courts on a more limited basis.²³

The European system originally limited the standing of individuals in two respects. Unlike State Parties, individuals had no

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18. The Foundation of International Human Rights Law, *supra* note 17.
 19. *Regional Systems*, INTERNATIONAL JUSTICE RESOURCE CENTER, <http://www.ijrcenter.org/regional/> [<https://perma.cc/3ZQG-ZSZN>] (last visited Nov. 11, 2017).
 20. European Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
 21. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter *American Convention*].
 22. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter *American Convention*]; see also *European Court of Human Rights*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/tirana/european-court-of-human-rights> [<https://perma.cc/AJ7J-89CF>] (last visited Nov. 11, 2017) (noting how ratifying parties have standing to file complaints) [hereinafter *European Court of Human Rights*].
 23. Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK J. INT'L L. 911, 915 (2011).

standing to file a claim with the European Commission charging a state with a violation of their Convention rights unless the state in question had also recognized the right of individual petition.²⁴ Individuals also had no standing to bring a case directly to the Court.²⁵ Standing before the court was reserved to the Commission and the State Parties.²⁶ In order for an individual's case to reach the Court, the State Party alleged to have violated the individual's Convention rights had to have recognized the jurisdiction of the Court.²⁷ Protocol 11 to the European Convention dramatically changed the position of the individual. Not only did the Protocol abolish the Commission, it also conferred on individuals themselves the right to directly access the Court.²⁸ To date, no other regional court has done so.

The American Convention, since its inception, provided individuals the right to petition its Commission without first requiring a separate state declaration recognizing that right.²⁹ Inter-state complaints, however, require a declaration.³⁰ Individuals do not have the right under the American Convention to access the Court directly.³¹ That right is reserved to the Commission acting on behalf of the individual and to those States Parties that have recognized the Court's jurisdiction.³²

The African Charter restricts the right of its Commission to receive individual communications to "special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights."³³ This means the African Commission only has jurisdiction over those individual petitions that charge numerous or massive violations of individual Charter rights. Over time, however, the African Commission has been able to circumvent this requirement

24. Dilton Rocha Ferraz Ribeiro, *Prospects for Jus Standi or Locus Standi of Individuals in Human Rights Disputes before the International Court of Justice* (Sept. 9, 2010) (unpublished L.L.M. thesis, University of Manitoba) (on file with the faculty of Graduate Studies, University of Manitoba).

25. European Court of Human Rights, *supra* note 22.

26. American Convention, *supra* note 21, at art. 45.

27. European Court of Human Rights, *supra* note 22.

28. Ribeiro, *supra* note 24, at 96.

29. American Convention, *supra* note 21, at art. 44.

30. American Convention, *supra* note 21, at art. 45.

31. American Convention, *supra* note 21, at art. 61.

32. American Convention, *supra* note 21, at art. 61.

33. African Charter on Human and People's Rights art. 58, *adopted* Jun. 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

and to deal with individual violations.³⁴ The contentious jurisdiction of the African Court resembles that of the inter-American Court in that it permits African states and the African Commission to refer cases to the Court.³⁵ Individuals may not do so.³⁶ African NGOs, however, have such standing, which is thus far unique.³⁷

The European Court, the oldest regional human rights court, has produced the largest body of caselaw to date, followed by the Inter-American and African Courts.³⁸ It can also point to a much greater compliance record by its State Parties.³⁹ Its decisions have had a very significant impact on the domestic law of its member states and international human rights law in general. The two other regional courts lag behind the European Court in attaining that tribunal's success, although member states have increasingly complied with their

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34. Information Sheet No. 2, The African Commission on Human and People's Rights, Guidelines for the Submission of Communications, 6, (1998) available at <http://hrlibrary.umn.edu/africa/achpr-infosheet2.html> [<https://perma.cc/32BJ-FC2N>].
35. The African Court, <http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court> [<http://perma.cc/6JMG-E23Y>] (last visited Nov. 10, 2017).
36. *Id.*
37. *Id.*
38. Compare European Court of Human Rights, Document Search, [https://hudoc.echr.coe.int/eng#{"documentcollectionid2":\["GRANDCHAMBER"\],"CHAMBER"}](https://hudoc.echr.coe.int/eng#{) [<http://perma.cc/64UW-H5BP>] (last visited on Nov. 10, 2017) (detailing the number of cases in the court's history), with Inter-American Court of Human Rights, Cases in the Court, <http://www.oas.org/en/iachr/decisions/cases.asp> [<https://perma.cc/P8E3-D77N>] (last visited Nov. 10, 2017) (detailing the number of cases in the court's history, which are fewer than the European Court), and The African Court on Human and People's Rights, Contentious Matters, <http://en.african-court.org/index.php/cases#finalised-cases> [<http://perma.cc/X5J8-6SVA>] (last visited on Nov. 10, 2017) (detailing the number of cases in the court's history, which are fewer than the European Court).
39. Compare Council of Europe, *The Execution of Judgments of the European Court of Human Rights*, at 64, HUMAN RIGHTS FILES, NO. 19, (2008) (explaining the member countries compliance with judgments made by the court), with Daniel Abebe, *Does International Human Rights Law in African Courts Make a Difference?*, 56 VA J. INT. L. 527, 564 (2017) (noting that non-compliance is much rarer in European courts than African courts), and Cecilia M. Bailliet, *Measuring Compliance with the Inter-American Court of Human Rights*, 31 NORDIC J. OF HUM. RTS. 477, 494 (2013) (noting full compliance with resolutions has only occurred once in Latin America).

decisions which have slowly gained region-wide acceptance as part of the domestic law of their respective State Parties.⁴⁰

CONCLUDING OBSERVATIONS

The international community has created a large body of conventional international and regional human rights law and established many international and regional institutions to apply it. The decisions of three existing regional human rights tribunals and the quasi-judicial practice of international bodies interpreting human rights treaties have expanded and added to that law. Probably no other branch of international law has grown as rapidly as contemporary international human rights law. It is nevertheless true that this normative growth and evolution of international human rights has not resulted in comparable compliance by states with their international human rights obligations.

Despite the very considerable progress the international community has made in promoting the protection of human rights, the system continues to display significant weaknesses when it comes to compliance by states with their international human rights obligations. Let me start with the fact that the human rights system established under the UN Charter — what I call the UN Charter system — was primarily designed to deal with large-scale human rights violations, whereas the three regional human rights systems were created to address individual human rights violations. It is true of course, that by dealing with large-scale human rights violations, the UN Charter system can also have some impact on the protection of individual human rights, whereas in certain situations the regional human rights systems can also prevent large-scale human rights violations. Neither of these systems, however, can deal effectively with both large-scale and individual human rights violations.

Moreover, many human rights treaties adopted by UN — what I call the UN human rights treaty system to distinguish it from the UN Charter system — are basically designed to deal with violations of individual human rights, although they can under certain circumstances also be applied to massive human rights violations. The real weakness of the UN treaty system results from the failure of very many UN Member States to ratify these treaties. Also, unlike the regional human rights systems, UN treaties do not provide for their own judicial tribunals with legally binding decisions. Despite the fact that some Committees attached to the UN human rights treaties do a relatively good job, they lack the enforcement powers of the regional

40. See Abebe, *supra* note 39, at 554 (inferring that since member states have human rights crimes and cases they are adopting law form the African Court); see also Bailliet, *supra* note 39, at 477.

courts.⁴¹ Since the regional human rights systems exists to-date only in Europe, the Americas, and Africa, the vastly more numerous inhabitants of Asia, for example, and other parts of the world do not enjoy that very important protection regional human rights treaties and courts could provide.

A majority of the world's inhabitants thus lives in countries where they are effectively protected neither by regional human rights law nor by UN human rights treaty law. The contemporary international human rights system thus fails to protect individual victims of human rights violations in those parts of the world where such protection is most needed.

I believe therefore that a serious effort should be made to promote the establishment of additional regional human rights systems in different parts of the world. They might be modelled on the institutional structure of the existing regional systems but drawing on the catalog of rights the UN Covenants proclaim. Such systems would provide much more effective individual human rights protection than is currently the case. At this time, Asia might make a good candidate for one or more sub-regional systems, consisting of no more than a dozen member states. The Asian continent is too large, and politically and culturally too diverse for just one system. A single regional system would better suit other parts of the world.

I also believe that the protection of human rights could be strengthened if a number of regional criminal tribunals were established to deal with serious transnational crimes, including for example, human trafficking, various forms of slavery, drug trafficking, piracy, arms trafficking and some forms of terrorism. Even though these crimes seriously violate the human rights of the human beings they victimize, many smaller states are often unable to deal effectively with these offences because of limited resources, poorly trained police forces, corruption, and powerful cross-border criminal gangs. This leaves the perpetrators of these crimes free to commit them with impunity. Here multilateral treaty-based regional criminal courts could perform valuable human rights services that the international community has to-date not addressed. Whether and how such tribunals should be brought into an institutional relationship with the International Criminal Court might be the subject of a future colloquium at this law school. Finally, given the theme of this today's conference, I wonder whether some corporate human rights violations might not also be better dealt with by regional criminal courts.

41. Ben Haight, *The Human Rights Committee: A Mechanism of Noncompliance and Failure*, J. OF L. AND INT. AFFAIRS, April 15, 2014, <http://sites.psu.edu/jlia/the-human-rights-committee-a-mechanism-of-noncompliance-and-failure/> [<https://perma.cc/DB89-TUPM>].