REGIONAL HUMAN RIGHTS SYSTEMS: NEED AND PROSPECTS FOR SOUTH ASIA

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FINAL APPROVAL

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LIST OF ABBREVIATIONS / ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACHR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACJ	African Court of Justice
ACtHPR	African Court on Human and Peoples' Rights
AU	African Union
CAT	United Nations Convention against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
COE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
GA	General Assembly of the United Nations
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
NGO	Non Governmental Organization
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
SAARC	South Asian Association for Regional Cooperation
UDHR	Universal Declaration of Human Rights
UN	United Nations

DEDICATION

This effort is dedicated to the Holy Prophet Muhammad (peace be upon him) who has given us a clear and unprecedented human rights approach and documents and to all those people who are trying for the best availability of human rights to the world for its prosperity and peace.

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ABSTRACT

REGIONAL HUMAN RIGHTS SYSTEMS:

NEED AND PROSPECTS FOR SOUTH ASIA

By

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Human beings constitute the basic elements of all organized societies within the state and the international community. Therefore, the realization of human rights is and will remain the first and final goal and purpose of the state for all times to come. It is strongly believed that the protection of human rights is essential to the sustainable achievement of the agreed global priorities of peace, development and democracy. There is an extremely close nexus between human rights and peace, freedom, national self determination, economic, cultural and technological development. Respect for human rights has therefore become an integral part of international law. Until recently rights and remedies, to the extent that any guarantee or enforcement existed, was the domain of the national government within their own political and territorial jurisdiction. How a government treated its own citizens in its own territory was considered a matter of sovereign domestic jurisdiction. The atrocities committed during the Second World War brought the issue of human rights into main stream of international relations and the scope of international law expanded from states to include the new international and regional institutions and

individuals. With the exception of the pursuit of peace, there is no cause the United Nations is more closely identified with than the cause of human rights. Since the world is divided into many cultural, ethnic, linguistic, economic, religious groups, therefore an area of social interaction or social value that may be important in a particular cultural or social context may not be important in other cultural or social context. To fill up this vacuum, regional human rights mechanisms were emerged to tackle the matter within its own cultural context. Hardly any regional organization today can avoid dealing with human rights. There are many regional bodies specifically tasked with protection of human rights in Africa, Europe and the America. In fact such regional human rights systems address the root causes of their regional problems and contribute towards the economic, social and political uplift, which ultimately provide peace and stability to the region and these are desirable stepping stones towards world organization. However, in South Asia, there continue to be a wide gap between rights enshrined in the constitutions and the abject reality that denies peoples their rights. Therefore South Asian States shouldn't further delay to start work on such regional system to improve the deteriorated situation of human rights in the region and to make the Subcontinent a peaceful and progressive region of the world.

CHAPTER I

PROTECTION OF HUMAN RIGHTS

1.1 INTRODUCTION TO HUMAN RIGHTS

Human beings are rational beings and by virtue of this quality human beings possess certain basic and inalienable rights which are commonly known as human rights.[1] The most striking feature of human rights is that they may difficult to define but impossible to ignore.[2] Since these rights belong to human beings solely because of their very existence, these rights become operative with their birth. Human rights, being the birth right, are therefore "inherent in all the individuals" irrespective of their religion, race, sex, creed and caste. These rights refer to the concept of universal rights, or status, regardless of legal jurisdiction, and likewise other localizing factors, such as ethnicity and nationality.[3] These rights are inherent in all the individuals as they are essential for their freedom and dignity and are conducive to spiritual, moral, physical and social welfare. They are also necessary as they provide appropriate conditions for the moral and material uplift of the people. Because of their elemental significance to human beings, human rights are also sometimes referred to as natural rights, inherent rights, basic rights, birth rights and fundamental rights. Presently, the vast majority of philosophers and legal scholars agree that every human being is entitled to some basic rights." Thus, there is universal

[1] H.O Agarwal, *Human Rights* (Allahabad: Central Law Publications, 2008), 2.
[2] Dr. Tapan Biswal, *Human Rights: Gender and Environment* (New Delhi: Viva Books Pvt. Ltd, 2007), 43.
[3] Prakash Talwar, *Human Rights* (Delhi: Isha Books, 2006), 1.

acceptance of human rights in principle both at International and domestic levels. The word Human rights, is composed of two root words;[4]

Human --- a member of the Homo sapiens species: a person; a man, a woman, a child

Rights--- an interest or thing to which you are entitled or allowed or freedoms that are guaranteed and protected by law

Therefore the word Human Rights means the rights which you have simply because you are human beings. "Human rights" is a generic term and it encompasses civil liberties, civil rights, and economic, social, and cultural rights. It is therefore taxing to give a precise definition of the term 'human rights. However, it can be said that the rights that all people have merely by virtue of their being human' are called human rights. Plano and Olton have stated that "human rights are those rights, which are considered to be absolutely essential for the Survival, existence and personality development of a human being".[5] The most common explanation given to the right in human rights is that of claim-rights. These are defined as benefit to which individuals are entitled merely by virtue of their being human, and there is a correlative duty on others in relation to that benefit.[6] The idea of human rights is bound up with the idea of human dignity and also widely considered to be those fundamental moral rights of the persons that are necessary for a life with human dignity. These rights are essential for the adequate development of human personality and for human happiness.[7]

[4] <http://www.youthforhumanrights.org/what-are-human-rights.html> (accessed 24 Aug 2011)
[5] Dr. Tapan Biswal, *Human Rights: Gender and Environment* (New Delhi: Viva Books Pvt. Ltd, 2007), 44.
[6] Prakash Talwar, *Human Rights* (Delhi: Isha Books, 2006), 6.
[7] Dr. Tapan Biswal, *Human Rights: Gender and Environment* (New Delhi: Viva Books Pvt. Ltd, 2007), 44.

1.2 HISTORICAL DEVELOPMENT OF HUMAN RIGHTS

The origin of the concept of human rights is found in theology, philosophy and law[8] and became popular particularly in the 20th century, though it had its roots in different forms since time immemorial.[9] However, the term "human rights" is relatively new and become part of everyday phraseology only since the creation of the United Nations in 1945, particularly after the adoption of the Universal Declaration of Human Rights by the UN General Assembly in 1948. The concept of "Universal Human Rights" was not known in the ancient world, not in Ancient Rome and Greece, Ancient China, Ancient India, nor among the Hebrews; e.g. in ancient times, slavery was justified as a natural condition[10]. Ancient societies had "elaborate systems of duties... conceptions of justice, political legitimacy, and human flourishing that sought to realize human dignity, flourishing, or well-being entirely independent of human rights"[11]. A few Greek and Roman philosophers recognized the idea of natural rights. Plato (427-348 B.C.) was one of the earliest writers to advocate a universal standard of ethical conduct. The Roman jurist Ulpian stated that according to law of nature, all men are equal, and by the same law all are born free. This meant that foreigners are required to be treated in the same way as one deals with one's compatriots. Sophocles (495-406 B.C.) was one of the first to promote the idea of freedom of expression against the State. Cicero (106-43 B.C.), a Roman statesman laid down the foundations of natural law and natural rights in his work. Cicero wrote in his book The Laws (52 B.C.) that there should be universal laws that would transcend customary and civil laws. Stoics employed the ethical concept of natural law to

[8] Ibid., 46
[9] Ibid., 47
[10] Michael Freeman, *Human rights: An Interdisciplinary Approach* (Cambridge: Polity Press, 2002), 15-17.
[11] Jack Donnelly, *Universal Human Rights in Theory & Practice* (Ithaca: Cornell University Press,2003),71.

refer to a higher order of law that corresponded to nature and which was to serve as a standard for the laws of civil society and government. The real precursor of human rights discourse was the notion of natural rights which emerged as a part of the Natural law tradition and became prominent during the Enlightenment with philosophers such as John Locke and considerably influenced the political discourse of the American Revolution and the French Revolution. However, the concept of natural law, itself become a matter of great controversy. Subsequently a new term "the rights of Man" was emerged but it was not universally understood to include the rights of women and therefore was replaced as well by the later expression "human rights". It was first used by Thomas Paine in the English translation of the French Declaration of the Rights of Man and Citizen.[12] Thus, the term 'human rights' came somewhat late in the vocabulary of mankind. It is a twentieth century name for what has been traditionally known as natural rights or the rights of man. The first documentary uses of the expression 'human rights' is to be found in the Charter of the United Nations.[13]Some argue that the concept of human rights has a universal history in the various religions and philosophies of the world and on account of the convergence of several historical factors, by the middle of the 20th century, the concept of Human Rights Universal in approach and comprehensive in its content

[12] Thomas Paine, Rights of Man (1791), argues that Human rights originate in Nature, thus, rights cannot be granted via political charter, because that implies that rights are legally revocable, hence, would be privileges. Popular political revolution is permissible when a government does not safeguard its people, their natural rights, and their national interests. Using these points as a base it defends the French Revolution against Edmund Burke's attack in Reflections on the Revolution in France (1790). For more details visit, <http://www.ushistory.org/paine/rights/ index.htm> (accessed 15 Dec 2011)

[13] Acharya Dr. Durga Das Basu, *Human Rights in Constitutional Law* (New Delhi: Wadhwa and Company, 2005), 8.

emerged,[14] while others maintain that, it originated in the West and was universalized only recently, after the Second World War.[15]

1.3 HUMAN RIGHTS AND INTERNATIONAL LAW

Until recently International Law was mainly concerned with States in general and this practice was substantially influenced by the "doctrine of State sovereignty".[16] This view was based on the thesis that only States participate in International Law making process, and therefore these rules are valid for them alone. From the International Law point of view, no importance was attached to the Individuals, and therefore, they had no legal significance. Individuals were associated to one State through the bond of nationality or citizenship, and considered in the role of alien by the other States. Under International Law If an injury was inflicted to the individual of a particular State to which the individual belonged and it was the state alone which owed the responsibility to another State. Even those individuals who enjoyed certain rights and duties in conformity with International Law such as the rights enjoyed by Heads of State, diplomatic envoys etc while staying on foreign territory on the behalf of their states were not considered as

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[14] Dr.Tapan Biswal, *Human Rights: Gender and Environment* (New Delhi: Viva Books Pvt. Ltd, 2007), 48.
[15] Ibid., 46
[16] Sovereignty, though its meanings have varied across history, also has a core meaning, supreme authority within a territory. It is a modern notion of political authority. Historical variants can be understood along three dimensions — the holder of sovereignty, the absoluteness of sovereignty, and the internal and external dimensions of sovereignty. The state is the political institution in which sovereignty is embodied. An assemblage of states forms a sovereign states system. The history of sovereignty can be understood through two broad movements, manifested in both practical institutions and political thought. The first is the development of a system of sovereign states, culminating at the Peace of Westphalia in 1648. Contemporaneously, sovereignty became prominent in political thought through the writings of Machiavelli. Luther, Bodin, and Hobbes. The second movement is the circumscription of the sovereign state, which began in practice after World War II and has since continued through European integration and the growth and strengthening of laws and practices to protect human rights. The most prominent corresponding political thought occurs in the writings of critics of sovereignty like Bertrand de Jouvenel and Jacques Maritain. For more details see; Philpott, Dan, "Sovereignty", The Stanford Encyclopedia of Philosophy (summer 2010 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/sum2010/entries/sovereignty/>.(accessed 24 Aug 2011)

proper subjects of International Law.[17] In the domestic sphere of states, rights were enjoyed by the individuals concerned not as rights in International Law but as rights derived from national law. Thus for both procedure and substance, States were the only subjects of international law and other entities including individuals were mere objects.

After World War II, the scope of international law expanded from states to include the new international and regional institutions[18] and the most remarkable developments in contemporary International Law is the transformation of the status of the individuals from mere objects to the proper subjects of international law. The Charter of the United Nations,[19] by using the words in its Preamble "We the Peoples of the United Nations" have remarkably recognized a place of importance for individuals. However, this alone did not enhance the status of individuals in the purview of International Law. "To realize this changed position of individuals they are regarded as the actual subjects and the ultimate beneficiaries of International Law by virtue of having both rights and duties flowing directly from International Law. Since the international community is primarily composed of States, it is only through the exercise of the will of states alone that rights and duties are conferred to individuals. States may agree to confer particular rights on

[17] H.O Agarwal, *Human Rights* (Allahabad: Central Law Publications 2008), 1.

[18] Russell A. Miller and Rebecca M. Bratspies, ed., *Progress in International Law*, by Barry E. Carter (Leiden: Martinus Nijhoff Publishers, 2008), 56.

[19] The Charter of the United Nations is the foundational treaty of the international organization called the United Nations. It was signed at the San Francisco War Memorial and Performing Arts Center in San Francisco, United States, on 26 June 1945, by 50 of the 51 original member countries (Poland, the other original member, which was not represented at the conference, signed it later). It entered into force on 24 October 1945, after being ratified by the five permanent members of the Security Council—the Republic of China (later replaced by the People's Republic of China), France, the Union of Soviet Socialist Republics (later replaced by the Russian Federation), the United Kingdom, and the United States—and a majority of the other signatories. As a charter, it is a constituent treaty, and all members are bound by its articles. Furthermore, the Charter states that obligations to the United Nations prevail over all other treaty obligations. Today, 193 countries are the members of the United Nations

individuals which will be enforceable under International Law, independently of municipal law"[20].

However, Individuals do not possess all the rights and duties recognized by International Law, they possess only a few of them, and therefore, individuals possess limited or restricted capacity in contrast to full or unlimited capacity possessed by the States which are endowed most of the rights and duties, if not all, by the rules of International Law. Therefore it has to be conceded that in International Law States have "unlimited personality", that is, they have full capacity whereas individuals have "restricted personality", since they hold only a few rights and duties. Human rights are one of such rights which have been conferred to individuals by the States in the contemporary International Law.

1.4 PROTECTION OF HUMAN RIGHTS

Since human beings constitute the basic elements of all organized societies within the state and the international community. Therefore, the realization of human rights is and will remain the first and final goal and purpose of the state for all times to come.[21] It is commonly believed that the protection of human rights is essential to the sustainable achievement of the agreed global priorities of peace, development and democracy. Therefore respect for human rights has become an integral part of international law and foreign policy.[22] However, the growth of international human rights law has often not been matched by protection of human rights. Enforcement of international human rights

[20] H.O Agarwal, *Human Rights*, (Allahabad: Central Law Publications 2008), 2.
[21] Dr.Tapan Biswal, *Human Rights: Gender and Environment* (New Delhi: Viva Books Pvt. Ltd, 2007), 43.
[22] Prakash Talwar, *Human Rights* (Delhi: Isha Books, 2006), 241.

law can occur on either an international, regional or domestic level. States that ratify human rights instruments pledge themselves to respect those rights and make sure that their domestic law is compatible with international human rights obligations. When domestic law fails to provide a remedy for human rights exploitations, victim parties may be able to make use of regional or international mechanisms for enforcing human rights. To accomplish these goals, the international community has recognized a number of mechanisms both to restrain the human rights infringements and to create an environment in which they will be protected in the future. They are not alternatives to each other, but offer important benefits in enforcing human rights and envisaging a brighter future. Currently, human rights mechanisms are working at following levels.

- The U.N Human Rights Mechanism
- The Regional Human Rights Mechanisms
- National Human Rights Institutions
- Non Governmental Organizations

1.5 THE UNITED NATIONS MECHANISM

The United Nation's Charter does not define the term 'human rights', although it contains a clear prohibition of discrimination based on race, sex, language or religion[23] and recognizes human rights as one of its fundamental purposes. The 'human rights' interrelate each of the fields of the UN's work; peace and security, humanitarian affairs, economic, development and social affairs. The promotion and protection of human rights has been a primary concern for the United Nations since 1945, when the founding nations

[23] Dinah Shelton, *Remedies in International Human Rights Law* (New York: Oxford University Press, 1999), 7.

of the Organization determined that the misery of The Second World War should never be permitted to reappear. "With the exception of the pursuit of peace, there is no cause the United Nations is more closely identified with than the cause of human rights".[24] General Assembly declared in the Universal Declaration of Human Rights that respect for human dignity and human rights is the foundation of peace, justice and freedom in the world. United Nations as a universal IGO is regarded as the most appropriate forum for efforts to reconcile divergent moral traditions into common public policy.[25] Over time, a wide-ranging system of human rights instruments and mechanisms has been built up to make sure the primacy of human rights and to deal with human rights abuses and contraventions, whenever and wherever they take place. To enhance respect for fundamental human rights and to further progress towards their observance, the United Nations implemented a three-pronged approach:

(a) Creation and promotion of international standards,

(b) Protection of human rights, and

(c) U.N technical assistance.

Member states are obliged to promote universal respect and observance of human rights and fundamental freedoms. Member states are also urged to take joint and separate action for the achievement of the purposes. Charter based bodies (extra-conventional mechanisms) which include United Nations special rapporteurs, experts, representatives, working groups etc and treaty based bodies (conventional mechanisms) have been

[24] Dr. Digumarti Bhaskara Rao, ed., *Fact Files of Human Rights*, Part.1 (New Delhi: Discovery Publishing House, 2001), 1.
[25] Paul F. Diehl, ed., *The Politics of Global Governance* (New Delhi: Viva Books Pvt. Ltd, 2005), 370.

instituted with the purpose to monitor compliance with the range of international human rights instruments and to investigate alleged human rights infringements.

International human rights instruments relevant to protection of human rights can be classified into two categories: declarations, which are not legally binding, adopted by bodies such as the United Nations General Assembly, and conventions, which are legally binding instruments concluded under international law. Over time, International declarations can acquire the status of customary international law. International human rights instruments can be divided further into global instruments, to which any state in the world can be a party, and regional instruments, which are restricted to states in a particular region of the world. Most conventions institute mechanisms to supervise their implementation. In some cases these mechanisms have comparatively little power, and are often ignored by member states e.g. UN treaty committees, whereas, in other cases these mechanisms have great legal and political authority e.g. European Court of Human Rights and their decisions are almost always implemented. Virtually all United Nation's bodies and organs deal with matters relating to human rights[26], however, the United Nations' Monitoring Mechanism may broadly be divided into two categories which are as follows:

1.5.1 CHARTER BASED BODIES (EXTRA CONVENTIONAL MECHANISM)

The Charter's preamble states the purpose in founding such an institution; "we the peoples of the United Nations determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and

[26] Dinah Shelton, *Remedies in International Human Rights Law* (New York: Oxford University Press, 1999), 9.

women and of nations large and small" The Charter itself includes the following goals; "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Charter based bodies primarily include the Human Rights Council.

1.5.1.1 The Human Rights Council

The World leaders—Heads of State and Government met at United Nations Headquarters in New York from September 14 to 16, 2005 and adopted a document at the end of the Summit known as World Summit Outcome 2005 and agreed to create a U.N Human Rights Council (HRC). The HRC is the most important UN intergovernmental body based in Geneva, authorized for the promotion and protection of human rights. It was created by General Assembly Resolution 60/251 on 15 March 2006 to substitute the former Commission on Human Rights. The U.N Secretary General Kofi Annan acknowledged in April 2005 that "we have reached a point at which the Commission's declining credibility has cast a shadow on the reputation of the United Nations system as a whole, and where piecemeal reforms will not be enough."

The HRC is a subordinate organ of the General Assembly and consists of 47 members who shall be elected directly and individually by secret ballot by an absolute majority of the General Assembly for three-year terms in a secret ballot. Membership in the Council shall be open to all member States of the United Nations and shall be based on equitable geographical distribution with a third of them being elected each year. HRC Member States are ineligible for re-election after two consecutive terms, therefore preventing

de facto permanent membership. The first election of the Council Members took place on May 9, 2006. The General Assembly, by a two-thirds majority of the members present and voting, may suspend the HRC membership of a State that commits gross and systematic violations of human rights. The HRC holds a minimum of three sessions each year, for a total of no less than 10 weeks. It can also convene Special Sessions at the request of a member of the HRC with the support of a third of its members.

1.5.1.2 Functions of the Human Rights Council

The Council shall perform the following functions—:

- It shall make recommendations with regard to the promotion and protection of human rights and shall submit an annual report to the General Assembly;
- it shall promote the full observance of human rights obligations assumed by States and follow up to the commitments and goals related to the promotion and protection of human rights originating from United Nations Conferences and Summits;
- it shall promote universal respect for the observance of all human rights and fundamental freedoms for all, in a fair and equal manner and without distinction of any kind;
- It shall promote the mainstreaming and the effective coordination of human rights within the UN system;

- it shall work in close cooperation in the field of human rights with state governments, national human rights institutions, civil society and regional organizations;
- it shall undertake a universal periodic review, based on reliable and objective information, of the fulfillment by each State of its human rights commitments and obligations in a manner which guarantee equal treatment with respect to all States and universality of coverage;
- it shall promote human rights learning and education as well as technical assistance, advisory services, and capacity building, to be provided to the Member States concerned;
- It shall make recommendations to the General Assembly for the further development of International Law in the field of human rights;
- It shall contribute, through cooperation and dialogue, towards the prevention of human rights violations and address situations of human rights abuses, including gross and systematic violations and to make recommendations thereon;
- It shall serve as a forum for dialogue on thematic issues on all human right;
- The Council shall under take the responsibilities and role of the Commission on Human Rights.

1.5.1.3 The Universal Periodic Review

The Universal Periodic Review (UPR) is a new feature of the Council that "has great potential to promote and protect human rights in the darkest corners of the world". It is

devised to review the fulfillments by each UN Member State of its human rights commitments and obligations over a four-year rotation. The review of States is carried out in a Working Group of the Council, which is composed of the Council's forty seven Member States. The Working Group assembles in three two-week sessions each year. A total of forty eight States are reviewed per annum.

Three documents serve as the basis for the review of each State:

- Information prepared by the Member State under review, in the form of a National report.
- A summary of stakeholders' submissions, prepared by the OHCHR. These stakeholders include regional organizations, national human rights institutions and civil society representatives (including human rights defenders, NGOs, research institutes and academic institutions).
- A compilation of UN information on the Member State under review prepared by OHCHR. (Including the reports of the Special Procedures, human rights treaty bodies, and other relevant official UN documentation)

The Working Group conducts a three-hour interactive dialogue with each Member State under review. The review of each Member State is facilitated by a "troika," which consists of three rapporteurs selected from the different UN regional groups. Although other stakeholders (including NGOs in consultative status with ECOSOC) may attend Working Group sessions but they do not play a role in the interactive dialogue. During the interactive dialogue session the concerned State is given an opportunity to present the information that it has prepared toward its review. The concerned State also responds to

the recommendations and questions presented by the HRC's Member and Observer States relating to the human rights situation as well as human rights practices within its domestic jurisdiction.

1.5.1.4 HRC Special Procedures

Special Procedures are the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council (HRC) to address either specific country situations also known as country mandates or thematic issues also known as thematic mandates in all parts of the world. Special Procedures mandate holders are independent human rights experts who have been appointed by the HRC to accomplish a particular mandate. They may be individuals titled as Independent Expert, Special Rapporteur, Representative of the Secretary-General and Special Representative of the Secretary-General or working groups which commonly composed of five representatives, one from each UN regional group. The purpose, function, duration etc., of the Special Procedure mandates are defined and established by the relevant HRC resolution creating them. Special Procedures do not necessitate domestic remedies to have been exhausted, and can be set in motion even where a State has not ratified the relevant treaty or instrument. International, regional and national NGOs and other civil society actors play an essential role in relation to the Special Procedures system. Special Procedures mandate holders have developed diverse working methods. Some may obtain information on specific allegations of human rights abuses and send urgent letters or appeals to the concerned governments asking for explanation. Mandate holders may also under take studies on key human rights issues and, at the invitation of a State, may visit a country to appraise the general human rights situation and/or the specific administrative, legal, judicial and

institutional conditions prevailing there that are pertinent to their mandate. All special procedure mandates report to the Human Rights Council on their findings and recommendations.

1.5.1.5 HRC Advisory Committee

The Advisory Committee of the Human Rights Council (HRC) substitutes the former Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights. The Committee works with governments, national human rights institutions, NGOs and other civil society entities. The Committee is composed of eighteen individual experts proportionally representing the five UN regions. The Committee members serve for a period of three years and are eligible for re-election once. It functions as a think-tank for the Council, by providing advice, expertise and undertaking research at the HRC's request. Each year the Committee meets in two sessions for a maximum of ten working days, with the possibility of additional ad hoc sessions with the HRC's approval.

1.5.1.6 HRC Complaint Procedure

The Complaint Procedure of the Human Rights Council deals with consistent patterns of reliably attested and gross violations of all human rights and fundamental freedoms occurring in any part of the world and under any circumstances. Any group (NGO) or individual can bring gross infringements of human rights to the HRC's attention. Complaints can be submitted by the individual whose human rights have been allegedly infringed or by a third party on behalf of that person such as an NGO. It is not necessary for NGOs to be in consultative status with ECOSOC in order to present a complaint

through the Complaint Procedure of the HRC. However, communications alleging a consistent pattern of reliably attested and gross violations of human rights and fundamental freedoms must fulfill certain criteria.

1.5.2 TREATY BODIES (CONVENTIONAL MECHANISM)

The core human rights treaties have set up committees to perform the task of monitoring State's parties compliance with their obligations which are as follows :—

(1) Human Rights Committee (HRC) by the International Covenant on Civil and Political Rights (ICCPR)

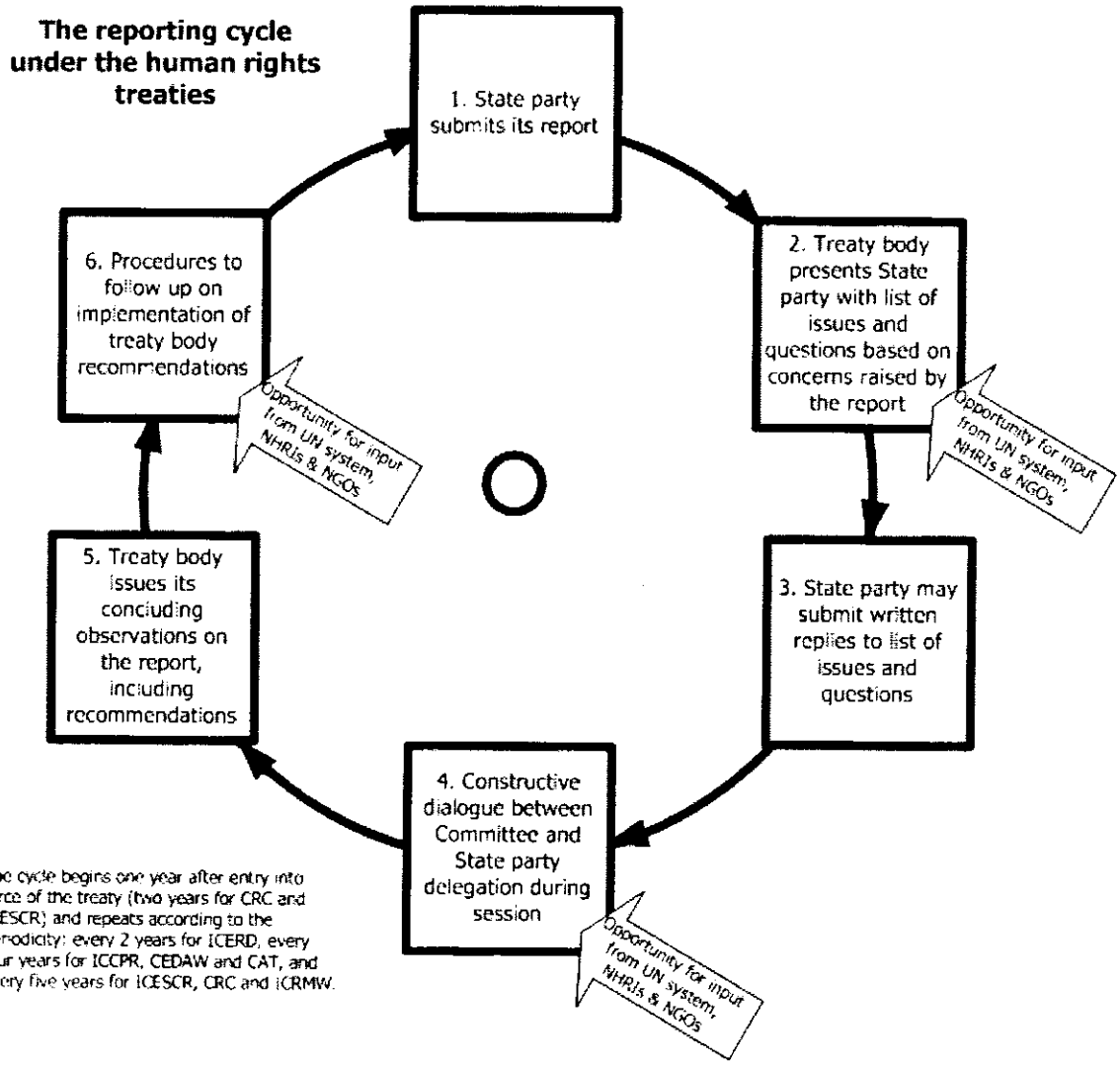
(2) Committee on Economic, Social and Cultural Rights (CESCR) by the International Covenant on Economic, Social and Cultural Rights (ICESCR)

(3) Committee on the Elimination of Discrimination against Women (CEDAW) by the Convention on the Elimination of All Forms of Discrimination against Women

(4) Committee against Torture (CAT) by the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment

(5) Committee on the Rights of the Child (CRC) by the Convention on the Rights of the Child

(6) Committee on the Racial Discrimination (CRD) by the Convention on the Elimination of All Forms of Racial Discrimination



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[1]<http://www.google.com.pk/imgres?q=reporting+system+in+un+treaties+bodies&hl=en&gbv=2&tbm=isch&tbnid=RRPnL5fRqdbEM:&imgrefurl=http://www2.ohchr.org/english/bodies/treaty/reform.htm&docid=O0eeYIvBBTMq1M&imgurl=http://www2.ohchr.org/english/bodies/docs/ReportingCycle.gif&w=699&h=639&ei=pBtNT6rOMforAfwiY2IDw&zoom=1&iact=rc&dur=539&sig=117392118147919060326&page=1&tbnh=124&tbnw=136&start=0&ndsp=28&ved=1t:429,r:25,s:0&tx=54&ty=38&biw=1152&bih=734>

(7) Committee on the Right of Migrant Workers and Members of Their Families (CMW) by the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

(8) Committee on the Rights of Persons with Disabilities by the Convention on the Rights of Persons with Disabilities.

The above Committees monitor the State's obligations through a dialogue with the representatives of each of the State's parties on the basis of a detailed report (an initial report followed by periodic reports at; approximately four to five year interval). The principal outcome of this process is the record of the resulting dialogue and the Committee's own summary of the key points which provide an opportunity for individual member or the Committee as a whole, to indicate the extent to which the State party appears to be in compliance or otherwise. Most of these Committees also deal with · interstate complaints and complaints from individuals alleging violations of their rights protected by the treaty concerned.

1.6 OTHER INTERNATIONAL HUMAN RIGHTS MECHANISMS

Following institutions are also related to the human rights enforcement.

1.6.1 International Criminal Tribunals

Faced with widespread violations of international human rights and humanitarian law in the former Yugoslavia and Rwanda in the early 1990s, the UN Security Council decided to establish two international criminal tribunals.

The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were set up in 1993 and 1994, respectively. Their mission is to prosecute individuals responsible for genocide, crimes against humanity and other breaches of international humanitarian law committed in the territories of the former Yugoslavia since 1991 and in Rwanda between 1 January and 31 December 1994.

1.6.2 The International Criminal Court

The International Criminal Court (ICC) is another important human rights mechanism. It was established by a UN conference in 1998 which adopted the Rome Statute. The Statute entered into force in 2002. It is the first permanent international court with the authority to try individuals accused of genocide, war crimes and crimes against humanity. The ICC was established not as an organ of the United Nations but as an independent international judicial institution with a Relationship Agreement with the UN. The Court cooperates with the UN in many different areas, including the exchange of information and logistical support. Each year, the ICC reports to the UN Security Council and General Assembly on its activities.

1.6.3 UN Specialized Agencies' Mechanisms

Some UN specialized agencies have established specific mechanisms to protect human rights in their relevant fields of competence. In 1978, the Executive Board of the United Nations Educational, Scientific and Cultural Organization (UNESCO) created a course of action for the examination of complaints concerning suspected violations of human rights in the Organization's fields of competence, specifically science, education, information and culture. One of UNESCO's permanent subsidiary organs – the Committee on

Conventions and Recommendations – carries out this work. A complaint may be filed against any Member State of the Organization. It is confidentially scrutinized by the Committee with the cooperation of the concerned government until a friendly solution can be commenced to the case. NGOs as well as individuals may submit complaints, whether they are themselves victims or whether they believe to have trustworthy knowledge of such violations.

The International Labour Organization (ILO) was established in 1919 and had developed Recommendations and Conventions that cover a wide range of subjects concerning employment, work, social policy, social security and related human rights. The ILO's supervisory bodies – the International Labour Conference Committee on the Application of Standards and the Committee of Experts on the Application of Conventions and Recommendations – regularly examine the application of international labour standards in ILO Member States. A special procedure – the Committee on Freedom of Association – evaluates complaints concerning violations of freedom of association, whether or not a Member State has ratified the relevant conventions.

1.7 REGIONAL HUMAN RIGHTS SYSTEMS

The next two chapters will provide the detailed and comprehensive analysis of the three major Regional Human Rights Systems (Inter-American, European, and African) currently in operation.

1.8 NATIONAL HUMAN RIGHTS INSTITUTIONS

National human rights institutions are crucial to national human rights protection systems. The international community has recognized the importance of NHRI in

ensuring effective protection of human rights for over a decade.[27] They play a central role in the promotion and effective implementation of international human rights standards at the national level; a role which is progressively more recognized by the international community[28]. NHRIs are quasi judicial and administrative bodies, established to monitor and protect human rights in a particular state. The development of such bodies has been promoted by the Office of the United Nations High Commissioner for Human Rights (OHCHR) which has supported NHRIs to access the UN treaty bodies and other committees, and offered support and advisory services. [29]

NHRIs can be grouped together in two broad categories: ombudsmen and human rights commissions. While most ombudsman institutions have their powers vested in a single person, whereas human rights commissions often represent various political tendencies, social groups and consist of multi-member committees. Sometimes NHRI's are established to deal with specific issues. Specialized national institutions exist in many states to protect the rights of a specific vulnerable group such as indigenous peoples, ethnic and linguistic minorities, women, children or refugees. However, generally these national human rights institutions have an explicit and a broader mandate, which include handling complaints about administrative deficiencies as well as research, documentation, training and education in human rights issues[30]. In most countries, an institution-specific legislation, a human rights act or a constitution will provide for the establishment of a national human rights institution. The independence of these

[27] Carolyn Evans, "Human Rights Commissions and Religious Conflicts in The Asia-Pacific Region," *International and Comparative law Quartely* 53 (July 2004): 714.
[28] <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx > (accessed 01Dec 2011)
[29] < http://nhri.ohchr.org/EN/Pages/default.aspx> (accessed 015Dec 2011)
[30] Birgit Lindsnaes, Lone Lindholt, Kristine Yigen (eds.) *National Human Rights Institutions, Articles and working papers, Input to the discussions of the establishment and development of the functions of national human rights institutions* (The Danish Institute for Human Rights, 2001)

institutions from the state's influence depends upon domestic law, and for optimum practice, it requires a statutory or constitutional basis rather than an executive order.

1.9 HUMAN RIGHTS AND NON-GOVERNMENTAL ORGANIZATIONS

Non-Governmental Organizations (NGOs) are private organizations consisting of private groups of religious, scientific, cultural, philanthropic, technical or economic orientation. They are neither inter—governmental agreements nor involve direct government participation. The Economic and Social Council of the United Nations by adopting a resolution [288(x)] on February 27, 1950 defined the non-governmental organizations as "any international organization which is not established by inter-governmental agreements". In wider sense, the term can be applied at any nonprofit organization that is independent of government. Examples of such organizations are International Chamber of Commerce, Inter Parliamentary Union, World Veterans Federation, Federation of Trade Union and Women's International Democratic Federation. NGOs may be either national (or domestic) or international (global). Private—organizations formed at national level have national membership and they define therein goals in their Constitutions. International NGOs having international membership perform their activities at international level. They may be considered analogous to the public interest groups in the sense that their activities are meant not for particular and expediential interests of their members but for the public good. The activities of these groups, therefore, produce no direct and immediate benefit to the members of the group or organization (except for physical satisfaction). However, the performance of NGOs has been frequently criticized.

The optimistic belief that cooperation with NGOs partners in the South would lead quasi automatically to better results has faded.[31]

Human rights NGOs are private associations and they denote significant resources to the promotion and protection of human rights. They are independent of both government and all political groups which seek direct political power. Human rights NGOs are different from NGO's involved in other fields in the sense that the former seek to protect the rights of all members of the society and not to a particular group or constituents, A number of NGO's have come into existence for the promotion and protection of human rights. Activities and membership of most of them are confined to one country However; some human rights groups have been organized internationally and they have international membership"[32]. Examples of such groups are Amnesty International (London), Anti-Slavery Society (London), International Commission of Jurists (Geneva), International League for Human Rights (New York), International PEN (London), French League for the Defense of the Rights of Man and of the Citizen (Paris). The International human rights NGO's not only have special 'consultative status' with the United Nations, they also have direct access to the UN Commission on Human Rights, its Sub-Commission on the Prevention of Discrimination and Protection of Minorities, International Labour Organization and the United Nations Educational, Scientific and Cultural Organization (UNESCO). NGOs can also act as systematic modifiers of state behavior and their role as soft actors also poses a challenge to the realist paradigm in international relations.[33]

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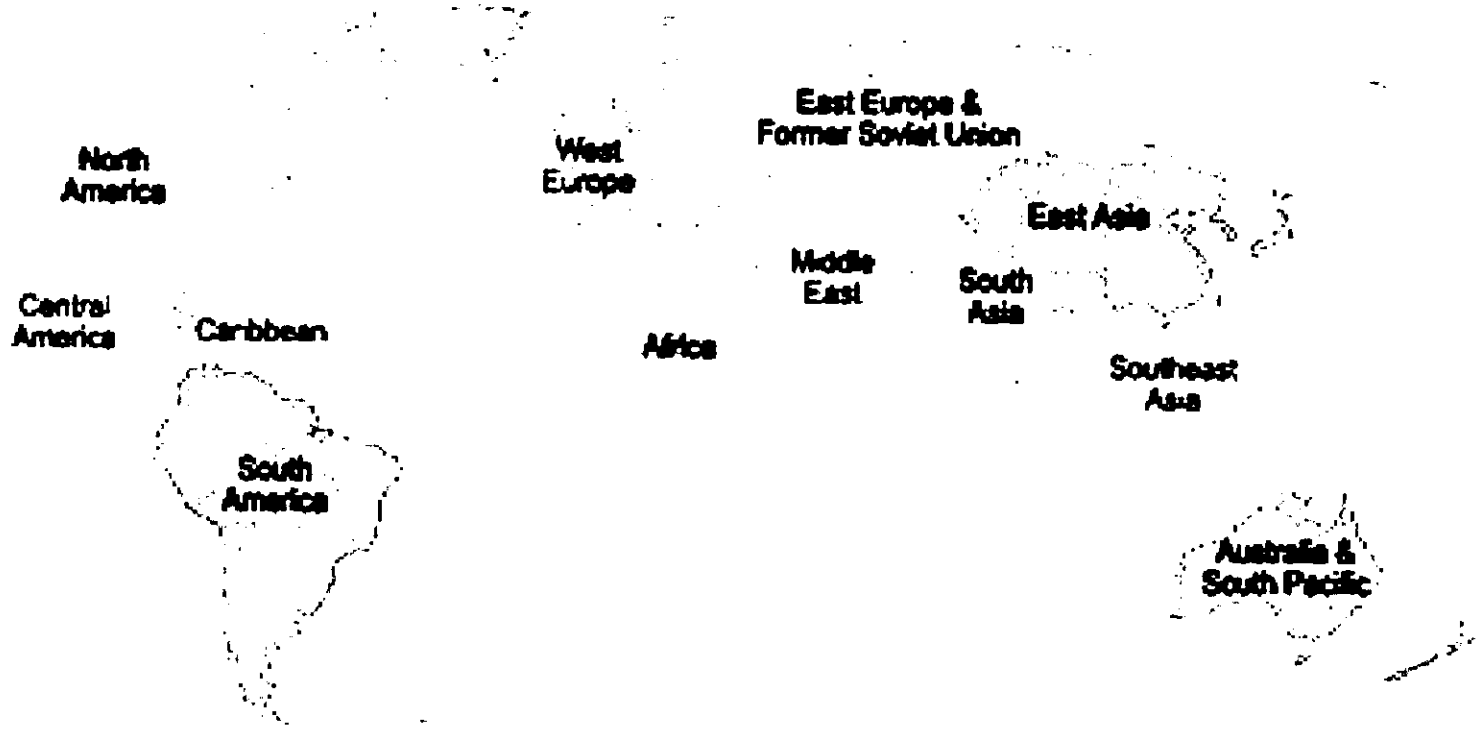
[31] Dr. M. Lakshmi Narasaiah, *NGOs and Human Rights* (New Delhi: Discovery Publishing House, 2006),7.
[32] H.O Agarwal, *Human Rights* (Allahabad: Central Law Publications, 2008), 211.
[33] Paul F. Diehl, ed., *The Politics of Global Governance* (New Delhi: Viva Books Pvt. Ltd, 2005), 381.

REGIONS OF THE WORLD[1]



[1] <http://www.eoearth.org/article/Region> (accessed 28 Feb 2012)

CHAPTER II
REGIONALISM AND HUMAN RIGHTS

2.1 WHAT IS REGIONALISM?

Regionalism is a frequently used term in international relations. Regionalism refers to both a tendency and a political commitment to organize the world in terms of geographical regions. Joseph Nye[1] defined an international region in the following words "a limited number of states linked by a geographical relationship and by a degree of mutual interdependence", and international regionalism in the following words, "the formation of interstate associations or groupings on the basis of regions".

Regionalism has been a remarkable trend in post-Second World War international relations. The first sound regional attempts began in the 1950s and 1960, and observed the rise of various regional groups in different parts of the world – the European Economic Community in Western Europe, the Organization of Petroleum Exporting Countries in the Middle-East, the Organization of African Unity in Africa, and the Association of Southeast Asian Nations in Southeast Asia. Regional groups achieved little, except in Western Europe with the establishment of the European Community. The

[1] Joseph Samuel Nye is the co-founder of the international relations theory neoliberalism, developed in their 1977 book Power and Interdependence. He developed the concepts of asymmetrical and complex interdependence. More recently, he pioneered the theory of soft power. His notion of "smart power" became popular with the use of this phrase by members of the Clinton administration, and more recently the Obama Administration. He is currently University Distinguished Service Professor at Harvard University, and previously served as dean of Harvard University's John F. Kennedy School of Government. He also serves as a Guiding Coalition member for the Project on National Security Reform.

accomplishment of the EEC among these was the most notable, but the same was not emulated in other parts of the world. Some political analysts term these initiative "old regionalism". In the late 1980s, a new spells of regional integration which also known as "new regionalism" began and still continued. However, regionalism attained an enhanced momentum after the end of the Cold War and with the driving force of globalization. The termination of the Cold War brought about some key changes in the international order. It provided impetus to the process of globalization and accelerated the growth of interdependence. Both regionalization and globalization cause integration; but the two works at different levels and do not necessarily contradict nor complement each other. A new wave of political initiatives advancing regional integration took place globally during the last two decades. Bilateral and regional trade deals have also grown rapidly after the failure of the Doha round.[2] The European Union (EU)[3] can be categorized as a consequence of regionalism. The under laying theme behind this improved regional identity is that once a region becomes economically more integrated, it will essentially become politically integrated as well. The European example is particularly valid in this regard, as the European Union emerged as a political body out of more than forty years of

[2] The Doha Development Round or Doha Development Agenda (DDA) is the current trade-negotiation round of the World Trade Organization (WTO) which commenced in November 2001. Its objective is to lower trade barriers around the world, which will help facilitate the increase of global trade. As of 2008, talks have stalled over a divide on major issues, such as agriculture, industrial tariffs and non-tariff barriers, services, and trade remedies. < http://www.nationalaglawcenter.org/assets/crs/RL 32060pdf > (accessed 11 Aug 2011)

[3] The European Union is an economic and political union of 27 member states which are located primarily in Europe. The EU traces its origins from the European Coal and Steel Community (ECSC) and the European Economic Community (EEC), formed by six countries in 1958. In the intervening years the EU has grown in size by the accession of new member states, and in power by the addition of policy areas to its remit. The Maastricht Treaty established the European Union under its current name in 1993

economic integration within Europe. The European Economic Community (EEC)[4], the forerunner of the European Union was completely an economic organization.

2.1.1 Categories of Regionalism

"Regionalism" is a political process that causes enhanced integration in a geographical region. "Regions" can be defined as essentially geographical entities, emerging as relatively integrated units on the basis of shared identities or interests. Bjorn Hettne applies the term "regionness" to specify the different levels of integration in a geographical unit. According to him, there are five levels of "regionness" which are expounded as follows.[5]

- Region as a Regional Space or Geographical Unit

  Regions are composed of communities and are rooted in territorial space controlling certain natural resources and integrated through a certain set of cultural or historical values.

- Region as a Regional Complex or Social System

  Regional identities may date back to pre-modern history. A long history of interdependence may exist and this can be considered as the foundation of regionalism.

- Region as Regional Society or Transnational Co-operation

[4] The European Economic Community (EEC) (also known as the Common Market), was an international organization created with a view to bring about economic integration (including a single market) among the Inner Six of European integration: Belgium, France, Germany, Italy, Luxembourg and the Netherlands. The EEC was created by the Treaty establishing the European Economic Community (Treaty of Rome; renamed Treaty on the functioning of the European Union in 2009) of 1957.

[5] Hettne, Bjorn & Fredrik Soderbaum, *Theorising the Rise of Regionness* in Shaun Breslin et. al. (eds.) – *New Regionalisms in the Global Political Economy* (London: Routledge, 2002)

At this stage, a huge number of communication processes transcending the national space begin to emerge. These may be through the non-state actors as well as intergovernmental. A regional organization may be established to give formal shape to regional co-operation. Thus, the process of regionalization gets more augmented.

- Region as Regional Community or Civil Society

  At this level, the region turns into an active subject with a decision-making structure along with distinct legitimacy and identity vis-a-vis a civil society transcending the old state borders. The distinction between separate and "imagined" national communities within the region may begin to gradually disappear as further development.

- Region as Region State or Acting Subject

  This may give rise to a union that in territorial terms would be larger than the states but by no means having the same degree of sovereignty or homogeneity of a nation-state.

The development from the first to the fifth stage of "regionness" is the outcome of the process of regionalization, which Hettne defines as "the process whereby a geographical area is transformed from a passive object to an active subject, capable of articulating the transnational interests of the emerging region."[6] Hettne accentuates that a "region may not necessarily evolve from an earlier to a later stage. It is possible that the process of regionalization may fail, leading to decreasing regionness or even dissolution of a

[6] Hettne, Bjorn, *Regionalism, Security and Development: A Comparative Perspective* (London; Macmillan: 2001), 2.

region". Regionalism has implications for both development and security in a region.[7] In the first case, it refers to "concerted efforts from a group of countries within a geographical region to increase the complementarity and capacity of the total regional economy as well as finding the right balance between functions and territory." In the second case, it aims at transforming "a security complex with conflict generating interstate and intrastate relations" into "a security community with co-operative external relations and domestic peace." Based on the five levels of regionness and the success of development and security regionalism, the different regions can be classified into three categories, namely, core regions, intermediate regions and peripheral regions.[8]

- Core Regions

  Core regions are more organized at the supra-state level, politically strong, economically dynamic and growing in a sustained manner.

- Intermediate Regions

  Intermediate regions are closely associated with some or the other core region. They tend to emulate the economic and political systems of this core region and at some upcoming stage might be absorbed into the core region.

- Peripheral Regions

  Peripheral regions are economically stagnant or politically turbulent or both. They face underdevelopment, domestic crises as well as wars.

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[7] ibid.

[8] Hettne, Bjorn, *Globalism, Regionalism and the New Third World* in Nana Poku & Lloyd Pettiford (eds.) – *Redefining the Third World* (London: Macmillan, 1998)

2.2 ARE HUMAN RIGHTS UNIVERSAL?

The debate between cultural relativism versus universality is one of the key issues in study of human rights. The reason of this debate is that the modern notion of human rights is principally based on the liberal tradition of Western thought.

2.2.1 The Emergence of the Debate in International Law

A delegation led by Syria, Iran and China during the 1993 UN Conference on Human Rights held in Vienna, officially challenged the universality of Human Rights and presented the following conclusions:

- Human Rights as currently defined are based on Western morality and not universal in nature.
- They argue that the imposition of one's standard on another culture is imperialist and unjust in nature.
- Furthermore, they should not therefore be imposed as norms on non-western societies in disregard of their cultural differences along with perceptions of what is right and wrong, and in disregard of those societies' historical and economic development.

2.2.2 The Theoretical Content of the Debate

The Universalist theory of Human Rights is in fact primarily based on Western philosophy and is product of Greek philosophy, Christianity and the Enlightenment thinkers. The Universalist theory asserts that one can use God, nature, or reason to identify basic rights, which pre-exist society and inherent to every human. Since these

rights are God-given or natural or inherent to humanity are so fundamental that there should be no exception to their application. The contemporary doctrine of the Universalist approach has been best summarized by the Jack Donnelly by putting forward the following conclusions:

- All humans have rights by virtue of their humanity;
- Human Rights exist universally as the highest moral rights, so no rights can be subordinated to an institution (e.g. the state) or another person (e.g. a husband).
- A person's rights cannot be conditioned by gender or national or ethnic origin;

Donnelly emphasizes the universal validity of this theory by indicating that it is increasingly the practice of states to accept it, through ratification of international instruments.[9]

On the contrary, cultural relativism is based on the idea that there are no objective standards by which others can be judged. The debate between relativism and universalism is as old as the history of philosophy itself. Relativism was first introduced by the sophist[10]Protagoras.[11] He rejected objective truth by saying in so many words, later quoted by Plato; "The way things appear to me, in that way they exist for me and the way things appear to you, in that way they exist for you".[12]

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[9] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press), 2.
[10] William S.Sahakian, Mabel Lewis Sahakian, *Realms of philosophy* (Cambridge: Schenkman Pub. Co 1965), 40
[11] Protagoras (ca. 490 BC – 420 BC) was a pre-Socratic Greek philosopher and is numbered as one of the sophists by Plato. Sophists are considered the founding fathers of relativism in the Western World. Elements of relativism emerged among the Sophists in the 5th century BC. Notably, it was Protagoras who coined the phrase, "Man is the measure of all things: of things which are, that they are, and of things which are not, that they are not." The thinking of the Sophists is mainly known through their opponents, Plato and Socrates. In a well known paraphrased dialogue with Socrates, Protagoras said: "What is true for you is true for you, and what is true for me is true for me."
[12] K. Ross, "Relativism" available at <http://www.firesan.com/relative.htm> (accessed 24 Nov 2011)

Relativism as related to culture emerged later due to the work of anthropologists who empirically demonstrated that there exist many different cultures in the world, each equally worthy. However, International Law has only recently begun to undertake the issue of cultural relativism, which first emerged in a 1971 book by Adda Bozeman entitled The Future of Law in a Multicultural World.[13] The essential themes of the book are as follows:

- There exist profound differences between western legal theories and cultures and those of Africa, Asia, India and Islam.
- In order to fully understand a culture, one must be a product of that culture.
- Even if a culture were to borrow a concept from another culture, that concept's meaning would be filtered through the first culture's unique linguistic-conceptual culture.
- There can be no universal meaning to a moral value.
- A universal text on values is a futile exercise.

Theoretically speaking, the debate between cultural relativism versus universality is inscribed on a spectrum ranging from radical relativism which explains culture as the sole source of the validity of a moral value to radical universalism that disallows any derogation from certain standards.

2.2.3 Arguments of Universalists

Universalists argue that the Universal Declaration of Human Rights represents a common core of values to which all nations and peoples should aspire. The idea of human rights

[13] Adda Bozeman, *The Future of Law in a Multicultural World* (Princeton University Press, 1971), 4.

can and should apply for all human beings in every human society in equal measure by virtue of their humanity. "Advocates of the doctrine of universal human rights contend that certain rights inhere in all individuals regardless of cultural context".[14] Convergence on human rights has been taking place across cultures, which symbolizes the universality of human rights. However, what these rights mean in practice will vary from culture to culture and from nation to nation. Even if a body of substantive human rights norms does exist, its application varies substantially from nation to nation and from culture to culture. For example, the European Court of Human Rights has developed the concept of the "margin of appreciation"[15], when examining national legislation for compatibility with the European Convention of Human Rights, makes it possible for the Court to permit a multiplicity of approaches within Europe.

The modern concept of human rights stalks principally from the liberal tradition of Western thought, especially the Lockean theory of natural rights.[16]According to the Western concept, human rights consist of rules and principles made available to the

[14] Adamantia Pollis and Peter Schwab, ed., *Human Rights: New Perspectives, New Realities* (New Delhi: Viva Books Private Limited, 2002), 10.

[15] Margin of Appreciation is a concept, the European Court of Human Rights has developed when considering whether a member state of the European Convention on Human Rights has breached the convention. The margin of appreciation doctrine allows the court to take into effect the fact that the Convention will be interpreted differently in different member states. Judges are obliged to take into account the cultural, historic and philosophical differences between Strasbourg and the nation in question. The Doctrine was used for the first time in the case Handyside v. United Kingdom which concerned the publication of a book aimed at school children, a chapter of which discussed sexual behavior in explicit terms. The ECHR were willing to allow a limitation of freedom of expression in the interests of the protection of public morals.

[16] John Locke (1632–1704) is among the most influential political philosophers of the modern period. In the Two Treatises of Government, he defended the claim that men are by nature free and equal against claims that God had made all people naturally subject to a monarch. He argued that people have rights, such as the right to life, liberty, and property that have a foundation independent of the laws of any particular society. Locke used the claim that men are naturally free and equal as part of the justification for understanding legitimate political government as the result of a social contract where people in the state of nature conditionally transfer some of their rights to the government in order to better insure the stable, comfortable enjoyment of their lives, liberty, and property. Since governments exist by the consent of the people in order to protect the rights of the people and promote the public good, governments that fail to do so can be resisted and replaced with new governments.

individual with the fundamental aim of facilitating him to defend himself against the state. For example, the concept of natural rights depicts a view of man as natural, private and autonomous.

The U.S. Constitution states that:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness...to secure these rights governments are instituted among men, deriving just power from the consent of the governed; that whenever any form of government becomes destructive of these ends it is the right of the people to alter or abolish it and to institute a new government.

2.2.4 Arguments of Cultural Relativist

Cultural relativists stress that culture is the source of the validity of rules and moral rights. The conceptual analysis of cultural relativism is provided by Nickel, who asserts that cultural relativism means that all moral values, including human rights, are "culturally embedded" and thus are relative to the cultural context. Crocker argues that moral relativism consists of three doctrines:

- Social descriptive relativism (i.e. cultural relativism) maintains that different societies, cultures, or classes have significantly different positive social morality;
- Social normative relativism (prescriptive relativism) recommends that since morality is relative, therefore, one should follow the moral rules of one's group;

- Meta-ethical relativism (skeptical relativism) asserts that moral judgments cannot be resolved rationally and both sides to the conflict are equally justified or correct.

According to cultural relativism, considering the existence of diverse cultures, there is no universal culture therefore; no religion, ideology, tradition or culture can speak for all humankind. Thus, there exist no universal moral or legal standards. "Cultural relativists, argue that fundamental values are culturally specific and the communal group, whatever that might be (tribe, village, or kinship) and not the individual, is the basic social unit".[17] Every culture or society recognizes certain mores, values, operational principles and norms by which it seeks to approximate the ideas of human dignity. Each country's human rights conditions are delineated by its historical, cultural, economic and social, conditions and human rights reflect a country's stage of historical development.

2.2.5 Types of Cultural Relativism

Jack Donnelly differentiates three types of cultural relativism as radical, strong and weak.[18] The differences between these relativist positions are that culture is the sole, principal or maybe an important source of the validity of moral rights or rule.

- Radical Cultural Relativism

  Radical cultural relativism is the most extreme form and holds that culture is the only source of the validity of a moral right or rule. On the other hand, radical

[17] Adamantia Pollis and Peter Schwab, ed., *Human Rights: New Perspectives, New Realities* (New Delhi: Viva Books Private Limited, 2002), 11.

[18] Jack Donnelly, "Cultural Relativism and Universal Human Rights" <www.agoraproject.eu/papers/Donnelly_cultural_relativisim.pdf>(accessed 24 Nov 2011)

universalism holds that culture is irrelevant to the validity of moral rights or rules, which are universally valid.

- Strong Cultural Relativism

  Strong cultural relativism holds that culture is the principal source of the legitimacy of a moral right or rule. However, universal human rights standards serve as a check on potential excesses of relativism.

- Weak Cultural Relativism

  Weak cultural relativism holds that culture may be an important source of the legitimacy of a moral right or rule. Universality is initially presumed, but the relativity of rights, communities and human nature serve as a check on potential excesses of universalism. Weak cultural relativism would recognize a comprehensive set of prima facie universal human rights, but allow occasional and strictly limited local exceptions and variations.

2.2.6 Debate between Cultural Relativist and Universalist

Western societies believe human rights to be adversarial, individualistic, inalienable and just, in contrast to, collective rights, social welfare, economic development and consensual dispute resolution and state interests in Islamic, African and Asian traditions. While human rights in the West are based on individualism, human rights in classical and medieval Islamic thought were based on the general interest of society.[19] These have resulted in the controversy that the idea of human rights is strange to non-Western cultures. Therefore, the controversy has been made that the application and meaning of

[19] Ahmad S. Moussalli, *The Islamic Quest for Democracy, Pluralism, and Human Rights* (Florida: University Press of Florida, 2001), 127.

human rights should be dependent upon national and regional conditions. Relativists argues that because of its Western origin the notion of human rights is inherently unfamiliar to the non-Western tradition of third world countries to which it is now being extended. They assert that extensive application of Western principles to non-western conditions is unfair and unjustifiable. In this context, relativists assert that certain human values such as political participation or equal protection are unsuitable in certain political or cultural contexts. For that reason, contemporary international human rights standards are incompatible with or insensitive to various social, political and cultural conditions. Mahbubani[20] emphasizes that the West has no right to give moral lectures to Asia. The Third World leaders may assume that the human rights movement causes one more attempt by ethnocentric Western societies to enforce their values on the rest of the world. They feel deeply about the importance of preserving their own cultures and traditions. In addition, the diversity of levels of economic development, political structures and cultural traditions make it difficult to define a single coherent and distinctive human rights regime that can take hold of vast regions. These opinions lead to the view that different societies have and should have different consciousness and understanding of right and wrong; "What is right or good for one individual or society is not right or good for another, even if the situations involved are similar" and there is no single, across the world, applicable

[20] Kishore Mahbubani (born October 24, 1948, Singapore) is a notable academic and is currently Professor in the Practice of Public Policy and the Dean of the Lee Kuan Yew School of Public Policy at the National University of Singapore. From 1971 to 2004 he served in the Singaporean Foreign Services, ending up as Singapore's Permanent Representative to the United Nations. In that role he served as president of the United Nations Security Council in January 2001 and May 2002. Mahbubani is best known outside Singapore for his writings in journals such as Foreign Affairs and in the books Can Asians Think? and Beyond the Age of Innocence: Rebuilding Trust between America and the World. His articles have appeared in several leading journals and newspapers outside of Singapore, such as The New York Times and Wall Street Journal.

standard of human rights. The "Statement on Human Rights" prepared by the American Anthropological Association stated in 1947, in part:

- Standards and values are relative to the culture from which they derive.
- The individual realizes his personality through his culture. Hence respect for individual differences entails a respect for cultural differences.

The relativist position was effectively expressed in the Bangkok Declaration,[21] which asserts a state-centric perspective based on respect for territorial integrity, national sovereignty and noninterference in the internal affairs of states. The Declaration states that "human rights must be considered in the context of the dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds".

Relativists attack the Universalist position that the apparently neutral title of international human rights law in fact favors deepening and widening the legitimacy of Western conceptions of human rights; the objections have ranged from accusations of "cultural imperialism" to "Western bias." Third World views human rights as a "Western construct with limited applicability." Relativists make the point that the international law of human rights is an export of the West to the rest of the world[22] and the Universal Declaration of

[21] Bangkok Declaration was adopted by Ministers of Asian states meeting in 1993 in the lead up to the World Conference on Human Rights; Asian governments reaffirmed their commitment to the principles of the United Nations Charter and the Universal Declaration of Human Rights. They stated their view of the interdependence and indivisibility of human rights and stressed the need for universality, objectivity and non-selectivity of human rights. At the same time, however, they emphasized the principles of sovereignty and noninterference, calling for greater emphasis on economic, social, and cultural rights, particularly the right to economic development, over civil and political rights. The Bangkok Declaration is considered to be a landmark expression of the Asian Values perspective, which offers an extended critique of human rights universalism.

[22] R. J. Vincent, *Human rights and international relations.* (Cambridge University Press, 1986), 4.

Human Rights is the imposition of an alien value system---the universalization of Western aspirations and values.

Universalists argue that the world has become more and more interdependent. Interdependence implies that nations are vulnerable or sensitive in significant ways to developments taking place beyond their borders. The concept of a right has become a matter of treaty obligation and has been removed from the domain of domestic jurisdiction. A state is thus duty-bound to integrate international standards into its domestic system. Kofi Annan, General Secretary of the UN, states an insightful remark that "it was never the people who complained of the universality of human rights, nor did the people consider human rights as a Western imposition. It was often their leaders who did so". The concern for human rights invalidates the principle of non-interference in domestic affairs. To a certain extent, violation of human rights, especially gross violations, are placed in international judicial processes, such as international criminal court and progressively being removed from domestic jurisdiction. Universal human rights are possible because of the global wave of democratization and the emerging common culture of modernity. Modernization involves increasing levels of education, urbanization, industrialization, wealth, literacy and social mobilization.

Human rights are a mainstay of the UN Charter to which all nations are bound and are universal values to be promoted and defended. The Vienna Declaration provides that while the significance of regional and national particularities and various religious, historical and cultural backgrounds must be borne in mind, it is responsibility of states, regardless of their economic, political and cultural systems, to promote and protect all human rights and fundamental freedoms.

2.3 REGIONALISM AND INTERNATIONAL LAW

The Treaty of Westphalia (1648)[23] introduced the concept of sovereignty and statehood that accordingly provided the basis for cooperation among states and thus consequently influenced the progressive growth of international law. The League of Nations also developed cooperation among the states that existed at the time. After the Second World War, the inclination to move towards universalism was further embedded in the United Nations Charter of 1945. The Charter was mainly considered as the global constitution of mankind and a vital step in establishing the fundamental principles of equality of all states and state sovereignty. In accordance with the purposes and principles of the organization, the UN was established with a view to promote international cooperation and enhance friendly relations among states. These principles are also more elaborated in the Friendly Relations Declaration.[24]

It is significant to note that international law mainly works on the basis of a single global system where the international actors, primarily states and other international organizations operate. However, international law also seems to be influenced by regional systems as reflected in various reservations to treaties and the recognition of regional arrangements in promoting international cooperation.

Universalism presumes that the world is operated and governed under a single system that is applicable to nation states and other legal persons. Although international law

[23] The Peace of Westphalia was a series of peace treaties signed between May and October 1648 in Osnabrück and Münster. These treaties ended the Thirty Years' War (1618–1648) in the Holy Roman Empire, and the Eighty Years' War (1568–1648) between Spain and the Dutch Republic, with Spain formally recognizing the independence of the Dutch Republic.

[24] UN General Assembly, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, 24 October 1970, available at: http://www.unhcr.org/refworld/docid/3dda1f104.html (accessed 6 Jan 2012)

deems that states are connected by a common purpose and destiny, it is submitted that the world's diversity is reflected in the different cultures, ideologies, economic advancement, regions and other factors that influence international relations. Therefore, despite of the fact that universalism is the corner stone of international law diversity is also evident and play a significant role in international affairs. Regionalism has long been a significant phenomenon in international relations. The UN Charter has discussed regarding the regional arrangements in Chapter VIII. It endorses that nothing in the Charter shall bar the existence of regional mechanisms or arrangements from dealing with such matters with respect to international peace and security as are suitable for regional action. However the regional arrangements are permitted so far as they are consistent with the principles and purposes of the UN.

The International Court of Justice has also recognized regionalism in the Asylum Case,[25] where the ICJ considered the practice of the states regarding the granting of asylum and concluded that there was no uniform practice as regards to the same. The recognition of regionalism and diversity has also found its place in the reservation phenomenon. The Vienna Convention on the Law of Treaties[26] (Articles 19-23) provide for reservations. However it is significant to note that reservations are not permitted if they defeat the purpose and object of the treaty. The International Court of justice in

[25] In the Asylum Case (Colombia v Perú), judgement 20 November 1950 (General List No. 7 (1949–1950)), the International Court of Justice (ICJ) recognized that Article 38 of the Statute of the International Court of Justice encompassed local custom as well as general custom, in much the same way as it encompasses bilateral and multilateral treaties. The Court also clarified that for custom to be definitively proven, it must be continuously and uniformly executed.

[26] The Vienna Convention on the Law of Treaties (or VCLT) is a treaty concerning the international law on treaties between states. It was adopted on 22 May 1969 and opened for signature on 23 May 1969. The Convention entered into force on 27 January 1980. The VCLT has 45 Signatories and 111 Parties as of December 2011. Some countries that have not ratified the Convention recognize it as a restatement of customary law and binding upon them as such.

advisory opinion on the Genocide Convention[27] in 1951 stated that "the object and purpose of the treaty limit the freedom in making reservations". The court affirmed that the state parties to such conventions do not have convenience or inconveniences of their own nor their own interests but purely a common interest. These observations were later enshrined in Article 19 of the Vienna Convention on The Law of Treaties.

Regional human rights systems have also adopted the same stance in respect to reservations. Article 57 (1) of the European Convention on Human Rights proscribes reservations of a general character. In the same way, the Inter American Court stated that reservations may not lead to a result that deteriorates the system of protection provided by the Convention. Article 27 of the Vienna Convention also put some limits on regionalism with respect to universalism and lay downs that a country cannot invoke its domestic law to defend its failure to perform under a treaty. This stipulation effectively endorses that universalism takes precedence over regionalism and that a state owes its obligations first to the international community as a whole and hence it must strive to conform its domestic laws to its international law obligations.

2.4 REGIONALISM AND UNITED NATIONS

Over the years, the processes and structures of the United Nations have developed much stronger regionalist features than the occasional references to geography in the Charter would put forward. Group dynamics, often of a regional character, have been among the

[27] The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948 as General Assembly Resolution 260. The Convention entered into force on 12 January 1951. . The Genocide Convention has 41 Signatories and 142 Parties as of December 2011.

most characteristic features of United Nations activity. The General Assembly has granted observer status[28] to several regional organizations, including the Organization of American States (OAS) in 1948,[29] the League of Arab States in 1950,[30] the Organization of African Unity (OAU) in 1965,[31] and the European Economic Community (EEC) in 1974,[32] the Conference on Security and Cooperation in Europe (CSCE) in 1993,[33] South Asian Association for Regional Cooperation on December 2, 2004,[34] The European Union (EU) has been an observer member at the United Nations (UN) since 1974[35] and has had enhanced participation rights since 2011[36] etc.

Regional cooperation has been formalized in most appointments and elections. In the General Assembly, the elections of the Chairs of the Main Committees, of the Vice-Presidents and of the President, follows a carefully balanced regional pattern.[37] In the Security Council, the 10 non-permanent seats are assigned to specific regions.[38] In the contemporary debate about a new composition for the Security Council, there is not only stress for a better representation of certain regions but even suggestions to create semi-

[28] The status of a Permanent Observer is based purely on practice, and there are no provisions for it in the United Nations Charter. The practice dates from 1946, when the Secretary-General accepted the designation of the Swiss Government as a Permanent Observer to the United Nations. Observers were subsequently put forward by certain States that later became United Nations Members, including Austria, Finland, Italy, and Japan. Switzerland became a UN Member on 10 September 2002.
[29] G.A. Res. 253(111).
[30] G.A. Res. 477(V).
[31] G.A.Res.2011(XX).
[32] G.A. Res. 3208(XXIX). The now defunct Council for Mutual Economic Assistance was granted observer status at the same tune. See G.A. Res. 3209(XXTX).
[33] G.A. Res. 48/5.
[34] G.A. Res (A/RES/59/53)
[35] G.A. Res (A/RES/3208 (XXIX)
[36] G.A. Res (A/RES/65/276)
[37] G.A. Res. 1990(XVIID, G.A. Res. 33/138.
[38] G.A. Res. 1991A(XVm).

permanent or genuine permanent regional seats.[39] Likewise, the structure of the ECOSOC is determined by a list of countries prepared as a result of regional groups.[40]

Regional considerations were even extended to organs whose members are elected in their individual capacity and do not represent States. It is customary that the composition of the International Court of Justice should generally reflect the geographical composition of the Security Council. The International Law Commission is also composed according to a rigid regional pattern, which under Article 8 of its Statute is to mirror the principal legal systems and the main forms of civilization of the world.[41] In the Secretariat, the problem of equitable geographical distribution has become the dominant factor for appointments. Desirable national ranges have been established for every Member on the basis of population, membership and financial contribution. Regional considerations also normally play a role with certain positions revolving amongst the nationals of the members of certain group.[42]

The establishment of genuine regional substructures has not been an important feature in the United Nations. The five Regional Economic Commissions set up by ECOSOC are exceptional in this respect. They work comparatively independently and are regarded as generally successful. A number of Specialized Agencies have field units or regional offices e.g. UNDP has regional field offices and representatives. Regionalization within the United Nations has clearly served some valuable purposes. Political groupings can play a beneficial and important role in any democratic decision-making process. Regional

[39] Sucharipa-Behrmann, "The Enlargement of the UN Security Council. The Question of Equitable Representation of and Increase in the Membership of the Security Council', 47 AJPIL (1994) 1.
[40] G.A. Res. 1991 B(XVm) and 2847(XXVI).
[41] G.A. Res. 36/39.
[42] The General Assembly has repeatedly criticized this practice. See, e.g., G.A. Res. 45/239,46/232, 47/226.

distribution of seats in political organs gives all groups a more secure sense of representation and decreases the potential for conflict in the selection of Members.

In an organization of the size of the United Nations, clustering of Members is almost sure to continue to play a significant role. What is less sure is whether groupings will continue to be dominated by geography. To the extent that economic development and political orientation go beyond geographical regions, new group loyalties will begin to emerge. For example, Africa held together by widespread poverty and by its colonial past may lose its coherence and one day may look more like Asia with its substantially more diverse economic and political landscape. A flexible response of the United Nations system to these probable changes will be crucial for maintaining its smooth functioning.

In non-political organs such as the Secretariat, the International Law Commission and the International Court of Justice, any benefit of regional distribution of positions is less understandable. Regionalization will frequently be at the cost of personal qualification. Nevertheless, representation of different legal systems is, no doubt, an important element. However, inflexible regional quotas are neither helpful nor necessary. This criticism particularly applies to the Secretariat. as provided for by Article 101(3) of the Charter, where the primacy of merit over geographical considerations should be restored.

2.5 REGIONALISM AND HUMAN RIGHTS

The development of human rights law has been among the most striking developments in international law. This development has taken place on both the regional and the universal levels. The United Nations Charter has not made any specific provision for the prospective growth of the regional human rights systems. The only reference made to

regional arrangements was regarding the peace and security. Therefore at the regional level, human rights systems to promote and protect basic rights were developed independent of the United Nations system. In fact, initially the United Nations was doubtful regarding the parallel growth of regional human rights system, fearing that they would weaken the universality of human rights. Nonetheless, besides the significant UN instruments, procedures and bodies, Africa, America and Europe, devised significant regional systems. The United Nations have at times explicitly welcomed them and have taken a generally positive attitude towards regional systems supplementing their own efforts in this area.[43] The UN World Conference on Human Rights of the 1993 (Vienna Declaration) authenticates that regional arrangements should strengthen universal human rights standards and approves efforts to reinforce these arrangements. It even supported the founding of regional and sub regional arrangements where they do not already exist.[44] On the other hand, the regional systems recognized the basic instruments adopted by the United Nations system. The African Charter of Human and Peoples' Rights, in its preamble, affirms the relevance of the Universal Declaration of Human Rights. More notably, the Charter permits the African Commission of Human Rights to draw inspiration from other international human rights instruments including, but not limited to the UDHR and other instruments adopted by the UN. The European Convention on Human Rights clearly refers to Universal Declaration of Human Rights. The Inter-American Convention on Human Rights also refers to the UDHR.

[43] G.A. Res. 47/125.
[44] United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action. 25 June 1993,1 para. 37,32 E.M (1993) 1661 at 1672.

The Universal Declaration of Human Rights of 1948 proceeded from a universal and homogeneous concept of human rights. However, regionalization of efforts to protect human rights may be vindicated due to the diversity of value systems. The succeeding debates have focused on the precedence of different types of human rights and their appropriateness for different regions, cultures and economies. This debate led to a division of human rights culminating in the adoption of the two UN Covenants in 1966, one dealing with civil and political rights and the other with economic, social and cultural rights. At the time, a widespread assumption was that America and Europe would give priority to the former while the developing regions of Asia and Africa would give attention to the latter. Succeeding developments have not fully borne out this expectation and the ratification record is largely identical for both Covenants.[45]

On the regional level, America and Europe did give priority to civil and political rights. Instruments on economic, social and cultural rights were drafted somewhat later. It is paradoxical that Western Europe, the region with the highest social standards domestically, has regarded the international protection of economic, social and cultural rights with some diffidence. The European Convention on Human Rights of 1950 was followed by a much weaker instrument, the European Social Charter in 1961. The American Convention on Human Rights of 1969 was followed by an Additional Protocol in the Area of Economic, Social and Cultural Rights in 1988.[46] The African Charter includes both categories of human rights, at the same time underlining certain regional characteristics such as duties of the individual, group solidarity and self-determination.

[45] As of 31 December 2011 the two Covenants had (ICESCR, Signatories70 & Parties160) and (ICCPR, Signatories 74 & Parties167) respectively.
[46] 28 ILM (1989) 156.

An examination of the various regional and universal human rights instruments does yield a number of variations in detail. However, no basic ideological or philosophical divergence has appeared which would rationalize separate regional developments. On the whole, the basic unity of human rights as a universal set of standards has prevailed over regional fragmentation and cultural relativism.

In spite of, some opposition from dictatorial holdouts, the 1993 Vienna Declaration reiterates the inherently universal character of all human rights;

> [a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[47]

The framework for regional human rights cooperation that has its foundation on a regional human rights charter and mechanisms is an important third way to advance and protect human rights, aside from the universal and domestic ways. Beginning with the adoption of the European Convention on Human Rights in 1950, the attempts to elaborate regional norms and standards continued with the adoption of the American Convention on Human Rights in 1967, which was later followed by the African Charter on Human and Peoples' Rights, adopted in 1981. Various other regional treaties have been adopted in an effort to promote and protect not only the civil and political rights, but also of economic, social and cultural rights, more efficiently.

[47] United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, 25 June 1993, I. para. 5, 32 ILM (1993) 1661 at 1665. This view was subsequently confirmed by G.A. Res. 48/119.

Regional human rights systems are usually composed of regional instruments and mechanisms, and take part in the important task of the promotion and protection of human rights. Regional human rights instruments (e.g. declarations, conventions, treaties) facilitate to localize international human rights standards and norms, reflecting the particular human rights concerns of the region. Regional human rights mechanisms (e.g. commissions, courts) help to realize these instruments on the ground. In this chapter an analysis will be given of some of the most important regional human rights systems established for the promotion and protection of the human person in Europe, the Americas and Africa.

2.6 ADVANTAGES OF REGIONAL HUMAN RIGHTS SYSTEMS

Regional human rights systems present certain benefits that other protection systems cannot offer. The possibility of similarity in political, economic, social, and cultural, peculiarities among states that are in a region makes it easier to reach agreement on the text of a common convention.

The political, economic, social, and cultural similarity further allows the regional systems to offer improved enforcement potential than their international counterparts. States have a tendency to show more inclination towards the regional systems than international bodies and thus this adds to the advantage of better enforceability to decisions of regional mechanisms over their international contemporaries. Regional sanctions can be more useful than other international sanctions. States are more inclined to show stronger political will to conform to the decisions of regional mechanisms. The existence of an

effective regional human rights system is of primary importance to the promotion and protection of human rights, as it:

- Assists to enhance the legitimacy and relevance of international human rights standards in the region and pave the way for its effective Implementation;
- Assists national governments of their respective regions regarding the performance of their international human rights commitments; for example, assisting with the implementation of the recommendations of Universal Periodic Review , special procedures and the treaty bodies ;
- Provides a useful platform through which specific regional concerns and issues can be effectively addressed;
- Provides subjects of the respective states with more accessible mechanisms for the safeguard of their human rights, provided that domestic remedies have been exhausted;
- Helps to build understanding of, respect for, and provides a channel of communication on human rights concerns;
- Strengthen the institutional capacity and independence of national human rights institutions.
- Helps to build people's understanding of their human rights, reflecting their particular human rights concerns and placing them in a more localized context;
- Provides regional input to the development of international human rights mechanisms and the improvement of international human rights standards;
- Provides support for regional governments having weak and fragile national human rights mechanisms;

- Facilitates the advancement of complementary human rights norms and standards that are of regional concern and filling the lacunae in the influence and reach of international human rights institutions;
- Helps national governments to better deal with regional human rights concerns that cross their national borders; e.g. human rights concerns related to transnational crime, environmental disasters and migration.
- allows for standards, norms, processes and institutions to be designed to fit the peculiar characteristics of the region and can promote the development of helpful region-specific expertise;
- The legitimacy and localized knowledge of such institutions means that regional mechanisms are specifically placed to discover and react to human rights abuses;
- A regional mechanism could support national commitment to the international human rights system by providing know-how and resources that are currently not accessible to many countries due to financial constraints;
- If adequately funded, a regional human rights mechanism could make possible human rights education programs which are presently not financially feasible;
- Regional mechanisms acts as an autonomous forum, independent of government in which the accomplishment of human rights objectives may be pursued in a transparent atmosphere less vulnerable to political interference than national human rights mechanisms.
- Better able to appreciate the common characteristics of the region (economic, social , cultural and geographic);

2.7 UNITED NATIONS GUIDELINES ON WORKING PRINCIPLES OF THE REGIONAL HUMAN RIGHTS SYSTEMS

The Vienna Declaration may be considered as an elucidation of international human rights law. It states the theoretical foundation for the commencement of a regional mechanism to protect human rights. The Paris Principles recommend the essential requirements and the framework to establish a national human rights enforcement mechanism. However, these guidelines can be a basis for a regional framework.

2.7.1 The Vienna Declaration

United Nations has issued a number of policy statements regarding the creation of regional arrangements for human rights protection, including the more significant, the Vienna Declaration and Programme of Action 1993, which declares that:

> [r]egional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. The World Conference on Human Rights endorses efforts under way to strengthen these arrangements and to increase their effectiveness, while at the same time stressing the importance of cooperation with the United Nations human rights activities. [48]

A regional mechanism, often focusing on a specialized set of issues, has the competence to theoretically advance the rights paradigm by adding new ideas into it. The World Conference on Human Rights reaffirmed the need to think about the possibility of establishing regional and sub regional arrangements for the promotion

[48] Vienna Declaration and Programme of Action World Conference on Human Rights, Vienna, 14–25 June 1993 UN Doc A/CONF.157/23 12 July 1993 <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En> (accessed 6 Dec 2011)

and protection of human rights where they do not already exist. The Declaration presumes that a regional normative framework can be more effective in strengthening universal human rights standards and values and can re-contextualize rights in the light of the economic, political and cultural peculiarities of the region. The overwhelming approval of the Vienna Declaration by states clearly upholds the view that the Declaration is a rewording of the international law on human rights. Donnelly examines that such approval is also pinpointing the "dramatic change in dominant international attitudes" in relation to the contemporary paradigm of human rights. For he says, "whatever the gap between theory and practice, most states today prominently feature appeals to human rights, democracy, and development in their efforts to establish national and international legitimacy."[49] The Vienna Declaration therefore has remained an important milestone in the course of incorporating human rights values and standards into national policy formulation. The Vienna Declaration emphasizes that "the universal nature of these rights and freedoms is beyond question" and "reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues."[50] The Declaration also underpins the notion that human rights are interdependent and indivisible and rejects the view of generational human rights.

2.7.2 The Paris Principles

The importance of effective national level institutions for implementing human rights has been repeated by the UN Human Rights Commission several times. The UN General

[49] Jack Donnelly "Human Rights, Democracy, and Development" 21/3 *Human Rights Quarterly* (1999): 608–632.
[50] Vienna Declaration, Article 1.

Assembly in December 1978 adopted a resolution which produced the guidelines on the functioning and structure of national institutions for the promotion and protection of human rights.[51] The resolution created basic ground rules for such national mechanisms and specified methods of effective implementation of international human rights standards at a meeting in Paris in 1991.[52] This meeting culminated to generate comprehensive guidelines commonly known as The Paris Principles[53] that established institutions for the protection of human rights on a national basis.[54] These principles can also be used as the foundation of a regional mechanism of human rights, since the primary purpose of the Paris Principles is the promotion of a localized and decentralized effective human rights protection mechanisms. A regional human rights system shall be autonomously mandated to promote and protect human rights in accordance with the human rights obligations of the States Parties, with the following structure, powers and responsibilities, as a point of reference.[55]

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[51] National Institutions for the Promotion and Protection of Human Rights A/RES/33/46 14 December 1978 <http://www.un.org/documents/ga/res/33/ares33.htm> (accessed 11 Nov 2011).

[52] Julie Mertus, *The United Nations and Human Rights: A Guide for a New Era* (London: Routledge, 2005), 11.

[53] National institutions for the promotion and protection of human rights Adopted by General Assembly Resolution 48/134 of 20 December 1993.

[54] These principles were subsequently endorsed by the UN Commission on Human Rights (Resolution 1992/54 of 3 March 1992) and the UN General Assembly (Resolution 48/134 of 20 December 1993) The same content was reiterated in a number of UN-sponsored conferences on human rights issues, including the Regional Meeting for Africa of the World Conference on Human Rights, held in Tunis in 1992; the Regional Meeting for Latin America and the Caribbean, held in San Jose in 1993; the Regional Meeting for Asia, held in Bangkok in 1993; the Commonwealth Workshop on National Human Rights Institutions, held in Ottawa in 1992; and the workshop for the Asia and Pacific Region on Human Rights Issues, held in Jakarta in 1993.

[55] Principles for Regional Human Rights Mechanisms (Non-Paper) <http://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx>(accessed 6 Dec 2011)

2.7.2.1 Monitoring

- May demand States Parties to provide it with information regarding the promotion and protection of human rights, together with information on specific human rights issues;
- Observes and analyze the human rights situation in the region and publishes reports which include suggestions for collective action at the regional level;
- Manage on-site visits to States Parties to examine and investigate specific human rights concerns. These visits shall yield a report regarding the human rights situation observed which will contain recommendations to the respective State Party on the adoption of measures to remedy any violations determined;
- Publishes progress reports on a periodic basis in addition to on-site visit reports;
- Establish an early warning system to prevent gross violations of human rights including war crimes, crimes against humanity and genocide.
- The reports will be made widely circulated and easily accessible and with the help of States Parties, to legislatures, media outlets, public libraries , academic institutions, relevant government departments of all States Parties and relevant international institutions as well as being placed on the Internet;

2.7.2.2 Communications

- Receives, analyses, investigates, and decides on communications from any individual, group of persons or non-governmental organization alleging human rights violations by a State Party;

- During the investigation, the regional mechanism shall have the power to acquire all necessary information (including unrestricted access to places of relevance, alleged victims and witnesses) with an assurance that the State Party will not engage in retaliations against those persons providing information to the mechanism;
- Investigators, complainants, witnesses shall be protected from intimidation, threats of violence , violence and any other form of hostility;
- The communication must prove that the victim has exhausted all the available remedies at the domestic level. If such remedies have not been exhausted, it must be proved that the victim tried to exhaust domestic remedies but failed due to the following reasons:
    - Effective access to those remedies was denied,
    - Those remedies did not provide for adequate relief; or
    - There had been prolonged and unreasonable delay in the decision on those remedies;
- Where the regional mechanism finds that there has been a violation of human rights, recommendations of appropriate remedies shall be made in the form of specific findings to the concerned State Party.
- In urgent and more serious cases, and whenever necessary, based on the available information, the mechanism may request to the concerned State Party to adopt particular precautionary measures to prevent irremediable harm to persons;

- To make sure compliance, States Parties must report within 90 days on measures that they have taken to give effect to the decisions or findings of the mechanism.
- moreover, a secretariat shall be established to follow up on information regarding the implementation of remedies and compliance of recommendations made by the mechanism;
- Any State Party may submit a communication to the regional human rights mechanism alleging that another State Party has perpetrated a violation of human rights.

2.7.2.3 Capacity Building and Education

- Assists and contributes to human rights training programmes for relevant groups including the military, police, parliamentarians, national human rights institutions, non-governmental organizations, universities and schools.

- promotes wider knowledge and public awareness of human rights in the region by publishing and distributing studies on specific subjects and by arranging seminars, conferences and meetings with representatives of governments, non-governmental organizations, academic institutions and UN representatives in order to disseminate information;
- Advises on national and regional legislations and policies in order to make sure compliance and harmonization with international human rights norms and standards;
- replies to requests for advice from States Parties on matters relating to human rights;

- takes into account the general comments that help to clarify the meanings of human rights norms and standards, adopts the general comments issued by international human rights treaty bodies;
- Conducts promotional country visits with the purpose of reminding the States Parties of their obligations , engaging with government officials and promoting human rights standards;
- promotes accession or ratification to all core international human rights treaties;
- Consults and cooperates with local, national, regional and international institutions that are capable to play a significant role for the promotion and protection of human rights, including national human rights institutions and the United Nations;
- Consults and cooperates with non-governmental organizations dedicated to promotion and protection of human rights;
- Establishes contact with media, representatives of other relevant non-state institutions and non-governmental organizations to publicize its mandate and work.

2.7.2.4 Composition and Support

- The regional mechanism shall be composed of members who are impartial persons of integrity with a recognized competence in the field of human rights and independent from government.
- every members shall be nominated by State Parties following a transparent selection process at the national level which includes close consultation with

national human rights institutions, non-governmental organizations and civil society (if applicable);

- If a member is alleged to be involved in actions that are contrary to service on the regional mechanism, at first instance the matter shall be decided by the mechanism itself and, in the second instance, by the Foreign Ministers Meeting;
- Membership of the mechanism shall aim to achieve gender balance and will reflect representation of geographical areas;
- Members shall be elected for a single, non-renewable term of five years. They shall be endowed with necessary immunities and privileges by the States Parties in order to conduct their work;
- States Parties shall provide the mechanism with sufficient resources, and the authority to use these resources independently and freely to properly fulfill its mandate. For this purpose, the work of the members shall be supported by a secretariat, with professional administrative staff appointed according to criteria of impartiality, competence, and independence.

2.8 MAJOR REGIONAL HUMAN RIGHTS SYSTEMS

Regional human rights systems, consisting of regional instruments and mechanisms, play a significant role in the promotion and protection of human rights. Regional human rights instruments help to localize international human rights standards and norms, reflecting the particular human rights concerns of the region. Regional human rights mechanisms (e.g. courts, commissions) then help to put into practice these instruments on the ground. Credible regional human rights systems have been established in Africa, the Americas and Europe.

2.9 THE EUROPEAN REGIONAL HUMAN RIGHTS SYSTEM

Of all the regional human rights systems, the European system is the most well-established and the most complex. European mechanisms for the promotion and protection of human rights primarily consist of the Council of Europe, The Organization for Security and Cooperation in Europe and The European Union. Each of these intergovernmental organizations has their own regional human rights instruments and institutions. Some of the most developed and longstanding of these institutions exist in the Council of Europe, with instruments including the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the European Social Charter (1961), and institutions such as the European Court of Human Rights.

The development of a European regional system of Human Rights protection is primarily based on the European Convention of Human Rights and Fundamental freedom which was produced by The Council of Europe and established the European Court of Human Rights which was the best known body for the protection of Human Rights. This development can be seen as a direct reaction to two major concerns. Firstly, as the consequence of the Second World War and the convention was a response to the most serious human rights violations which had occurred during the war and as an attempt to avoid such atrocities in the future. Secondly, the Convention was a response to the development of Communism in Eastern Europe and designed to defend the member states of the Council of Europe from communist insurrection.

2.9.1 Council of Europe

The Council of Europe is an international organization fostering close co-operation among all countries of Europe in the areas of cultural co-operation, democratic development, legal standards, human rights and rule of law. It was established in 1949, and currently has 47 member states with some 800 million citizens. The headquarters of the Council of Europe are situated in Strasbourg, France. It is a separate body from the European Union (EU), which has currently only 27 member states. However these two share certain symbols such as the flag. The Council of Europe has nothing to do with either the European Council or the Council of the European Union which are both EU bodies. The work of Council of Europe has resulted in conventions, charters and standards to promote cooperation among European states.

Its statutory institutions are the Secretary General heading the secretariat of the Council of Europe, the Parliamentary Assembly composed of MPs from the Parliament of each member state and the Committee of Ministers comprising the foreign ministers of the member state. The Commissioner for Human Rights[56] is an autonomous institution within the Council of Europe, authorized to promote understanding of and respect for human rights in the member states. These institutions fasten the Council's member states to a common code of human rights. The Council also promotes the European Social Charter and the European Charter for Regional or Minority Languages. The European

[56] The Commissioner for Human Rights is elected by the Parliamentary Assembly of the Council of Europe, the Commissioner seeks to engage in permanent dialogue with member states, continually raising awareness about human rights issues, and promoting the development of national human rights structures. The Commissioner conducts visits to each member state for an evaluation of the human rights situation, and issues reports, opinions and recommendations to governments.
The Commissioner also co-operates with a broad range of partners, including the European Union, the United Nations and its specialized offices, as well as leading human rights NGOs, universities and think tanks.

Union also has a separate human rights instrument; the Charter of Fundamental Rights of the European Union. Since March 2007 the European Union has had a Fundamental Rights Agency[57] based in Vienna

2.9.1.1 The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

After World War II, the Convention was drafted by the Council of Europe in response to a call issued by Europeans from all walks of life who had assembled at the Hague Congress (1948). More than one hundred parliamentarians from the twelve member states of the Council of Europe came together in Strasbourg in 1949 for the first ever meeting of the Council's Consultative Assembly to draft a charter of human rights and creating a Court to implement its provisions.

The Convention for the Protection of Human Rights and Fundamental Freedoms is generally known as the European Convention on Human Rights (ECHR) and was drafted in 1950 by the then newly established Council of Europe and entered into force on 3 September 1953. The convention is a regional transnational legal instrument to protect human rights and fundamental freedoms in Europe. All member states of the Council of Europe are party to the Convention and new members are being anticipated to ratify the convention soon.

2.9.1.2 European Court of Human Rights

The European Convention on Human Rights and Fundamental Rights established the European Court of Human Rights (ECtHR). Any person, who thinks his rights have

[57] The European Union Agency for Fundamental Rights (usually known as the Fundamental Rights Agency, FRA) is a Vienna-based agency of the European Union inaugurated on 1 March 2007. It was established by Council Regulation (EC) No 168/2007 of 15 February 2007 as the successor to the European Monitoring Centre on Racism and Xenophobia (EUMC).

been violated by a state party, which are guaranteed and protected by the Convention, can file a case before the Court. Judgments regarding the violations of rights and freedoms, guaranteed by the convention are binding on the concerned States and they are required to execute them. The Council of Europe supervises the execution of judgments through the Committee of Ministers, particularly to make sure the payment of the amounts awarded by the Court as compensation for the damage sustained by the applicants.

Traditionally, only states were considered as legitimate actors in international law and the establishment of a Court to protect individuals from human rights violations was a unique characteristic for an international convention on human rights, as it awarded the individual an active role on the international arena. Before the commencement of the existing system, the European system had both commission and a court. Under the present system, there is only the European Court of Human Rights.

The European Court can make declaratory judgments and award damages. The European Court of Human Rights can also give advisory opinions on the request of the Council of Ministers. The European Convention on Human Rights and Fundamental freedoms has devoted some provisions to the qualifications and appointments of the judges and the structure of the court.

2.9.2 European Union

The European Union is a separate organization and to some extent geographically overlapping with the Council of Europe. Although it originated as an economic union, human rights have become a legitimate concern within the EU. The treaty on European Union declare that the EU itself is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the

rights of persons belonging to minorities ... in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[58]

The European Court of Justice is the judicial court enforcing EU legislation. The Fundamental Rights Agency is an European Union monitoring body, instituted in 2007, that affords fundamental rights expertise and assistance to the twenty seven EU member states in executing the community law. Before the Lisbon Treaty (2009), EU Legislation was primarily concerned with federalism and regional economic integration. The Lisbon Treaty gave legal effect to the Charter of Fundamental Rights of the European Union. The EU also promoted globally the issues of human rights. The EU contests the death penalty and has proposed its universal abolition and is effectively treated as one of the Copenhagen criteria.[59] Abolition of the death penalty and signing the European Convention on Human Rights (ECHR)[60] is a precondition for EU membership.[61]

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[58] Article 2, Consolidated version of the Treaty on European Union/Title I: Common Provisions < http://en.wikisource.org/wiki/Consolidated_version_of_the_Treaty_on_European_Union/Title_I:_Common_Provisions#Article_2 > (accessed on Dec 15 2011)

[59] The Copenhagen criteria are the rules that define whether a country is eligible to join the European Union. The criteria require that a state has the institutions to preserve democratic governance and human rights, has a functioning market economy, and accepts the obligations and intent of the EU. These membership criteria were laid down at the June 1993 European Council in Copenhagen, Denmark, from which they take their name.

[60] Parliamentary Assembly Resolution 1610 (2008), The accession of the European Union/European Community to the European Convention on Human Rights <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1610.htm#1 >(accessed on Dec 15 2011)

[61] The European Convention on Human Rights was previously only open to members of the Council of Europe (Article 59.1 of the Convention), and even now only states may become member of the Council of Europe (Article 4 of the Statute of the Council of Europe).

2.9.2.1 Charter of Fundamental Rights

The Charter of Fundamental Rights is a codified catalogue of fundamental rights against which the EU's legal acts can be judged. It codified various rights which were formerly recognized by the Court of Justice and developed from the "constitutional traditions common to the member states." The Court of Justice has already recognized fundamental rights and has, on different occasion, nullified EU legislation based on its failure to adhere to those fundamental rights. The Charter of Fundamental Rights was drawn up in 2000. Although the Charter was not initially a legally binding document, however it was frequently cited by the EU's courts as a benchmark of fundamental principles of EU law.

2.9.3 Organization of Security and Cooperation in Europe

The Organization of Security and Cooperation in Europe (OSCE), was set up in 1975, primarily a security-oriented organization but also associated it with human rights. The Organization for Security and Cooperation in Europe (OSCE) is a Cold War organization in the sense that at the time of its creation, during the Cold War, there were broad disagreements between the East and the West. The OSCE provided a platform for discussions on the issues of common interest, which also contained to some extent human rights, though commitments to the promotion and protection of human rights were not very articulated before the 1990s. It was a compromise solution, which may be applicable in certain senses to Asia. It has a big geographical territory, with 57 members, and its standards are non-binding with no convention having been adopted by the OSCE. The OSCE developed detailed and non-binding standards in relation to the rule of law, democracy, freedom of expression, national minorities, etc.

2.10 INTER-AMERICAN REGIONAL HUMAN RIGHTS SYSTEM

In the Americas, the regional human rights systems exist within the ambit of regional intergovernmental organization known as the Organization of American States (OAS). The most important and primary human rights instruments in the inter-American system are the American Declaration on the Rights and Duties of Man (1948) and the legally binding American Convention on Human Rights, and the key mechanisms for the observance and realization of these instruments include the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

2.10.1 Organization of American States

The Organization of American States (OAS) is a regional organization, headquartered in Washington, D.C., United States. It was established to promote solidarity, achieve a regional order of peace and justice, and defend their independence, territorial integrity and sovereignty.[62] Its members are the thirty-five sovereign states of the Americas. With the end of the Cold War, the OAS made major efforts to adapt it according to the new context and thrust toward globalization. Its stated priorities now include the following:

- Working for peace
- Strengthening democracy
- Combating corruption
- Protecting human rights
- Promoting sustainable development
- The rights of Indigenous Peoples

[62] OAS Charter, Article 1.

Since the formation of the OAS, the States of the Americas have adopted a number of regional instruments that provided the normative foundation of the regional system for the advancement and observance of human rights and created different organs to oversee their protection.

The current system properly started with the adoption of the American Declaration of the Rights and Duties of Man at the occasion of 9th International Conference of American States, held in Bogotá in 1948, during which the Charter of the OAS was adopted, advancing the "fundamental rights of the individual" as one of the cardinal principles on which the Organization is established.

Full respect for human rights is preserved in various sections of the Charter. Therefore, the Charter underlines that "the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man." The Charter also establishes that the IACHR is a principal organ of the OAS, whose task is to promote the observance and realization of human rights and to act as a consultative organ of the OAS in the matters relating to the human rights issues.

2.10.2 The Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACHR) is an autonomous organ of the Organization of American States (OAS) and one of two bodies in the inter-American system mandated for the promotion and protection of human rights. The IACHR is a permanent body and has its headquarters in Washington D.C. The other human rights

body is the Inter-American Court of Human Rights, which is situated in San José, Costa Rica. The IACHR is an autonomous organ of the Organization of American States (OAS). The IACHR represents all of the member States of the OAS. It has seven members who act independently, without representing any particular country. The members of the IACHR are elected by the General Assembly of the OAS.

The Commission meets in ordinary and special sessions several times a year to examine allegations of human rights violations in the hemisphere. The Executive Secretariat of the IACHR carries out the tasks delegated to it by the IACHR and provides administrative and legal support to the IACHR as it carries out its work. Its mandate relating to human rights human rights duties is primarily based on following three documents:

- the OAS Charter
- the American Declaration of the Rights and Duties of Man
- the American Convention on Human Rights

2.10.3 Inter-American Court of Human Rights

The Organization of American States established the Inter-American Court of Human Rights in 1979 to interpret and enforce the provisions of the American Convention on Human Rights. Its two main functions are thus advisory and adjudicatory. Under the former, it issues opinions on matters of legal interpretation brought to its attention by other OAS bodies or member states. Under the latter, it rules and hears on the specific cases of human rights infringements referred to it. It is an autonomous judicial institution based in the city of San Jose, Costa Rica. In cooperation with the Inter-American Commission on Human Rights, it makes up the human rights protection system of the

Organization of American States (OAS), which serves to promote and uphold basic rights and freedoms in the Americas.

Under the Convention, cases can be referred to the Court by either a state party or by the Inter-American Commission on Human Rights. In contradiction of the European human rights system, individual citizens of the OAS member states are not allowed to take cases directly to the Court.

2.11 AFRICAN REGIONAL HUMAN RIGHTS SYSTEM

The more recent African regional human rights system was established within the ambit of a then regional intergovernmental organization known as the Organization of African Unity (OAU). The OAU was established in 1963, as the practical manifestation of the idea of pan-Africanism and provided a platform that pulled together the newly recognized independent African states. Therefore OAU did not show any significant concern regarding the human rights protection. This was clearly depicted by the fact that human rights were not given a due importance in the mandate of the OAU when it was founded. However, in due course, the OAU adopted a few human rights instruments relating to some specific issues. The most important and comprehensive instrument of general nature was obviously the African charter on Human and Peoples Rights (1981), that to some extent, helped to erode the impression that the OAU was not really concerned to deal with human rights. The major normative and substantive part of the human rights system in Africa is primarily and essentially derived from this particular document. This is the most important regional human rights instrument in Africa, where as the fundamental enforcement mechanisms are the African Commission on Human and

Peoples' Rights and the African Court on Human and Peoples' Rights, which is going to be merged with the African Court of Justice to establish a new integrated African Court of Justice and Human Rights.

2.11.1 African Union

The African Union is a regional intergovernmental organization of African states, established on 9 July 2002. The AU was formed as a successor to the Organization of African Unity (OAU). The beginning of the African Union (AU) can be expressed as an event of great importance in the institutional evolution of the continent. On 9.9.1999, the Heads of State and Government of the Organization of African Unity approved a Declaration which is known as Sirte Declaration, calling for the establishment of an African Union to step up the process of socio-economic and political integration in the continent. The AU's secretariat which is known as the African Union Commission is located in Addis Ababa, Ethiopia.

Among the leading objectives of the AU are:

- to achieve peace and security in Africa;
- to step up the socio-economic as well as political integration of the continent;
- to promote and defend African common positions on issues of interest to the continent and its peoples; and
- to promote good governance, democratic institutions and human rights.

2.11.2 African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (ACHPR) is a quasi-judicial entity entrusted with promoting and protecting human rights and people's (collective)

rights throughout the African continent as well as interpreting the African Charter on Human and Peoples' Rights.

The African Charter, adopted by the OAU on 27 June 1981. The Commission was established with the coming into force of the African Charter on Human and Peoples Rights on 21 October 1986. Its authority primarily rests on its own treaty, the African Charter. Its first members were elected by the OAU's 23rd Assembly of Heads of State and Government in June 1987 and the Commission was properly installed for the first time on 2 November 1987. Initially, the Commission was located at the OAU Secretariat in Addis Ababa, Ethiopia, but in November 1989 it was shifted to Banjul, Gambia.

The Commission has been tasked with the following important responsibilities:

- Promoting human and peoples' rights
- Protecting human and peoples' rights
- Interpreting the African Charter on Human and Peoples' Rights

For the effective accomplishment of these goals, the Commission is authorized to "collect documents, undertake studies and researches on African problems in the field of human and peoples, rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments" (Charter, Art. 45).

With the creation of the African Court on Human and Peoples' Rights, the Commission has been assigned the additional task of preparing cases for submission to the Court's

jurisdiction. In 2011, the commission has filed a case against Libya before the African Court on Human and Peoples' Rights.

2.11.3 The African Court on Human and People's Rights

The African Court on Human and Peoples' Rights was established by the Protocol to the African Charter on Human and Peoples' Rights, which was adopted by Member States of the then Organization of African Unity (OAU) in Ouagadougou, Burkina Faso in June 1998. The Protocol entered into force on 25 January 2004 with the ratification by fifteen member states of the Protocol to the African Charter on Human and Peoples' Rights creating the AfCHPR. Presently, twenty six African Union Member States have ratified the Protocol establishing the Court.

The African Court on Human and Peoples' Rights is a regional court that was created primarily to make judgments on African Union state's compliance with the African Charter on Human and People's Rights. The African Court on Human and Peoples Rights complements the protective mandate of the African Commission on Human and Peoples' Rights. The Court has the competence to take binding and final decisions on human rights infringements.

The first Judges of the African Court were elected in January 2006, in Khartoum, Sudan and were sworn in before the Assembly of Heads of State and Government of the African Union on 2 July 2006, in Banjul, The Gambia. The Judges were elected in their personal capacities from among African judges and jurists of proven qualifications, experience and integrity, which were nominated by African Union Member States. The Court had its opening meeting on July 2-5, 2006. The President and Vice-President are elected to two-

year terms whereas the Judges are elected for six-year terms and can be re-elected once. On December 15, 2009, the Court delivered its first judgment, finding an application against Senegal inadmissible.[63]

Article 34(6) of The Protocol Establishing the Court entails that the Non Governmental Organizations and individuals should have direct access to the Court. Article 5(3) of the Protocol requires that the State should make a declaration accepting the competence of the Court to entertain applications from these persons. Currently five States Parties to the Protocol establishing the Court have made this declaration:

2.11.4 African Court of Justice

The African Court of Justice was initially intended to be the principal judicial organ of the African Union having jurisdiction over disputes on interpretation of AU treaties. A protocol to establish the Court of Justice was adopted in 2003, and entered into force in 2009. However, it was superseded by a protocol creating the African Court of Justice and Human Rights, which will integrate the already established African Court on Human and Peoples' Rights with African Court of justice having two chambers — one for rulings on the human rights treaties and one for general legal matters. The merger Protocol on the statute of the African Court of justice and Human Rights was adopted in Sharm El-Sheikh, Egypt, on 1st July 2008. This Protocol and the Statute annexed to it shall enter into force thirty days after the deposit of the instruments of ratification by fifteen Member States. The integrated court will be based in Arusha, Tanzania. The plans to amalgamate the African Court of Justice with the African Court on Human and People's Rights appear

[63] http://www.african court.org/fileadmin/documents/Court/Latest_Judgments/English/JUDGMENT._MICHELOT_YOGOGOMBAYE_VS._REPUBLIC_OF_SENEGAL_1_.pdf (accessed 15 Dec 2011)

to be going slowly: as of August 2010, only three countries have ratified the Protocol on the statute of the African Court of justice and Human Rights, out of fifteen required for its entry into force.[64]

2.11.5 African Court of Justice and Human Rights

There has been a significant development with regard to the establishment and institutionalization of the African Court on Human and Peoples' Rights. During the 3rd Ordinary Session of the AU Assembly of Heads of State and Government in July 2004, a resolution was passed relating to the seats of the organs of the AU. The most notably, it was decided that The African Court on Human and People's Rights and The Court of Justice should be amalgamated into one Court. During the African Union Summit of the Heads of State and Government on 1st July 2008 in Sharm El Sheikh, Egypt, The African Court of Human and People's Rights African was integrated with the Court of Justice, to establish, what is now named as The African Court of Justice and Human Rights. In particular, an argument presented for the integrated court was the concern over the insufficient personnel and financial resources for two courts. Besides this, there might be a consideration to evade the circumstances experienced by the European system, whereby the decisions of the European Court of Justice and of the European Court of Human Rights emerged simultaneously and consequently giving rise to two separate sets of human rights jurisprudence. The benefit of the merger is that it will avert the courts from unintentional encroaching on each other's jurisdiction and working at cross purposes. The key issue with regard to the integration of the two Courts also relates to the concern of the AU for a well-resourced, effective regional judicial system for upholding the human

[64]http://www.africa-union.org/root/au/Documents/Treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf (accessed 15 Dec 2011)

dignity, rule of law and human rights. This Organ is responsible for civil matters particularly with regards to the consolidation of good governance and protection of human rights in Africa. It will serve as an apex Court for the Continent regarding AU law.

CHAPTER III
COMPARISON OF MAJOR REGIONAL HUMAN RIGHTS SYSTEMS

3.1 INTRODUCTION

The universal notions of human rights have been further expressed and expanded in a way that is owned by a particular region. In the previous chapter, it has been discussed that Africa, the Americas and Europe each have a human rights charter for their region, along with associated mechanisms to make sure compliance with the rights to which the states have agreed. In this chapter, the human rights structures available specifically to the African, Inter-American and European regions will be briefly examined.

3.2 SALIENT FEATURES OF AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The African Commission on Human and Peoples' Rights is a quasi-judicial entity, created by the African Charter on Human and Peoples' Rights. The Commission is based in Banjul, Gambia.

- Composition

  The Commission is composed of eleven members, who are elected from amongst African personalities of the highest reputation, known for their high integrity, morality, competence and impartiality in matters of human and peoples' rights.

However, preference may be given to persons having legal competence. The members of the Commission shall serve in their personal capacity.[1]

- ❖ Who may file a Complaint?

ACHPR does not put any specific restrictions on who may file cases to the Commission. This charter simply provides: "Before each Session, the Secretary of the Commission shall make a list of the communications other than those of States parties to the present Charter and transmit them to the Members of the Commission, who shall indicate which communications should be considered by the Commission." The Commission has interpreted this provision as giving locus standi to the victims themselves and to the victims' families as well as NGOs and others acting on their behalf. However, such communication shall only be considered by the Commission if a simple majority of its members so decide.[2]

- ❖ Admissibility Criteria

The complaints are entertained by the Commission subject to the following criterion;

- Conditions for State Communications

- o If a State Party believes that another State Party to this Charter has violated the provisions of the Charter, it may submit a written communication relating to matter to the alleged State. This communication shall also be sent to the Chairman of the Commission and to the Secretary General of the AU. The State party to whom such communication has been submitted shall give a written explanation to

[1] ACHPR, Article 31
[2] Ibid., Article 55

the enquiring State regarding the alleged violations of the provisions of the Charter, within three months of the receipt of the communication.[3]

- If the issue is not settled to the satisfaction of the concerned States within three months from the date on which the original communication is received by the alleged State, through any peaceful procedure or bilateral negotiation, either State shall have the right to put forward the matter to the Commission through the Chairman and shall give notice to the other concerned States.[4]

- Conditions for Non State Communications

  The communications under the Charter of the African Union, relating to human and peoples' rights shall be subjected to the following admissibility criteria: [5]

- The communications should identify its authors, even if the latter request anonymity.

- The communications should be compatible with the present Charter and the Charter of the African Union.

- The communications should not be written in insulting or disparaging language against the concerned State or the African Union.

- The communications should not be merely based on the news propagated through the mass media.

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[3] Ibid., Article 47
[4] Ibid., Articles 48

[5] Ibid., Article 56

- The communications should be submitted to the commission after completely exhausting the available domestic remedies, unless it is evident that such procedure is unreasonably prolonged.

- The communications should be filed within a reasonable time period from the date domestic remedies were exhausted; and

- The communications should not deal with the cases that have been resolved by concerned States according to the provisions of the present Charter, or the Charter of the African Union, or the principles of the Charter of the United Nations.

❖ Provisional Measures

The Commission has developed a mechanism for the adoption of interim measures. Before the submission of its final observations with regard to a particular communication to the Assembly of the Heads of States and Governments of the African Union, the Commission may inform the concerned State parties regarding the suitability of interim measures to avoid irreparable loss being caused to the victim of the alleged violation. If the commission is not in session, the same function shall be performed by the chairman on behalf of the commission.[6]

❖ Friendly Settlement

At any stage of the examination of the Communication, "the Commission may, at the request of any concerned State Party or on its own initiative, place its good offices at the disposal of the interested States Parties for a friendly settlement of

[6] Rules of Procedure, Rule 98

the issue. However, the Commission shall make sure that amicable solution is based on the consent of the victim and complies with human rights and fundamental liberties, as recognized by the Charter or other applicable instruments. Such friendly settlement must also include an undertaking from the concerned state parties to observe the terms of the settlement.

- Procedure

The Commission, after appropriate deliberation on the submissions of concerned parties, shall decide on the merits of the Communication. These deliberations shall be private and confidential. The decision, duly signed by the Chairperson and the Secretary, shall remain confidential until its publication is authorized by the Assembly of the Heads of States and Governments of the African Union.[7] The Commission, at written request of any concerned party or on its own initiative may review the decision.[8] The decision of the Commission shall be transmitted to the parties and may be posted on the Commission's website within thirty days after its publication is authorized by the Assembly. "The concerned State Parties shall inform the Commission in writing, within one hundred and eighty days, regarding the measures taken to act in accordance with the decision of the Commission. The Commission may require further information regarding the compliance, within ninety days and if such information is not provided within specified time the Commission may send a reminder within next ninety days. The Rapporteur or the designated member of the Commission shall monitor the observance of the decision.

[7] Ibid., Rule 110
[8] Ibid., Rule 111

3.3 SALIENT FEATURES OF AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The African Court on Human and Peoples' Rights is a judicial body and shall complement the protective mandate of the African Commission on Human and Peoples' Rights.[9] The original African Charter did not provide for the institution of a Court of Human Rights. On 10 June 1998, the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' during the 34th Ordinary Session of the Assembly of Heads of State and Government, held at Ouagadougou, Burkina Faso, which entered into force on 25 January 2004.

- Composition

  The Court shall be composed of eleven judges, elected from the nationals of States Parties of the OAU, representing the main regions of Africa and their principal legal traditions, provided that no two judges shall be nationals of the same State. Judges shall be elected in their personal capacity from among jurists having practical, judicial or academic competence and recognized high moral character along with experience in the field of human and peoples' rights. Adequate gender representation is recommended in the Protocol[10], where as it does not provide for the appointment of ad hoc judges. A judge is prohibited from participation in a case, who is a national of a state that is a party to the case.[11]

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[9] ACHPR, Article 2.
[10] Ibid., Articles 12(2) and 14(3)
[11] Ibid., Article 22)

❖ Who may file a Complaint?

The following entities are allowed to put forward cases to the Court:[12]

- The Commission;
- African Intergovernmental Organizations;
- The State Party which has submitted a complaint to the Commission;
- The State Party against which the complaint has been submitted;
- The State party whose citizen is a sufferer of human rights infringement;

The striking omission is the lack of locus standi for victims of human rights violations. However, States Parties may recognize the standing of non-governmental organizations and individuals and before the Court through a separate declaration. Articles 34(6) provides that "At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration."

❖ Admissibility

The admissibility criteria to file a case before the Court are same as those of the Commission under Article 56 of the Charter, except for the cases instituted under article 5(3) of the Protocol. The Court, while deciding on the admissibility of a complaint submitted under article 5 (3) of the Protocol, may ask for the opinion of the Commission which shall give it as soon as possible. The novelty is the

[12] Ibid., Article 5(1)

possibility for the Court to 'request the opinion of the Commission' on admissibility. The Court may consider such cases or transfer them to the Commission.[13]

- Inquiry

  The Court is authorized to conduct inquiries.[14]

- Friendly Settlements

  The Court may strive to reach a friendly settlement in a case pending before it, according to the provisions of the Charter.[15]

- Judgments

  If the Court, after due deliberations, decides that there has been infringement of a human or peoples' right, it shall make orders to remedy the infringement, including the payment of fair reimbursement or compensation. [16]

- Binding Force

  The decisions of the Court are binding on the State parties. The Protocol entails the States Parties to comply with the judgement of the Court within the time fixed by the Court and to assure its execution."[17]

- Execution of Judgments

  Protocol provides a role for the Council of Ministers and Assembly of Heads of State and Government of the AU to guarantee observance of its judgements. The Court shall present an annual report to the Assembly of Heads of State and

[13] Protocol, Article 6.

[14] Ibid., Article 26(1)
[15] Ibid., Article 9
[16] Ibid., Article 27(1)

[17] Ibid., Article 30

Government and particularly point out the cases where a state has not acted in accordance with the Court's judgement[18]. The Council of Ministers shall also be notified of the judgement and shall monitor its execution on behalf of the Assembly.[19]

- Advisory Opinions

  The Court may give an opinion at the request of the OAU, a Member State of the OAU, any organs the OAU, or any African organization recognized by the OAU regarding a legal matter relating to the Charter or any other applicable human rights instruments. The mandate of the Court in this regard is considerably broader than that of the Commission. The only exception is that the subject matter of the opinion should not be related to a matter being examined by the Commission.[20]

- Provisional Measures

  In times of great urgency and gravity, and when required to avoid severe harm to persons, the Court shall adopt such interim measures as it deems necessary.[21]

- Procedure

  Hearings are usually held in public, but may be conducted in camera as provided in the Rules of Procedure. All parties to a case are allowed to be represented by a legal representative of their own choice. However, free legal representation may be granted where the interest of justice so demands.[22]

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[18] Ibid., Article 31
[19] Ibid., Article 29 (2)

[20] Ibid., Article 4(1)
[21] Ibid., Article 27(2)
[22] Ibid., 10(2)

3.4 SALIENT FEATURES OF EUROPEAN COURT OF HUMAN RIGHTS

The European Court is an international regional Court, set up in 1959, by the European Convention on Human Rights and Fundamental Freedoms and located in Strasbourg, France. It entertains individual as well as State Complaints regarding the violations of civil and political rights specified and guaranteed in the European Convention on Human Rights. Since 1998 it has sat as a full-time court and individuals of the member States can directly apply to it. During the fifty years of its existence, the Court has delivered approximately more than 10,000 judgments. These judgments are mandatory and have led the concerned States to modify their legislative and executive practice to a larger extent. The Precedents of the Court's make the Convention an authoritative living instrument for consolidating the democracy and rule of law in Europe.

- Composition

  The Court shall be composed of a number of judges equal to member State Parties;[23] therefore currently Court consists of forty-seven judges, one judge for each state party to the ECHR. The judges shall bear high moral character and must have required qualifications either to be appointed as a high judicial officer or be jurisconsults of acknowledged competence.[24] The judges shall perform their duties in their personal capacity.[25] Ad hoc judges can be appointed with the consent of the respective States.[26]

[23] ECHR, Article 20
[24] Ibid., Article 21(1)
[25] Ibid., Article 21(2)
[26] Rule 29(1) Rules of Court.

❖ Who may file a Complaint?

The Court may entertain applications from any individual, group of individuals or nongovernmental organization claiming to be the victim of a violation inflicted by a member State regarding the rights guaranteed in the Convention and its subsequent protocols. The member State Parties also conceded not to obstruct at all the effective exercise of this right.[27]

❖ Admissibility

The complaints are entertained by the Court subject to the following admissibility criterion;

- Exhaustion of Domestic Remedies

The Court may only entertain the complaints where all available local remedies have been exhausted, in accordance with the generally recognized rules of international law.

- Time Period

The Court may only deal with the complaints if it is filed to the Court within a period of six months after exhaustion of local remedies.

- Duplication of Procedures

The Court shall not entertain any application that "is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information".[28]

[27] ECHR, Article 34
[28] Ibid., Article 35

❖ Inadmissibility

The Court shall declare any individual application inadmissible, that is;

- anonymous
- incompatible with the provisions of the Convention and the protocols,
- manifestly ill-founded, or an abuse of the right of application.[29]

❖ Amicus Curiae Briefs

A State Party whose citizen is an applicant shall have the right to take part in hearings and to file written comments. The Court, in the interest of justice, may invite any person or any State Party which is not a party to the concerned proceedings.[30]

❖ Friendly Settlement

If the Court considers an application admissible, it shall place itself at the disposal of the concerned parties with a view to reach on friendly settlement of the matter. "Nevertheless, the Court shall ensure that such friendly settlement conforms to human rights, as endorsed by the Convention and other applicable instruments".[31]

❖ Judgments

If the Court finds that the domestic law of a concerned State Party allows only partial compensation to the violation of the rights guaranteed by Convention or the protocols, the Court shall, if necessary, grant just satisfaction to the injured party.[32]

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[29] Ibid., Article 35
[30] Ibid., Article 36
[31] Ibid., Article 38
[32] Ibid., Article 41

- Binding force

  The State Parties affirm to abide by, the final judgments of the Court to which they are parties.[33]

- Execution of judgments

  The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.' Additionally, according to Articles 3 and 8 of the Statute of the Council of Europe, the Committee of Ministers has the power of expulsion of noncompliant states.[34]

- Advisory Opinions

  The Court may provide advisory opinions, at the request of the Committee of Ministers, on legal questions relating to the interpretation of the Convention and other applicable protocols. However, such opinions shall not contend with any question concerning to the scope or content of the rights or freedoms mentioned in Section I of the Convention and the protocols. Decision to seek an advisory opinion of the Court shall require a majority vote of the Committee of Ministers.[35]

- Interim Measures

  The Court at the request of a party or on its own initiative may signify to the parties any provisional measure which it believes to be adopted in the interests of the parties or necessary for proper conduct of the proceedings. Notice of such interim measures shall also be sent to the Committee of Ministers. The Chamber

[33] Ibid., Article 46(1)
[34] Ibid., Article 46(2)
[35] Ibid., Article 47

ay also require information from the concerned parties on any matter connected with the implementation of any provisional measure.[36]

- Procedure

The official languages of the Court shall be English and French. However, prior to the decision on the admissibility of an application, all communications by the applicants may be in one of the official languages of the Contracting Parties. Once the application is declared admissible, all communications by applicants shall be in one of the Court's official languages, unless the President authorizes the continued use of the official language of a Contracting Party. Nevertheless this stipulation is not applicable to the expert, witness or other persons appearing before the Court, if he or she cannot communicate in any of the official language of the Court. In that incident the Registrar shall make the requisite arrangements for translation and interpretation.[37]

3.5 SALIENT FEATURES OF INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The Inter-American Commission on human rights is a quasi-political and quasi-judicial body established by the OAS Charter and the American Convention on Human Right. It is located in Washington DC, USA.

- Composition

The Commission is consist of seven members Commission members must recognized competence in the field of human rights, be recognized as persons of

[36] Rules of Court, Rule 39
[37] Ibid., Rule 34

high moral character.[38] Members are elected in their individual capacity.[39] There should not be more than one member from the same State.[40]

- ❖ Who may file a Complaint?

  Any person or group of persons, or any non-governmental organization legally recognized in one or more member states of the Organization, may file complaints regarding the violation of this Convention by a State Party.[41]

- ❖ Admissibility

  The Commission shall entertain the complaints subject to the following admissibility criterion;

- ❖ Exhaustion of Domestic Remedies

  The complaint must be lodged after complete exhaustion of the available remedies under local law. However, this rule is not applicable in certain situations;[42]

  - o When the domestic legislation of the state concerned does not afford the due process of law for the protection of a particular right
  - o When the injured party has been deprived of the remedies available under domestic.
  - o If unnecessary delay is involved to avail the remedies available under domestic law.

[38] ACHR, Article 34
[39] Ibid., Article 36
[40] Ibid., Article 37(2)
[41] Ibid., Article 44
[42] Ibid. Article 46(2)

- ❖ Relevant Information

  If the petition is filed by a non State entity, it does not contain the essential information relating to the entity lodging the petition.

- ❖ Time Period

  The complaint must be filed 'within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment.[43]

- ❖ Duplication of Procedures at the International Level

  The complaint must not be pending in another international proceeding for settlement.[44]

- ❖ Inadmissibility

- o The communication shall be declared inadmissible if:[45]
- o Any of the requirements mentioned in Article 46 has not been observed.
- o The communication does not state facts regarding the violation of the rights.
- o The petition or communication is manifestly groundless or obviously out of order.
- o The subject matter of the complaint must not be substantially the same as one previously considered by the Commission or by another international organization.

- ❖ Friendly Settlements

  After determining the admissibility of a complaint, the Commission shall place itself at the disposal of the concerned parties with a view to attain a friendly.

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[43] Ibid. Article 46
[44] ACHR, Article 46 and Rules of Procedure, Article 31 of the Inter-American Commission.
[45] ACHR., Article 47

However, the Commission shall make sure that such a settlement is based on respect for the human rights recognized in this Convention.[46]

- Provisional Measures

  In cases of urgency and gravity, the Commission may, at the request of a party or on its own initiative, adopt precautionary measures to avoid irreparable harm to persons.[47]

3.6 SALIENT FEATURES OF INTER-AMERICAN COURT OF HUMAN RIGHTS

The Inter-American Court of Human Rights is a non-permanent, part-time judicial body established by the American Convention on Human Rights. It is based in San Jose, Costa Rica.

- Composition

  The Inter-American Court of Human Rights consists of seven judges. The Judges should be national of the member state parties and be elected from among the persons of recognized competence in the field of human rights and of highest moral authority.[48] The judges may sit on cases involving their own countries.[49] Ad hoc judges may be appointed to hear the cases.[50] No specific provisions are provided regarding the gender representation:

[46] Ibid. Article 48(1)(f)
[47] Rules of Procedure, Article 25(1)
[48] ACHR. Article 52
[49] Ibid., Article 55
[50] ACHR. Article 55(3) and Rules of Procedure, Article 18

❖ Who may file a Complaint?

Only a state party and the Inter-American Commission have the right to submit a case to the Court.[51] However, individuals may submit cases to the Inter-American Commission. The alleged victims are allowed to take part in the proceedings by submitting their motions, pleadings and evidence. They may also apply for the adoption of interim measures.[52]

❖ Admissibility

The complaints are entertained by the Commission subject to the following admissibility criterion;

- Exhaustion of Domestic Remedies

The complaint must be submitted after complete exhaustion of the available remedies under domestic law. This rule is not applicable in certain cases;

- When the local legislation of a state does not provides for the due process of law regarding the protection of a particular right
- When the victim has been deprived of the remedies available under domestic.
- If unreasonable delay is involved to get the available remedies under domestic law.

- Relevant Information

If the petition is filed by a non State entity, it does not contain the essential information relating to the entity lodging the petition.

[51] ACHR, Article 61(1)
[52] ACHR, Article 23 and Rules of Procedure, Article 25

- Time Period

  The complaint must be filed 'within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment.[53]

- Duplication of Procedures at the International Level

  The complaint must not be pending in another international proceeding for settlement.[54]

❖ Interim Measures

In emergency cases and where necessary to avoid irreparable damage, the Court shall adopt such interim measures as it consider pertinent in the cases it has under consideration. The Court may act at the request of the Commission regarding the cases not yet submitted to the Court.[55]

❖ Judgments

If the Court decides that there has been a breach of a right or freedom guaranteed by the Convention, the Court shall rule that the injured party be ensured regarding the enjoyment of his right or freedom that was violated and if appropriate, a fair compensation be paid to the injured party.[56]

❖ Binding force

The States Parties undertake to abide by the judgment of the Court in any case to which they are parties.[57]

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[53] ACHR, Article 46
[54] ACHR, Article 46 and Rules of Procedure, Article 31 of the Inter-American Commission.
[55] ACHR, Article 63(2)
[56] Ibid., Article 63(1)
[57] Ibid., Article 68

- Execution of Judgments

  The Convention does not provide for any institutional role of the political organs of the Organization of American States to oversee the execution of the Court's rulings. The Court is shall submit an Annual Report for consideration to each regular session of the General Assembly of the OAS. In this report, the Court shall identify the cases in which a state has not complied with its judgments along with relevant recommendations.[58]

- Amicus Curiae briefs

  The Court accepts amicus curiae briefs although there is no particular provision relating to their submission.

- Inquiry Procedure

  At any stage the Court may hold hearings for the purpose of gathering evidence.[59]

- Friendly Settlements

  When the parties to a case before the Court, reach at a friendly settlement, the Court may strike the case from its list.[60]

- Advisory Opinions

  The member States and the organs listed in Chapter X of the Charter of the Organization of American States may consult the Court regarding the interpretation of this Convention or of other treaties relating to the protection of human rights in the American states. The Court may give opinion regarding the compatibility of domestic laws with the regional human rights instruments.[61]

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[58] Ibid., Article 65
[59] Rules of Procedure, Article 45(4)
[60] Ibid., Article 54
[61] ACHR, Article 64

❖ Procedure

The official languages of the Court shall be those of the OAS, which are English, Spanish, French and Portuguese. The working languages shall be determined by the Court each year. However, in a particular case, the language of one of the parties may be adopted as a working language, provided that it is one of the official languages of the Court.[62]

3.7 COMPARATIVE ANALYSIS OF HUMAN RIGHTS ENFORCEMENT UNDER PRINCIPAL REGIONAL SYSTEMS

Following procedures are utilized by regional mechanisms to enforce the human rights.

3.7.1 INTERSTATE COMPLAINTS

In international law, the term Inter-state complaint means, the complaints made by one state against the other before an international entity, alleging a breach of obligation by other state. The underlying principle of inter-state complaint mechanism is that states are concerned in the protection and observance of human rights and as such will be legitimate participants in such litigation. Human rights treaties entail corresponding obligations for states , firstly, towards their own citizens and, secondly, towards international community. This secondary obligation creates another legal justification for the interstate complaints procedure. Presently inter-state complaint procedure is being used by various international human rights bodies as one of the means of human rights enforcement.

[62] Rules of Procedure, Article 20

3.7.1.1 The African Human Rights System

The African System makes use of inter-state complaint procedure as a tool to enforce human rights. The inter-state complaint procedure is a mandatory procedure under the Banjul Charter. Once a state becomes a party to the Banjul Charter, it is bound by the inter-state complaint procedure mechanism. The Banjul Charter affords two ways of making an inter-state application. The first way provides a state the option of direct communication with the alleged state that has infringed rights before going to the African Commission with the complaint.[63] Under this system, a state has a ninety days time period during which it has to look for a diplomatic solution to the problem. The second choice is that a state can submit the case directly to the African Commission without employing the first option.[64] Once a member state chooses to submit an inter-state complaint against other state, certain criteria is applied. One such stipulation relates to the exhaustion of domestic remedies. However, stipulation is not applicable in certain cases that involve massive human rights violations. The African states have not frequently resorted to interstate complaint procedure mechanism. Only a few inter-state complaints have been made in the African human rights system. One is the complaint filed by Sudan against Ethiopia in 1997 alleging that Ethiopia abused human rights of the local resident's in bordering cities of Gissan and Kurmmuk. This complaint did not succeed because at the time of the complaint Ethiopia was not a party to the Charter. Another interstate complaint filed was the one Libya made against the United States regarding the U.S. bombing of Libya. The complaint was declared inadmissible because the United States

[63] Banjul Charter, Articles 47 & 48.

[64] Article 49 of the Banjul charter reads:"Notwithstanding the provisions of 47,if a state party to the present Charter considers that another state party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a communication to the Chairman to the Secretary General of the Organization of African Unity and the state concerned."

was not a party to the Charter. The third inter-state complaint is the one that the Democratic Republic of Congo submitted against Uganda, Rwanda and Burundi. It seems to be admissible and the one properly filed, since all parties to the complaint were parties to the Banjul Charter. Keeping in view the widespread abuse of power and violation of rights in the region, the inter-state complaint procedure should be used more frequently, but the African states usually hesitate to use the inter-state complaint mechanism due to their caring attitudes toward their recently won sovereignty.

3.7.1.2 Inter-American Human Rights System

The inter-American system of human rights also recognizes the right of states to submit a complaint against the other states for their alleged human rights violations. The Inter-American Convention declares that the commission will only consider the complaints filled by those states, either the complaining or the responding party, that have ratified the competence of the Inter-American Commission to entertain the interstate complaints.

The Inter-American human rights System made the inter-state complaints mechanism comparatively flexible and voluntary, leaving it to the choice of member states. Therefore, until now, only few states have ratified the competence of the Inter-American Commission to entertain such complaints. Moreover, some procedural requirements are also applicable to the inter-state complaints e.g., domestic remedies must have been exhausted before its submission and the case must not be pending before any other international dispute settlement entity. There is also a time limit of six-months for filing such complaints after the notification of the final decision on the case by the international

body.[65] After the Inter-American Commission completes its investigation regarding the complaint, it will try to arrive at a friendly settlement and present its findings to the Secretary-General of the Organization of American States. If such a settlement is not accomplished, the Inter-American Commission prepares a report and presents it to the litigant state parties. If either state differs with the report and files the case before the Inter-American Court of Human Rights or it does entertain the case, the decision of the Inter-American Court will be final in this regard. Otherwise, the Inter-American Commission will enunciate its final recommendation and fix the time for observance by the deviant state.[66] Until now, there have been no inter-state complaints submitted to the Inter- American Commission. The capacity of the Inter-American Commission to take up matters at its own discretion might have averted the use of this procedure. Furthermore, the particular history of the region primarily the non-intervention policy also makes clear the hesitation of states to choose this procedure.

3.7.1.3 European Human Rights System

The European Convention on Human Rights regards the inter-state complaints as an important part of its enforcement mechanisms. The European Convention on Human Rights and Fundamental Rights provides[67] that a state can file a case against another state if it considers that it is abusing human rights granted and protected by the European Convention on Human Rights. Under the European human rights system, this mechanism is mandatory on all member states parties. A state party filing such complaints need not have an interest in that particular case. The inter-state complaint procedure is part of an

[65] ACHR, Article 46.
[66] Ibid., Art. 51(1)
[67] Article 33 of the European Convention reads: "Any Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and Protocols thereto by Another Contracting Party."

enforcement mechanism intended to maintain the "public order in Europe" rather than a way to advance self-interest. This inter-state complaint procedure can also be exercised by a state. which desires to bring an action to compel another state to give effect and execute the decisions of the European Court of Human Rights. This system has received the highest number of such interstate complaints. Two of the cases were filed by Greece against the United Kingdom. These two complaints were related to the United Kingdom's colonial rule in Cyprus and the various practices and laws in Cyprus that allegedly allowed physical punishment on males below eighteen years and summary punishment and therefore infringed the European Convention on Human Rights. Following two recommendations by the European Commission, the Committee of Ministers decided that no further action was required after taking into account the agreements of London and Zurich. which focused on the independence of Cyprus. Another interstate complaint was present by Austria against Italy regarding the brutal treatment of the local German-speaking community in a criminal investigation of the murder of an Italian customs officer violated the European Convention on Human Rights. Regarding this case, the Committee of Ministers[68] decided that there was no breach of the European Convention.

3.7.2 REPORTING SYSTEM

The reporting system is mainly of two types; a country report and a state report. The State Reports are Periodic submissions made by a state regarding the state's compliance with treaty obligations. Most international and regional treaty bodies necessitate the states to submit periodic report. Usually these reports are examined by the relevant bodies and

[68] Prior to protocol 11. The Committee of Ministers had the power to decide on cases coming from Commission if no state or the Commission itself brought the case to the Court of Human rights within three months of such decisions. See Articles 32 and 48 cumulatively)

in certain cases; recommendations are also made to the reporting state. State reporting plays a significant role in the following ways.

Firstly, no state wants to be known as a violator of the international legal norms and standards. Therefore states want to avoid disclosure of their wrongdoing as much as possible. Publicity serves as the catalyst for timely response of the international community to the deviant state. Secondly, while preparing the report, it offers the reporting state with a chance to scrutinize their internal human rights situation. State reporting also provides a chance to engage in a productive dialogue with the examining body; state reporting is not confrontational and helps states to think about the possible prospective improvements. Of the major regional systems, only the African system unequivocally recognizes this system.[69]

3.7.2.1 The African Human Rights System

According to the Banjul Charter[70]: "Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative measures taken with the view to giving effect to the rights and freedoms recognized and guaranteed by the Charter." Article 62 specify a general obligation of reporting on all state parties without determining the competent body to entertain, and scrutinize such reports, it also does not tell about the contents of the reports, or how the reports are presented and submitted.

[69]Only the Banjul Charter recognizes this mechanism under its article 62. The Inter-American system uses the country reporting system.
[70] Banjul Charter, Article 62.

Subsequently, The Assembly of Heads of State and Government bestowed the Commission with the competence to receive such reports. In the same decision, the Assembly of Heads of State and Government authorized the African Commission to issue guidelines on the contents of such reports. The Commission formulated its first guidelines regarding the contents of the report. These guidelines classify the reports under seven different headings. These are: civil and political rights, Economic and social rights, peoples' rights, specific duties under the Charter, elimination of racial discrimination, and elimination of discrimination against women. A second set of guidelines was prepared in 1997, and many unnecessarily details were removed. However, the untimely submissions and differences in the form of these reports have severely diluted its efficiency, e.g. the report submitted by Algeria to the 19th session of the African Commission was written on ninety-six pages whereas the report of Mozambique was only seven pages long.

3.7.2.2 The Inter-American Human Rights System

The Inter-American human rights system does not specify state reporting as one of its enforcement mechanism. The Inter-American Commission, however, has been granted the power to ask for state reports from member states regarding their human rights situation.[71] Because the Inter-American Commission has implemented extensive powers on the subject of country reports and used this tool assertively. Therefore development of country reports mechanism has greatly watered down the state reporting option in the Inter-American human rights system. However, States submit reports to the Inter American Council of Education, Science and Culture and Inter-American Economic and

[71] ACHR, Article 43

Social Council on the measures they took in realizing the Convention rights. States are also required to forward these reports to the Inter-American Commission on Human Rights.

3.7.2.3 The European Human Rights System

The European system does not establish a proper state reporting mechanism. However, the European Convention on Human Rights provides that the Secretary General of the Council can ask states parties to provide reports on how it is implementing the rights guaranteed by the European Convention. Initially such reports were requested from all states. However, this did not proscribe the Secretary General from singling out particular states. The European system is primarily based on the individual complaints mechanism and this enables the European Court to reach all types of infringements. The Individual petition system seems insufficient to confirm compliance in situations where violations originate from massive or vast violations of human rights. Although the major European conventions do not use state reporting as an effective enforcement device. however, other treaties within the ambit of the Council of Europe require such periodic state reports. The European Social Charter necessitates states to submit reports. The Framework Convention for the Protection of National Minorities and the Charter for Regional or Minority Language also entail states to submit state reports.

3.7.3 COUNTRY REPORTS

3.7.3.1 African Human Rights System

The African human rights system does not utilize country reporting mechanism at all, therefore does not require the production of country reports by its organs. The African

Commission gives only small details in its annual reports that can hardly be described as country reports.

3.7.3.2 The Inter-American Human Rights System

The Inter-American system utilizes the country reporting mechanism as an important tool of its enforcement mandate. It also fills up the gap created by the non-existence of a state reporting mechanism. Although, the Inter-American Convention of Human Rights did not provide clear and specific provisions relating to the Inter-American Commission's mandate of country reporting. The Inter-American Commission created this mechanism through its own initiative, based on the 1960 Statute of the Inter-American. The Inter-American Commission follows certain criteria to selects a country on which it will prepare a country report, usually high numbers of complaints against a state can cause this mechanism to launch on that state. The country report on Chile is an example of this. The other important grounds include presence of undemocratic governments in a particular state; suspensions of any of Inter-American Convention and Declaration rights and any evidence of gross violations of rights. A state party may also request the Commission to prepare a country report on it. A country report on Panama was the result of such initiative. During the preparation of country reports, the Inter-American Commission can ask for information from the concerned state and other non-governmental organizations. The Inter-American Commission may also hear witnesses; conduct site visits and even resort to individual complaints. Site visits have enabled the Inter-American Commission to understand the ground realities and facts. These country reports usually discuss the overall political and legal system of the country and their comparisons with international counterparts, and therefore sometime these reports face

severe criticisms from states. These reports primarily examine the observance of civil and political rights; however, this practice has changed to include occasional discussions of social and economic rights.

The Inter-American Commission can recommend states to investigate certain incidents and may request to reform their systems to avoid prospective violations. Initially the political organs of the OAS did not discuss country reports i.e. until 1976. During the period from 1976 to 1980, the OAS conducted a thorough discussion on country reports and in certain cases even passed decisions condemning the states involved in violations. In the post-1980 period, the OAS has avoided condemning a specific country and just dealt with violations in general. A country report is published and transmitted to the General Assembly of the OAS with a purpose to ensure the involvement of the political organs of the OAS and create an environment that can exercise pressure on states to comply with the recommendations. The effectiveness of the country reports depends on the penalties that follow country reports. So far, the biggest fault in the country reports mechanism lies in the way the Inter-American system has been using country reports. The OAS General Assembly might not take firm stand on the reports. However, apart from the decisions to be made by the General Assembly, the issuance of reports has met with some success.

3.7.3.3 The European Human Rights System

The European system does not utilize country reporting as its primary device. In certain cases, the Committee of Ministers may authorize the Commissioner for Human Rights to prepare visit reports. These reports may be annual or be on particular issues and states.

Usually the annual reports discuss general human rights situations in Member states whereas other reports may pursue a thematic or even group focused pattern or may be general reports on particular countries. Usually, these reports do not include a recommendation to the Committee of Ministers or to the Parliamentary Assembly. The Commissioner also prepares follow-up reports to ascertain state's compliance with its recommendations. The follow-up reports seem to suggest that this reporting system has contributed to improve human rights situations in Europe.

3.7.4 INDIVIDUAL COMPLAINTS AND EXECUTION OF JUDGMENTS

Traditionally the States were considered as the only subjects of International law; however the development of International human rights law had changed this scenario to a larger extent. This development in international human rights law having the protection of individuals at its center brought a corresponding development in the individual-centered enforcement mechanisms. By means of such mechanisms, individuals can apply to an international body to be heard in cases against states for violating their human rights. In the United Nations system, various Charter and treaty bodies can entertain individual petitions. Treaties bodies often include an implementation mechanism which allows "judgment –creditor" to get remedy against "judgment-debtor" state. The regional human rights systems have also developed individual-based enforcement systems.

3.7.4.1 The African Human Rights System

The Banjul Charter authorizes the Commission to receive communications other than those of states. It provides:[72] "before each session, the Secretary of the Commission shall

[72] Banjul Charter, Article 55.

make a list of the communications other than those of states parties to the present Charter and transmit them to the members of the Commission, who shall indicate which communications should be considered by the commission." This wide mandate has established the practice of accepting communications from non-governmental organizations and individuals. After receiving a complaint, The African Commission proceeds to check the communication for admissibility and In case of individual complaints; the African Commission first tries to reach a friendly settlement. Once the friendly settlement attempt fails, the Commission decides the merits of the case. The mandate of the African Commission is very feeble, and does not cover any credible enforcement mechanism. The maximum power of the African Commission is limited to make a recommendation to the Assembly of the Heads of States and Government. The African Commission has not established any follow-up procedure to scrutinize states' compliance with its recommendation. The final authority on these recommendations is vested in the assembly of heads of State and government. This arrangement makes the African Commission practically incapable to give remedies to individual petitions. However, this lack of enforcement has been balanced by the establishment of the African Court of Human and Peoples Rights, which has a mandate not only to receive individual communications but also to decide whether states have violated rights contained in the Banjul Charter.

The mandate of the court relating to individual's complaints is expressed under article 3(1). It provides: "The jurisdiction of the African Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Banjul Charter, this protocol and any other relevant human rights instruments."

The main problem, in the African system, has been the manifest contempt of the recommendations of the African Commission. For instance, manifest disrespect to the Commission can be found in the following case against Nigeria. The African Commission in Constitutional Pen et al and Nigeria decided that the Civil Disturbances Act under which the tribunal tried the applicants to be in contravention of the Banjul Charter. A few years later, these tribunals created under the same Civil Disturbance Act sentenced Ken Saro – Wiwa and eight other persons[73] to death.[74] The African Commission, "reiterates its decision on recommendation 87/93 that there has been a violation of article 7.1(d)[75] with regard to the establishment of the Civil Disturbance Tribunal." In overlooking this decision," The Commission stated, "Nigeria has violated article 1 of the Charter."

3.7.4.2 The Inter-American Human Rights System

The Inter-American Commission of Human Rights entertains individual complaints.[76] These complaints are put through admissibility criteria. Non-governmental organizations can also submit communications with the Inter-American Commission.[77] The Inter-American Commission, after receiving a complaint, demands information from the concerned state and provides copies of the petition to that state.[78] After receiving a reply from the concerned state or after the state's failure to reply, the Inter-American

[73] The Subjects of these cases were executed on November 10/ 1985 in clear defiance of interim measure to postpone the execution date. However the Commission went ahead and considered the case on its merits.
[74] International Pen et al V Nigeria, Communications 137/94, 139/94, 154/96,ACHPR/PRT/12, paragraph 7
[75] Banjul Charter article 7.1 (d) reads: "the right to be tried within a reasonable time by an impartial trial or tribunal."
[76] ACHR Article 44.
[77] Ibid.
[78] Ibid., Article 48/1a

Commission verifies the facts that led to the petition.[79] If grounds for the complaints persist, then the Inter-American Commission finds out the facts of the case.[80] The Inter-American Commission, if deems necessary, can make use of investigation to ascertain the facts. It can resort to oral hearing of statements or can ask the state to provide information.[81] If grounds for the complaints come to an end or cease to exist, the Commission closes the case.

The Inter-American Commission attempts to affably resolve the dispute between the parties.[82] In case of a friendly settlement, the Inter-American Commission sends the report to the concerned parties and Secretary General of OAS for publication.[83] In case of failure to achieve a friendly settlement, the Inter-American Commission prepares a report summarizing the facts and conclusions.[84] The Inter-American Commission has the mandate to make a recommendation.[85] The Inter-American Court of Human Rights is the other equally significant body dealing with execution of Judgments and individual complaints.[86] It can order that violations be stopped and can make decisions entitling the victims to reparations.[87] The course of action relating to implementation has taken many forms. Sometimes, it takes the form of a continuous negotiation between different stakeholders. At other times, the Inter-American Court has just simply accepted agreements reached between the states and the victims and supervised its accurate execution.

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[79] Ibid., Article 48/1/b
[80] Ibid., Article 48/1/ c
[81] Ibid., Article 48/1/d
[82] Ibid., Article 48/2
[83] Ibid., Article 49
[84] Ibid., Article 50/1
[85] Ibid., Article 50/3
[86] Ibid., Article 63
[87] Ibid., Article 63/1

3.7.4.3 The European Human Rights System

The European Convention on Human Rights declares that member states have assumed an obligation to make sure the enjoyment of all rights protected by convention.[88] It also holds the member states responsible to accept the decisions of the European Court of Human Rights.[89] The ECHR entails the following three responsibilities of states, i.e., the duty to stop the violation,[90] make system reform to prevent the prospective contraventions and to pay reparation for the harm caused.[91] However, it is up to the concerned state, how to bring about the change pronounced by the decision and the Court does not have a mandate to dictate how member states meet the terms of the decisions. The Committee of Ministers is the responsible body for the implementation of the decisions of the European Court.[92] Pursuant to this mandate; the Committee has divided judgments of the court into those requiring general measures, individual measures and just satisfaction. The Committee of Ministers can keep any outstanding judgment on its future agenda for an indefinite period.[93] The Statute of the Council of Europe empowers the Committee to suspend any persistent defying state from membership in the Council of Europe. However, European states mostly have shown willingness to execute the judgments of the European Court.

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[88] ECHR, Article, 1.
[89] Ibid., Article 46/1
[90] Article 1 of the European Convention reads: " The High contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section I of this Convention.
[91] Article 46 of the European Convention reads: " 1 The high Contracting Parties undertake to abide by the finaljudgements of the Court in a case to which they are parties, 2 The final judgment of the Court shall be transmittedto the Committee of ministers, which shall supervise its execution"
[92] ECHR, Article, 46/2.
[93] Rule 4, Rules for the Application of Article 46 , Paragraph 2 of the European Court of Human rights

4.8 COMPARATIVE ANALYSIS OF INTERNATIONAL AND REGIONAL PROTECTION OF HUMAN RIGHTS

As it has been discussed in the previous sections of this chapter that the raison d'etre of various regional systems for the protection of human rights would does not only rest on the assortment of values and cultures in connection with the substantive rights to be protected but also depicts certain differences in the modes for their international supervision. An appraisal of regional and universal human rights instruments and practices shows significant variations as to procedures and structures for their implementation.

On the universal level, state reports to bodies of independent experts like the Human Rights Committee are the most important feature of monitoring. The limitation of this system has often been criticized. None of the permanent United Nations treaty or internal bodies has legal competence to order compensation or other remedies. Sometimes these bodies call on the state to pay compensation or afford other remedies, but they do not specify amounts that may be due or other of redress. [94] However, it may be more effective than is often assumed. The investigative body does have access to other information to correct and counterbalance the inbuilt partiality and unfairness of self-scrutiny in country reports. More significantly, the Committee is able to deal with basic structural problems in the concerned country without having to wait for individual cases. Moreover, a specific strength of universal systems is the fact that persons selected on a

[94] Dinah Shelton, *Remedies in International Human Rights Law*, (New York: Oxford University Press, 1999), 10.

global basis with diverse ideological and cultural backgrounds may, sometimes, be more critical and objective than individuals working through the regional mechanisms.

Regional human rights bodies have the power to designate that the state must afford to the victims of human rights violations. [95] The system under the European Convention has been dominated by individual complaints leading to quasi-judicial or judicial procedures. Although, this machinery has been highly effective, in a sense, has become a victim of its own success. The accumulation of cases has pushed the Council of Europe to draft an 11th Additional Protocol intended to reinforce the judicial character of Strasbourg organs and at the same time to streamline the procedure before it. Its most important characteristic is the substitution of the existing Court and European Commission with a new permanent Court. The achievement of the European system with its focus on individual complaints has been accredited to the fact that there are presently no systematic and widespread human rights violations, making it the ideal remedy for remote and isolated violations. The American system, though possessing several features of the European Convention,[96] has been most successful through the Commission's fact-finding role, mostly through persuasion and on the basis of on-site inspections. With remarkable progress being made towards the rule of law in many parts of Latin America, it is expected that judicial methods based on individual cases will contribute a more significant part in the future. With regard to the African Charter, it is still somewhat early to form a clear picture. The modus operandi before the Commission is not intended for individual cases save for ascertaining the existence of a series of massive or serious

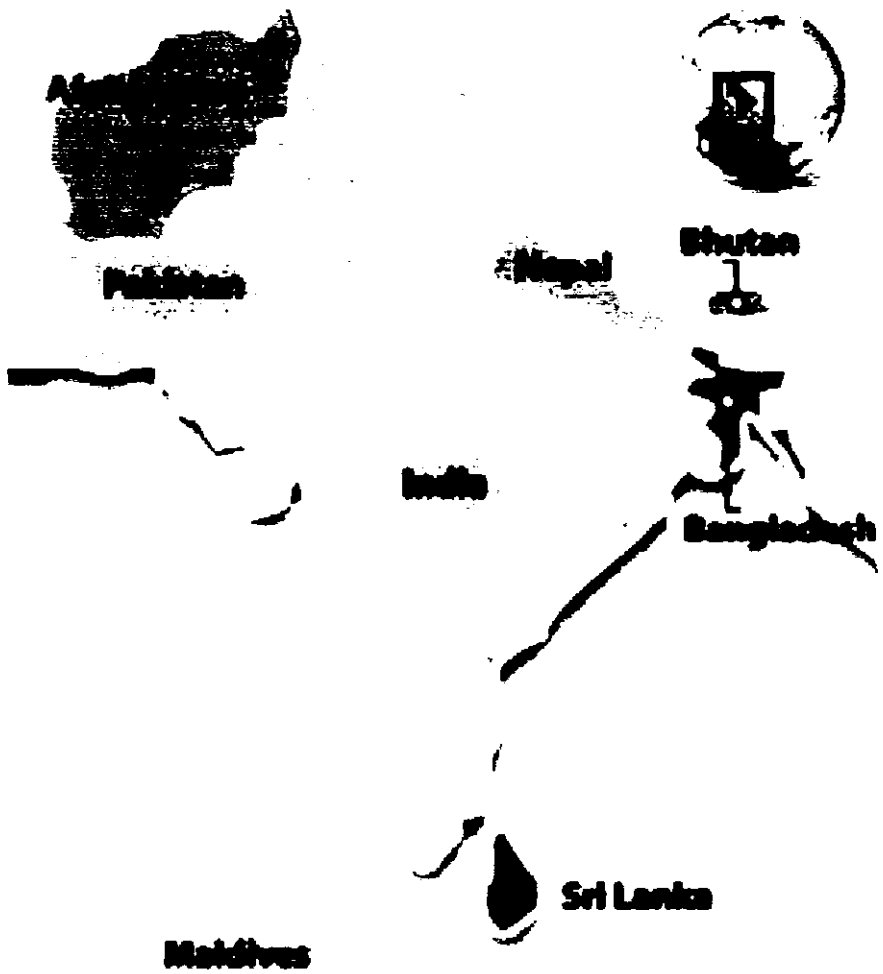
[95] Ibid., 10

[96] Robertson, "The American Convention on Human Rights and the European Convention: A Comparative Study', 29 European Yearbook (1981) 50.

violations. Sanctions are inadequate. The Court has played a secondary role. The accomplishment of a friendly settlement is more related to African traditions than a judicial decision. The different regional systems of supervision reflect cultural preferences and specific needs. Moreover, regional procedures are normally seen to be more effective with a higher potential to give attention to detail. The measures on the universal level have a reinforcing effect for regions with their own machinery of supervision but also remain significant for areas of the globe with no functioning regional systems. No negative effects can be seen to begin from a two-tier system for the protection of human rights. At the current stage of the international protection of human rights, ancillary procedures and institutions should not be seen as superfluous repetition of work but as a truly needed reinforcement for a system that is still very much in its formative years. Enhanced synchronization among the different institutions, both at regional and universal level will be an essential element in this development. The establishment of a UN High Commissioner for Human Rights is a case in point "to coordinate the human rights promotion and protection activities throughout the United Nations system".[97]

[97] The United Nations High Commissioner for Human Rights is the official "with principal responsibility for United Nations human rights activities" and with the mandate "to coordinate the human rights promotion and protection activities throughout the United Nations system" (GA Res.48/141 of December 20, 1993). His staff is the secretariat of the United Nations Centre for Human Rights, with principal seat in Geneva, a liaison office at United Nations headquarters in New York, and several field offices.

SOUTH ASIA



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[1]http://www.google.com.pk/imgres?q=map+of+south+asia&hl=en&gbv=2&tbm=isch&tbnid=l2dUtLHNnpnthM:&imgrefurl=http://southasiaspeaks.wordpress.com/2010/03/25/a-case-for-a-new-south asia/&docid=Tgr5Ir3jHxUU3M&imgurl=http://southasiaspeaks.files.wordpress.com/2010/03/saarc-map.jpg&w=306&h=360&ei=9R1NT8KJI47IrQfzysGKDw&zoom=1&iact=rc&dur=467&sig=117392118147919060326&page=6&tbnh=179&tbnw=152&start=96&ndsp=21&ved=1t:429,r:3,s:96&tx=122&ty=63&biw=1152&bih=734

CHAPTER IV

HUMAN RIGHTS IN SOUTH ASIA

4.1 INTRODUCTION TO SOUTH ASIA

South Asia is the southern region of the Asian continent, which currently encompasses the countries of Afghanistan, Pakistan, India, Bangladesh, Nepal, Bhutan, and the island countries of Sri Lanka and Maldives. The land frontiers of the region, approximately 4,000 miles in length, are dominated by mountain ranges that constitute a reasonably effective physical and ethnic/linguistic dividing line between the subcontinent and the adjacent areas of Asia.[1] These geographic factors have had a deep impact upon South Asia's relationship with the rest of Asia both physically and psychologically.[2] The definition of the geographical extent of the South Asia varies and for some authorities it also includes the adjoining countries to the west and the east, e.g. According to the United Nations geographical region classification, Iran is also included in the South Asia. South Asia is densely populated and is home to well over one fifth of the world's population, making the most populous geographical region in the world.

The notion and term of "South Asia" soon after being coined by the US state department, substituted the older and much used "Indian subcontinent". However, the terms "South

[1] Werner J. Feld and Gavin Boyd, ed., *Comparative Regional Systems*, by Leo E. Rose and Satish Kumar (New York: Pergamon Press , 1980), 237.
[2] Ibid.

Asia" and "the subcontinent" are sometimes used interchangeably.[3] Due to political considerations, some prefer to use the terms "the Subcontinent", "Indo-Pak Subcontinent"[4] "South Asian Subcontinent",[5] or simply "South Asia"[6] over the term "Indian subcontinent". Some holds that the usage of the term "South Asia" is getting more common since it clearly differentiates the region from East Asia. Some academics argue that the term "South Asia" is in more frequently used in North America and Europe, rather than the terms "Indian Subcontinent" or "Subcontinent".[7] Topographically, the subcontinent is a peninsular region in south-central Asia and rests on a distinct tectonic plate known as the Indian Plate, and is isolated from the rest of Asia by mountain barriers, the Arakanese in the east, the Himalayas in the north and the Hindu Kush in the west and extends southward into the Indian Ocean. Geographically, South Asia is surrounded by Southeastern Asia, Eastern Asia, Central Asia, Western Asia, and the Indian Ocean.

4.2 HUMAN RIGHTS ISSUES IN SOUTH ASIA

South Asia is characterized by highest human deprivation, in terms of opportunity for work and leisure, safe drinking water, access to health and sanitation facilities, low life expectancy, illiteracy and poverty. It is home to half of the world's poor[8] and the poorest region on the earth after Sub-Saharan Africa. It has one of the highest

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[3] Milton Walter Meyer, *South Asia: A Short History of the Subcontinent* (Adams Littlefield, 1976), 1.
[4] Mark Juergensmeyer, *The Oxford Handbook of Global Religions* (New York: Oxford University Press, 2006), 465.
[5] Lucian W. Pye & Mary W. Pye, *Asian Power and Politics* (Cambridge: Harvard University Press, 1985), 133.
[6] Sugata Bose & Ayesha Jalal, *Modern South Asia* (London: Routledge, 2004), 3.
[7] Judith Schott & Alix Henley, *Culture, Religion, and Childbearing in a Multiracial Society* (Elsevier Health Sciences, 1996), 274.
[8] South Asia is home to half the world's poor. <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/0,,print:Y~isCURL:Y~menuPK:158937~pagePK:158889~piPK:146815~theSitePK:223547,00.html> (accessed on 31 DEC 2011)

child malnutrition rates in the world, with approximately half of its children being under-weight, compared with 24% in Sub-Saharan Africa.[9] It is the least integrated region in the world and intra regional trade among South Asian states is only 2% of the region's combined GDP, as compared to 20% in East Asia. Since decolonization, South Asian states have systematically failed to eliminate inequalities in terms of infrastructure development, education ,health, land distribution, resources, capital, market credit and would thus have paved the way for endemic poverty. In the perspective of human rights this failure transforms into systematic denial of basic human rights, such as education, health, and decent standards of living. South Asian states both at national and regional levels did not devise a successful economic plan that supports emancipation for the millions in this region, who are ensnared in the cycle of poverty and to create an environment that would integrate the marginalized segments of society into the mainstream developmental process. Though many of the countries in South Asia have their distinct problems in securing human rights, however, they also share an experience of common colonial legacy. Let us first examine the similarities which actually form South Asia as a region and later dissimilarities which explicate the levels of difference in experiencing the rights.

Pakistan, India, Bangladesh, Maldives and Sri Lanka all had experienced anti-colonial movements. These countries have innate awareness of the civil rights and liberties. Bhutan and Nepal which were British protectorates continued as monarchies. The development of human rights awareness always depends upon the development of civil

[9] The prevalence of underweight children in India is among the highest in the world, and is nearly double that of Sub-Saharan Africa. <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/0,,menuPK:158851~pagePK:146732~piPK:146813~theSitePK:223547,00.html> (accessed on 31 DEC 2011)

society which acts as a counterbalancing force to the authority of state. Because of the domination of the nationalist elite and the amalgamation of the rights movement with the independence movement during the anti-colonial struggles, therefore after Independence there was obvious uncertainty in the perception of civil liberties. However, when the ruling elite failed to include different sections in the nation-building process, there appeared severe turbulences in different parts of the South Asian region. It principally resulted in two fold situation: on one hand, the state apparatuses became more and more oppressive and coercive and on the other hand, the legitimacy and authority of the state started waning with the rise of many voices of marginalized sections. This situation appeared in different ways in different countries of the region.

In Pakistan, it resulted in recurring military dictatorships with short Constitutional experiments of civilian government which never granted any meaningful democratic rights to the people. The state in Pakistan dominated by the nexus among landed aristocracy, bureaucracy and principally by military never permitted civil society to develop. It has also resulted in sectarian and communal conflicts in Pakistan.

In India, it resulted in the imposition of emergency during Indira Gandhi period in the 1970's. Consequently, political parties became less responsive and a surge of many autonomous non-party movements intensified the situation. The authority of the ruling elite also severely restricted with the rise of women, backward caste and Dalit, sub-regional and environmental movements. These movements have questioned the development and social policies of the state.

The Bangladesh's experience is not different from other countries of the region. Although it is a country of newest origins as compare to other countries of the region, it could never set up strong democratic institutions because of aggressive changes in the political establishment. With its lowest economic base in the world, Bangladesh was never able to provide basic facilities and services to the people.

Though Sri Lanka experienced comparatively a better democratic institutional set up, the society has been twisted with a substantial ethnic violence since the early 1980s. The Tamil nationalism in Sri Lanka perilously challenges the authority and legitimacy of the state. Efforts to meet the dispute of Tamil nationalism have resulted in the emergence of an oppressive state.

In Bhutan and Nepal with their monarchical legacies, the human rights were the biggest victim. The refugee problem of Bhutan and Maoists violence in Nepal could be a good example of the way the human rights are shaped.

4.3 IMPACT OF GLOBALIZATION ON HUMAN RIGHTS IN SOUTH ASIA

Globalization is the central organizing principle of the post- Cold War world, an international order that replaced the Cold War system.[10] It has initiated a new wave of debate on the human rights at the international level in the present times. From the time when United Nations adopted the Universal Development of Human rights in 1948, violation of human rights in any part of the world has been considered as a matter of concern for international community. However, in the perspective of the current sweep of globalization, the human rights issue has attained a complex character. There have been

[10] Adamantia Pollis and Peter Schwab, ed., *Human Rights: New Perspectives, New Realities* (New Delhi: Viva Books Private Limited, 2002), 209.

efforts on the part of big global powers to bring the human rights issues, particularly in the third world under the international regime. Human right violations are now connected to the trade issues. The global economic agencies such as IMF and World Bank which are controlled by the big global powers are pressurizing the third world countries by connecting grants and aid with human rights record of these countries. Though it could help to some extent to curtail the deterioration of rights and liberties in these countries, it also severely hampered the competence of the third world countries to negotiate at the international forums. Though it is not wrong to check the human rights breaches through international instrumentation, however, it is also a matter of serious concern to use the concern of human rights as a political tool to advance Western supremacy over the developing countries in an essentially iniquitous global order.

The third world countries have been arguing that the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights are based on principles of individualism and "reflect only the Western ideas and insofar as its deleterious effects are concerned, be linked to a new version of colonialism and imperialism".[11] These States argue that the efforts to impose Western values or to claim their moral superiority are denounced as cultural imperialism and a sign of disrespect for their civilizations and heritage.[12] Therefore, human rights predicated on these values and standards cannot be instilled and implanted to the third world. In this perspective, regions like South Asia face serious problem both internally and externally. South Asian states, because of their poor economic base, are unable to meet the rising aspirations of the people and resultantly have become oppressive. Very often the violations of human rights such as

[11] Ibid., 218
[12] Ibid., 12

police brutalities in Bangladesh, terrorism issue in Pakistan, communal and caste issues in India, Maoist violence in Nepal, ethnic strife in Sri Lanka or Kashmir issue between India and Pakistan, have become foreign policy tools in the global power politics. Some of the big powers, particularly the United States are using human rights violations in South Asia to accomplish their foreign policy goals. On the other hand, with the rise of identities in South Asian region, the local communities are seeking cross border support against state's contraventions of human rights. This is creating an appropriate situation for global intervention in the region. Though the changes that are taking place at the global level relating to human rights may have some positive results in the South Asian region, it may also restrict the scope of the state to act autonomously.

4.4 SOUTH ASIAN RESPONSE TO CONTEMPORARY GLOBALIZATION

Contemporary globalization, with its growing control on the economy ,media, culture and technology, has facilitated to the advancement of the idea of universal human rights whereas, at the same time creating a need to improve protection mechanisms to protect the marginalized and the victims of the globalization process, because the states themselves are most often not the direct violators. The diminishing role of the state in regulating economic activities has produced new freedoms regarding the economic activities both within and beyond the state, creating the rights of the people in terms of discovering new business and trade opportunities, The contemporary globalization is liberalizing the decision-making powers of the individuals regarding the economic activity and enhancing the prospects of resource and capital transfer. Since the globalization has influenced the state`s role in determining economic

policy it seems that the content and the extent of human rights. is now determined by market forces.

As various academic enquiries into the outcomes of globalization demonstrate that the phenomenon has produced a negative impact on political, economic and cultural rights of the poorest segments in the developing states. The paradoxical effect of globalization comes into play whereby it expands and reinforces the rights of the privileged or the inclusive, while the recognized human rights of the excluded segments of society remain endangered or are caused to be impotent by the globalization process. The most devastating challenge to the contemporary discourse of human rights is the endemic poverty that appears to perpetuate. This is the fundamental reason that the developing states have traditionally taken the view that these rights are inaccessible in the prevailing economic conditions, to which the United Nations report has responded: "The negative impact on one dimension of human rights. e.g. economic rights. necessarily has a domino effect on other rights. This reality reinforces the principle enunciated in the Vienna Declaration and Programme of Action (1993) that human rights are 'universal, indivisible, interdependent and interrelated'."[13] It is becoming more and more obvious that it is no longer plausible to draw a neat distinction between the nature of state obligations with regard to civil and political rights on the one hand, and economic, social and cultural rights on the other. United Nations human rights mechanisms have discredited the traditional view that civil and political rights necessitate only negative obligations, while economic, social and

[13] "Globalization and Its Impact on the Full Enjoyment of Human Rights" Sub-Commission on the Promotion and Protection of Human Rights. Fifty-second session Item 4 of the provisional agenda" Preliminary report submitted by J. Oloka-Onyango and Deepika Udagama. in accordance with Sub-Commission resolution 1999/8 15 June 2000. <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2000.13.En?Opendocument> (accessed 11 Nov 2011).

cultural rights yield the more complex issue of positive state obligations, which require resources to be expended. Gauging development purely on the basis of economic indicia is increasingly viewed with skepticism, as it often does not reflect the ground realities, especially those relating to disparities in income distribution and living standards. Such a position ignores the human dimension of development and the important linkage between development, human rights and peace. It overlooks the violent social and political forces that invariably are unleashed by extreme poverty and the denial of other human rights.

The South Asian states have been emphasizing on socio-economic rights. These states confidently deem that the socio-economic rights generate favorable circumstances for the realization of civil and political rights. They are not in opposition to civil and political rights. They say that given the realities - social inequalities, unemployment, poverty - in this region, socio-economic rights should be given priority. But the international human rights organizations which are mostly under the influence of Western nations are responsive to the infringement of civil and political rights. Socio-economic rights are usually overlooked. Due to this factor the third world countries blame the West of using the human rights as a political tool to intervene in the third world.

Against this backdrop, the human rights practitioners in third world like South Asian countries have been making efforts not only to put emphasis on socio-economic rights but also to advance different set of human rights appropriate to their requirement. These rights include the right to peace, right to development, right to communicate, right to environment and right to property over common heritage of mankind. Of these third generation rights, the third world countries have been putting emphasis on the right to

development. These rights are in a very early stage of development. For the first time, the term "right to development" was used in 1972. The General Assembly of the United Nations, after lot of debate, finally adopted a declaration on the right to development in 1986. This right to development is in the form of an entitlement. Hence development must be seen as an entitlement. It assures a right to choose social and economic system without outside interference. The state seeking development is also entitled to claim that the other states should not deprive what is due to it or should not take away from it, what belongs to it. State is also entitled to a fair share of what is common property.

However, in order to incorporate into the global capitalist system under the auspices of the international financial institutions, almost all the countries in South Asia have adopted the rhetoric of universal human rights and liberal democracy in the process of economic liberalization along with good governance policies. The truth is that the operation of the liberalization policies assures only for the markets and meanwhile weakens the economic, social and cultural rights of the people. In an atmosphere where the market is given preference over other considerations, it is impossible to make sure functional mechanisms for human rights protection. If the forces of globalization are allowed to maneuver freely — disregarding the central principle of human-centered development — the spectra of massive levels of human rights contraventions resulting in severe political and social chaos becomes a reality. Furthermore, this notion of competing rights in development discourse has another dimension. The scale to which global competitiveness has condensed the economic and political role of the state has directly influenced the government's image as protector of citizens' rights. The decreased role of

the state has created an authority vacuum in which novel forces emerge in response to individuals' desire for security, welfare and power.

4.5 REGIONALISM IN SOUTH ASIA

The existing region of South Asia encompasses what is traditionally known as the Indian subcontinent. This roughly comprises the territory between Myanmar in the east and Afghanistan in the west; and between China in the north and the Indian Ocean in the south. South Asia or Indian subcontinent has existed as regional space since pre-modern history and most of the boundaries of this subcontinent are delimited by geographical and natural features. Ever since ancient times until the British period, the big empires and small principalities of the region have had a history of interdependence. This interdependence expanded from commerce and trade to migration of peoples and from conquers of territory to intermarriages among ruling dynasties. Thus, even before the colonial period, it had developed as a regional complex. The existing political map of South Asia began to develop since the early twentieth century. Sri Lanka (Ceylon) and Myanmar (Burma) were separated from the British Indian government in 1935 and 1937 respectively. At the midnight of 14-15 August 1947, British India was divided to create two separate independent states, viz., Pakistan and India. Sri Lanka (Ceylon) became independent from the British rule in 1948. The two land-locked kingdoms of Bhutan and Nepal were under British suzerainty and never ruled directly by the British Indian government. With the departure of the British, they became sovereign. Later in 1971, following a war, Pakistan was further divided when the Bengali-speaking and geographically disconnected eastern wing of Pakistan seceded to form the independent state of Bangladesh.

South Asia receded into blinkered post-colonial state-system in the 1950s. The new states were obsessively protective of their territorial integrity and sovereignty, as well as the "independence" to formulate foreign policies. The states in the region were unable to develop regional approach to regional or global issues. This was caused by many factors. First, there was a nonexistence of commonly perceived extra-regional threat to the regional states. Secondly, South Asian countries did not have a common approach to or a common perception of the superpower rivalry and the Cold War. Indeed, most regional states perceived of India as an important threat. The third reason for the absence of regional approach is the Pakistan-India dispute. The antagonism between the two main powers of the region has made development of regional approach virtually impossible. India's South Asia policy is the fourth reason for the absence of regional approach in South Asia. In spite of its rhetoric of multilateralism in global affairs, India has always practiced bilateralism in its relations with South Asian States.[14] India was also apprehensive to allow any influence of the external powers in regional affairs. As a result of all these factors, there was no driving force for regionalization in post-colonial South Asia. The South Asia was not only a late starter, but also a reluctant and unenthusiastic starter in regionalization.

It has already been discussed in the previous chapters that regional organizations are providing effective means of implementing the basic rights and freedoms granted in their respective regional human rights instruments primarily in Europe and to a lesser extent in Americas and Africa. The South Asian states share many political and socio-economic

[14] The liberal-internationalist foreign policy of India's first Prime Minister Nehru broadly emphasized multilateralism in international affairs; yet, followed bilateralism in relations with South Asian neighbors. This was more clearly outlined in the Gujral Doctrine – the guiding principles of India's South Asia policy as stated by I.K. Gujral, then the Foreign Minister of India. For a detailed discussion, see Sahasrabuddhe, Uttara – "Paradigm Shift in Indian Foreign Policy"; Indian Journal of Strategic Studies; October 2003.

problems, such as terrorism, illiteracy, poverty, unemployment, violence against women, unequal treatment of women, pollution and exploitation of child labor. South Asian governments generally seem to be less successful to make effective and viable mechanisms for the realization of obligations under international human rights law. The present regional structure lacks the capacity to put into effect the basic rights and freedoms granted under international human rights instruments.

4.6 SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION

Despite the fact that the South Asia shares a long history and facing common problems originating from adverse global economic conditions as well as from common colonial past, South Asian states avoided moves towards regional integration until the beginning of the 1980s. In the late 1970's, President Ziaur Rahman, proposed the creation of trade bloc consisting of South Asian countries. The Bangladeshi proposal was acknowledged by Pakistan, India and Sri Lanka during meeting held in Colombo, when the foreign secretaries of the South Asian countries met in April 1981. In August 1983, the leaders adopted the Declaration on South Asian Regional Cooperation during a summit which was held in New Delhi. The foreign secretaries of the South Asian countries met again in August 1985 in Colombo and identified five broad areas for regional cooperation. New areas of cooperation were included in the following years. The SAARC was formally instituted on 8 December 1985. The SAARC Charter was adopted by the Heads of States or Government of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka 117 and dedicated to economic, social, cultural and technological, development as well as emphasizing collective self-reliance. Afghanistan joined SAARC as a Member at the Fourteenth SAARC Summit, Delhi, April 2007. SAARC is unique

concept of regional cooperation with very distinct cultural, environmental and geographical diversity; the SAARC is home to nearly 1.5billion people or about 22% of world's population. Today, there are nine Observers to SAARC[15] as Australia, China, European Union, Iran, Japan, Republic of Korea, Mauritius, Myanmar and USA. The SAARC Secretariat is based in Kathmandu, Nepal. It serves as a channel of communication between the Association and its Member States as well as other regional organizations, prepares for and services meetings and monitors and coordinates implementation of activities. The stated areas of cooperation are agriculture and rural development, biotechnology, culture, economic and trade, energy, environment, financial funding, human resource development, information and media, people to people contact, poverty elevation, science and technology, security aspects, social development and tourism.

4.6.1 Objectives of the SAARC

The objectives of the Association as defined in the Article 1 of the Charter are"

- to promote the welfare of the peoples of South Asia and to improve their quality of life;
- to accelerate economic growth, social progress and cultural development in the region and to provide all individuals the opportunity to live in dignity and to realize their full potentials;

[15] Since the Thirteenth SAARC Summit (Dhaka, 12-13 November 2005), the requests by a number of countries and one intergovernmental organization to be associated with SAARC as Observers was welcomed by the Heads of State or Government of SAARC. Since the Fourteenth SAARC Summit (New Delhi, 3-4 April 2007), Observers have been invited to participate in the inaugural and closing Sessions of SAARC Summits. With the admission of Observers to SAARC, a number of proposals have been made by some Observers to engage in mutually beneficial cooperation and some of the proposals are currently under implementation. < http://www.saarc-sec.org/Cooperation-with-Observers/13/> (accessed on 31 DEC 2011)

- to promote and strengthen collective self-reliance among the countries of South Asia;
- to contribute to mutual trust, understanding and appreciation of one another's problems;
- to promote active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields;
- to strengthen cooperation with other developing countries;
- to strengthen cooperation among themselves in international forums on matters of common interests; and
- to cooperate with international and regional organizations with similar aims and purposes."

Although the organization was created more than two decades ago but did not accomplish substantially in terms of its objectives, yet it has succeeded in creating an institution that has brought together a diverse group of countries with apparent civilizational similarities but deeply embedded divisions in terms of religion, political affiliations, ethnicity and a variety of bilateral issues and fostered a common relationship that has endured for more than two decades, proving that there is at least some fertile ground for a more effective regional alliance as will be advocated later in this thesis.

4.7 SAARC AND HUMAN RIGHTS

The United Nations has been showing serious concern over the failure of the member states to observe and implement the international commitments relating to Human Rights.

It has been emphasizing the important role of institutions at the national and regional level that can play important role regarding the promotion and protection of human rights and fundamental freedoms.

South Asian Association for Regional Cooperation (SAARC) was established in 1985 with its main rationale to "promote the well-being" of the people of South Asia through regional economic and cultural cooperation. It was hoped that greater regional cooperation would foster appreciation of one another's problems and generate "mutual trust, understanding"[16]. It was founded on the conviction that South Asia shares a common future and destiny shaped by our close geographical, historical and cultural ties. Though, SAARC has tried to promote greater understanding, goodwill and cooperation among the Governments and people of South Asia and stimulated mutually beneficial cooperation in many diverse areas. It has also served as an important platform to build confidence, mutual trust and sustained engagement and interaction to address and overcome the common challenges faced by the region.[17] However, since its commencement, no significant endeavors have been made by SAARC to discuss human rights issues in comprehensive manner. In fact, the promotion and protection of human rights is not a recognized objective of the SAARC Charter. Although most of the SAARC countries have established National Institutions but these institutions usually lack independence and autonomy. Despite continued efforts by civil society and international community, SAARC countries are not willing to even consider adoption of a mechanism to supervise adherence to and implementation of the same.

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[16] www.saarc-sec.org> (accessed 18 DEC 2011).

[17] SAARC Charter Day Message from Her Excellency Uz. Fathimath Dhiyana Saeed Secretary General of SAARC - Day 8 December 2011 <http://www.saarc-sec.org/2011/12/08/news/SAARC-Charter-Day-Message-from-Her-Excellency-Uz.-Fathimath-Dhiyana-Saeed-Secretary-General-of-SAARC----Day-8-December-2011/83/ > (accessed 18 DEC 2011).

SAARC adopted quite a few conventions as an attempt to give effect to the international obligations that arose after becoming party to the international human rights treaties. However, SAARC treaties are more focused on cooperative activities than on the setting up of regional machinery to deliver justice. Several agreements have been signed relating to gender and child rights related issues through several conventions and common action plans. Such as SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and SAARC Convention on Regional Arrangement for the Promotion of Child welfare in South Asia. SAARC has also signed agreements on Food Security Resort and specific social issues, which require coordinated and concerted actions for the effective realization of their objectives. Similarly, other SAARC treaties also address some of the Human Right issues, but so far SAARC has not adopted any uniform, Comprehensive and specific Human Rights Charter or Convention nor have they agreed to establish any common Regional Mechanism or Institution to monitor observance and realization of various Human Rights Charters, Conventions signed by the Member Countries or to provide remedy to the victim of human rights violations. Consistent efforts made by non-governmental organizations for regional cooperation and increased awareness in civil society are mounting pressure on South Asian countries to establish regional institutions and mechanisms for the promotion and protection of human rights. A regional human rights mechanism can help to address this difficulty to make sure that SAARC member States hold on to international human rights standards.

The President of Maldives, during his speech on the 16th SAARC Summit held in Bhutan, called to the SAARC member States;

> [o]n the issue of democracy and human rights, it is pleasing to note that South Asia is now a region of democracies. However, we all face challenges consolidating democracy and strengthening human rights. I believe SAARC should consider establishing a regional human rights mechanism, similar to the one being developed for the ASEAN region. This mechanism could help States promote and protect rights and freedoms in their jurisdiction. It could ensure that international human rights laws are observed and implemented by SAARC members. And such a mechanism could help people in our region develop a common understanding of universal human rights issues and perspectives.[18]

SAARC member states are socio-politically similar to each other and regional human rights mechanism can provide a common platform where these countries can articulate their human rights-related concerns to evolve a collective strategy to address human rights violations. Considering the large population and territory, including emerging economies in the world, SAARC should be able to demonstrate its commitment towards the best values of human being through the promotion and protection of the principles of Human Rights in the region.

4.8 HUMAN RIGHTS INITIATIVES OF THE SAARC

Human rights is still a no-go area and the Countries in South Asia consider human rights to be a 'domestic' matter and are reluctant to regional scrutiny. The need for a regional mechanism on human rights has been expressed in the various human rights fora in South Asia and the governments are gradually more pressurized by human rights activists to put aside bilateral insecurities and resentments and to move forward towards a viable and effective regional initiative for the protection of human rights.

[18] Address by President Mohamed Nasheed at the inaugural session of Sixteenth SAARC Summit <http://www.saarc-sec.org/userfiles/StatementofthePresidentofMaldives.pdf > (accessed 16 DEC 2011).

Despite the capacity to establish a regional human rights mechanism through the SAARC's platform, the regional insecurities and the lack of political consensus that impeded the successful realization and implementation of the SAARC manifesto have also impeded a regional initiative on human rights mechanism. The SAARC has not adopted a human rights charter, nor has envisioned the establishment of a mechanism to monitor effectively the adherence to and the implementation of various international human rights charters , conventions and treaties to which the South Asian states are parties. Although the Human rights are still not included in the recognized areas of cooperation, the SAARC has initiated several agreements and treaties relating to human development.

- SAARC Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution
- Convention on Promotion of Welfare of Children
- SAARC Convention on Narcotics Drugs
- Agreement on establishing the SAARC food bank

In this way the SAARC has accomplished to achieve a general consensus on a variety of issues that has vast potential to develop into an effective system for human development. However, this consensus is yet to move on from a norm-setting stage to the next stage of realization and implementation. The SAARC has also established the independent South Asian Commission on Poverty Alleviation, which is entrusted with the responsibility to develop policies and strategies of implementation on rural agriculture, social mobilization, poverty eradication and human development. The Commission on Poverty Alleviation is also mandated to evaluate the impact of the

open economy and structural adjustment strategies pursued by the SAARC member countries. Unfortunately, like most of the other initiatives of the SAARC, the Commission seems to be unsuccessful to have a positive impact on reducing regional poverty.

South Asian human rights activists are increasingly realizing the great truth in Falk's assertion that "available research strongly suggests that most Third World countries possess the resources to eliminate poverty and satisfy basic human needs if their policy makers were so inclined." However, besides this unfavorable background the SAARC Social Charter was adopted in the 12th Summit in Islamabad in 2004. Despite the affirmation in the SAARC Charter that the organization's objective is to promote the economic and social welfare of the people in the region, an initiative towards a Rights Charter was not considered until a long period of time. The SAARC Social Charter was formulated by an Inter-Governmental Group of Experts in the 1998 SAARC Summit in Colombo. The Social Charter was an attempt to create a set of principles relating to Economic, Social and Cultural rights at regional level. It was not an exhaustive catalogue of social and economic rights. Indeed, there are many inadequacies and shortcomings in terms of both the rights contained in the Social Charter and implementation mechanisms. nevertheless, the Charter has contributed enormously to the creation of normative standards on Economic, Social and Cultural rights in the region, and invigorated the objectives of the SAARC.

4.9 MAJOR CHALLENGES TO THE HUMAN RIGHTS COOPERATION IN SOUTH ASIA

The lethargic and lackluster development in regional cooperation is primarily due to the hostile and extremely difficult bilateral relations especially between Pakistan and India with major focus on Kashmir issue along with the SAARC's ineffective institutional structure to cope it appropriately. The presence of communal fascism in South Asia and expansionist behavior of India are the other key reasons of mistrust among the people of South Asia. The functioning of the SAARC shows that the dominance of politico-security issues has upset regional cooperation under SAARC. There has been hardly any serious debate in the region to reform SAARC both operationally and structurally, which will improve its effectiveness to become a vibrant regional cooperation. This is high time to revisit the main objectives, modalities, structures and main rationale of the SAARC process. The ongoing human rights violations in many South Asian states and geo-political situation have raised number of challenges in the establishment of a human rights mechanism in South Asia. Some of the major challenges have been highlighted as follows:

4.9.1 Lack of Strong Commitment towards Human Rights

The South Asian states have not considered human rights as their priority agenda and proper efforts in addressing the ongoing human rights violations such as torture, disappearances, Extra Judicial Executions, gender based violence and the common human rights issues of the region such as rights of the minorities , migration and human trafficking.

4.9.2 Lack of Good Governance

While governments have talked of eradicating poverty, illiteracy and providing employment, but faulty development strategies have hampered the progress. Poor governance has kept South Asia mired in poverty, with inadequate opportunities for health care, education and employment. The South Asian states are still suffering due to deficit of real democracy, accountability and lack of transparency. Although a number of institutions have been established including the judiciary, quasi-judicial bodies and National Human Rights Institutions, yet these are struggling with capacity gap, lack of independence and unable to function effectively. The Anti-corruption Commissions and the Right to Information Act has been enacted in most of the South Asian states .However, these steps are still unable to pave the way for good governance.

4.9.3 Slow Democratization Process

The process of democratization and human rights movement have not still been able to generate higher momentum for the South Asian governments to engage in serious dialogue among the SAARC governments and discussion with civil society for the consolidation of democracy and human rights during more than 26 year's history of the SAARC. The Association moved slowly both in terms of its programmes and its institutions. The major weaknesses of SAARC have been its lack of a dispute settlement mechanism, restrictive agenda, ineffective implementation machinery and weak Secretariat .

4.9.4 Visa Restrictions

The visa restrictions and bureaucratic controls placed by governments on citizens of neighboring states have led to estrangement. The lack of communication between the

respective authorities has often led to confinement of foreigners in prisons, who are denied equal access to justice. Human rights based approach needs to be applied for their release and repatriation.

4.9.5 Intra State Conflicts

Conflicts within states have led to vast numbers of refugees and internally displaced persons, for example Pashtuns from Swat and tribal areas of Pakistan, Muslims from Kashmir and Gujrat in India, Bhutanese in Nepal, Tamils in Sri Lanka. It is important that a mechanism should be created through a coordinated effort to check displacement and to make sure that the resettlement fulfills international standards.

4.9.6 Effects of Terrorism

The presence of state terrorism, cross-border terrorism and extremism in the region, particularly in context of the long standing antagonism between Pakistan and India, has prohibited a cooperative approach to address violence by extremist groups. Instead each has attacked the other for supporting violent gangs and tried to gain influence over the smaller countries of South Asia. Furthermore, counter terrorism strategies of the states have often relied upon illegal measures such as preventive detention and custodial torture, in contravention of constitutional rights and international human rights. These have allowed impunity for perpetrators of human rights violations.

4.9.7 Lack of Conflict Resolution Mechanism

Unlike Europe and other parts of the world, there is no appropriate mechanism within the SAARC to determine and resolve the conflicting issues at regional level. The official SAARC Summit cannot put the conflicting issues as the agenda of SAARC. As result number of issues with major impact on human rights including the border disputes,

refugees, human trafficking, internally displaced persons, climate change and management of natural resources for the mutual benefits such as water management have not been effectively addressed and some of the ad-hoc efforts taken at bilateral level are without effective monitoring and implementation mechanism.

4.9.8 Lack of Enforcement Mechanism

The South Asian states have been observing the growing number of reported as well as unreported cases of human rights infringements followed by institutional failures to address them. Adoptions of SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia on January 5, 2002 at the Eleventh SAARC Summit held in Kathmandu were important milestone and timely initiative in preventing and combating trafficking. However, there is no effective implementation mechanism in position to implement these Conventions. Culture of impunity in the conflict zone area is another challenge in South Asia.

4.10 ASSESSING THE SAARC AND SOUTH ASIAN REGIONALISM

Not only SAARC has survived for over 26 years, it has also "deepened" as well as "widened". Deepened, as its institutional activities and network have enlarged, and widened, as its membership has increased from seven to eight, and as many as nine Observers have been attending its summits. There is also an agreement on the formation of free trade area and trade liberalization. Despite all this, regionalization process has not taken basis in South Asia. Mere presence of intergovernmental organizations does not exhibit advanced stage of regionalism. It involves search for complementarities among

regional economies to eventually lead to greater integration as well as evolution of regional approach to intrastate and interstate conflicts.

As far as regional conflicts are concerned, SAARC is very unique regional intergovernmental organization. The regional countries do not have a common approach to resolve interstate disputes in the region. The guiding principles are that all decisions will be made on the basis of unanimity and the contentious bilateral issues will be excluded. [19] India rejects the role of extra-regional powers in resolving regional disputes and put emphasis on bilateralism. On the other hand, other regional states do not reject the role of extra-regional powers. The establishment of SAARC has not changed the state of affairs. Indeed, SAARC has insistently evaded from any involvement at any level in any interstate conflict in the region. South Asia is a security complex with many unresolved intrastate as well as interstate conflicts. However, SAARC summits or ministerial meetings do not formally discuss interstate conflicts. There are no deliberations on major politico-security issues that affect most regional countries, such as democratization, separatism, ethno-nationalism and border disputes. In fact, most of high political issues are categorically debarred from the agenda of the SAARC. The absence of politico-security confidence-building mechanisms makes technical confidence-building and economic and socio-cultural efforts ineffective. Thus, SAFTA does not seem to work and economic co-operation does not seem to take off. Except the land-locked Bhutan and Nepal, intraregional trade of the other South Asian states is very small as compared to

[19] P.A. Joy, *SAARC Trade and Development* (New Delhi: Deep & Deep Publications, 1998), 4

their total world trade.[20] South Asia's share of global trade is less than 2 percent and Intra-regional trade constitutes less than 5 percent of total trade.

[20] Hossain, Sharif and Ishtiaque Selim, "Regional Co-operation in South Asia: Future of SAFTA", *BIISS Journal*, Vol. 28 (April 2007), 2

CHAPTER V
PROSPECTS OF HUMAN RIGHTS SYSTEM IN SOUTH ASIA

5.1 ASIA IN HUMAN RIGHTS CONTEXT

Regionalism as a means of preserving and promoting the common interests of states and maintaining regional co-operation within the geographical propinquity has been in "vogue" [1] since the end of Second World War but has far greater influence than any fleeting trend and instead rightly remains a "central concept for organizing world politics".[2] Regional mechanisms bring together states which have geographical, historical and cultural resemblance, and are affected in a common way. It has been discussed in the previous chapters that human rights both civil and political rights and economic, social and cultural rights were included into the regional mechanisms in Europe, the Americas and Africa for many decades. however the analysis pointed out that the success with which rights are promoted and protected is principally depended on the mechanisms that are employed within each regional mechanism to implement the rights. Most of the regional or sub-regional groupings in Europe, the Americas and Africa have appreciated the need to have common human rights charters,

[1] Krispa Sridharan, *Regional Cooperation in South Asia and South East Asia* (Singapore: Institute of South East Asian Studies, 2007), 1.
[2] Peter Katzenstein "Regional States: Japan and Asia, Germany and Europe" in Kozo Yamamura and Wolfgang Streeck (eds) *The End of Diversity? Prospects for German and Japanese Capitalism* (Ithaca: Cornell University Press, 2003), 89.

conventions and treaties and have officially constituted autonomous statutory mechanisms to make sure their observance and enforcement. The European Community takes pride in its own charter of human rights and the working of its human rights court, whose rulings can overrule the verdicts of the highest national courts. The Americans have their charter and court and so have the African countries.

Asia alone is the region without a consensus on shared human rights concepts and the means of guaranteeing their respect. The Asian continent can be divided into four basic regions The Middle East Asia, South Asia, Southeast & East Asia and The Commonwealth of Independent nations. The Commonwealth of Independent states are the countries which got segregated from the former USSR. Most of these commonwealth countries still lack effective human rights institutions and the possibility of having a human rights mechanism in this region is a distant dream. The five States of Central Asia share many features and challenges, partially because of their geographic proximity and because of their shared history and the legacy of the Soviet Union. Yet, since independence each country has developed in its own way, therefore, targeted and specific activities need to be developed for each country. There is no regional human rights mechanism in Central Asia, and the situation of human rights differs little between the region's countries, but is often reported to be a cause of concern among many outsider observers. The nation which comes under the Middle East Asia falls under "Arab system of human rights". In 1968, the Council of the League created the Arabic Commission of Human Rights. The main missions of this Commission are the information and promotion about human rights. On September 15, 1994, the Council of the League adopted the Arab Charter on Human Rights. But on May 2004, this Council adopted a new version of the

Arab Charter on Human Rights. The Charter came into force in March 2008 and has been accepted by ten Arab States.[3] The situation of human rights in East Asia varies between the region's countries, which differ in political orientation and history as well as between contexts within each country. Although in the region of Southeast Asia, a sincere effort has been made to achieve a common human rights mechanism, but the results are yet to be materialized. The ASEAN Intergovernmental Commission on Human Rights (AICHR) was inaugurated in September 2009 as a consultative body of the Association of Southeast Asian Nations (ASEAN). The human rights commission exists to promote and protect human rights, and regional co-operation on human rights, in the member states.[4] Although the Commission was described as "toothless" However, NGOs in the region submitted cases of alleged violations to it at its inaugural meeting in Jakarta.[5]

South Asia is one of the most densely populated (around one-fifth population of the world), politically polarized and poverty ridden region of the world. The region is still besieged by the internal and interstate conflicts, illiteracy, poverty, and gross violation of human rights followed by the culture of impunity. Multifaceted polarization, poverty and illiteracy are not only complimentary to each other but also produce many hurdles in the realization and implementation of Human Rights. On the one hand, lack of effective initiatives from the respective states in addressing geo-political situation, poverty and illiteracy have aggravated the situation of ongoing impunity, lack of transparency and

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[3] Algeria, Bahrain, Jordan, Libya, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and Yemen have accepted the Arab Charter on Human Rights. <http:/carnegieendowment.org/2009/10/06/arab-charter-on-human-rights/6cj1> (accessed16DEC 2011)

[4] Brunei Darussalam, Cambodia, Indonesia, Laos PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam are members of AICHR.

[5] Despite the fact that the commission has no mandate to investigate rights abuse cases, NGOs submit reports on human rights violations at the formal inaugural meeting of ASEAN Intergovernmental Commission on Human Rights (AICHR) <http://www.thejakartapost.com/news/2010/03/29/ngos-report-rights-abuse-cases-aichr.html> (accessed 26 DEC 2011).

good governance together with gross violations of human rights. On the other hand, there is increasing awareness about democracy and human rights among the civil society organizations. The civil society of the region has contributed to restore democratic freedom and human rights in South Asian countries. In spite of continuous efforts made by civil society, the Governments of the SAARC countries have not made any serious attempt to adopt a uniform Human Right Convention and to establish any mechanism to oversee observance and enforcement of the same. SAARC has also been unable to push forward effectively its agenda of economic cooperation, social development and building trust among the South Asian nations. Disputes relating to water resources and lack of cooperation in energy sector are the direct output of regional security issues. South Asia like most other post-colonial security regions is a "conflictual security complex".

5.2 SOUTH ASIA AND INTERNATIONAL HUMAN RIGHTS LAW

The fundamental assumption of the universal regime of human rights is that national governments are the central actors and the most important players relating to human rights. The reason for presuming this is that governments negotiate and vote on the content and sphere of human rights obligations they undertake through the various treaties on human rights and take any further necessary steps to implement them into domestic law. The success of the treaties is calculated by the extent to which they are adhered to and are implemented within each state.

On the whole, the ratification record of South Asian countries relating to the human rights treaties and their implementation mechanism are not satisfactory. None of the

SAARC member states, except Bangladesh has ratified the Rome Statute and become the member of the International Criminal Court. Bhutan and Pakistan even do not have National Human Rights Institutions. Some of the states have made reservations and following restrictive treatment on the ratified treaties and limited willingness to implement the core human rights treaties. Bhutan has still not ratified the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights. Among the SAARC countries, majority of member states have yet to ratify the Optional Protocols to the core human rights treaties, i.e. International Covenant on civil and Political Rights and the Convention on the Elimination of Discrimination against Women etc., which allow the concerned treaty-based Committees to receive and examine the complaints from individuals. Only Sri Lanka and Maldives have ratified both Protocols, while Nepal has ratified only the Optional Protocols to the International Covenant on civil and Political Rights. Pakistan and Bhutan have neither signed nor ratified the Convention against Torture. Sri Lanka is the sole South Asian state that has ratified the Convention on the Rights of Migrant Workers. Nepal is the only South Asian State that has ratified the ILO's Indigenous and Tribal Peoples Convention (1989), which assures the "effective protection of indigenous and tribal peoples' rights ownership and possession" of land.

United Nations have made many recommendations to improve the human rights situation of South Asian countries. Universal Periodic Review as a new review mechanism of the UN Human Rights Council has provided an opportunity for an active engagement of all concerned stakeholders including the National Human Rights Institutions and Non-Governmental Organizations.

RATIFICATION RECORD OF SAARC COUNTRIES

Country	ICCRD	ICCPR	ICCPR OP	ICCPR OP2	ICESCR	ICES ROP	CEDAW	CEDAW OP	CAT	CAT OP
Afghanistan	6 Jul 83	24 Jan 83			24 Jan 83		5 Mar 03		1 Apr 87	
Bangladesh	11 Jun 79	6 Sep 00			5 Oct 98		6 Nov 84	6 Sep 00	5 Oct 98	
Bhutan	S:26Mar73						31 Aug 81			
India	03 Dec 68	10 Apr 79			10 Apr 79		9 Jul 83		14 Oct 97	
Maldives	24 Apr 84	19 Sep 06	19 Sep 06		19 Sep 06		1 Jul 93	12 Mar 06	20 Apr 04	15 Sep 06
Nepal	30 Jan 71	14 May 91	14May 91	04Mar98	14 May 91		22 Apr 91	15 Jun 07	14 May 91	
Pakistan	21 Sep 66	23 Jun 10			17 Apr 08		12 Mar 96		S 17Apr 08	
Sri Lanka	18 Feb 82	11 Jun 80			11 Jun 80		6 Oct 81	15 Oct 02	3 Jan 94	
Total ratification by treaty	7/8	6/8	2/8	1/8	7/8		8/8	4/8	6/8	1/8

Country	CRC	CRC OPAC	CRC OPSC	ICMW	ICPD	ICPD OP	ICED	ICC	Total Ratifications By country
Afghanistan	20 Mar 93	24 Sep 03	19 Sep 02					18 Feb 03	9/18
Bangladesh	3 Aug 90	6 Sep 00	6 Sep 00	S: 7Oct 98	30 Nov 07	12 May 08		23 Mar 10	12/18
Bhutan	1 Aug 90	S: 15 Sep 05	29 Oct 09						3/18
India	11 Dec 92	30 Nov 05	16 Aug 05		1 Oct 07		S: 6Feb 07		8/18
Maldives	11 Feb 91	29 Dec 04	10 May 02		S: 2 Dec 07		S: 6Feb 07		11/18
Nepal	11 Sep 90	3 Jan 07	20 Jan 07		S: 3 Jan 08	S: 2 Jan 08			11/18
Pakistan	12 Nov 90	S: 26Sep 01	S:26Sep 01		S: 25 Sep 08				5/18
Sri Lanka	12 Jul 91			11 Mar 96	S: 30Mar 07				8/18
Total ratification by treaty	8/8	5/8	7/8	1/8	2/8	1/8	0/8	2/8	

[1] Source < http://www.bayefsky.com/> (accessed 10 Dec 2011)

All South Asian states have undergone the UPR process, where the National Human Rights Institutions and the civil society organizations had played significant role for the implementation of human rights obligation of the state.

The situation of first generation's human rights is very problematic due to the geo-political situation, illiteracy, discrimination and denial of basic human rights to the disadvantaged and marginalized communities. Furthermore, the anti-terror measures and the internal conflicts of the states have paved the way for gross violations of human rights by the state and non-state actors. The national and international organizations have been raising serious concerns on the human rights violations in South Asian countries such as extra-judicial killings, disappearances, impunity, suppression of freedom of assembly, freedom of association and freedom of expression, and attack against the media, civil society advocates and Human Rights activists.

5.3 PARADOXICAL HUMAN RIGHTS SITUATIONS IN SOUTH ASIA

Although, the core idea of modernization theory is that economic and technological developments bring a coherent set of social, cultural and political changes.[6] However, historically human rights were treated as an ideological weapon in the struggle against communism, rather than as an instrument for inducing internal democratic changes.[7] The policy formulation has traditionally been the exclusive domain of national governments However, de facto influence over the content and scope of that policy has instead been gained by IFIs (the International Monetary Fund, The World Bank) and bilateral donors.

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[6] Ronald Inglehart and Christian Welzel, "How Development Leads to Democracy," *Foreign Affairs* 88 (March/April 2009): 39.

[7] Vojtech Mastny and Jan Zielonka, ed., *Human Rights and Security: Europe on the Eve of a New Era* (SanFrancisco: Westview Press, Inc., 1991), 253.

Since "values become norms through the constitutive process of authoritative decision-making. Such norms may take the form of law through a particular form of authoritative decision making of institutions associated with a legal system".[8] Undeniably, such influence and dependence has created mass economic, social and particularly cultural damage.[9] This has resulted in a fundamental restructuring of the domestic sphere to reflect neo-liberal values. The UN Special Rapporteur on ESCR's warns,

> [t]he flurry of many States romantically to embrace the market as the ultimate solution to all of society's ills, and the corresponding rush to denationalize and leave economics, politics and social matters to the whims of the private sector, although the theme of the day, will inevitably have an impact upon the full realization of economic, social and cultural rights. History has adequately shown that many aspects of social policy cannot be attained through blind reliance on market forces.[10]

At the same time, by giving effect nationally to human rights obligations undertaken at international level through treaties, states try to neutralize the fall-out from policy prescriptions of the IFIs upon whom the developing world is economically dependent. This paradoxical situation cannot be avoided through individual state efforts alone. Instead it has to come through the collective action of states at the regional level. Therefore the regional mechanism that is supported here is premised on the attempt to discard the strong neo-liberal bias of contemporary globalization and create a normative standard regionally in relation to promotion and protection of human rights.

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[8] Prakash Talwar, *Human Rights* (Delhi: Isha Books, 2006), 11.

[9] On 2 July 2009, the Delhi High Court decriminalised homosexual intercourse between consenting adults, throughout India. < http://www.hindu.com/2009/07/03/stories/2009070358010100.htm >

[10] Danilo Türk, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Realization of Economic, Social and Cultural Rights (Final report) E/CN.4/Sub.2/1992/16,3July1992.<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.1992.16.En?Opendocument> (accessed 6 NOV2011).

5.4 SIGNIFICANCE OF ESTABLISHING A REGIONAL HUMAN RIGHTS MECHANISM

The traditional concept of security used to be external and military in character and human rights used to belong to moral rather than security concerns.[11] True security means more political, economic, and other nonmilitary solutions and the promotion of human rights is indispensable among them.[12] The regional apparatus for human rights protection that has a regional human rights instruments; charters and conventions along with mechanisms as its core contributes a significant role and is of great significance in promoting respect, realization and protection of human rights in the region. "The importance of regional tribunals is meaningful, allowing each region to tackle the matter within its own cultural context—a flexibility that avoids relativism".[13]As observed from the creation and working of present human rights systems in Africa, the Americas and Europe, the significance and function of a regional system for human rights protection embraces at least the following four characteristics:

Firstly, it facilitates, on the basis of fully reflecting human rights principles and practices of the region, a further acknowledgment and development of universally- recognized human rights standards in the region and augments widespread acceptance of these standards by peoples and governments of the region.

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[11] Vojtech Mastny and Jan Zielonka, ed., *Human Rights and Security: Europe on the Eve of a New Era* (SanFrancisco: Westview Press, Inc., 1991), 251.
[12] Ibid., 257
[13] Russell A. Miller and Rebecca M. Bratspies, ed., *Progress in International Law*, by Kelly Parker (Leiden: Martinus Nijhoff Publishers, 2008), 495.

Secondly, it facilitates to strengthen collaboration in the field of human rights among individuals, non-government organizations and governments within the concerned region and relevant institutions and international organizations, thereby promoting an incessant advancement of human rights conditions in the region.

Thirdly, it facilitates the creation of a flexible, effective and region-compatible mechanism for international supervision and cooperation, thus providing a significant supplement to domestic and universal protection of human rights. And fourthly, it facilitates the solution of disputes in the region and to promote human rights-related peace, security, stability and development within the region.

5.5 PROSPECTS OF REGIONAL HUMAN RIGHTS SYSTEM IN SOUTH ASIA

As it has already been discussed that most of the South Asian states are facing common problems such as trafficking, torture, Violation against Women, involuntary disappearances, refugees, the internally displaced due to conflicts and right over resources. There is an extremely close nexus between human rights and peace, freedom, national self determination, economic, cultural and technological development.[14] Therefore, after decades of divisiveness and intolerance, there is an increasing demand from peoples of South Asia for tolerance, unity and human rights. These issues have been raised through citizens' activism at the national and regional level. They have demanded that the South Asian States should take authentic steps towards ending communal hostility, reducing poverty, striving for gender equality, enabling freedom of movement

[14] Dr. Tapan Biswal, *Human Rights: Gender and Environment* (New Delhi: Viva Books Pvt. Ltd, 2007), 56

within the region, and for environmentally-friendly and people-centered development.[15] Despite the commitment to the UN Charter, SAARC has established some regional arrangement for some specified areas and adopted number of Declaration, Charter and conventions related to human rights. Several agreements have been adopted under SAARC including the SAARC Social Charter, SAARC Food Security Reserve and some other documents related to specific social issues. Similarly, many South Asian countries have also signed several conventions and treaties such as convention on promotion of child welfare, convention combating trafficking in women and children for prostitution, convention on narcotics etc. However, there is no regional human rights mechanism in South Asia. Therefore, strenuous and continuous efforts are necessary from the key stakeholders for the establishment of regional mechanisms and institutions, particularly from the civil society organizations, for the promotion and protection of human rights in South Asia. The President of Maldives, during his inaugural speech on the 17th SAARC Summit held in Addu City Maldives, reiterated to consider for the establishment of the regional human rights body in South Asia.[16] Furthermore, the establishment of a regional human rights mechanism is being advocated by large number of civil society organizations of South Asia.

The six states of South Asia have National Human Rights Institutions (NHRI)[17] and these NHRIs gather at Asia Pacific Forum as Members.[18] These NHRIs are not meeting at a common platform for a common understanding on the Human Rights at regional level.

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[15] Statement Addressed to the SAARC Heads of State by Members of SAHR on the occasion of the SAARC Summit Meeting at Addu – Maldives 10th-11th November 2011 <http://www.southasianrights.org/?p=4456> (accessed 16 DEC 2011).

[16] President Nasheed's inaugural address to the 17th SAARC Summit held in Addu City, Maldives <http://www.seventeenthsaarcsummit.mv/ > (accessed 16 DEC 2011)

[17] http://en.wikipedia.org/wiki/National_human_rights_institutions (accessed 24 Dec 2011)

[18] http://www.asiapacificforum.net/about (accessed 24 Dec 2011)

However, in context of new role conferred by the Human Rights Council of United Nations such as UPR, NHRIs can supervise the implementation of treaties and focus on the human rights issues.[19] Therefore, NHRIs should come forward at SAARC level and pave the way for a regional mechanism. OHCHR also conduct meeting at Asia pacific level focusing on the human rights mechanism at regional sub regional level,[20] which provides option for advocacy at OHCHR level to engage the Government of SAARC for sub-regional human rights mechanism. In order to become a more effective regional organization SAARC should reform from within to establish a new mechanism particularly to promote basic rights of the peoples of the region and to combat impunity. This mechanism should be based on a charter and a legal framework to guide whole region. The new mechanism should develop its identity as a part of the region by creating links with various institutions in the region concerned with issues of justice and human rights.

International community has been searching for ways to create stronger machinery required to achieve practical realization of the rights specified in the Universal Declaration of Human Rights. Article 37 of the Vienna Declaration and Plan of Action, reiterated the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist. UN Human Rights Commission advocated for several times to explore the possibility of setting up "regional arrangements" in the form of an inter-governmental "regional machinery", possibly a regional human rights commission- to review the human rights situation and to provide redress where the national setting is unable or unwilling to

[19] http://www.ohchr.org/EN/HRBodies/UPR/Pages/NoteNHRIS.aspx (accessed 24 Dec 2011)
[20] http://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx

deliver justice. There has been gradual progress in terms of collaboration in the Asia-Pacific Region. Sub-regional initiatives trying to provide supervision and redress beyond the national setting have become more visible such as establishment of ASEAN human rights body; and the presence of OHCHR in the Asia-Pacific region provides possibility to form a machinery to promote and protect human rights through collective efforts.

5.5.1 Key Factors involved in the Establishment of Regional Human Rights System in South Asia

The successful creation and function of any regional human rights system is subject to influence from many subjective and objective factors. Subjective factors are marked principally in the attitudes, wills and ideas of relevant action takers on the creation of a regional human rights system; and objective factors are mainly manifested in human rights-related existing religious, political, social, economic, cultural, legal, custom, population and geographic realities. Following three main factors will influence the establishment of a South Asian regional human rights system. Of the three, the governments of South Asian countries doubtlessly play a crucial role, while United Nations' organizations and non-government organizations at all levels in the region are expected to play a vital role.

Pertaining to objective factors, the South Asian region is home to many countries (has a big population and vast in land area), which are confronted with a range of human rights problems. On the one hand, this calls forth an urgent need for the establishment of a regional human rights system, able to effectively promote and protect human rights in the

region and, on the other hand, causes a main challenge to the successful establishment of such a framework.

With reference to subjective factors, in the past several decades, the region's non-government organizations at various levels and relevant UN organizations have been more proactive in supporting the creation of a regional human rights system. Since the 1960s, the former Human Rights Commission and the United Nations General Assembly adopted a number of resolutions, encouraging countries in regions where no regional arrangements had been made in the field of human rights to create appropriate mechanisms in their respective regions to promote and protect human rights. In the South Asian region, several non-governmental organizations have taken a more proactive position in promoting regional human rights system and the creation of a supervisory mechanism and have done much in this regard, (for example, Kathmandu Declaration adopted in 2010). On the contrary, governments in this region do not have an appropriate, common and deep understanding on this issue and lack necessary political will in adopting a comprehensive regional human rights convention and creating a wide-ranging and comprehensive supervision mechanism to promote and protect human rights. The South Asian governments have usually emphasized on values, such as social stability, national sovereignty, government authority and economic development. This has enabled them, in practice, to pay particular attention to technical cooperation in human rights-related economic, social and cultural fields and made it difficult for them to take effective action to adopt a comprehensive regional convention on human rights and set up a wide-ranging human rights supervision mechanism.

5.5.2 Efficacy of Human Rights Paradigm in South Asia

The human rights paradigm has a huge capacity to make human rights both inclusive and relevant. The rights paradigm has been acknowledged as the vehicle of choice for expressing notions of well-being and human dignity and for granting these notions constitutional and legal validity.[21] The legitimacy and authenticity of the rights paradigm was strengthened in the developing world through the "popular mass struggles by marginalized groups and colonized peoples." These movements for independence and self-determination have left an ineradicable mark on human civilization and the right to self-determination as a legal right is a result of such movements.[22] Examples of these movements are the anti-racist and anti-colonial movements by the peoples of the Caribbean, Latin America, Asia, Africa and the Pacific.[23] The human rights paradigm has proven its ability to make out its duty-bearers, identify violators and evolve mechanisms to enhance and protect human rights.[24] The rights paradigm has been mostly successful in standard-setting and gained overwhelming global support. The ICECSR,[25] the ICCPR,[26] and the Vienna Declaration on Human Rights[27] are occasions where such universal standard setting efforts have had global empathy and support.

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[21] K Sikkink and SC Ropp, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999); and Richard Pierre Claude and H Burns Weston, *Human Rights in the World Community: Issues and Action* (University of Pennsylvania Press, 1992)

[22] Article 1.1 All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[23] Makau Mutua, "Standard Setting in Human Rights: Critique and Prognosis" *Human Rights Quarterly* vol. 29 (2007): 547–630

[24] Tony Evans, *The politics of human rights: a global perspective* (London: Pluto Press, 2005); David Kinley and Rachel Chambers "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law" 6 *Human Rights Law Review* (2006): 447–497

[25] <http://www.unhchr.ch/html/menu3/b/a_cescr.htm > (accessed 16 NOV 2011).

[26] <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm> (accessed 16 NOV 2011).

[27] <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En>

However, on some occasions this support has been divided as in the case of the Declaration on the Right to Development. The UN Human Rights Commission set out the idea of a right to development in 1977 and the UN General Assembly adopted the Declaration a decade later .[28] The previous chapters illustrated how regional mechanisms endeavor to promote and protect the human rights within various cultural and sociopolitical contexts.

In the South Asian context, it is also essential that there should be regional cooperation to circumvent the gross violations of human rights. This requires the formulation of new structures and strategies not only to protect the rights that are being violated but to create filtering mechanisms, which will prevent potential future violations. South Asia is a region where there are no regional mechanisms on Human Rights such as the African Commission on Human and Peoples' Rights, The Inter American Commission on Human Rights or The European Court of Human Rights. The Asian Human Rights Commission is only an NGO. A SAARC "Convention for the Protection of Human Rights and Fundamental Freedoms" of the people of the region, along with a Regional Mechanism on Human Rights may be a way to fight the huge human rights violations because such a convention with a regional mechanism to implement it will prevent the root causes for violence arising in the first place. This chapter suggests a new regional mechanism that is proposed for South Asia. The primary objective of the new mechanism is to devise an efficient machinery that responds to the exigencies of the region relating to the human rights. The proposed new mechanism, to be called the South Asian Commission

[28] CHR Res. 4 (XXXIII), UN ESCOR, Comm'n on Hum Rts (21 Feb 1977). The Declaration on the Right to Development was adopted by the United Nations General Assembly, Resolution 4/128 on 4 December 1986 <http://www.unhchr.ch/html/menu3/b/74.htm> (accessed 16 NOV 2011)

on Human Rights System (SACHR), is put forward to fill the gap in the SAARC's mandate regarding the human rights. It is envisioned that the contemporary members of the SAARC — Afghanistan, Pakistan, India, Bangladesh, Bhutan, Nepal, Sri Lanka, and the Maldives —will be the constituting members of the SAHRS.

5.6 GUIDING PRINCIPLES FOR PROSPECTIVE SOUTH ASIAN HUMAN RIGHTS SYSTEM

Article 7 of Part I of the Vienna Declaration and Program of Action says: "The processes of promoting and protecting human rights should be conducted in conformity with the Charter of the United Nations, and international law." In line with the purposes and principles of the United Nations' Charter and provisions of the important declarations on human rights and core human rights convention of the United Nations, with the aim of effective promotion and protection of human rights, and given realities in the South Asia, at least the following principles should be pursued for the creation of an South Asian regional system for human rights protection:

- The principal objective of the South Asian regional human rights system should be to promote, effectively and comprehensively, the universal respect, realization and protection of human rights in the region. This objective is related to the objectives of peace, stability and development within the region but should not be substituted or hindered by the latter. Countries in the South Asian region should also develop their good faith in this form of cooperation.
- The basis for the South Asian regional human rights system should be voluntary consent of governments of the South Asian countries. For this purpose, South

Asian governments should make efforts to reach consensus and build up their political will for sincere cooperation on issues such as the significance, content, principles, procedures, standards and form of the South Asian regional human rights system. Supportive and assistance activities of UN organizations and other international organizations should be conducted and provided on the basis of respecting the will of countries of the region.

- Legal standards for the South Asian regional human rights system should be along the lines of international human rights standards. A comprehensive and specialized regional human rights convention should strengthen the basic standards of core human rights conventions of the United Nations. Domestic or regional characteristics should be given due recognition, however these should not be used as pretexts or reasons for not observing universal human rights standards.
- The content and substance of the South Asian regional human rights system should enfold all aspects of human rights. Taking regional realities into consideration, preference may be given to some specific human rights problems requiring urgent solution (such as the trafficking of human beings, extreme poverty, ethnic conflicts and the use of child labor).
- All South Asian States should participate in the South Asian regional human rights system. At the same time when governments in the South Asian region are assured of their decision-making and leading positions, individuals, non-governmental organizations and UN organizations should have opportunities to

fully and effectively participate, in the establishment of the regional human rights system.

- In geographical extent, the South Asian regional human rights system should cover the entire region, including the disputed territory of Kashmir and the participating nations in this system should avoid mutual conflicts.
- The process of establishing South Asian regional human rights system should be gradual. Work can start from areas where it is easier for governments of South Asian countries to arrive at consensus and from a structure that can be more easily accepted by them. South Asian countries should endeavor for continuous progress. On the assumption that basic international human rights standards are complied with, a comprehensive regional human rights convention may provisionally provide for a supervision mechanism that has comparatively limited powers and functions. This mechanism can be improved and developed in the form of an optional protocol when conditions are matured.
- In structure and composition, the South Asian regional human rights system can be multifarious and flexible so that it is apposite for different needs. At the same time when assistance and technical cooperation is further strengthened, serious and careful consideration should be given to the feasibility and rationality of a comprehensive regional framework for human rights and creating supervision mechanisms that intend to promote and protect human rights.

Establishment of an effective, comprehensive South Asian regional human rights system is an obligation of countries of the South Asian region to observe their moral

responsibility as well as international laws. The need to respect, promotion and protection of human rights in the region and to realize overall development, stability and long-term peace in the region calls for the establishment of such a human rights system. The final accomplishment of the task requires sincere, concerted and long-term efforts of individuals, non-government organizations, governments and relevant UN organizations.

5.7 SALIENT FEATURES OF THE PROSPECTIVE SOUTH ASIAN COMMISSION ON HUMAN RIGHTS

Prospective South Asian Commission on Human Rights (SACHR) will be the dedicated human rights promotion and implementation unit of the SAARC. It will reflect the role and the function of the OAS Commission on Human Rights, "whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters."[29] SACHR will cause every member state to accept the "principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms" as granted in the other regional human rights systems. [30] The SAARC Charter shall be made explicit in terms of the mandate of the Regional Human Rights Commission and will stipulate that it is a legal obligation of every member state to maintain respect for human rights and fundamental freedoms and that no member can derogate from this legal obligation.

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[29] Article 10 of OAS Charter <http://www.oas.org/juridico/english/charter.html#ch15> (accessed 12 JUN 2011).

[30] Article 3 of the Statute of the Council of Europe <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=001&CM=1&CL=ENG> (accessed 12 JUN 2011).

Like other regional human rights commissions, the SACHR will be authorized to promote constitutional and legislation measures to promote human rights among member states, to disseminate information on human rights among the people in the region, and to supervise human rights implementation in the region.[31] Similarly to the Council of Europe Human Rights Commissioner, the SACHR will identify deficiencies in the legislation and practice of member states. Although, due to widespread acceptance and knowledge of international human rights the South Asian states have constitutional guarantees of human rights and fundamental freedoms. However, only Afghanistan, India, Maldives, Nepal and the Sri Lanka, have independent functional national human rights institutions to receive and examine complaints and to provide remedy on human rights issues.[32] Pakistan has presented a Bill in Parliament to create a National Human Rights Commission in 2005 and again in 2008 which is passed by the parliament in April 2011 and amended in Dec 2011 but yet to be materialized. [33] The inherent problems of these institutions are restrictive mandate and implementation of the recommendations of the Commissions. The SACHR Charter will specify that the existing human rights commissions will come within the

[31] Article 41 - American Convention on Human Rights, OAS Treaty Series No 36 1144 UNTS 123 entered into force 18 July 1978 <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> (accessed 20 NOV 2011).

[32] National Human Rights Commission, State Human Rights Commission and Human Rights Court were established in India in pursuance to the Protection of Human Rights Act 1993. The National Human Rights Commission in Nepal was established under the Act of 1997, as an independent autonomous statutory body. Similarly the Human Rights Commission in Sri Lanka was established in March 1997 under the Human Rights Commission Act of 1996. Maldives' Human Rights Commission is the latest addition, created in 2003. Afghanistan Independent Human Rights Commission was established pursuant to Bonn Agreement (5 December 2001) and on the basis of decree of the Chairman of the Interim Administration, June 6, 2002, and resolution 134/48 of United Nations General Assembly in 1993 and Paris Principles and on the basis of article 58 of the Constitution of Islamic Republic of Afghanistan, and now the Commission is performing its activities in the areas of promotion, protection and monitoring of human rights.

[33] The National Assembly in Dec 2011 passed The National Commission for Human Rights 2011 amendment bill which provides for the establishment of a National Commission for Human Rights. <http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=11185&Cat=13> (accessed 26 DEC 2011).

purview of the SACHR. Like the Organization for Security and Cooperation in Europe (OSCE) which has established mechanisms termed "human dimension" to ensure that member states adhere to the human rights and democracy obligations they have assumed under the Charter of the OSCE. The SACHR Charter will also provide a similar mechanism based on "human dimension", which facilitates participating states, to raise questions relating to the human dimension situation through an established set of procedures, in other OSCE States.[34]

The national human rights commissions can seek guidance and assistance from SACHR for effective functioning of matters relating to Human Rights. The SACHR will draw strength from the existing national commissions, and will initiate processes to establish national human rights commissions in member states that do not yet possess them. The initiative for the establishment of a national human rights commission and the supervision of the existing human rights commissions will be allocated to the SACHR, a measure that will enhance the legitimacy of the of national human rights commissions and the appointment of commissioners would be resolved by the SACHR in consultation with the relevant member state. This is particularly significant in an environment when the national human rights institutions are failing to acquire credibility both nationally and internationally.[35] The SACHR shall keep an eye on the implementation of the recommendations of the national commissions through a reporting mechanism. There shall be a right of appeal from the national commissions to the SACHR which may includes a demand for intervention when the

[34] <http://www.osce.org/odihr/13497.html> (accessed 26 DEC 2011).
[35] "Sri Lanka: Human Rights Commission Downgraded" Human Rights Watch (no author given) <http://hrw.org/english/docs/2007/12/18/slanka17581.htm> (accessed 26 Dec 2011).

recommendation of the national commission is not implemented. The Charter will also require that any violation must be brought into the cognizance of the concerned national human rights commission irrespective of whether other opportunities for the vindication of rights having been exhausted. Time limitations in relation to submitting violation petitions will be set aside until the people in the region are sufficiently familiarized with the procedures of complaints. The SACHR Charter will promote judicial activism in the region through public interest litigation. Therefore, affected interested parties and individuals in the form of both NGOs and individuals will have the right to petition, initially to the national commission and then to the regional SACHR in an appellate capacity against the violations of human rights protected in the SACHR Charter.[36]Similarly to the African Charter on Human and Peoples' Rights, The SACHR Charter will require state parties to present every two years a report on the legislative or other measures relating to the rights and freedoms guaranteed by the SACHR Charter[37]. The SACHR will examine the reports and make recommendations to member states for implementing the Charter rights. Failure to implement these recommendations shall result in the member states being reported to the SAARC's Council of Ministers, who shall call for explanation from the member state. incessant non-compliance will result in a series of consequences ranging from a "naming and shaming" campaign to economic sanctions against offending states.

[36] Similar to Article 44 of the American Convention on Human Rights OAS Treaty Series No 36, 1144 UNTS 123, entered into force 18 July 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)

[37] Article 62 of the African Charter on Human and Peoples' Rights, <http://www.achpr.org/english/_info/charter_en.html > (accessed 26 Dec 2011).

CONCLUSION

Since the Human rights issue has been acknowledged as an international concern all the way through the UN Charter, UDHR and many subsequent treaties, but the main problem lies in the enforcement and realization of these rights at the ground. The guarantee of basic rights to all human beings equally and indiscriminately will only be meaningful, if such rights are implemented everywhere in the world without any discrimination. However, the diversity of cultures and values effects the realization of these rights and weaken the enforcement mechanism at universal level. At the same time, politically and economically powerful Western Countries are trying to impose their values and standards in the name of universality by the use of International Financial Institutions and some time political force is also used to enforce the Western style democracy and standards of values on the other states, particularly, on the third world in form of cultural imperialism.

Therefore, there is a need of a regional mechanism which can create harmony between these two extremes. I have discussed in chapter 2 and 3 that different regional mechanism are working successfully in the other continents, particularly in Europe and providing synchronization between the local and the universal set of values as well as providing buttress to the cultural identities. Though South Asian states have states have guaranteed the basic rights in constitutions, however the realization of these rights has been marred by the political conflict and limited resource basis. The process of Globalization has further deepened the problem and the economically week countries are more susceptible with respect to their second and third generations rights, which ultimately aggravate and

weakened the situation of first generation rights. The aggravated conditions of the human rights catalyze the evolution of both the intrastate and interstate conflicts. A regional system can provide human rights based approach to the solution of the mutual conflicts to discuss the grey areas of human rights concerns and can pave the way for economic and political stability of the region. Some of the major advantages that South Asian Commission on Human Rights (SACHR) can deliver are elaborated as follows;

- SACHR can help to overcome institutional and procedural shortcomings and weaknesses of some domestic jurisdictions and of the international system.
- SACHR can help to overcome lack of experience and expertise in human rights jurisprudence.
- SACHR can lead to more effective implementation and enforcement of human rights norms and standards.
- SACHR can draw on the values and concepts which are integral to the religious and intellectual traditions of South Asia.
- SACHR can address specific regional human rights problems more effectively.
- SACHR would be one of the more credible mechanisms as the moral legitimacy would stem from being drawn up by the governments, scholars, lawyers and civil society representatives of the region.
- SACHR can promote human rights based approach to the mutual conflicts.
- SACHR can pave the way for the Regional Human Rights Court in South Asia, though, it seems excessively optimistic at this moment.

ANNEXURE: COMPARISON OF THREE PRINCIPLE REGIONAL HUMAN RIGHTS SYSTEMS

	African Human Rights System	**Inter-American Human Rights System**	**European Human Rights System**
Regional organizations of which the systems form part	Organization of African Unity (0AU) replaced by African Union (AU) in July 2002 (53 members)	Organization of American States (OAS), Established in 1948. (35 Members)	Council of Europe (COE) Established in 1949 (47 Members)
General human rights treaties which form the legal base of the systems	African Charter on Human and Peoples' Rights (1981/86) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1999&2004). The Protocol entered into force in January 2004 and the process is underway to establish the Court. The AU Summit has taken a decision in July 2004 to merge the African Human Rights Court with the African Court of justice The entries below are based on the 1998 Protocol	Charter of the OAS (1948/51), read together with the American Declaration on the Rights and Duties of Man (1948) American Convention on Human Rights (1969/78).	Convention for the Protection of Human Rights and Fundamental Freedoms (1 950/53) and additional protocols. The eleventh protocol created a single court (1994/98)

Specialized additional protocols and other prominent instruments that are part of/supplement the systems	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969/74) African Charter on the Rights and Welfare of the Child (1990/99) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003/2005)	Inter-American Convention to Prevent and Punish Torture (1985/87) Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (1988/99) Protocol to the American Convention on Human Rights to Abolish the Death Penalty (199CV91) Inter-American Convention on Forced Disappearances of Persons (1994/96). Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994/95), inter-American Convention on the Elimination of all forms of Discrimination against Persons with Disabilities (1999/2001)	European Convention on Extradition (1957/60) European Convention on Mutual Assistance in Criminal Matters (1959/62) European Social Charter (1961/65) European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987/89) Framework Convention on the Protection of National Minorities (1995/98) European Social Charter (revised) (1996/99) Convention on Human Rights and Biomedicine (1997/99), European Convention on Nationality (1997/2000)

Supervisory bodies in respect of general treaties	Court: established in 2006 Commission: established in 1987	The Court was established in 1979. The Commission was established in1960 and its Statute was revised in 1979.	A single Court was established in1998, taking over from the earlier Commission and Court.
Supervisory bodies based	Court: Arusha, Tanzania Commission: Banjul, Gambia but often meets in other parts of Africa	Court: San Jose, Costa Rica. In May 2005 the Court held its first extraordinary session (in Paraguay) Commission: Washington DC, but also occasionally meets in other parts of the Americas	Strasbourg, France
Contentious/advisory jurisdiction of Courts	Contentious and broad advisory	Contentious and broad advisory	Contentious and limited advisory
Who able to seize the supervisory bodies in the case of individual complaints	Court: After the Commission has given an opinion, only states and the Commission will be able to approach the Court. NGOs and individuals will have a right of "direct" access to the Court v4'ere the state has made a special declaration Commission: Not defined in Charter, has been interpreted widely to include any person or group of persons or NGOs	Court: After the Commission has issued a report only states and the Commission can approach the Court. As from 2001, the Commission sends cases to the Court as a matter of standard practice Commission: Any person or group of persons, or NGO	Any individual, group of individuals or NGO claiming to be a victim of a violation
Number of members of the supervisory bodies	Court: 11 Commission: 11	Court 7 Commission: 7	Equal to the number of state parties to the Convention (47)

Appointment of members of the supervisory bodies	Judges and Commissioners are elected by the AU Assembly of Heads of State and Government	Judges and Commissioners are elected by the General Assembly of the OAS.	The Parliamentary Assembly of the CoE elects judges from three candidates proposed by each government. There is no restriction on the number of judges of the same nationality.
Meetings of the supervisory bodies	Court: Regularity of sessions to be determined Commission: Two regular two-week meetings per year. Three extraordinary sessions have been held.	Court: four regular meetings of two to three weeks per year (one extraordinary session in 2005) Commission: two regular three-week meetings per year and one or two short special sessions	The Court is a permanent body.
Terms of appointment of members of the supervisory bodies	Judges will be appointed for six years, renewable only once. only the President full-time Commissioners are appointed for six years, renewable, part time.	Judges are elected for six-year terms, renewable only once, part time. Commissioners are elected for four-year terms, renewable only once, part time.	Judges are elected for six-year terms, renewable, full-time.
Responsibility for election of chairpersons or presidents	The President is to be elected by the Court (two-year term). The Commission elects its own Chairperson (two-year term).	Court: The President is elected by the Court (two-year term). Commission: The Chairperson is elected by the Commission (one-year term).	The President is elected by the Plenary Court (three-year term)

Form in which findings on merits are made in contentious cases; remedies	Court: Will render judgments on whether violation occurred, orders to remedy or compensate violation. Commission: Issues reports which contain findings on whether violations have occurred and sometimes makes recommendations.	Court: Renders judgments on whether violation occurred, can order compensation for damages or other reparations. Commission: Issues reports which contain findings on whether violations have occurred and makes recommendations.	Declaratory Judgments are given on whether a violation has occurred, can order "just satisfaction"
Permission required from supervisory bodies to publish their decisions.	Court: No Commission: Requires permission of the Assembly. In practice permission has been granted by the Assembly as a matter of course. However, in 2004 the publication of the Activity Report was suspended due to the inclusion of a report on a fact- finding mission to Zimbabwe to which the government claimed it bad not been given the opportunity to respond. Permission to publish the report was given in January 2005.	Court: No Commission: No	No, decisions and judgments are public.
Power of supervisory bodies to issue interim/ provisional/ precautionary measures	Court: Will have the power Commission: Yes	Court: Yes Commission: Yes	Yes

Primary political responsibility for monitoring compliance with decisions	Executive Council and Assembly of the AU.	General Assembly and Permanent Council of the OAS.	COE Committee of Ministers
Country visits by Commissions	A small number of fact finding missions and a larger number of promotional country visits.	Frequent, on-site fact-finding missions are conducted	N/A
Commissions have own initiative to adopt reports on state parties	Yes, occasionally following fact-finding missions	Yes, 56 country reports and six special reports adopted so far	N/A
State parties required to submit regular reports to the Commission	Yes, every two years	No	N/A
Appointment of special rapporteurs by the Commissions	Thematic rapporteurs: Extra-judicial killings, prisons and women, freedom of expression, human rights offenders, refugees and displaced persons Follow-up committee on torture (Robberi Island Guidelines) Working groups economic social and cultural rights. indigenous people or communities Country Rapporteurs: None	Thematic rapporteurs: Freedom of expression, prison condition, women, children, displaced persons, indigenous peoples, migrant workers, human rights defenders, Afro descendants and racial discrimination. Country rapporteurs: Each OAS member state has a country rapprteur drawn from the Commission members.	N/A

Clusters of rights protected in the general treaties	Civil and political rights as well as some economic, social and cultural rights and some third generation rights	Civil and political; Socio-economic rights in the Protocol.	Civil and political, also education
Recognition of duties	Yes, extensively	In the American Declaration but not in the American Convention	No, except in relation to the exercise of freedom of expression
Recognition of peoples' rights	Yes, extensively	No	No
Other bodies which form part of the regional systems	Committee of Experts on the Rights and Welfare of the Child monitors compliance with the African Charter on the Rights and Welfare of the Child		COE Commissioner for Human Rights (established in 1999) Monitors and promotes human rights in member states; may undertake country visits; assists member states (only with their agreement) to overcome human rights related shortcomings.
Other regional human rights for a whose work draws upon/ overlaps with the systems	The African Peer Review Mechanism (APRM) of the New Partnership for Africa's Development (NEPAD) reviews human rights practices as part of political governance.		European Union (EU): Membership of the COE and adherence to the European Convention on Human Rights is a prerequisite for membership of the EU The Convention constitutes general principles of European Union law. European institutions with roles that affect human rights and which draw upon the

			Convention include: The European Council, the Council of the European Union. the European Commission, the European Parliament, the European Court of justice and the European Ombudsman. Organization for Security and Co-operation in Europe (OSCE): Although its standards do not impose enforceable international legal obligations as they are mostly of a political nature, it draws heavily upon the principles of the European Convention. It does provide for a multilateral mechanism for the supervision of the human rights dimension of its work.
Official Websites	www.achpr.org www.arfrica-union.org	www.corteidh.org.cr www.cidh.org	www.echr.coe.int

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