The Evolution of Regional Human Rights Mechanisms: A Focus on Africa

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Considerable research has already been done on the role of the United Nations in promoting human rights; however, the work of regional organizations is just beginning to be explored in greater depth. This article compares the regional evolution of human rights instruments, focusing particularly on Africa, and examines different explanations for regional variance. The impact of domestic conditions, regional and international pressures, and cultural concerns on the instrumental calculations of state actors are explored revealing that international and regional factors played a key role in early adoption of protection mechanisms, and that domestic pressures have grown increasingly important.

Introduction

Studies of human rights norms have expanded considerably in recent years. These studies cover a wide range of material, including works that explicitly define norms, trace the evolution of norms, and examine compliance with these norms. Considerable research has already been done on the role of the United Nations in promoting human rights; however, the work of regional organizations is just beginning to be explored in greater depth. Even a brief look at human rights norms at the regional level reveals great disparities between regions in terms of the institutionalization of human rights, with Europe and Latin America having far greater legalization than Africa and Asia do. More detailed analysis of regional actions taken to protect and to promote human rights provides interesting details about the evolution and codification of human rights instruments in different contexts. Europe and Latin America have both a Human Rights Commission and Court of Human Rights; Africa has had only a Commission, but is working on establishing a functioning court. Asia is focused more on national-level efforts to protect human rights than broader regional ones.

There is considerable information written on human rights instruments and enforcement in Europe, which has the most legalized human rights system. There is also a growing body of literature regarding human rights in Latin America, but Africa is often overlooked. It is particularly interesting to study Africa in contrast with these other regions to see if the normative evolutionary patterns seen in other regions are also evident in Africa. A

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comparative examination and explanation of these differences provides insights into the factors that affect legalization decisions by states. Examining the development of human rights instruments in Africa also provides additional empirical evidence to determine which explanations of variance are most applicable to the region. This paper compares the regional evolution of human rights instruments, focusing particularly on Africa, and examines different explanations for regional variance. I begin with an overview of human rights protections in Latin America, Europe, and Southeast Asia. Next, I look at the evolution of human rights in Africa in the early 1980s and the late 1990s. The impact of domestic conditions, regional and international pressures, and cultural concerns on the instrumental calculations of state actors are then explored revealing that international and regional factors played a key role in early adoption of protection mechanisms, and that domestic pressures have grown increasingly important. Finally, I contrast African developments with the other regions using an instrumentalist approach to explain the variance between regions. Whereas Europe and Latin America have had ideal regional organizations and growing democracies to facilitate the protection of human rights regionally, Africa and Asia have not had these same advantages and have also faced the challenge of addressing cultural counterpressures.

**Regional Development of Human Rights Instruments**

In addition to the development of human rights protections at the global level such as the Universal Declaration on Human Rights (1948), states within regional organizations have also sought to draft regional conventions and establish commissions and courts to guarantee human rights. The European and Latin American states were the first to begin legalizing human rights protections in separate regional instruments. Africa and Asia have lagged behind these two regions in developing regional legal protections for human rights.

**Latin America**

Members of the Organization of American States (OAS) have a long history of codified human rights that have been developed along with many of the UN generated documents of the past fifty years. Latin America led the way internationally in codifying human rights in the American Declaration on the Rights and Duties of Man (1948, revised 1965). The Declaration was a formal statement by member states regarding human rights principles, but it was not an international treaty to be ratified by states. In an effort to do more than simply issue declarations supporting human rights, the OAS created the Inter-American Commission on Human Rights in 1959 to investigate alleged violations in the Americas. The duties of the Commission include promoting the respect for and the defense of human rights, requesting information from member states, responding to and advising members on human rights matters, and preparing and submitting annual reports to the OAS on human rights conditions in the region (Weston et al. 1992: 249). The Commission can examine complaints by individuals as well as by states and may actually choose to widen the scope of its investigations based on a single allegation of abuse to a broader investigation of rights within a particular country (Shelton 1992: 127). The process for handling cases is less formal than in Europe although both Commissions take similar steps when responding to communications. The Inter-American Commission begins with a consideration of the merits of the case without a formal decision on admissibility. (If it is determined the case is not admissible based on information gathered, this is communicated to the petitioner.) The Commission communicates with the state party involved, requesting information, and then allows the petitioner to respond. It may choose to hold a hearing. It may also conduct on-site investigations. It seeks to promote friendly settlements between parties when possible. If
a settlement is reached, it is transmitted to the OAS Secretary General and published. If a settlement is not reached, the Commission adopts an opinion and makes recommendations to remedy the situation. The Commission may choose to publish its opinion if the state party does not carry out its recommendations.

With the signing of the American Convention on Human Rights in 1969, the OAS further augmented the instruments already in place to protect human rights by establishing the Inter-American Court of Human Rights. The Convention, as an international treaty, is a stronger legal document than the Declaration. There are several limitations, however, influencing the effectiveness of the Court. Only those states that recognize the Court’s jurisdiction have standing before the Court. This means that it cannot hear cases against states that are not party to the Convention. The Court also has limited powers of enforcement. Its rulings are legally binding on member states and it does have the authority to award compensation to an injured party, but it must rely on the OAS General Assembly to enforce its rulings. The Court’s hearings are normally held in public, and this visibility does help put pressure on states to comply with its decisions. Cases in which states are not in compliance with the Court’s rulings are submitted in an annual report to the General Assembly to adopt whatever sanctions it believes are merited. Although the General Assembly has issued resolutions of concern about blatant abuses, the emphasis on consensus within the organization has sometimes led to less-than-effective actions on reports of human rights violations. Despite these limitations, a wide range of overlapping documents in the Inter-American system provides the Commission and the Court considerable authority in interpreting and protecting human rights. Cases may be referred to the Court if the Commission is unable to achieve a friendly settlement of the dispute and finds justification for Court proceedings. The Commission itself has become increasingly effective in pressing states to protect human rights and in influencing them to change abusive patterns of behavior (Weston et al. 1992: 254).

Europe

Just as Latin America has had a long history of codifying human rights, European states have also developed a wide variety of conventions and mechanisms to protect human rights. The European Convention for the Protection of Human Rights and Fundamental Freedoms was opened for signature on November 4, 1950, and entered into force on September 3, 1953. It was drafted by the Council of Europe and included forty-five contracting parties in 2005. The Convention protects a wide range of political and civil rights through the work of the European Court of Human Rights, the Commissioner of Human Rights, and the Committee of Ministers. The European Human Rights system has evolved considerably over the years, with additional protocols to the Convention (Paris 1952; Strasbourg 1963 and 1966), and with the creation of new bodies to protect human rights in the region. Initially the European Commission on Human Rights played an important role in addressing complaints that were filed. The Commission would seek to resolve complaints through a friendly settlement between the parties (these settlements were binding once they were agreed upon by both sides). If a settlement could not be concluded, the Commission considered the facts and precedents relating to the case and issued a confidential report and recommendations for resolution. The Commission might also refer the case to the Court. In 1998 the Court system was restructured and the Commission was replaced with the office of the European Commissioner for Human Rights. Unlike the Commission, the Commissioner’s office is a nonjuridical institution and does not take up individual complaints. The Commissioner’s main responsibilities are to identify shortcomings in the legislation and practice of member states, to promote the
effective observance of human rights, and to promote education and awareness of human rights (www.coe.int). In addition to the creation of the Commissioner’s office, the Court was also restructured in 1998 to address concerns about backlogged cases. The Convention’s optional protocol to allow for individual petition has been signed by all parties, creating a growing number of cases as more Europeans learn of their rights and methods of redress for grievances. The Court has greater enforcement power than the Inter-American Court because its judgments are final and binding and it has the ability to call for “just satisfaction” or financial compensation. The Committee of Ministers supervises the execution of the Court’s judgments. It can expel or suspend a member for failure to carry out the Court’s rulings.

An even larger number of European states have been involved in addressing the “Human Dimension” of the Helsinki Accords (1975) through the Conference on Security and Cooperation in Europe (CSCE) (now Organization for Security and Cooperation in Europe [OSCE]). This has been a particularly valuable forum since its membership included countries from both the east and west. The changing international environment in the 1990s witnessed considerable growth and institutionalization of the OSCE. Commitments to protecting human rights became even stronger with the creation of the Office for Democratic Institutions and Human Rights (ODIHR) in 1990. The Election Section and Democratization Section of this office seek to strengthen democratic institutions and civil society. The Monitoring Section focuses on human rights. It gathers information on human rights commitments in member states and reports back to decision-making bodies in the organization. Two mechanisms help the monitors to carry out their duties: the Vienna Mechanism (1989) obliges states to respond to requests for information concerning human rights and allows states to bring situations and cases in the human dimension to the attention of other states; the Moscow Mechanism (1991, amended 1993) provides the option of sending a mission of experts to assist in the resolution of a particular problem relating to the human dimension. The mission may gather information and, if necessary and appropriate, offer good offices and mediation services. The OSCE takes a rather unique approach to promoting human rights in comparison with other international organizations. It seeks to assist rather than to isolate states that fail to live up to their commitments.

Asia

Of the different regions examined in this paper, Asia has the most limited codification/legalization of human rights norms. Association of Southeast Asian Nations (ASEAN) is arguably the regional organization best suited to pursue protection of human rights in the Southeast Asian region based on its inclusion of all ten Southeast Asian states. Although APEC (Asian-Pacific Economic Cooperation forum) has a broader membership base, member states are much more culturally diverse and geographically dispersed. In addition, the APEC forum is focused largely on issues of economic cooperation and rarely addresses broader “political” issues such as human rights. ASEAN also has a limited agenda, emphasizing primarily economic and political security. Despite the limited focus, however, the organization is facing increasing pressure to expand its agenda to include protection of the environment and human rights. These pressures are largely being resisted, with occasional efforts to co-opt human rights issues from their non-governmental organization (NGO) advocates. In a meeting in 1995, the ASEAN Heads of State reaffirmed that “cooperative peace and shared prosperity shall be the fundamental goals of ASEAN” (www.aseansec.org). ASEAN leaders tend to argue that such pressures to address environmental, democratic, and human rights issues derive from the West and are contrary to Asian values. Several different justifications are made. China, for example, claims that
the state is best able to determine these values for its nationals to maintain social stability. Indonesia accepts the universality of human rights in principle but argues that economic pressures force the government to put the protection of human rights below economic development priorities. Singapore, as a developed state, claims that development can occur without these rights and that there is no need to offer greater human rights protections (Harris 2000). Despite these cultural relativist arguments, the movement to codify human rights norms within ASEAN is largely being driven by Asian (and some international) NGOs.  

Asian NGOs were very active throughout the 1990s, holding the region’s first human rights conference in Bangkok in 1993, and completing a final version of an Asian Human Rights Charter in 1998 (Harris 2000). The charter calls for the creation of an Asian Human Rights Commission and Asian Human Rights Court. State leaders have been reluctant to embrace such broad steps. Indonesian Foreign Minister Ali Alatas argued in the early 1990s that ASEAN would not consider developing regional human rights mechanisms until each member state had taken actions to create national institutions to carry out such tasks (Aviel 2000: 23). Their argument is that any regional efforts will be ineffective without securing cooperation from national-level agencies that are monitoring human rights. State leaders have since backed away from demanding such prerequisites and are considering the creation of an Eminent Persons Group to inquire into human rights abuses (Aviel 2000). The belief is that such a group would be more sensitive to the concerns of regional governments than a formal commission would.

Despite the lack of significant progress towards codifying human rights instruments in the Asian region, there is evidence to suggest that explicit human rights may eventually be incorporated into an ASEAN treaty, but this is likely to be in the extended future. In 1997, the heads of states in the region signed a document entitled ASEAN Vision 2020 in which a number of goals for the future were laid out. These goals focused mostly on economic development and cooperation, but the document also contained a section on creating a community of “caring societies” in which families are able to adequately care for the youth and elderly; establishing that all groups should have equal opportunity for economic development regardless of race, gender, religion, language, or social and cultural background; and creating rules of behavior and cooperation to address transnational problems including trafficking in women and children. In addition, the document envisioned members being “governed with the consent and greater participation of the people with its focus on the welfare and dignity of the human person and the good of the community.” The statement of such goals may provide a foundation on which future regional human rights instruments can be built.

Human Rights Instruments in Africa

Human rights protections in Africa are less extensive than the mechanisms in place in Latin America and Europe. Although the Charter of the Organization of African Unity (OAU) (1963) made specific reference to the Universal Declaration of Human Rights, calling on member states to “have regard” for the document in order to promote international cooperation, protection of human rights was not a goal of the founding states (Kannyo 1984: 130; Ojo and Sesay 1986: 89). The OAU Charter explicitly mentioned promoting solidarity and development, ending colonialism, defending sovereignty, and promoting international cooperation, but the explicit incorporation of human rights principles within the OAU did not come until 1981 with the signing of the African Charter on Human and People’s Rights (Banjul Charter).
Banjul Charter

The Banjul Charter entered into force October 21, 1986, and has gradually gained regional support with all fifty-three African states adopting the Charter by 1996. The Charter includes a wide range of rights, similar to the Helsinki Accords and the American Convention on Human Rights. Not only does the Banjul Charter include first generation rights (civil and political), and second generation rights (economic, social, and cultural) but it also includes third generation rights (rights of the “peoples”). These third generation rights include the right of all people to self-determination (article 20), and the right of all people to freely dispose of their wealth and natural resources (article 21).

Despite the inclusion of so many rights in the document, the Banjul Charter does have several significant weaknesses. First, it has a number of “clawback” clauses that permit more exceptions and restrictions to declared human rights than the Latin American and European documents do (Weston et al. 1992: 253; Ojo and Sesay 1986: 100). These clauses place qualifications on observance of the principles in the Charter under certain circumstances. For example, in article 6 “No one may be deprived of his freedom except for reasons and conditions previously laid down by law” (emphasis added). Given that many countries in the region have long had oppressive laws on the books that restrict human rights, this clause renders such guarantees almost meaningless. Article 8 places similar limits on the free practice of religion: “No one may, subject to law and order, be submitted to measures restricting the exercise of [this] freedom” (emphasis added). National governments can and do interpret the conditions necessary to maintain law and order rather restrictively. The freedom of assembly is similarly restricted in article 11 “The exercise of this right shall be subject only to the necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”

A second weakness of the Charter is its lack of a nonderogation clause under which certain rights would be inviolable in all circumstances. The African Charter does have a nonderogation clause with a relatively large number of nonderogable rights that are protected, but it unfortunately has quite a few justifications that allow for derogation of rights as well. A third weakness in the Banjul Charter is the language of “duties” in Part 1, Chapter II. Article 27 states that every individual shall “have duties toward his family and society, the State and other legally recognized communities and the international community.” These duties are further elaborated upon in article 29, which states that an individual has the duty to “serve his national community by placing his physical and intellectual abilities at its service” and not to “compromise the security of the State. . . .” Makau Mutua notes that there is room for potential abuse given the language of duties (1999: 344). Olusola Ojo and Amadu Sesay similarly remark that the emphasis on duties may forestall the promotion of individual rights in the region (1986: 99). A more positive outlook is offered by Thomas Buergenthal who links the seriousness of the risk of abuse to the pace and success of democratization in Africa (1995: 237). A positive aspect of the Charter is that it does not contain “progressive realization” language; all parties assume immediate responsibility for the application of rights (Odinkalu 2001: 349). Thus, states cannot justify continued abuses based on a gradual incorporation of human rights protections.

African Commission on Human Rights

Not only have the weaknesses noted above limited the effectiveness of the Charter but the failure to establish a Court of Human Rights in the Banjul Charter also presented a significant setback to the protection of human rights in the region. Protection of human
Human Rights Mechanisms: A Focus on Africa

Rights according to the Banjul Charter is to be carried out by the African Commission on Human Rights. The Commission (established in 1987) has endeavored to promote human rights in the region by carrying out the tasks given to it in the Charter, but it has faced a number of institutional and political challenges.

Articles 30 through 62 establish five broad functions for the Commission. These functions include the protection and promotion of human rights, the reception of state reports and other “communications” regarding human rights conditions, and the interpretation of international human rights law. The Commission’s protection mandate is vague and brief and presumably derives from carrying out its other specified tasks. Article 45 simply states that the Commission shall “ensure the protection of human and peoples’ rights under conditions laid down by the present Charter.” In its promotional capacity, the Commission engages in research on and dissemination of human rights materials through workshops and other educational forums.

The Commission not only disseminates but also receives information regarding human rights. Member states are expected to submit a report every other year on legislative or other national measures taken to protect human rights. The Commission also receives “communications” regarding violations of human rights. One of its strengths is that it is able to act on both interstate complaints and individual allegations. In fact, nearly all “communications” received by the Commission are from nonstate actors (Odinkalu 2001: 358). In addressing communications regarding violations, the Commission may request all relevant information from the states involved. The Commission seeks to find an amicable settlement after its fact-finding efforts and then makes recommendations to the OAU Heads of State regarding its investigations. The final function of the Commission is to interpret the Charter at the request of a state party, the OAU, or other recognized regional organization. This authority is actually uniquely wide ranging because the Commission is instructed to “draw inspiration from” not only the Banjul Charter but also the UN Charter, the Universal Declaration of Human Rights, and “other instruments adopted by the United Nations and by African countries in the field of human and peoples’ rights” (article 60) (Odinkalu 2001: 353).

Given its mandate to protect, to promote, to receive reports and communications, and to interpret the Charter, the Commission has had only limited success in protecting human rights in Africa. Its failures are due to a number of political and institutional challenges. Although the Commission is nominally independent, it is elected by the OAU Heads of State and is frequently composed of government representatives rather than independent experts. This puts Commission members in the precarious position of having to investigate the very governments that they serve in a number of cases. The Commission is also disadvantaged by not being able to publicize its reports regarding the communications it has received. All reports remain confidential unless the heads of state choose to release them. Thus, a number of reports about violations are never brought to light because state leaders choose not to malign their fellow leaders. This lack of transparency prevents the Commission from utilizing public pressure to get governments to carry out its recommendations to resolve human rights violations.

In addition to the politization of the Commission’s work, there are also a number of procedural hurdles to be cleared in order to successfully petition the Commission. These hurdles are similar to those in the European Convention and the American Convention in terms of setting guidelines for admissibility. There are limitations on the wording that may be used in petitions. Communications cannot be disparaging or insulting to a state (article 56). Furthermore, the Commission cannot act until all local remedies have been exhausted. The Commission recognizes, however, that local remedies may not be available, adequate,
or effective in some cases. When such circumstances occur, the Commission may choose to take the communication regardless of whether local remedies have been attempted. Local remedies may also be disregarded in cases of serious and massive violations (Odinkalu 2001). In all cases, the authors of the communication cannot remain anonymous. Even when the Commission has accepted a petition, action is not taken immediately. If the states involved with the communication (the accuser and violator) cannot reach a resolution by peaceful procedure after three months, then the Commission will step in to try to achieve an “amicable solution.” Following an investigation, the Commission will issue a set of recommendations to the parties and report to the heads of state. There is no further enforcement of its recommendations, particularly if they are not made public so that public pressure can be brought to bear. In the final analysis, the Commission is structured to focus on “massive violations” and maintaining state relations, rather than serving as a watchdog for individual rights (Ojo and Sesay 1986: 96).

The Commission also has an enforcement problem regarding the State Reports that it receives. Every two years states must submit a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter (article 62). The Charter establishes detailed guidelines for what should be included in these reports. The Reports, however, are often delayed or incomplete, and the follow up record of the Commission on these reports is mixed (Odinkalu 2001, 358). State responses to inquiries are not made public so NGOs cannot tell how much states have done to address Commission concerns.

**Recent Evolution of the Commission**

Despite the political and institutional challenges facing the Commission, it has evolved over the years to play a more assertive role in protecting African human rights. It has decided on more than forty-five cases over a fifteen-year period. Its decisions have become increasingly more substantive, elaborating on issues of law and fact. Its recommendations, however, are still not binding and are largely ignored by governments (Mutua 1999: 347). In the 1990s, the Commission began to exercise its authority to conduct onsite investigations for the first time, further exerting its influence and the visibility of human rights abuses. Chidi Odinkalu argues that the Commission has the opportunity to broadly interpret human rights protections within Africa working from the “formidable normative basis” of the Banjul Charter. Odinkalu believes the Charter is a solid document guaranteeing a wide range of rights and that the Commission must respond to the “official corruption and abuse of power which currently represent the greatest legal and political problems faced by the African continent” (2001: 348). Makau Mutua similarly notes that much of the Commission’s potential has not been fully realized (1999: 346). In spite of these positive assessments by some, African leaders acknowledged in the mid-1990s that the protection of human rights needed to go a step further and initiated the formation of an African Court of Human Rights.

**Creation of the African Court**

In June of 1998, at the OAU Meeting of the Heads of State, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court of Human Rights was adopted. The Protocol entered into force on January 25, 2004, following the deposit of the fifteenth necessary-state ratification. The Protocol lays out a Court with features similar to the Inter-American Court and the European Court of Human Rights.
The Court, once it is established, will have the authority to offer advisory opinions as well as rule on alleged violations of the Banjul Charter brought before it by states party, the Commission, NGOs, and individuals (article 5). Its proceedings will take place in public (article 10) with the Court able to issue orders to remedy violations, including payment of fair compensation (article 26). Rulings by the Court will be legally binding on all parties that have ratified the Protocol.

The actual creation of a Court of Human Rights, however, faced a setback with the inauguration of the African Union. When African Union leaders met in Maputo in July 2003, they drafted a Protocol to the Constitutive Act (which had created the Union in 2000). This Protocol established the jurisdiction of a second court, the African Court of Justice. The initial plan was for these two courts to remain separate and distinct, with states able to sign and to ratify each Protocol separately. In July 2004, however, just a few months after the first Protocol for the Court of Human Rights had come into effect, the Assembly of the Heads of State issued a resolution calling on the “integration” of the two courts and requested the Chairperson to work out the implementation of this decision in a report. Since the first Protocol creating the African Court of Human Rights had already come into effect, it could only be amended or suspended to achieve “integration” by those states that were already party to it.

There was much discussion among governments as well as NGOs about the advantages and disadvantages of such a merger. Advocates argued that African states already faced severe financial and personnel restrictions and that two entirely separate courts would be a strain on the system. Opponents were concerned that human rights would take a lower priority to other issues before the African Court of Justice.

An administrative merger might address resource concerns without compromising the jurisdictions of the Courts. A more substantive merger could limit the capacity of the Court of Human Rights and would certainly delay its full establishment.

By January 2005, a new Draft Protocol (the third one) was in circulation that would clarify the separate and overlapping functions and jurisdictions of these two courts. This third Protocol would be adopted “without prejudice to the operationalization of the African Court of Human Rights” that had already come into effect, while the African Court of Justice had only eight of the fifteen necessary signatures. Amnesty International expressed concern about this Draft, noting that in cases of inconsistency between the original two protocols, the African Court of Justice Protocol would take precedence, potentially weakening the African Court of Human Rights. In addition, judges would be removed in conjunction with the Assembly of Heads of State, not by other Court judges alone. This would bring in an undesirable political element to the judicial process. Ultimately, at their July 2005 meeting, the Assembly rejected this idea of a partial merger in favor of creating a single court. At the African Union Assembly meeting in January 2006, members appointed eleven judges based on elections conducted by the Executive Council to the newly created African Court on Human and Peoples Rights.

The establishment of a second protocol and court has resulted in much legal wrangling and delays to the creation of an African Court to protect human rights. The next section examines the motivating forces behind the creation of the Banjul Charter and the Court of Human Rights and considers the potential future impact of the Court.

Explanation for Expanding African Human Rights Protections

The examination of human rights instruments in Africa clearly indicates that protections in the region are evolving and gradually becoming more institutionalized. States that rejected
the creation of a Court in the 1980s have seen the Protocol for the African Court of Human Rights entering into force in the new millennium. It is evident that states’ interests have changed and have been redefined over time, leading to greater support for new regional human rights instruments. This section focuses on the conditions leading to the ratification of the Banjul Charter and then examines the circumstances surrounding the creation of the African Court. By examining the evolution of rights in Africa at two different times, one can see the combination of factors that shape state interests on the issue of human rights.

Many factors affect the calculations of state actors as they consider whether to sign and to ratify human rights instruments. There are domestic conditions, regional and international pressures, and cultural concerns. Domestic, regional, and international factors tend to vary, with constantly changing conditions that affect state decision making. Cultural factors are more constant (though by no means static) and are often used to justify rejection of broad human rights instruments. Domestic factors can include domestic pressure groups or elites, domestic instability, and the level of democratization; regional and international conditions that may be taken into account include gross human rights violations in neighboring countries, the existence of acceptable forums/organs to address human rights issues, pressure from powerful international actors (i.e., the United States and European states), and pressure from NGOs. Cultural factors can affect not only the definitional considerations such as what are considered to be human rights but also the preferences for what types of mechanisms ought to be used to protect these rights.9

As state leaders take each of these factors into account, weighing each one to consider how it impacts the state’s interests, they may choose to move forward to improve human rights protections, to resist such efforts, or to seek self-interested compromises. In the discussion below regarding the creation of the Banjul Charter, the international and regional factors appear to have the strongest impact on the calculations of state leaders, with domestic and cultural factors actually serving as counterpressures for the protection of human rights. In contrast, when the African Court on Human Rights was created a decade later, regional and domestic factors were the most critical with international pressures having only a secondary impact.

1981 Creation of the Banjul Charter

At the time that the Banjul Charter was signed and entered into force, a number of domestic, regional, and international factors came into play as African leaders weighed the costs and benefits of creating a regional human rights regime. One international factor that influenced decision makers at the time was the emphasis by the United Nations on the need for regional organizations to address regional issues. Following a proposal in 1967 that the United Nations Commission on Human Rights establish regional human rights commissions, a UN study group recommended that this work should be carried out by regional actors and organizations, not directly by the UN. Seminars were held in Africa by the UN to discuss the proposal further in 1969 and 1979 (Kannyo 1984: 140). Although it took some time for African leaders to endorse this idea and to move it forward, the work on the Banjul Charter was partially inspired by this push for regionalism. A second international factor that affected African leaders was a growing global awareness of and focus on human rights in the 1970s. The media, politicians, and NGOs all began to give greater attention to human rights issues including abuses in Cambodia and Vietnam. The Carter Administration in the United States played an influential role linking US foreign aid to the improvement of human rights conditions in developing countries. The work of Amnesty International was recognized through the receipt of the Nobel Peace Prize in 1977. The signing of the Final
Act of the Helsinki Accords, which included Basket Three on human rights, highlighted the role that regional organizations could play in protecting rights. Olusola Ojo and Amadu Sesay argue that the involvement of the OAU in human rights in the 1980s was largely externally induced (1986: 92).

One regional condition that affected the calculations of decision makers to adopt the Banjul Charter were the massive violations of human rights under Idi Amin in Uganda, Macias Nguema in Equatorial Guinea, and Jean-Bedel Bokassa in the Central African Republic. These violations were a considerable concern and embarrassment to other African leaders. Edward Kannyo (1984: 142) argues that the large-scale killings in these countries “were almost certainly the most important factors in the final decision of the OAU to move toward creating a human rights protection mechanism for Africa.” The Tanzanian invasion of Uganda that unseated Amin in 1979 caused a major debate at the OAU Summit in 1979. States discussed, rather than ignored, the conditions in Uganda and whether an invasion was justifiable.

A second regional condition that was influential in the 1970s was the acceptance by most African leaders of the OAU as the principal forum for resolution of African problems (Kannyo 1984: 129, 138). The OAU was the one regional organization with nearly universal African membership. It frequently addressed issues that threatened regional instability, with the treatment of refugees being the most common human rights issue raised. Dating back to the OAU Charter of 1963, Africans have preferred to have African solutions to African problems, so the OAU was viewed as the best forum for handling the human rights issues that needed to be addressed.

The preference for African solutions to African problems is also reflected in the Banjul Charter’s references to unique African culture. Pressure from the international community and NGOs may have inspired leaders to take action, but the Banjul Charter still included elements that reflected and respected African cultural norms. Cultural influences were evident in the specific directions given to the drafting panel by the OAU Secretary General, instructing them to make a distinct convention that included individual rights and peoples’ rights; duties to the community, family, and state; and showed “that African values and morals still have an important place in our societies” (quoted in Ojo and Sesay 1986: 94). The Conference of Ministers that examined the draft document in May 1980 wanted to ensure that the final document was distinctly African and added a new paragraph to the preamble to take “into consideration the virtues of their [African states] historical traditions and the values of African civilization which should inspire and characterize their reflections on the concept of human and peoples rights” (quote in Ojo and Sesay 1986, 94). In the final considerations, states deliberately chose not to create a Court of Human Rights, in part because of cultural preferences for settling disputes through nonjuridical mechanisms.

Given the international pressures and regional concerns regarding human rights, a critical number of African states determined that it was in their interest to draft and to adopt the Banjul Charter in 1981. These interests appear to be based on both functional and pragmatic calculations. Based on the instability created by refugee flows from countries with poor human rights conditions, there was a functional need for states to offer greater protection of rights and to reduce the instability stemming from abuses. The Carter Administration’s linking of foreign aid to human rights conditions also affected the economic and development calculations of leaders. Pressure from the United States and other international sources led leaders to believe that there would be economic costs to opposing the creation of regional human rights mechanisms. The weaknesses in the Banjul Charter and Commission, however, indicate that despite international pressures and recognition that protecting human rights can promote regional stability, African states did not fully embrace a strong human
rights regime. This stems from the fact that state interests largely reflected the interests of individual heads of state. State leaders were motivated by their desire to stay in power, to expand their wealth and prestige (or avoid getting a tarnished reputation), and to defend state sovereignty and territorial integrity (Ojo and Sesay 1986: 91).

The circumstances surrounding the creation of the Banjul Charter reveal that not only are there multiple domestic, regional and international factors influencing states to develop human rights protections but also that there are counterpressures affecting states’ self-interested calculations. One domestic counterpressure that shaped leaders’ considerations of human rights protections was the potential for domestic instability in the future. In order to hold onto power, many African leaders recognized that they might need to restrict some freedoms under certain conditions. The numerous clawback clauses in the Charter reflect this. Cultural factors also played a counterproductive role. Arguments for a unique document that reflected African culture resulted in language with the potential for abuse and mechanisms that were often too weak to thwart violations of rights. International and regional factors played a key role in state leaders initiating human rights protections, but due to domestic and cultural counterpressures, they were not taken far enough. Although some of the protective mechanisms evolved to some degree on their own (as seen in the broader interpretations by the Commission of its mandate and authority), they needed further work by states to become a stronger regime. The right conditions for expansion of the African human rights regime, however, did not emerge for another decade.

1998 Protocol to Create the African Court

The international and regional factors that favorably combined to produce the Banjul Charter in 1981 can also be seen in the 1990s leading up to the Protocol to create the African Court, along with the increasing positive impact of domestic factors. Makau Mutua (1999) notes that the conditions were more favorable to create an effective human rights system than they had been in the past. He justifies his assessment on the number of emergent democracies that he believes are more inclined to respect human rights.10

Allain and O’Shea (2002: 122) identify a positive trend in Botswana, Malawi, Mozambique, Namibia, and South Africa where the recent transition to democracy has shown early signs of success and those human rights violations that have occurred have had little if any political link at all. Democracy may not only have an internal effect on the improvement of citizens rights but may also affect the attitude of states toward nondemocratic regimes in the region resulting in increased pressure on those who violate human rights. Mutua further argues that there is a growing acceptance of the idea that a state’s conduct towards its citizens is not entirely an internal affair (1999: 353). Although there were several efforts in the 1970s and during the creation of the Banjul Charter to challenge African regimes that came to power through violence, there were few states that took a tough stance. One exception was when Tanzania took a stand in 1975 and declared that it was wrong for Africans to criticize human rights in South Africa, but not in other “black” regimes (Kannyo 1984: 134). Although a few states have become more outspoken about violent seizure of power, there is still a hesitancy to criticize regimes that stay in power by using violence. In part, African leaders do not condemn abuses in neighboring states because of issues of loyalty and saving face. To demand more moral behavior would require admitting your own wrongs of the past, which most are not willing to do (Allain and O’Shea 2002: 124). As democracy grows in the region, there is hope that this attitude will shift so that leaders will hold each other more accountable.
A second domestic/regional factor is the end of the apartheid regime in South Africa. The end of apartheid signaled to many Africans that oppressive regimes could be brought down if the people were unified in their struggle for greater rights and freedoms. This has led to renewed domestic pressures for greater human rights protections. Not only does South Africa serve as an inspiration to the people of Africa but it also has the ability to serve as a powerful influence on the continent in promoting human rights as it strives to right the wrongs in its own past.

Just as international attention on human rights was brought to bear in the 1970s, the end of the cold war also resulted in a renewed emphasis on human rights. With cold war ideological struggles put aside in the 1990s, international actors became critical once again of human rights violations in Africa (and elsewhere). The Clinton Administration pursued a policy of engagement and enlargement with an emphasis on good governance. The hope was that domestic political reforms would also lead to regional reforms in terms of strengthening human rights instruments. Other regional organizations continued to strengthen their own mechanisms to protect human rights, thus increasing the pressure on African states to do the same.\(^\text{11}\)

NGOs such as Amnesty International and Human Rights Watch have diligently continued to press for greater human rights protections in Africa and around the world despite the changed climate after September 11, 2001, in which security issues have taken a dominant place on the international agenda. One key set of actors has been The Coalition for an Effective African Court on Human and Peoples’ Rights comprising a collection of over thirty NGOs, INGOs, and academic institutes including the Human Rights Institute of South Africa (HURISA), the West Africa Human Rights Forum, the Centre of Human Rights (Pretoria), Open Society Justice Initiative, and Amnesty International. The Coalition “exists to advocate for a credible, effective and independent African Court on Human and Peoples’ Rights through promoting full ratification by all African States of the Protocol Establishing the African Court on Human and Peoples’ Rights” (www.africancourtcoalition.org). In addition, the Coalition seeks to promote the acceptance of the right of individual access to the Court by encouraging States Party to make the declaration under Article 34(6) of the Protocol, to ensure a transparent process for the nomination and election of judges and the full and meaningful participation of African civil society in the establishment and sustenance of the Court.

When the Banjul Charter was established, African culture played a role in shaping the document by including the unique protection of “peoples’ rights” and respect for African traditions and civilization. Cultural claims have also affected the debate concerning the creation of the African Court. These claims have tended to work as a “counter legalization” force in the case of the Court because of the African tradition of resolving disputes through friendly settlements rather than through formal juridical mechanisms. The structure of the Court reflects the preferences of states to avoid juridical proceedings, with the Court’s authority extending only to cases brought by states with an optional protocol extending to individual cases.

In 1998 the domestic and regional conditions were right for some state leaders to calculate that it was in their interest to draft and to sign the Protocol creating the African Court. This was only the first step, however. In order for the Court to become an effective body, all states in the region must ratify the Protocol and become states party to it. State leaders, even those serving in established democratic regimes, remain hesitant to ratify the Protocol and to cede some of their sovereignty to the Court.\(^\text{12}\)

International pressures and regional conditions continue to encourage leaders to take this next step. The voices of international and regional leaders and those of NGOs have not been in complete agreement, however, when it comes to the implementation of the Protocol creating a Court of Human Rights. While some have expressed skepticism about the future
efficacy of the Court based on the long delay of its creation, Odinkalu and Romano (2005) have advocated an approach that is “deliberate, not rushed.” They prefer a more measured approach, noting that the procedural rules for the International Criminal Tribunal for the former Yugoslavia have been amended twenty-seven times and that this does not afford the defendants any certainty about the procedural fairness of the court. Amnesty International “reiterates its serious concerns about the continuing delay to establish [the Court of Human Rights].” Amnesty argues that the court “integration” process should be secondary to making the Court of Human Rights operational (Amnesty International 2005).

The most crucial factor, however, for the future of the Court may be domestic pressures from citizens demanding greater legal protections. Whereas African states came to accept the OAU as an appropriate body to address human rights concerns in the 1970s and 1980s, the newly created African Union (AU) may likewise gain a strong reputation as the leading regional forum in which further protections can be pursued. The AU may be able to provide incentives through trade and economic development to encourage states to ratify both Protocols (for the Human Rights Court and the Court of Justice). The regional organizational environment is being transformed at the moment and state leaders are reassessing their interests as they pertain to strengthening African unity. Some states that have been sanctioned by the international community in the past are beginning to take steps toward greater observance of human rights. Mommar Quadafi has recently invited an Amnesty team into the country for the first time in fifteen years in an effort to restore the country’s international image and pave the way for Libya (and Quadafi) to take a leading role in the new African Union.

Although some skeptics are critical that the Court has faced setbacks in selecting judges, and in September 2005 had yet to establish headquarters in a host country, there is hope that the gradual evolution of human rights mechanisms will continue to be strengthened in the region. More time is needed for international and domestic pressures as well as regional changes to induce states to ratify the Protocol. Even in countries that have protections established within their constitutions, the enforcement of those laws has been weak in many cases. There are indications, however, that gradual cultural transformations may also be underway that will reduce the tensions between national laws and traditional practices. Ibhawoh (2000: 858) notes that in some regions of Kenya, for example, local leaders are taking steps to alter traditional practices such as female genital mutilation (FGM) in order to reduce the contradictions between stated principles and actual practices. Education and awareness play an important role in transforming local practices and in giving citizens a greater voice to put domestic pressure on state leaders to ratify further human rights mechanisms.

Explanations for Regional Variances

It is evident from the examination of human rights evolution in Africa that the protection of human rights is not as firmly institutionalized as it is in Latin America and Europe although the Protocol to create a Court of Human Rights is a significant step. This section explores the variance between regions.13

Ultimately, greater regional protections for human rights come about when states determine that such instruments are in their interest and accept greater codification of human rights norms. This argument is essentially instrumentalist. Factors such as domestic conditions, regional and international pressures, and cultural concerns shape the calculations of state leaders as they weigh whether strong human rights mechanisms will benefit their states (and themselves). As noted above, not all of these factors are positive pressures for greater institutionalization. They can also serve as counterlegalization forces, offering
disincentives for states to adopt human rights protection mechanisms. This section compares and contrasts the factors affecting states’ decisions to endorse greater codification of human rights in different regions at the times that states created new human rights mechanisms.

**Domestic Conditions**

One factor that affects leaders’ calculations about whether to pursue greater codification of human rights is the level of domestic demand for greater rights. Progress is made based on a perceived need for greater human rights protections. This is essentially a functionalist argument. Growing domestic demands are often linked to greater awareness of and education about rights and the ability to voice these demands. Demands from domestic constituencies influence the preferences of state leaders to address particular problems in a specific manner. For example, in the area of international trade, domestic businesses recognize the need for greater legalization of rules and conflict management procedures in order to promote a stable economic environment. These businesses thus pressure their governments to reach international agreements to further legalize trade relations.

Just as in the area of international trade, domestic constituents can make a similar demand that there is a need for additional codification of human rights to advance their interests (and the interests of the state). Many scholars and NGOs make these arguments, linking human rights (including economic, social, and cultural rights) to development issues. Different groups place an emphasis on different rights, but all make credible arguments linking human rights and development. Human rights advocates around the world make the case that codification of human rights is functionally necessary to advance state interests particularly in the area of economic development.

One barrier that domestic constituencies and NGOs face is the inclination of state leaders to reserve the option to violate human rights in order to maintain political stability. The greater the potential for domestic instability, the less likely leaders are to cede their authority to forcefully reestablish control. The tendency for state leaders to hold onto power whatever the cost is less likely in democratic systems, however. Democratic leaders are rarely willing to violate human rights in order to hold on to power. Democracy and the protection of human rights are intimately linked not only because of the normative beliefs of state leaders but also in practical terms. The existence of a democratic government allows an even stronger voice for domestic constituencies to demand greater human rights protections. The link between democracy and human rights can be seen when comparing the adoption of protection mechanisms in different regions.

At the time that European governments were drafting the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950, there was strong domestic support within Council of Europe member states for the Convention. Following World War II, the people of Europe were strong advocates for greater human rights protections. Democratic governments did not consider that they would need to resort to violations of human rights in order to maintain domestic stability. This is not to say that rights have not been violated on a number of occasions by European states, but these violations were not strategic calculations made by state leaders at the time they adopted the Convention. Leaders wanted to commit to peaceful resolution of disputes with each other, and to the strengthening of democratic and human rights practices nationally and regionally, but needed some guarantees. Moravcsik explains that new democracies in particular were interested in binding international human rights obligations that would help “lock in” democratic practices and institutions (2000: 220). These “lock ins” would protect them from nondemocratic political threats by relying on international enforcement.
At first glance, the Latin American region appears to be a contradiction in terms of linking democratization and human rights codifications. The American Convention on Human Rights was drafted during a period when many military regimes were in power. These circumstances highlight the fact that the existence of international law does not necessarily coincide with local observance of it, nor national enforcement. Military regimes believed it was in their interest to rhetorically support human rights, even if they did not fully protect them. This double standard is evident in the fact that the Convention did not gain enough ratifications to enter into force until 1978 as the region was undergoing a democratic transformation. Lutz and Sikkink (2000) also remark on this, noting that the precision and delegation levels of human rights norms in Latin America increased in the 1970s and 1980s. The impact of domestic demands for greater protections is also evident with the increasing work of the Commission during this time. Weston et al. (1992) notes that, as those Latin Americans whose rights were being violated became more aware of their rights and the mechanisms available to them to protect those rights, there was a steady increase in communications to the Commission. The growing awareness of and education about the Inter-American Convention and the Commission led to greater domestic demands on states to provide better human rights protections. Even further steps were taken in 1988 with the signing of the San Salvador Protocol (entering into force 1999). This Protocol expanded upon the economic, social, and cultural rights first laid out in the American Declaration, including these rights in treaty form (Odinkalu 2001: 334).

The impacts of growing domestic demands and gradual democratization in Africa have been discussed above with the creation of the Banjul Charter, and most recently, efforts to establish the Court of Human Rights. Asian governments are also under increasing pressure from growing domestic voices and NGOs and are gradually adopting national and regional policies in response. One factor in both Africa and Asia that hinders further progress is the presence of or potential for domestic and regional instability. Leaders are hesitant to cede any authority that might inhibit them from using force to restore order. In a region as large and diverse as Africa, some states have greater concerns about instability than others. States such as Ghana, Lesotho, and Mozambique are relatively democratic and stable and have all ratified the Protocol to create the African Court of Human Rights. The authoritarian governments in Zimbabwe and Congo (Kinshasa), however, face significant political and economic challenges and have only signed the Protocol. Somalia could be described as a “failed state” and has no capacity to embrace regional human rights mechanisms. It is one of only eight countries that have not even signed the Protocol. Of the twenty-one ratifications (as of October 2005), fifteen are by countries listed as Free or Partly Free in the Freedom House 2005 report; four are by states that are Not Free.

Although no causal claim can be staked on these figures and more factors are at play than simply democratization, Free and Partly Free states do comprise the majority of ratifications. Domestic conditions alone, however, do not account for regional variations. Although there is a connection between levels of democratization and protection of human rights, there are still counterpressures in terms of sovereignty costs. One must also consider the regional and international pressures that are brought to bear on regimes weight whether to pursue greater human rights protections.

**Regional Pressures**

The impact of regional pressures on leaders’ decisions to pursue greater human rights protections is similar to the influence of domestic conditions. Certain regional situations can move leaders toward supporting human rights mechanisms, particularly those conditions
that risk or cause regional instability. Massive violations of human rights in the region, increasing refugee flows, and political instability may all affect the perceived need for greater mechanisms to address these regional problems. Following the brutality seen in WWII, Europeans were willing to embrace the European Convention as one mechanism for promoting stability and security. Quite a number of conventions have followed since 1950 as states have recognized the need for greater protections in different areas. For example, as European states have witnessed growing tensions regarding minority rights following the end of the cold war, they have responded by drawing up the Hague Recommendations on Education Rights (1996) and the Oslo Recommendations on Linguistic Rights (1998) for national minorities. Regional pressures in Latin America and Africa in the 1960s and 1970s stemmed from widespread government abuses that could not be ignored. Ironically, many of those leaders that were guilty of perpetuating their own abuses came to accept the logic that greater codification of rights was a necessity. State leaders argued that there was a need for human rights mechanisms because others were violating human rights. Some perhaps assumed that the new conventions would not affect them negatively because they were not the worst violators and would thus not be the initial target of regional scrutiny. In addition, the limitations placed on both the African and Latin American Commissions, and the clawback clauses in the Banjul Charter allowed leaders to rhetorically support human rights without sacrificing too much state sovereignty. The limited nature of the protection offered reveals the tensions between legalization and counterlegalization pressures. Regional conditions in Asia have not yet led to action. Although there is some verbal acknowledgement that rights should be better preserved, there is no consensus about what rights should be protected and what mechanisms might guarantee those rights.

The situation is Asia highlights a second regional factor that influences the calculations of state leaders: the existence of an appropriate regional mechanism/organization to address human rights issues. The Council of Europe, the OSCE, and the OAS are ideal regional forums. They have broad membership and are multipurpose organizations dealing with economic, security, social, and cultural issues. As noted above, African leaders gradually grew to accept the OAU as an appropriate organization for establishing the Banjul Charter. Time will tell whether the newly created African Union will be even better suited to protecting the rights of Africans. ASEAN and APEC are the two main regional organizations in Asia, but neither is particularly suited to addressing human rights issues. Both focus predominantly on economic and security matters and have thus far resisted pressures by Asian citizens to take further steps toward creating an Asian Convention on Human Rights.

Changing regional norms can also play a role in the instrumental calculations of states. The affect of regional norms is similar to the impact of acceptable organizations for states. Just as state leaders come to accept the greater legitimacy of certain forums, leaders may also be swayed by normative shifts prescribing appropriate behaviors. Since many of the human rights norms seen in conventions today originated in Europe, there is no obvious recent “norm cascade” that has occurred with regard to human rights in Europe. In Latin America, however, Lutz and Sikkink (2000) argue that a broad regional norm shift (norm cascade) has occurred that has led to an increased level of legalization of human rights. There are no manifestations of a normative shift underway in Africa at this time. “Norm affirming events,” such as declarations and treaties that are widely ratified, and numerous changes in domestic legislation would signal such a transformation. Asia likewise has yet to undergo any kind of normative shift.

Regional factors such as human rights violations and instability, suitable regional organizations, and regional norms have been quite influential in affecting state calculations. In the Latin American and African cases the perceived needs for action and for presence of
acceptable means for that action to occur were important factors. Further shifts in regional norms may eventually result in Africans further legalizing their existing protections. Domestic conditions and regional pressures, however, were not the only factors affecting state calculations of costs and benefits to further codification. Pressure from the international community has also been instrumental.

**International Pressures**

Although the emphasis the international community has placed on protecting human rights has waxed and waned over the years, the 1970s and 1990s were both decades that saw an increased focus on human rights. The Carter Administration (1976–1980) chose to link development aid to the improvement of human rights in developing countries. This US foreign policy toward the developing world helped elevate the priority given to human rights internationally. Since the European Convention was drafted shortly after the signing of the Universal Declaration of Human Rights in 1948, Europe led the way in terms of the development of regional conventions and human rights mechanisms. European states have been an additional source of pressure on developing states. European pressures and the policies of the Carter Administration affected both Latin American and African states. The need for development aid was a powerful incentive that affected leaders’ calculations regarding human rights protections. The progress seen in the 1970s reflects the impact of these pressures. Setbacks occurred when President Ronald Reagan came to power (1980–1988) and de-emphasized human rights. There were few efforts to address the flaws and weaknesses of the recently created regional human rights mechanisms when the international spotlight was no longer illuminating abuses around the world. The end of the cold war and the coming to power of President Bill Clinton provided a new momentum for strengthening human rights. The creation of the African Court is an example of the new momentum in Africa sparked by new international conditions in the 1990s. Although the emphasis on human rights by US administrations has played an important role in pressuring states to further protect human rights, there have been flaws in the policies of Carter and Clinton. Carter faced pressures to compromise his human rights policies to protect national security interests and has been accused of double standards in some cases with US allies. Although cold war security concerns had eased by the time Clinton came to power in 1992, he was pressured by the corporate world to compromise his stand on protecting human rights, particularly in China on the issue of granting Most Favored Nation (MFN) status.

Even though the United States has been unable to consistently put pressure on abusive regimes to improve their human rights records, there has been a second international source of pressure. International non-governmental organization (INGOs) have been engaged in the regular reporting of abuses around the world (including in developed countries) and advocating changes. NGOs did their best to keep up the pressure and the spotlight on abuses following the shift of international focus in the 1980s but were still coming into their own power. The strength and number of NGOs continues to grow. Those that have the most potential to affect regional changes may be regional and domestic NGOs. These organizations can address cultural arguments that are used to resist the establishment or strengthening of human rights institutions. Asian NGOs have been especially instrumental in drafting a regional convention on human rights (as yet rejected by regional governments) and advocating for the creation of an Asian commission and court.¹⁷

NGOs have also been instrumental in educating citizens about their rights and the mechanisms available to address alleged abuses. People in Africa and Latin America have only a limited awareness of their entitlement to fundamental human rights even though
there are mechanisms in place to protect them and to redress their grievances. By providing information to citizens, NGOs can also affect the level of domestic pressure that is placed on regimes.

As state leaders consider whether to adopt human rights instruments, the pressure from the international community, powerful international states, and NGOs can be significant. Ojo and Sesay (1986: 92) argue that the involvement of the OAU in human rights in the 1980s was largely externally induced. The final factor shaping state leaders’ interests is cultural concerns.

**Cultural Concerns**

There are two main arguments surrounding the issue of culture. One is based on the argument that so called “universal norms” are not universal but instead reflect Western culture and are an imperial imposition of developed countries onto developing ones. This argument has been used in the past as a counterlegalization force in non-Western regions and often includes demands for regional traditions to be taken into account when drafting human rights conventions. The second cultural argument is one of historical legacy and evolution. This is a slightly different take to explain the “lag” in human rights development in some regions, but it has a more positive spin in terms of the potential development of universal norms and protections. This perspective recognizes that culture is not static and that evolution of new norms is possible.

The first argument that equates universal norms and “western” norms believes that human rights advocates do not take into account important cultural differences between regions. This has an impact not only on defining specifically what rights individuals are due but also on the mechanisms created to protect those rights once they are established. For example, some cultures avoid adversarial and litigious conflict and thus prefer not to have courts serve as a protection mechanism for human rights. Protections can be offered through nonjudicial means such as negotiation and conciliation (Buergenthal 1995: 237). Many African and Asian cultures value nonjudicial forms of dispute settlement. These two regions also have in common the value they place on the community over the individual. This is reflected in the Banjul Charter that protects peoples’ rights as well as individual rights and also includes obligations of individuals to the state and to the community. When the Conference of Ministers met to consider the draft of the Banjul Charter, they wanted to ensure that the final document was distinctly “African” (Ojo and Sesay 1986: 94). Regional NGOs often discount arguments about cultural relativism, saying that the people in these regions do recognize certain universal human rights and would like to see them protected nationally and regionally. It is the governments that make the cultural argument based on pragmatic not cultural concerns. Those regimes that are not democratic, however, do not have to give much credit to public opinion or the opinions expressed by regional NGOs when considering whether to adopt greater regional protection measures.

The cultural arguments against adopting Western norms have been far less prevalent in Latin America given its European cultural heritage. Some of the norms seen in Europe were also expressed in Latin American documents dating all the way back to the Pan-American movement in the 1800s. It is not surprising, given a long history of normative development on such issues as peaceful settlement of disputes and democratic values, that the American Declaration on the Rights and Duties of Man (1948) protected a number of civil and political rights. The protection of economic and cultural rights was established in Latin America several decades later just as they were in Europe.
The similar developments in Europe and Latin America to establish human rights mechanisms are linked to a second explanation that focuses on the historical evolution of norms. This perspective explains the low level of legalization in some regions based on a “historical lag.” Some regions are simply behind others. They got a late start and will eventually reach the same level of legalization seen in Latin America and Europe today. It is true that Africa and Asia got a late start, but there is no guarantee that they will follow the same evolutionary path that Latin America and Europe have. Different historical circumstances and regional cultural values may place Africa on a different path. This can be seen in a comparison of northern and southern Africa. Allain and O’Shea (2002) note that the historical legacy of colonialism does appear to have played a role in the level of legalization in different countries. In the north and west, in former French colonies, when states sign international treaties, they automatically become part of the domestic legal framework (a “monist” system). Many northern states are parties to the important international human rights treaties but have made use of reservations that narrow the scope of their obligations. The northern national constitutions include human rights protections, but the constitutions also include references to sharia law and “duties” of individuals to the state. The situation in the south is different in terms of the approach to incorporating international treaties into domestic law. These states have a British legal legacy of “dualism” that requires separate adoption of human rights practices into national law after signing international treaties. An additional legacy is democratic institutions and principles stemming from the struggle for independence. For example, Botswana, Lesotho, Malawi, and Zambia inherited the basic pillars of British democracy including free elections, and the freedoms of expression, assembly, and association (Allain and O’Shea 2002: 104). Some social and economic rights are not as widely protected within constitutions because they are a relatively recent phenomenon (Allain and O’Shea 2002:108). Even subregional cultural and historical differences apparently affect the shape of human rights protections. These differences may result in the African regions following different paths in developing human rights protections.

It is worth noting that although cultural claims are often used to justify resistance to adopting human rights mechanisms, cultural factors can occasionally be a positive force. For example, the Banjul Charter identified and enshrined the protection of “third generation rights” that are not found in Latin American or European Conventions. Perhaps some of these rights will be adopted in other regions in the future. This discussion of cultural beliefs highlights a point made above about the evolutionary nature of norms. As Lutz and Sikkink have noted in Latin America, greater legalization can occur following a normative shift. Continued dialogue about the nature of human rights and the specific mechanisms that ought to be in place to protect rights serves a purpose in terms of furthering the acceptance (or rejection) of certain behaviors and the mechanisms for enforcement. Although there is not agreement regarding the universality of many rights, it is possible that agreements might eventually be reached even on this contentious issue. Kahler (2000b: 662) also discusses this evolutionary nature of norms, noting that it is a “reflexive process” in which domestic politics propels (or inhibits) legalization and legalization in turn shapes domestic political institutions and empowers domestic actors. Just as regional normative beliefs evolve, so do understandings of culture. Jane Cowan explains that “rather than seeing a singular culture with a set of fixed meanings that are incompatible with those of human rights, it is more illuminating to think of culture as a field of creative interchange and contestation, often around certain shared symbols, propositions or practices, and continuous transformation” (2001: 5). Cultural considerations play a role in affecting state leaders’ calculations to adopt greater human rights protections. They can be used to justify rejection of certain
human rights that are contrary to “regional culture” and to explain more gradual or different evolutionary paths to human rights protections.

Conclusion

This examination of domestic conditions, regional and international pressures, and cultural considerations reveals a number of factors that affect state leaders as they consider whether to pursue greater human rights protections. Kahler (2000b) remarks on the instrumentalist nature of international legalization, noting that ultimately states choose to participate in the legalization of norms not based on cultural preferences or aversions, but on strategic calculations. I would argue further than cultural concerns are a part of those strategic calculations. The comparison of Europe, Latin America, Asia, and Africa indicates that these factors have combined to impact these regions differently, with the conditions in Europe and Latin America being more favorable than in Africa or Asia. Europe and Latin America have had regional organizations that are well suited to develop human rights protections. They have also benefited from increasingly strong democratic states driving the process forward in each region. The cultural debate about “Western” values has not been a factor in Latin America or Europe. Despite cultural concerns and weak or nondemocratic regimes that militate against further regional human rights protections in Africa and Asia, the instrumentalist calculations of state leaders are also affected by regional concerns and conditions, and by international pressures. The case of Africa massive violations in Uganda, Equatorial Guinea, and the Central African Republic, as well as the connection of foreign aid to improved human rights protections under the Carter administration, pushed leaders to adopt the Banjul Charter in 1981. Continued pressure by international NGOs as well as increasing democratization and domestic demands inspired leaders to create the African Court of Human Rights in 2004. States have determined that it is in their interest to offer some level of protection for human rights. In order to overcome the weaknesses of the existing system, regional and international conditions and especially domestic pressures will have to combine to get leaders to make greater human rights commitments.

Notes

1. The United States signed in 1977 but has not ratified the Convention that created the Court. Thus the court has no jurisdiction over complaints about human rights abuses in the United States, nor in other states that have not ratified the Convention. The United States is the only country out of twenty-six signatories that has not ratified the Convention.

2. For a detailed discussion of the European Convention and Court, see Janis, Kay, and Bradley (1995); on the European Court of Justice, see Alter (2001); on the European Union see Alston (1999).

3. The protection of human rights has been one of the primary purposes of the Council of Europe since its founding in 1949, but its smaller membership resulted in less continent-wide dialogue on the issues prior to the creation of the CSCE/OSCE.

4. See also Thio (1999).

5. The Banjul Charter was unique in its extensive protection of third generation rights and also in its requirement that members uphold full economic, social, and cultural rights. The European Social Charter (into force 1965) allowed for a progressive commitment by members. A Protocol to the American Convention likewise obligates states to take progressive action to achieve the observance of economic and social rights.

6. Petitions by individuals and NGOs are only accepted if a state party has signed an optional protocol.

7. This legal position is based on the Vienna Convention on the Laws of Treaties.
The author recognizes that there is an ongoing debate concerning the universality of certain rights, but the author will not be addressing this more philosophical debate here. My argument is based on the rational calculations of state leaders who often do perceive there to be or to argue that there are cultural distinctions that must be taken into account when considering human rights issues.

These include Namibia, Malawi, Benin, South Africa, Tanzania, and Mali.

A few examples include: the European Convention on the Prevention of Torture (ECPT) that entered into force in 1989, the Human Rights Sub-Committee established by the European Parliament to receive petitions and to produce an annual report on European conditions. In Latin America: the adoption of the Inter-American Convention on Forced Disappearance of Persons in 1994 and the Democratic Charter in 2001 by the OAS.

For more on sovereignty costs see Abbott et al. (2000).

This section draws ideas from the Summer 2000 issue of *International Organization* (54:3) that studied legalization issues in detail. My framework emphasizes an instrumentalist explanation for variance, but it does not attempt to quantify levels of legalization in terms of obligation, precision, and delegation.

The form these agreements take, however, can vary. Governments may choose to pursue legal- ization in a regional forum, or in a global forum. As Kahler (2000a) notes, Asian governments have adopted World Trade Organization (WTO) mechanisms for dispute settlement but have been unwilling to invest APEC or ASEAN with legalized dispute settlement authority.


The author recognizes that normative and cultural arguments are quite similar but has chosen to address these factors separately.

They have actually created an NGO-based Asian Human Rights Commission that seeks to “Protect and promote human rights by monitoring, investigation, advocacy, and taking solidarity actions” among other objectives (www.ahrchk.net).

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