The Legal Status of Regional Human Rights Conventions in National Constitutions: Implication for Compliance with the Decisions of Regional Human Rights Courts

By

Tesfamhret Teklesenbet Haile

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Supervisor: Prof. Markus Bockenforde

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Abstract

This paper attempts the legal status of regional human rights conventions in the hierarchy of municipal laws and their implication for state compliance with the decisions of regional human rights courts. Relying on a primary data of 138 constitutions the paper finds that there are over seven legal status of international treaties including superior to ordinary laws but inferior to organic laws, superior to legislation, equal to constitution and superior to constitution. Importantly, the actual effect of legal status seem to heavily depend on the particular legal system in the sense that Act of parliament in the legal systems of the United Kingdom and France do not have the same legal force. Thus the implication of the legal status of human rights treaties in national constitutions to state compliance would differ accordingly. In this connection the French model of pre-commitment treaty check seems appealing. Furthermore, the paper observes that by comparison with margin of appreciation, the doctrine of conventionality test seems helpful to enhance the legal status of international treaties and it is one possible reason to explain as to why constitutions of member states to the American Court tend to grant a higher legal status than their European and African counterparts. Importantly, this paper finds that the margin of appreciation as applied by the European and African human rights courts are not the same in that the latter doesn't consider consensus in the practice of contracting states. Thus it is recommended that the African Court be cautious while referring to the jurisprudence of the European Court on that matter and that it delineates the margins of appreciation and ensure that the same is included in its Charter/Protocol in conformity with the principle of the rule of law. Finally, a number of recommendations are suggested to enhance compliance with the decisions of regional human rights courts.

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Introduction

Almost invariably, national constitutions contain supremacy clauses.[1] Or, in others, it is the Act of parliament that is supreme.[2] Either way, there is supreme law as far as sovereign states are concerned. The same is maintained even when states ratify international treaties.[3] And municipal courts are required to uphold constitutional supremacy.[4] And, it follows that if there is the supreme law, there are also subordinate laws in the hierarchy of the municipal legal system. And it is this hierarchy of municipal laws that this paper is concerned with to explain the compliance challenges of regional human rights courts.

The hierarchy of municipal laws presents compliance challenges in three different ways. First, the hierarchy of laws affects state compliance with human rights conventions to the extent it dictates municipal courts to interpret and apply regional human rights conventions per their legal status within the hierarchy of municipal laws. Second, various international judicial and quasi-judicial bodies are mandated to give effect to regional human rights conventions, but of particular interest for this research are the African Court of Human and Peoples' Rights,[5] the European Court of Human Rights,[6] and the Inter-American Court of Human Rights.[7] This is not only because these

[1] See for instance: Art. 31, German Constitution (1949); Art. 2(1), Constitution of Kenya (2010); and, Art. 102, Tunisia Constitution (2014).

[2] A good example for this is the Act of the Parliament of the United Kingdom.

[3] To do otherwise would mean to negate supremacy clause of constitutions. Of course there are exceptions to this such as the Constitution of Romania see *infra* (n 84).

[4] See for instance Art. 241, Constitution of Colombia (1991).

[5] Art. 1, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, adopted on June 10, 1998, entered into force on January 25, 2004.

[6] Art. 19, European Convention on Human Rights, adopted on November 4, 1950, entered into force on September 3, 1953.

[7] Art. 33(b), American Convention on Human Rights, adopted on 22 November 1969, entered into force on 18 July 1978.

conventions are supreme to these courts[8] (though the African Court enjoys jurisdiction broader than its Charter[9]) but also because the decisions of each regional court are meant to be enforced against, and or by, the concerned state which once again brings us back to the hierarchy of municipal laws. Third, it is this hierarchy of laws that states often attempt to plead to justify their failure to comply.[10]

However, it is worth noting that the said hierarchy clearly contradicts the Vienna Convention on the Law of Treaties,[11] state responsibility under international law,[12] and the relevant jurisprudence of international courts.[13]

This paper systematically explores a total of 138 constitutions from America, Africa, and Europe and observes that a great deal of constitutions do not specify the legal status of regional human rights conventions. And, those that specify do significantly differ in terms of the legal status they grant, including – superior to ordinary but inferior to organic laws, superior to regulations, and superior to the constitution.

[8] While both the European Court of Human Rights and the Inter-American Court of Human Rights are mandated to protect the rights enshrined in their respective convention that created them in the first place, the African Court on Human and Peoples' Rights, in addition to the African Charter on Human and Peoples' Rights and the Protocol that established the same, is authorized to apply any human rights instrument ratified by the Respondent State (see *supra* (n 7), Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights).

[9] *Ibid.*

[10] See *infra* (n 27).

[11] Art. 27, Vienna Convention on the Law of Treaties, adopted on 23 May 1969, entered into force on 27 January 1980. This of course is subject to the provision of Art. 46 of the same (that is if its ratification was made in via manifest violation of its internal laws).

[12] Art. 32, Responsibility of States for Internationally Wrongful Acts, adopted on 9 August 2001.

[13] See the decision of the Court of Southern African Development Community in the case of *William Michael Campbell v Zimbabw*e as discussed in: Horace Adjolohoun, 'The making and remaking of National Constitutions in Africa', African Journal of Comparative Constitutional Law, 2018, Vol.1, p. 40.

Then the paper proceeds to explore relevant state practice taking the French model of prior treaty check to remove any contradiction - including through constitutional amendment.

Importantly, recourse is made to the judicial practice of regional human rights courts, and by comparison with the margin of appreciation, the doctrine of conventionality test seems more helpful in mitigating compliance challenges related to the legal status of human rights treaties within the hierarchy of municipal laws. Furthermore, the margin of appreciation as applied by the European and African human rights courts are not synonymous in that the latter doesn't consider consensus in the practice of contracting states. And it is recommended that the African Court be cautious while referring to the jurisprudence of the European Court and that it clearly delineates the margins of margin of appreciation and ensure that the same is included in its Charter/Protocol in conformity with the principle of the rule of law.

Statement of problem

While the three human rights conventions are supreme instruments of the three regional human rights courts,[14] national constitutions are supreme before municipal courts.[15] Theoretically, therefore, no clash might be perceivable. However, both municipal and international courts and their respective instruments may clash once decisions are rendered by regional human rights courts[16] and/or when instructions are communicated to the respondent state specifying the

[14] The fact that these courts are the creation of the human rights instruments and that they are either exclusively (or together with other institutions such as their respective human rights commissions) mandated to protect, promote, interpret and apply their human rights Convention it is logistical to conclude that the said conventions are the supreme instrument to their respective court.

[15] *Supra* (n 1).

[16] The Intern-American Court of Human Rights in its Advisory Opinion declared member states including Costa Rica to legalize homosexuality. See: Jorge Contesse, 'Resisting the Inter-American Human Rights System' (2019) 44 Yale J Int'l L 179, p. 181.

modalities for their execution.[17] Especially when the breach of convention rights directly concerns the constitution of the respondent state or when the challenged legislation found in violation of the convention can't be amended without prior amendment of the constitution.[18]

The above problems are in part linked to the legal status of regional human rights conventions in the hierarchy of municipal laws as provided by national constitutions. And it wouldn't only impede compliance but is likely to tempt states to either withdraw declarations that permit individuals and NGOs to file an application before regional human rights courts which is the case in African Court[19] or withdraw their ratifications altogether.[20]

Research objectives

This research aims to explore and establish the legal status of regional human rights conventions within the hierarchy of municipal laws as provided by national constitutions. And use the same to explain why the hierarchy of municipal laws matters for state compliance with the decisions of regional human rights courts.

Finally, based on the above, to recommend ways of enhancing the legal status of regional human rights conventions thereby ensuring compliance with the decisions of regional human rights courts.

Research questions

This research attempts to address two but related questions - each with follow-up sub-questions.

[17] Ibid, p. 219. In the case of *Fontevecchia and D'Amico v. Argentina,* the Inter-American Court of Human Rights ordered the Argentinean Supreme Court to revoke domestic judgment – a judgment of the Supreme Court itself.

[18] *Ibid, p. 185,* wherein the author discusses the matter in connection to the case of "*The Last Temptation of Christ*" *Olmendo Bustos v. Chile, p. 185.*

[19] See *infra* (n 151).

[20] *Supra* (n 18), p. 204. For instance, Venezuela (2012), and Trinidad &Tobago (1998).

1. How do national constitutions rank regional human rights conventions within the hierarchy of municipal laws? And in particular:

    a) How many modalities (types) of legal status do we have in total?

    b) What is the implication for state compliance with the decisions of regional human rights courts?

    c) Is there a difference in ranking regional human rights conventions between the states that have not ratify, those that have ratified regional human rights conventions, and, finally, those states that accepted the jurisdiction of regional human rights courts? Or, is there a difference between the regions under consideration – America, Africa and Europe?

2. To what extent can the doctrines developed by regional human rights courts as tools of compliance help us to appreciate the implication of the legal status of regional human rights conventions as well as to enhance the legal status of regional human rights conventions in the hierarchy of municipal laws? In particular:

    a) why do constitutions of member states to the American Court not only tend to be more specific on the legal status but also tend to grant a higher legal status to regional human rights conventions than their African and European counterparts?

    b) So long as it aids compliance, is the doctrine of margin of appreciation as applied by the European and African courts the same?

Research scope

This research covers the three regional human rights courts – African Court of Human and Peoples' Rights, Inter- American Court of Human Rights, and European Court of Human Rights and their conventions. Importantly, a total of 138 national constitutions are considered. Nevertheless, its scope is strictly informed by the above set out research objectives and research questions.

Significance of the research

This paper is significant for improving compliance with the decisions of regional human rights courts in two ways

First, it is essential for constitutional advisers and organizations active in the promotion of the rule of law to ensure that national constitutions grant legal status to regional human rights conventions in accordance with the relevant provisions of the law of treaties.

Second, it is also significant for the African Court in many ways. This is because the margin of appreciation as applied by the African Court does not consider whether there is consensus in the practice of its member states. This is significant considering the criticism levelled against the same element as applied by the European Court. However, the jurisprudence of the African Court does not seem to clearly delineate the margins of appreciation and that the doctrine is included in its Charter/Protocol rather than limiting it to its jurisprudence to enhance the principle of the rule of law. And considering the difference between the European and the African Court in the application of the margin of appreciation, it is recommended that the latter take maximum care while referencing cases of the former.

Third, it is hoped to stimulate debate and further research.

Research Methodology

This comparative research relies on predominantly primary resources including regional human rights conventions, national constitutions, and case laws drawn from the three regional human rights courts, as well as secondary sources, mainly journals and books.

And these resources are processed and interrogated using qualitative and quantitative approaches. Thus instruments of the three regional human rights courts, as well as their respective jurisprudences, are dealt with qualitatively, whereas the quantitative approach is used to compare 138 constitutions from Europe, Africa, and America. The latter is expressed in percentile save few which are expressed numerically. And percentile is used to use uniform measurement and also to make it reader friendly for comparative purposes. The overall purpose of quantitative research is to avoid normative bias and to compress large data into manageable variables.

Regarding comparison each region i.e., Africa, America, and Europe, is treated separately. Then states in each group are divided into three sub-groups: those that have not ratified the regional human rights convention (for Africa, the Protocol is considered), those that ratified, and the states members to regional human rights courts. Again, the constitutions in each sub-group are divided into sub-sub-group in terms of the legal status they grant to regional human rights conventions in the hierarchy of their municipal laws. The result is quantified and then expressed in percentile. This is followed by three levels of comparative discussions. First, comparison between states from the same region; second, between states from different regions, and third, between constitutions that grant special (exceptional) status to regional human rights conventions.

CHAPTER ONE:
REGIONAL HUMAN RIGHTS CONVENTIONS AND NATIONAL CONSTITUTIONS NORMATIVE COMPARISON

1.1 Introduction

Broadly speaking, issues of compliance with the judicial decisions of regional human rights courts involve two major dimensions: norms and practice (I mean the doctrine of conventionality test and margin of appreciation). While this chapter deals with the normative aspects, the latter is dealt with in chapter two.

This chapter, in turn, has two parts. Part one explores the normative aspects of regional human rights courts' jurisdictions and enforcement mechanisms. And its purpose is just to set the scene so as to situate our research questions in their rightful place. And part two delves into exploring the implication of the legal status of international treaties in the hierarchy of municipal laws and their implication to state compliance with the decisions of regional human rights courts.

1.2 Jurisdiction of regional human rights courts

Jurisdiction is a crucial question for courts of all levels. Regional human rights courts enjoy contentious and advisory jurisdictions. While the former refers to jurisdiction over matters in controversy between parties, the latter refers to the court's ability to provide for a non-binding opinion. This section focuses on contentious jurisdiction because issues of non-compliance do not arise in the advisory opinion.

The instruments of regional human rights courts explicitly provide for material jurisdictions. However, the breadth of the jurisdiction they enjoy is not always the same. The jurisdiction of the African Court, for instance, extends to all cases and disputes involving the interpretation and

application of the Charter, the Protocol establishing the African Court, and other international human rights treaties ratified by a respondent state.[21] By comparison, the jurisdiction of the European Court is limited to matters concerning the interpretation and application of the Convention and the Protocols thereto.[22] Whereas the jurisdiction of the American Court is limited to the provisions of the Convention itself.[23] Thus, it seems that the African Court enjoys the broadest jurisdiction of all three regional human rights courts. The European Court seems to follow the African Court. This is because, unlike the American Court, the jurisdiction of which is limited to its Convention, the jurisdiction of the European Court extends to the Protocols of the Convention.[24]

In this regard, another important point to consider is the hierarchy (if any) of the legal instruments over which the courts have jurisdiction. For instance, it's already been indicated that the African Court has jurisdiction over multiple instruments.[25] In this respect, there seems to be no hierarchy between the instruments over which the African Court has jurisdiction. This is because the provision simply enumerates the instruments without any attempt to putting them in order.

When it comes to the European Court's Convention and its Protocols, a hierarchy might not be as controversial as in the case of the African Court. That is because its Protocols do not stand independent of the Convention. Instead, they are meant to augment the Convention. This, in turn,

[21] Art. 29 (1)(a), Rules of Court, African Court on Human and Peoples Rights, 1 September 2020, as revised on April 2021.

[22] Art. 32, European Convention on Human Rights, as amended by Protocols Nos. 11, 14, and 15, and as supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13, and 16.

[23] See supra (n 9), Art. 62 (3).

[24] See *supra* (n 24).

[25] See *supra* (n 23).

means that the latter is more likely to prevail as a parent document whenever the Protocol conflicts with the Convention. Yet, it seems possible to argue the other way round. That is because the Protocols are relatively recent, thus, they should prevail over the older Convention.

The American Court is mandated to interpret and apply only the Convention. This means there is no hierarchy of norms to consider.

It is also imperative to note that there are other factors that have a bearing on the jurisdiction of regional courts - including the number of ratifications entered by the Member States accepting the jurisdiction of the court, the general awareness of the public on the subject of human rights and of the courts, financial capacity and geographical proximity to the courts.

Importantly, whether the Court has jurisdiction is a question to be determined by the African Court [26] , American Court[27] , and European Court.[28]This means states have already transferred the necessary sovereignty to the courts to enable the latter to make an appropriate determination of whether it has jurisdiction to adjudicate matters brought before them. This means member states have no say apart from their right to challenge it before the same courts. However, once judgments have been rendered, member states are bound by them because of the finality of the judgments of the African Court,[29] the American Court[30] , and the European Court.[31] In this respect, the three courts do share common features.

[26] See *supra* (n 23), Art. 29 (3).

[27] See supra (n 25), Art. 62 (3).

[28] See *supra* (n 22), Art. 32 (2).

[29] See supra (n 7), Art. 28 (2).

[30] See *supra* (n 25), Art. 67.

[31] See *supra* (n 24), Art. 44 (1).

1.2.1 Legal enforcement mechanisms and the consequence of non-compliance

Once decisions of regional courts have been finalized, they must be communicated to the pertinent bodies for enforcement. In the case of the African Court, the Court shall notify the parties to the case, the African Commission on Human and Peoples' Rights, the Assembly (constituted by heads of State and Government of AU's Member States), AU's Commission, and any other concerned person or institution.[32] Besides, the same notification is to be communicated to the Executive Council of the AU.[33] By comparison, the American Court reports to the Assembly of the Organization of the American States (OAS).[34] In this connection, the Court shall also indicate the cases wherein a state has failed to comply with the ruling of the Court.[35]

The European Court transmits its final judgments to the Committee of Executives.[36] The same Committee is tasked with overseeing compliance.[37]

On the other hand, member states are duty-bound to uphold the courts' decisions. For instance, the rules of the African Court provide that all parties shall comply with the decision of the Court.[38] The same is true with respect to the American Court[39]as well as the European Court.[40] Thus, once

[32] See *supra* (n 23), Art. 75 (1).

[33] *Ibid*, Art. 75 (2).

[34] Art. 30, Statute of the Inter-American Court of Human Rights, adopted 1978 (entry date was not found).

[35] *Ibid*.

[36] See *supra* (n 25), Art. 46 (2).

[37] *Ibid.*

[38] See *supra* (n 23), Art. 80 (2).

[39] See *supra* (n 25), Art. 68 (1).

[40] See *supra* (n 24), (Art. 46 (1).

the appropriate communications have been completed, the remaining task is to ensure the same has been complied with by the concerned state.

Furthermore, contracting states are duty-bound to make reports to the African Court on the steps they undertook to put into effect the decision of the Court, and the same is meant to be transmitted to the applicant via the Court.[41] In case the concerned state failed to comply with the decision, then the African Court would report the same to AU's Assembly.[42] Besides, the Court would supply the Assembly with all the necessary information.[43] However, nothing is indicated as to what kind of measure the AU Assembly would take in overseeing compliance. By comparison, should the Committee of Ministers of the European Court consider that the concerned state has refused to comply with the decision of the Court, it shall notify the other party of the same.[44] And refer the matter to the Court for a determination whether it has failed to comply with its obligation of complying with the decision of the Court as provided under Art. 46 (1) of the Convention.[45] Furthermore, if the Court finds non-compliance, it shall report the same to the Committee of Ministers for consideration of the measures to be taken.[46] In its part, apart from the concerned state, the African Court may receive reports from other credible sources with a view to checking and ensuring compliance.[47] And, where there is a compliance dispute, the African Court may conduct an implementation hearing to determine whether or not compliance has been met.[48] And,

[41] See *supra (n 23)*, Art. 81 (1).

[42] *Ibid*, (4).

[43] *Ibid*, (5).

[44] See *supra* (n 24), Art. (46 (4).

[45] *Ibid.*

[46] *Ibid*, Art. 46 (5).

[47] See *supra* (n 23), Art. 81 (2).

[48] *Ibid*, (3).

should the Court find that the concerned state failed to comply with the decision of the Court, then it shall issue an order to that effect.[49]Again, if the state fails to comply with the decision of the Court, then the Court shall report the same to AU's Assembly.[50] Similar to the African Court, but unlike the European Court, the American Court seems to have the responsibility of compliance follow-up.[51]

Premised on the above, compliance procedures seem to differ between the American and African courts on the one hand and the European Court on the other hand. Given the political nature of compliance follow-up, it seems more suitable for political bodies such as the Committee of Ministers of the European Court to do the follow-up rather than judicial bodies, as is the case in both the African and the American courts.

Although the issue of non-compliance is one of the main challenges of regional human rights courts, none of the three regional courts have explicit provision on the consequence of non-compliance. This is problematic because if states were able to explicitly see the consequences of non-compliance, then the same would have deterred them from not complying. Again, once the political bodies such as the AU Assembly, OAS, and Committee of Ministers impose sanctions against the concerned state, it is likely to create a sense of arbitrariness – contrary to the rule of law - affecting compliance in the negative.

[49] *Ibid*.

[50] *Ibid* (4).

[51] Art. 69 (1)(2)(3) and (4), Rules of Procedure of the Inter-American Court of Human Rights.

1.3 Legal status of regional human rights conventions in the hierarchy of municipal laws and its implication for compliance with human rights courts

This section aims to explore and compare the legal status of human rights conventions in the hierarchy of municipal laws and what that may imply for state compliance with the decisions of regional human rights courts.

According to Oan, treaty ratification is associated with poor state compliance, a finding disputed by Derek and Ryan.[52] In this regard, I wish to indicate that how treaty ratification is related to state compliance is not the subject of this paper. However, treaty ratification is used to classify states into groups. However, the purpose is not to test how treaty ratifications are related to state compliance. Instead, it is to study the diverse legal status afforded to regional human rights conventions within the hierarchy of municipal laws. And make observations on how they may impede or promote state compliance.

It is submitted that compliance with international law does not necessarily require the inclusion of international treaties in national constitutions.[53] Yet it may still affect compliance.[54] And the fact that there are hundreds of treats means it may be challenging to include them all, but those related to human rights treaties deserve special consideration.[55] It is helpful that constitutions specify their

[52] Ryan Goodman and Derek Jink, Measuring the Effects of Human Rights Treaties, EJIL (2003), Vol. 14 No. 1, p. 171.

[53] Cheryl Saunders, Constitutions and International Law, IDEA, February 2020. p. 6

[54] Ibid.

[55] Ibid, p. 7.

legal status in the hierarchy of municipal laws.[56] Importantly, the constitution should facilitate and not impede state compliance with international treaties.[57]

Attempts have already been made to examine the legal status of international treaties in the hierarchy of municipal laws. In a 2021 publication a group of researchers (based on the data of 108 countries over 200 years) have concluded that the legal status of international treaties in national constitutions have much to do with legal origins and colonial legacies than with democratization and human rights.[58] However, this research is different in the sense that it is not concerned on what accounts for how constitutions rank international treaties rather the focus is how human rights treaties are are ranked within the hierarchy of municipal laws and what that implies for compliance with human rights obligations - specifically with the decisions of regional human rights courts.

This paper identifies relevant variables and quantifies the same, and again expresses them in percentage so as to be able to use uniform measurement. And it is organized as follows. First, it considers the legal status of international treaties in the constitutions of states that have not ratified regional human rights conventions. Second, it considers the legal status of international treaties in the constitutions of the states that have ratified regional human rights conventions. Third, it considers the legal status of international treaties in the constitutions of the states that have ratified regional human rights conventions and as well as accepted the jurisdiction of regional human rights courts. Fourth, this is augmented by intra-group as well as inter-group comparison. And fifth, an

[56] Ibid, p. 9.

[57] Ibid, p. 9.

[58] Kevin Cope *et.al*., The Global Evolution of Foreign Relations Law, University of Virginia School of Law, September 2021, p. 1.

attempt is made to draw conclusive observations on the legal status of regional human rights conventions in the hierarchy of municipal laws and how that may affect state compliance with decisions of regional human rights courts. Finally, the case of the French model of treaty review is briefly discussed.

In this section, a total of 138 constitutions (Europe (48), Africa (55), and America (35)) are considered. It should be noted that states, not members of the courts, are also considered to make it as inclusive as possible so as to appreciate the overall picture.

Of the 22 states that have not ratified the Protocol establishing the African Court, 77.27% of their constitutions do not specify the legal status of international treaties.[59] And, of the rest, superior to laws (13.63%),[60] the status of laws (4.54%),[61] and next to the constitution (4.54%).[62] In this respect, I wish to indicate that legal status "next to the constitution" and "superior to laws" may or may not be mean the same because municipal laws are country specific. But for the purposes of this research, it is treated separately. Furthermore, one thing that stands from the above comparison is that those that do not specify the legal status constitute a high percentage.

[59] Constitution of the Republic of Angola, 2010; Botswana's Constitution of 1966 with Amendments through 2005; Equatorial Guinea's Constitution of 1991 with Amendments through 2012; Eritrea's Constitution of 1997; Ethiopia's Constitution of 1994; Constitution of the Republic of Liberia, 1986; Morocco's constitution of 2011; The Constitution of the Republic of Namibia; The Constitution of the Democratic Republic of Sao Tome and Principe; The Constitution of the Republic of Seychelles; Sierra Leone's Constitution of 1991, Reinstated in 1996, with Amendments through 2013; Somalia's Constitution of 2012; South Sudan's Constitution of 2011; Sudan's Constitution of 2011; Eswatini's Constitution of 2005; Zambia's Constitution of 1991 with Amendments through 2016; and Zimbabwe's Constitution of 2013.

[60] Art. 151, Guinea's Constitution of 2010; Para. 2, Art. 90, Djibouti's Constitution of 1992 with Amendments through 2010; and Art. 94, Central African Republic's Constitution of 2016

[61] Art. 93, Egypt's Constitution of 2014.

[62] Art. 11(4), Cape Verde's Constitution of 1980 with Amendments through 1992.

Furthermore, of the other 33 states that have ratified the Protocol establishing the African Court, 48.48% of them do not specify the legal status of international treaties in their constitutions.[63] And of the rest, 51.52%: 42.42% superior to laws,[64] 3.03 superior to ordinary laws,[65] 3.03% superior to Acts of Parliament,[66] and 3.03% equal to Acts of Parliament.[67]

Premised on the above, I wish to indicate that according to the date discussed above, member states to the African Court tend to specify the legal status of regional human rights convention than those not members of the Court. Furthermore, they also tend to grant a higher legal status.

I now proceed to apply the same analysis with respect to the American states. In this section, a total of 35 states are considered. Of the ten states that have not ratified the American Convention, 90% do not specify the legal status of international treaties in their constitutions.[68] This means only 10% of them do attempt to specify the status of international treaties.[69]

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[63] Guinea-Bissau's Constitution of 1984 with Amendments through 1991; The Constitution of the Sahrawi Arab Democratic Republic 2015; Burundi's Constitution of 2005; Lesotho's Constitution of 1993 with Amendments through 2011; Libya's Constitution of 2011; Mauritius's Constitution of 1968 with Amendments through 2016; Mozambique's Constitution of with Amendments through 2007; Niger's Constitution of 2010; Constitution of the Federal Republic of Nigeria, 1999; Constitution of the Republic of Uganda, 1995; Gabon's Constitution of 1991 with Amendments through 2011; and Constitution of Kenya 2010 (note that Art. 2(6) is vague).

[64]Para. 4, Art. 137, Madagacar's Constitution of 2010; Art. 225, Chad's Constitution of 2018; Art. 12, para. 3, Comoro's Constitution of 2018; Art. 223, Congo (Republic of the)'s Constitution of 2015; Art. 45, Cameroon's Constitution of 1972 with Amendments through 2008; Art. 215, Congo (Democratic Republic of the)'s Constitution of 2005 with Amendments through 2011; Art. 80, Maurtania's Constitution of 1991 with Amendments through 2012; Art. 98, Senegal's Constitution of 20001 with Amendments through 2016; Art. 140, Togo's Constitution of 1992 with Amendments through 2007; Art. 147, Constitution of Benin 1990.

[65] Art. 95 (3), Rwanda's Constitution of 2003 with Amendments through 2015.

[66] Art. 150, The Constitution of the People's Democratic Republic of Algeria, 2016.

[67] Art. 231 (4), The Constitution of the Republic of South Africa, 1996.

[68] Bahamas (The)'s Constitution of 1973; Belize's Constitution of 1981 with Amendments through 2011; Canada's Constitution of 1867 with Amendments through 2011; Guyana's Constitution of 1980 with Amendments through 2009; Saint Kitts and Nevis's Constitution of 1983; Saint Lucia's Constitution of 1978; Saint Vincent and the Grenadines's Constitution of 1979; The Constitution of Antigua and Barbuda, 1981; and The Constitution of the United States.

[69] Art. 8, Cuba's Constitution of 2019.

There are three states that have ratified the American Convention but have not accepted the jurisdiction of the American Courts. However, 100% of them do not provide for the legal status of international law in their national constitutions.[70]

Finally, of the 22 states that have ratified the American Convention and accepted the jurisdiction of the American Courts, only 22.72% of them do not specify the legal status of international treaties.[71] This means 77.28% of the concerned states do specify the status of international treaties.[72]

Again member states to the American Court tend to specify the legal status of regional human rights convention than those states not members of the Court. Furthermore, the former tends to offer a higher legal status as well. It is to be recalled that the same observations are made with respect to African states as well.

The final comparators are European states - a total of 48 states. This is because the researcher was not able to locate the constitution of Vatican City. Thus not included in this research. And it should

[70] Dominica's Constitution of 1978 with Amendments through 1984; Grenada's Constitution of 1973, Reinstated in 1991, with Amendments through 1992; and Jamaica's Constitution of 1962 with Amendments through 2011.

[71] Barbados's Constitution of 1966 with Amendments through 2007; Panama's constitution of 1972 with Amendments through 2004; Trinidad and Tobago's Constitution of 1976 with Amendments through 2007; and, Uruguay's Constitution of 1966, Reinstated in 1985, with Amendments through 2004.

[72] Art. 22, Argentina's Constitution of 1853, Reinstated in 1983, with Amendments through 1994; Art. 12(IV), Bolivia's (Plurinational State of)'s Constitution of 2009; Art. LXXVIII (3), Brazil's Constitution of 1988 with Amendments through 2014; Art. 93, Colombia's Constitution of 1991 with Amendments through 2005; Art. 7, Costa Rica's Constitution of 1949 with Amendments through 2015; Art. 74(3) and (4), Dominican Republic's Constitution of 2010; Art. 424, para. (2) Ecuador's Constitution of 2008; Art. 144, El Salvador's Constitution of 1983 with Amendments through 2014; Art. 46, Guatimala's Constitution of 1985 with Amendments through 1993; Art. 276 (2), Haiti's Constitution of 1987 with Amendments through 2012; Art. 18, Honduras's Constitution of 1982 with Amendments through 2013; Art. 133, Mexico's Constitution of 1917 with Amendments through 2015; Art. 182, Nicaragua's Constitution of 1987 with Amendments through 2005; Art. 137, Paraguay's Constitution of 1992 with Amendments through 2011; Art. 57, para. 2, Peru's Constitution of 1993 with Amendments through 2021; Art. 106, Suriname's Constitution of 1987 with Amendments through 1992; and, Art. 23, Venezuela (Bolivarian Republic of)'s Constitution of 1999 with Amendments through 2009.

be noted that the Federal Republic of Russia is no more a state party due to the developments in Ukraine.[73] Furthermore, Kosovo and Belarus are neither signatories to the European Convention nor members of the European Court. Of the three states in this group, 33.33% do not specify the legal status of international treaties[74] , whereas the rest, 66.66%, rank them superior to laws.[75] The fact that these are the only European states not members of the European Court means the Convention enjoys a very high ratification rate. Notably, the relevant data indicate that of the states that are members of the European Court (the constitution of San Marino was not found and thus not counted), 51.11% do not specify the legal status of international treaties,[76] whereas the rest, 48.88% of them do.[77] Again, of the 22 states (48.88%) that specify the legal status of international

[73]European Court of Human Rights, Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe, section 1, dated 22/3/2022, available at https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf

[74] Belarus's Constitution of 1994 with Amendments through 2004

[75] Art. 15(4), Russian Federation's Constitution of 1993 with Amendments through 2014; Art. 19 (2), Kosovo's Constitution of 2008 with Amendments through 2016

[76] Belgium's Constitution of 1831 with Amendments through 2014; Luxembourg's Constitution of 1868 with Amendments through 2009; Denmark's Constitution of 1953; Norway's Constitution of 1814 with Amendments through 2014; Interpretation of legislation (page 283), United Kingdom's Constitution of 1215 with Amendments through 2013; Ireland's Constitution of 1937 with Amendments through 2012; Italy's Constitution of 1947 with Amendments through 2020; Iceland's Constitution of 1944 with Amendments through 2013; Austria's Constitution of 1920, Reinstated in 1945, with Amendments through 2009; Switzerland's Constitution of 199 with Amendments through 2002; Malata's Constitution of 1964 with Amendments through 2016; Portugal's Constitution of 1976 with Amendments through 2005; Spain's Constitution of 1978 with Amendments through 2011; Liechtenstein's Constitution of 1921 with Amendments through 2011; Finland's Constitution of 1999 with Amendments through 2011; Lithuania's Constitution of 1992 with Amendments through 2006; Andorra's Constitution of 1993; Latvia's Constitution of 1922, Reinstated in 1991, with Amendments through 2016; Netherlands's Constitution of 1814 with Amendments through 2008; Ukraine's Constitution of 1996 with Amendments through 2016; North Macedonia (Republic of)'s Constitution of 1991 with Amendments through 2011; Bosnia and Herzegovina's Constitution of 1995 with Amendments through 2009; and, Monaco's Constitution of 1962 with Amendments through 2002.

[77] Art. 122 (2), Albania's Constitution of 1998 with Amendments through 2016; Art. 55, France's Constitution of 1958 with Amendments through 2008; Art. 9 (part 6) Sweden's Constitution of 1974 with Amendments through 2012; Art. 28, Greece's Constitution of 1975 with Amendments through 2008; Art. 90 (para. 5), Turkey's Constitution of 1982 with Amendments through 2017; Art. 25, Germany's Constitution of 1949 with Amendments through 2012; Art. 169 (3), Cyprus's Constitution of 1960 with Amendments through 2013; Art. Q, Hungary's Constitution of 2011; Art. 91 (3), Poland's Constitution of 1997; Art. 5 (4), Bulgaria's Constitution of 1991 with Amendments through 2015; Art. 123, Estonia's Constitution of 1992 with Amendments through 2015; Art. 8, Slovenia's Constitution of 1991 with Amendments through 2013; Art. 10, Czech Republic's Constitution of 1993 with Amendments through 2002; Art. 7(5), Slovakia's Constitution of 1992 with Amendments through 2014; Art. 20 (2), Romania's Constitution of 1991 with Amendments through 2003; Art. 4 (2), Moldova (Republic of)'s constitution of 1994 with Amendments through

treaties, 61.90% rank them superior to laws,[78] 23.80% superior to legislation,[79] 4.76% legislative status,[80] 4.76% equivalent to laws,[81] and, interestingly, 4.76% superior to constitution unless the later provides for better protection of human rights.[82] Laws, legislation, Acts of parliament, etc., may seem the same. However, they may also have a different effect. Consider the Act of Parliament of the United Kingdom, for instance. It is the supreme law, and it can't even be challenged. Thus, it is advisable not to rush into assuming they are the same.

Given their relatively long democratic history, one would normally assume that constitutions of western European states offer high legal status to regional human rights conventions. Nevertheless, the above discussion and the footnotes illustrate that is not the case. For instance, Romania's constitution is exceptional from Eastern Europe. It seems that it is the feature of recent constitutions to specify the legal status of regional human rights conventions and more so with respect to offering a higher legal status, to which I now turn to make a close comparative discussion.

2006; Art. 141, Croatia's Constitution of 1991 with Amendments through 2010; Art. 6 (2), Georgia's Constitution of 1995 with Amendments through 2013; Art. 5 (4), Armenia's Constitution of 1995 with Amendments through 2015; Art. 151, Azerbaijan's Constitution of 1995 with Amendments through 2016; Art. 194, Serbia's Constitution of 2006; and Art. 9, Montenegro's Constitution of 2007.

[78] Ibid, Albania's Constitution of 1998 with Amendments through 2016; Greece's Constitution of 1975 with Amendments through 2008; Turkey's Constitution of 1982 with Amendments through 2017; Germany's Constitution of 1949 with Amendments through 2012; Poland's Constitution of 1997; Slovenia's Constitution of 1991 with Amendments through 2013; Slovakia's Constitution of 1992 with Amendments through 2014; Moldova (Republic of)'s constitution of 1994 with Amendments through 2006; Croatia's Constitution of 1991 with Amendments through 2010; Georgia's Constitution of 1995 with Amendments through 2013; Armenia's Constitution of 1995 with Amendments through 2015; Azerbaijan's Constitution of 1995 with Amendments through 2016; Serbia's Constitution of 2006;

[79] Supra (n 79), France's Constitution of 1958 with Amendments through 2008; Bulgaria's Constitution of 1991 with Amendments through 2015; Estonia's Constitution of 1992 with Amendments through 2015; Czech Republic's Constitution of 1993 with Amendments through 2002; and, Montenegro's Constitution of 2007

[80] Ibid, Hungary's Constitution of 2011

[81] Ibid, Sweden's Constitution of 1974 with Amendments through 2012

[82] Ibid, Romania's Constitution of 1991 with Amendments through 2003.

There are interesting varieties in the legal status of international treaties within the hierarchy of municipal laws as provided in the constitutions of the member states of regional human rights courts. For instance, one of the concerned American states ranks international human rights treaties at the constitutional level.[83] By comparison, there is nothing that resembles this in the constitutions of their counterparts in Africa. Interestingly, however, one of their European counterparts provides for legal status superior to constitutions unless the latter provides better human rights protection.[84] Furthermore, three of the concerned constitutions of the American states stipulate that should international human rights treaties conflict with their respective constitutions, the former shall undergo the same process as constitutional amendments in order for them to have legal effect.[85] Again, there is nothing that resembles this in the constitutions of their counterparts in Africa and Europe.

Furthermore, one of the concerned American states provides for simultaneous application of their Constitution and human rights treaties, which is nevertheless absent in the constitutions of their African and European counterparts.[86] Again two of the concerned American states provide that constitutional rights shall be interpreted in accordance with human rights treaties ratified by the concerned state.[87] Once again, such legal status does not seem to exist in the constitutions of their African and American counterparts.

[83] Supra (n 74), Venezuela (the Bolivarian Republic of)'s Constitution of 1999 with Amendments through 2009.

[84] Supra (n 79), Romania's Constitution of 1991 with Amendments through 2003.

[85]Supra (n 74), Peru's Constitution of 1993 with Amendments through 2021; Art. 18, Honduras's Constitution of 1982 with Amendments through 2013; Art. LXXVIII (3), Brazil's Constitution of 1988 with Amendments through 2014

[86] Supra (n 74) Mexico's Constitution of 1917 with Amendments through 2015

[87] Supra (n 74), Bolivia's (Plurinational State of)'s Constitution of 2009; and Colombia's Constitution of 1991 with Amendments through 2005

Thus, it is evident that constitutions do differ on whether or not they indicate the legal status of international treaties. Importantly, those that specify differ in terms of the legal status they grant to international treaties. As discussed above, the said legal status, *inter alia*, includes: superior to ordinary but inferior to organic laws,[88] superior to normative acts,[89] superior to regulations,[90] legislative status,[91] superior to Acts of parliament,[92] next to the constitution,[93] in case of conflict with the constitution it goes through the same process for the constitutional amendment,[94] require that constitutional rights be interpreted in accordance with the international human rights treaties ratified,[95] simultaneous application with the constitution,[96] constitutional rank,[97] superior to the constitution (unless the later provides for better human rights protection)[98] and superior to the constitution.[99] In this regard, I wish to indicate that the word/phrases employed by different constitutions to indicate the legal status of regional human rights conventions makes comparison very difficult. Besides, the nature of legal systems do make huge differences. For instance, the effect of Act of parliament in the United Kingdom is not the same as that in the French legal system because in the former it is the highest law where in the later it is the constitution which is supreme.

[88] Art. 95 (3), Rwanda's Constitution of 2003 with Amendments through 2015.

[89] Art. 6 (2), Georgia's Constitution of 1995 with Amendments through 2013

[90] Art. 106, Suriname's Constitution of 1987 with Amendments through 1992

[91] Art. 231 (4), The Constitution of the Republic of South Africa, 1996.

[92] Art. 150, The Constitution of the People's Democratic Republic of Algeria, 2016

[93] Art. 74(3) and (4), Dominican Republic's Constitution of 2010

[94] Art. 18, Honduras's Constitution of 1982 with Amendments through 2013

[95] Art. 12(IV), Bolivia's (Plurinational State of)'s Constitution of 2009

[96] Art. 133, Mexico's Constitution of 1917 with Amendments through 2015

[97] Art. 23, Venezuela (Bolivarian Republic of)'s Constitution of 1999 with Amendments through 2009

[98] Art. 20 (2), Romania's Constitution of 1991 with Amendments through 2003

[99] Art. 424, para. (2) Ecuador's Constitution of 2008

Overall, however, the extent to which the hierarchy of laws impacts compliance with human rights courts would vary from one constitution to another. For instance, a regional human rights court decision may require one state to amend its constitution or its legislation depending on where the regional human rights convention is placed in the hierarchy. Thus, the higher the legal status of regional human rights convention in the hierarchy of municipal laws, the more accessible for the state to comply with the decisions of the regional human rights court in the sense that it is not going to be required to amend its constitution – provided that the convention is placed superior to the constitution, for example. The same also applies with respect to the application of regional human rights conventions before domestic courts. That is, the higher the legal status in the hierarchy of municipal laws, the easier it becomes for the state to comply with. This observation, of course, is on the assumption that other factors are kept constant.

The French model seems helpful to discuss in this regard. French Constitutional Counsel, for instance, conducts a review of treaty documents before ratification to clear any contradiction that may arise by, when necessary, amending the Constitution and/or other laws per the content of the concerned treaty.[100] In addition to being smart to maintain the supremacy of the constitution, this is a great tool to ensure compliance with treaty obligations by removing possible barriers in inherent in the hierarchy of municipal laws, as discussed above.

[100] *Decision no. 98-408 DC of 22 January 1999;* Treaty laying down the Statute of the International Criminal Court. In this case the Constitutional Counsel conducted thorough assessment to check whether the Rome Treaty contradicts with its Constitution, Ordinances, Decrees and Acts. And, found contradictions on issues of amnesty (para. 34) and on the powers conferred to the Prosecutor of the International Criminal Court (para. 38) and ruled that the Constitution be amended accordingly (see Art. 1 of the finding at page 10.

This model is impressive because it combines two elements. First, it satisfies the state's interest in maintaining the supremacy of its constitution. Second, it makes it easy for the state to comply with its convention obligation or with any treaty for that matter.

CHAPTER TWO:
COMPLIANCE DOCTRINES DEVELOPED BY REGIONAL HUMAN RIGHTS COURTS

2.1 Introduction

In theory, obligations under regional human rights treaties are meant to be applied uniformly throughout the states that have ratified them. While the conventionality test of the American Court seems to strictly adhere to this standard, the European and the African courts seem to deviate from strict compliance, for they offer member states some latitude in the form of a doctrine known as the margin of appreciation. This chapter, therefore, is set to appreciate the origin of, justification for, and application of the margin of appreciation as well as the conventionality test. And it is organized as follows: first, it discusses the relevant theoretical frameworks, i.e., provisions of the conventions and the protocols thereto; second, it considers the doctrines of margin of appreciation and conventionality test. Finally, two cases from the African and European courts are critically examined to illustrate the inherent limitation of the doctrine of margin of appreciation.

2.2 Margin of appreciation vis-a-vis regional human rights conventions

This section explores whether and to what extent contracting states have anticipated the doctrine of margin of appreciation in their respective instruments.

The African Charter provides that to comply with their treaty obligations, member states "…shall undertake to adopt legislative or other measures..."[101] This illustrates the mandatory and strict nature of the obligation contracting states set for themselves. Furthermore, the use of the

[101] See *supra* (n 6), Art. 1.

disjunction "or" indicates that states are permitted to make use of either means in any given situation, i.e., "legislative" or "other means." Again, the Charter grants member states a leeway to make use of other means, i.e., non-legislative means. Importantly, the phrase "other measures" is open-ended; thus, states are free to use any means to comply with their Charter. Furthermore, the disjunction "or" in this context doesn't bar contracting states from employing "legislative" as well as "other measures" - simultaneously. As far as Art. 1 is concerned, therefore, there seems nothing to suggest that member states are permitted to deviate from the standards of compliance set by the Charter. Thus, the said flexibility is limited to the means states may employ to ensure compliance with their obligation as set out by the Charter.

On the other hand, the Charter permits the African Commission to consider common and relevant practices at the African or international level.[102] Nevertheless, this does not seem to mean that the Commission (as the guardian of the African Charter) is allowed to consider the peculiarities of member states. Instead, the African Charter is loud and clear that compliance is strict to the standards set by the Charter and/or the standards set at the African or global level. Thus, the said reference to the practices at the African or international level is only meant to aid the Commission while interpreting and applying the provisions of the Charter, for it is tasked to ensure the protection and promotion of the Charter.[103]

Read together (Art. 61 and Art. 45 (2)), or even when read severally, there seems nothing to suggest that compliance with the Charter rights would in part depend on the peculiarities of the concerned state, which is the very essence of margin of appreciation. Thus, the only meaning attributable to

[102] *Ibid,* Art. 61.

[103] *Ibid,* Art. 45 (2).

the suggestion that regard may be had to the common practices of African states or other international bodies seems to have nothing to do with whether a margin of appreciation should be granted. Nevertheless, some scholars, writing before the establishment of the African Court, read the same to mean that the African Court should grant a wide margin of appreciation in order to accommodate the diverse nature of the African legal systems, culture, etc.[104] This recommendation is based on the reference made to "the practices of African states and international bodies." In any event, this was addressed to the Commission, not to the Court. Premised on the above, therefore, the Charter does not seem to have provided for a margin of appreciation.

In this regard, the preamble of the European Convention provides that one of the ultimate purposes of the Convention is to aid greater unity among member states.[105] Besides, it provides for the collective enforcement of some of the rights contained in the Universal Declaration of Human Rights.[106] Furthermore, the preamble explicitly provides for the principles of primacy and subsidiarity for member states and regional courts, respectively.[107] And interestingly, the same preamble unambiguously grants member states a margin of appreciation.[108] Nevertheless, this was an addition to the preamble later as part of Protocol No. 1. In fact, as we shall see in the following sections, at least at the international level, the doctrine of margin of appreciation is exclusively the

[104]Kevin (I) Hopkins, 'The Effect of an African Court on the Domestic Legal Orders of African States' (2002) 2 Afr Hum Rts LJ, p. 242.

[105] See s*upra* (n 8) para. 4, Preamble of the European Convention on Human Rights.

[106] *Ibid*, para. 6.

[107] *Ibid*, para. 7.

[108] *Ibid*.

invention of the European Court. Thus, as it stands, the preamble not only stipulates for the uniform application of convention rights but also provides a margin of appreciation.

By comparison, the preamble of the American Convention exceptionally recognizes "…that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they, therefore, justify *international protection*…", *emphasis added*.[109] And, member states are obliged to "ensure to all persons subject to their jurisdiction the free and *[full]* exercise of those rights and freedoms.", *emphasis added.*[110] Thus the rights enshrined in the Convention are meant to be strictly complied with throughout all member states. Therefore, the doctrine of margin of appreciation does not seem to have been contemplated by the American Convention.

In conclusion, while the European Convention is very explicit (at least as it stands today) on the applicability of margin of appreciation, the American Convention and the African Charter are rather silent. Instead, both the American Convention and the African Charter seem to be strict in requiring uniform application of treaty obligations throughout contracting states. It is also noted that, at least in its original version, even the European Convention envisioned the uniform application of convention rights.

Whether the above-made observations hold with respect to the practices of the three jurisdictions is the subject matter of the next section.

[109] See *supra* (n 9), para. 3, Preamble of the American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32).

[110] *Ibid*, art. 1.

2.3 Margin of Appreciation vis-a-vis the practice of regional human rights courts

We have already seen that the three human rights conventions do not provide for a margin of appreciation. On the other hand, the role of regional human rights courts is to complement the primary role of contracting states in protecting human rights.[111] And this approach seems to justify the margin of appreciation to contracting states.[112] Thus there are two diverging views: that regional human rights courts should play harmonizing role known as the "standard unifying approach"; and that they should play a role that "permits diversity."[113]

As indicated above, the current preamble of the European Convention explicitly provides for the doctrine of margin of application.[114] This is, however, the outcome of the jurisprudence of the European Court. It is also worth noting that the origin of the doctrine goes to the practices of the municipal court of French Counseil D'etat (marge d'appreciation) as well as the administrative courts of Germany (Ermessensspielraum), at the international level, however, the credit goes to the European Court.[115]

The margin of appreciation refers to the latitude the Court offers to a respondent state in order to aid the latter meet its treaty obligation at a relatively lower standard than the one set by the Convention.[116] And its' purpose is to avoid damaging confrontation between the Court and

[111] Andrew Legg, The Margin of Appreciation in International Human Rights Law a chapter in Different Approaches to Deference in International Human Rights Law, OUP, 2012, p. 38.

[112] Ibid.

[113] Ibid.

[114] *Supra* (n 8), para. 4, Preamble of the European Convention on Human Rights.

[115] See https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper.p. 1.

[116] Ibid

contracting states, especially because of the legal plurality characterizing domestic legal systems of member states and also because the ultimate authority to enforce decisions rendered by regional courts depends on the willingness of member states.[117]

Thus, the application of the doctrine is inevitably linked with non-absolute rights. Such rights are limitable, but they require that the limitation be provided by law,[118] serve a legitimate purpose,[119] and be necessary in a democratic society.[120] States enjoy a wide margin of appreciation in evaluating whether there is a pressing social need. [121]This, in turn, brings us to the principle of proportionality. As such, the margin of appreciation is subject to the Court's supervisory role.[122] This means it operates within margins. And the task of the Court is to:

> "…establish a fair balance between two diverging interests: the interest of the States in maintaining a wider power of discretion and the applicant's interest in benefiting from a higher level of protection."[123]

The European Court, in general, considers two principal elements in the application of the doctrine of margin of application: peculiarities of the respondent state *vis-à-vis* the degree of consensus, if any, in the practice of states members to the Council of Europe.[124] The greater the consensus in

[117] *Ibid.*

[118] Steven Greer, The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights, Human Righst files No. 17, Council of Europe Publishing, July 2000, p. 10.

[119] *Ibid.*

[120] *Ibid.*

[121] *Ibid.*

[122] *Supra* (n 115), p. 2.

[123] *Ibid*, p. 14.

[124] George Letsas, The ECHR as a living instrument: its meaning and legitimacy in "The Europan Court of Human Rights in a National, European and Global Context", edited by Andreas Follesdal, Birgit Peters and Geir Ulfstein, p. 114.

the practice of contracting states, the narrower the margin of appreciation.[125] Thus, the standard set by the Convention does not form part of the formula of the doctrine of margin of appreciation. This attracted criticism because it dis-favors the practices of minorities in favor of majorities.[126] As such, it tends to negate the very essence of human rights, which is more about protecting minorities against the domination (tyranny) of the majority.[127]

Contrary to the European Court, the American Court adopted the doctrine of Conventionality test theory.[128] It was in 2006 that this theory was applied for the first time in *Almonacid-Arellano v. Chile*, wherein the Court held:

> … the Judiciary must exercise a sort of "Conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention…[129]

And as to why the American Court adopted particularly the Conventionality test, the former president of the Court, Judge Antonio Augusto, reasoned as follows:

> How could we apply [margin-of-appreciation doctrine] in the context of a regional human rights system where many countries' judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? How could we apply it in the context of

[125] Shai Dothan, 'The Three Traditional Approaches to Treaty Interpretation: A current Application to the European Court of Human Rights (2019) 42 Fordham Int'l LJ 765, p. 19.

[126] *Supr*a (n 126), p. 123.

[127] *Ibid*.

[128] Ariel E Dulitzky, 'An Inter-American Constitutional Court - The Invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) 50 Tex Int'l L J, p. 49.

[129] *Ibid*. pp. 49 – 50.

> national legal systems that are heavily questioned for the failure to combat impunity? We have no alternative but to strengthen the international mechanisms for protection.[130]

Thus, the American Court seems to leave no room for margin of appreciation. This means the standards of commitment the Convention sets are kept intact. In this respect, as far as these two doctrines are concerned, the European and the American courts clearly diverge. What about the African Court? Is the relevant practice of the African Court more in line with that of the American or European court?

Given the fact that African Court was preceded by the other sister courts means, it is quite interesting to see which approach is opted for. Or that it is charting its own approach? This is interesting because members of the African Court share the features of the European states (legal pluralism) and that of the American states (challenges of undemocratic systems). African states are characterized by legal plurality owing to their diverse historical and colonial experiences - for instance, the legal systems of Algeria, Tunisia, Senegal, Mali, and Chad which are linked to the French legal system - former colonial master. On the other hand, there are those with a common law legal system - former British colonies such as Nigeria, Kenya, and South Africa. We also witnessed mixed legal systems in Cameroon (Francophone and Anglophone) and Somalia (British and Italian). Besides, there are diverse customary and Islamic laws as well. And, like their American counterparts, African states also suffer from undemocratic systems.

Similar to its sister European Court, the jurisprudence of the African Court indicates its adoption and application of the margin of appreciation. Its jurisprudence reflects the margin of appreciation in three different ways. In the genocide case against Rwanda, the African Court held that the

[130]Andras Sajo and Renata Uitz, The Constitution of Freedom- An Introduction to legal Constitutionalism (2017), OUP, p. 461.

respondent state enjoys a margin of appreciation in prohibiting certain conducts, i.e., defining and criminalizing them.[131] This explicitly attests to the fact that the Court is willing to grant a margin of appreciation. Nevertheless, a close reading of the Court's position indicates that it is not clear how wide or narrow the margin is, nor the elements it entails. And, as far as this case is concerned, it seems limited to the discretion enjoyed by the respondent state in criminalizing certain conducts. But the question remains whether a state is free to criminalize certain conduct to a point not in accordance with (or that infringes) its obligation under the Charter? In this regard, the writer holds that the Court did not intend to grant a margin of appreciation in the same sense discussed above with respect to the European Court.

Furthermore, in *Isiaga*, the Court indicated that domestic courts enjoy a wide margin of appreciation while evaluating the probative value of evidence.[132] In this connection, domestic courts are not completely free while assessing evidence. Again, the conclusion reached above with respect to the margin of appreciation available for member states in criminalizing certain conducts seems to apply with reference to the discretion available to them while evaluating the probative value of evidence. The matter was further considered and elaborated by the African Court in *Abubakari.*[133] And, while the Court accepted that it is for domestic courts to assess evidence brought before them, it considers itself [not prevented] to assess how that evidence was in general processed and assessed to check conformity with Charter obligation, *emphasis added*.[134] In fact, the Court added that it is so empowered by the Charter.[135] Consequently, domestic courts will have

[131] *Umuhoza v Rwana* (merits) (2017) 2 AfCLR 165, paras. 137 and 138.

[132] *Isiaga v Tanzania* (merits) (2018) 2 AfCLR 218, para. 65.

[133] *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599, para. 26.

[134] *Ibid*, para. 26.

[135] *Ibid*, para. 173.

to ensure their evaluation mechanism meets the standard set by the Charter; otherwise, they may suffer a finding of violation by the Court. Then the question is whether this can be considered a margin of appreciation *proper*?

Suppose the margin of appreciation means a tool that permits member states to meet compliance using a standard relatively lower than that set by the African Charter. In that case, the above surely should not count as a margin of appreciation so long as it does not lower the standards set by the Charter. In its part, the respondent state invoked the margin of assessment.[136] By doing so, the respondent state invited the court to draw its attention to the former's established case law concerning cases related to convictions based on evidence obtained from a single witness.[137] This was dismissed by the Court on the ground that, as per the laws of the Respondent State, that was the exception and not the law.[138] However, whether the Court was willing to accept a lower standard of compliance remains open. Although the submission of the respondent state was not successful in the instant case, consideration of domestic practices (at least in principle) was not disputed by the Court. The question, however, remains whether the Court considered the case law (thus the practice of the domestic courts) or the laws of the respondent state? Although the respondent state called the attention of the Court to the practices of its municipal courts, the response of the Court was, interestingly, geared more towards the laws of the respondent state. Once again, this seems to require great caution not to be confused with "consensus in the practice of contracting states," as understood by the European Court.

[136] *Ibid*, para. 169.

[137] *Ibid*.

[138] *Ibid*, para. 175.

Furthermore, the Court also indicated that the respondent state enjoys a margin of appreciation with respect to determining the length of a prison sentence.[139] This, too, however, seems to fall short of the margin of appreciation *proper*. Instead, it looks to squarely fall within the kinds of margin of appreciation discussed so far. Besides, the margin of appreciation has also been invoked with reference to legal aid.[140] Nevertheless, this was dismissed by the Court without pronouncing on whether or not a margin of appreciation is available with respect to legal aid because the other criteria for violation were already established.[141] Therefore, the above-discussed margin of appreciation and assessment would constitute a margin of appreciation *proper* only if they are meant to set and permit a lower set of standards than the one set by the African Charter. Premised on the above discussion, however, this does not seem to be the case.

It was in *Mugesra* that the Respondent State invoked a margin of appreciation before the African Court because it clearly sought a lower standard of compliance. However, no effort was made to clarify the elements of margin of appreciation. Instead, the argument was more about why it should have been granted in the instant case. Similarly, to challenge the submission of the respondent state, the Applicant simply attempted to explain what margin of appreciation means in general rather than specifying the details of the criteria to be considered in assessing the same and why it should have been denied to the Respondent State.[142] In fact, no attempt was made even to make arguments along with the spirit of a narrow/wide margin of appreciation. On the other hand, the Respondent State argued that human rights are not meant to operate in a vacuum rather, their

[139] *Mallya v Tanzania* (merits and reparations) (2019) 3 AfCLR 482, para. 61.

[140] *William v Tanzania* (merits) (2018) 2 AfCLR 426, para. 81.

[141] *Ibid*. para. 87.

[142] *Mugesera v Rwanda* (provisional measures) (2017) 2 AfCLR 149, para. 123.

application is highly influenced by the overall climate of a domestic setting. [143]Accordingly, the Respondent State exclusively focused on the gravity of the issue at the bar –the 1994 Rwandan genocide. This is very important not only in the sense that the gravity of the 1994 genocide cannot be disputed but also, unlike the previous instances domestic factor is invoked as one of the principal factors to be considered in the evaluation of the doctrine of margin of appreciation to lower the standard of compliance set by the Charter. And the Court, in its part entering a finding for the Respondent State, relied entirely on the same, i.e., the peculiarity of the 1994 genocide.

Therefore, based on the above discussion, it seems logical to conclude that complete reliance was made on domestic factors. Thus no attempt was made to juxtapose domestic factors against any other factor, such as consensus in the practice of member states - as the European Court would normally have. The same is also true with respect to other relevant cases of the African Court.[144] Considering the fact that the doctrine of margin of appreciation is not provided in any of the relevant instruments of the African Court, one would normally have expected some sort of justification by the Court in its case-law explaining why the margin of appreciation is necessary to consider in the African context, its elements as well as its application. Doing so would also mean respecting the principle of the rule of law. Of course, the principle of the rule of law is not provided in the African Charter. However, it is evident from its case law that the Court values it seriously. [145]As it stands, however, the elements of clarity and certainty of law are missing from the doctrine

[143] *Ibid*, para. 126

[144] *Ajavon v Benin* (reparations) (2019) 3 AfCLR 196, para. 104; *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34; *Evarist v Tanzania* (merits) (2018) 2 AfCLR 402.

[145] Although what exactly means by the rule of law is a subject of fierce debate - in academia as well as in practice - both at the national and international levels - the formal elements of the rule of law i.e. clarity and certainty are not.

of margin of appreciation as applied by the African Court. In this connection, although the European Court devised a margin of appreciation in its case-law later, the same is incorporated in its Protocol and the preamble of its Convention.

Thus, while the American and European courts seem to hold opposing positions, the African Court appears to be somewhere in the middle. This is because the African Court seems to share some similarities with the European Court to the extent that it considers domestic peculiarities. But it is different from the European Court because it does not consider consensus practice. However, it remains unclear whether the African Court wishes to use the Charter standards instead of the consensus practice of member states.

Considering that the ultimate purpose of the African Court is to ensure the uniform application of the Charter throughout its member states, it is imperative to consider whether some degree of uniformity has already been reached in the application of the African Charter. However, this would be quite different from the one in use by the European Court. As such, it is likely to be immune to the criticism leveled against the "consensus practice" of the European Court. And I call it – the Doctrine of Charter-based Practice Consensus.

In this connection, this paper argues that this Charter-based doctrine is capable of remedying the defect inherent to the "practice consensus" of the European Court. Furthermore, there seems to be a compelling reason why the African Court should consider the doctrine of Charter-based consensus in the practice of its member states. This is because the African Charter on Human and Peoples' Rights have been applied by other judicial and quasi-judicial bodies with jurisdiction in

various regions of Africa. For instance, the Charter has been in use by the African Commission,[146] the Court of Justice of the Economic Community of West African States,[147] the Court of Justice of East African Community,[148] and other specialized Committees, including the African Committee of Experts on the Rights and Welfare of the Child.[149]

Nevertheless, unless the African Court is to make such an assessment, there seem no other means by which the Court would appreciate whether and to what extent the said uniformity has been established or is in the making. Thus it is for the African Court to capitalize on the same. Should this approach be adopted by the African Court, it would be able to keep intact the standards set by the African Charter while simultaneously granting some latitude for respondent states.

Although the margin of appreciation by the African court is not synonymous with the one applied by the European Court, the former often considers the relevant practices of the latter. For instance, in *Mtikila*, the African Court referred to *Gillow v Nited Kingdom* and *Olsson v Sweden* as part of its attempt to interpret and apply the margin of appreciation doctrine.[150] While reference to the works of other regional courts is advisable, considering the difference between the two courts on the application of the doctrine of appreciation, it suffices to indicate that it should be done with great care. Although the African Court also does refer to the jurisprudence of the African

[146] *See supra* (n 8), art. 45 (1, 2, and 3) mandating the Commission to promote, ensure the protection of and interpret the rights contained in the Charter.

[147] Amnesty International Togo and 7 Ors v. The Togolese Republic, ECW/CCJ/JUD/09/20, 25/6/2020, para. 45.

[148] Treaty for the Establishment of the East African Community, 1999, as amended on 14th/12/2006 and 20th/8/2007, art. 6(d).

[149] African Charter on the Rights and welfare of the Child, adopted 1/7/ 1990, 29/11/199, Art. 46.

[150] See *Mtikila supra (n 145)*, para. 55, and para. 106.3.

Commission and/or other relevant judicial and quasi-judicial bodies, it does not do so with reference to the margin of appreciation.

In conclusion, therefore, this paper draws the following observations. There seems to be some sort of inconsistency in the practice of the African Court. That is, it can't have a margin of appreciation that is different from the one applied by the European Court while referring to the jurisprudence of the latter. Thus, the African Court should either distinguish itself from the practice of the European Court and map out its own path as discussed above or re-adjust its margin of appreciation to that of the practice of the European Court. Nevertheless, it can't have both without risking inconsistency.

And should the African Court choose not to consider the consensus practice of its member states, then one possible option is to juxtapose the peculiarities of the respondent state vis-à-vis the standard set out by the Charter. This approach will likely enable the African Court to overcome the criticism leveled against the European Court.

As it stands, however, the elements of the doctrine of margin of appreciation do not seem to have been clearly outlined, nor do its margins delineated. This is likely to create legal uncertainty, and probably it is for this reason that some states have been seeking a margin of appreciation without margins – an unfortunate trend to which I now turn to explore.

2.4 The limits and limitations of margin of appreciation

As a doctrine, margin of appreciation aid compliance. However, this paper advances the proposition that the margin of appreciation, contrary to its proponents, has its limitations likely to impede compliance. First, the margin of appreciation is likely to encourage states to expect a much lower standard of compliance. Consequently, once a finding is entered in favor of an applicant, the

concerned state will have to adjust its conduct to comply with much higher standards as set out by the pertinent Convention/Charter. This is likely to have a discomforting effect. Second, member states have values they dearly hold, and it is often in order to protect those values that they invoke a margin of appreciation. This means that once regional courts rule in favor of applicants, respondent states would normally find it uneasy about giving up those dearly held values. These two are what I call the limits of the margin of appreciation. In order to appreciate this line of argument, it is important to explore some relevant case laws. To this end, the genocide case (Rwanda) and prisoners case (Russia) are considered.

As indicated above, Rwanda is the first state to have successfully invoked a margin of appreciation in a case related to the 1994 genocide. Nevertheless, the same subject matter, i.e., genocide, also became the source of discontent between Rwanda and the African Court. In a letter sent from the Ministry of Foreign Affairs of Rwanda to the African Court, the Ministry:

> …pointed out that in 2013, when Rwanda signed the declaration…it never envisaged that such a person (Genocide Convict/fugitive) would ever seek or be granted a platform …[151]

Rwanda's Minister of Justice, in his part - in a letter communicated to the African Court:

> Safari …was convicted of Genocide. We sent the judgment and informed the court last year that we would take serious exception if Safari was allowed a platform in the African Court because with Genocide Rwanda would not compromise.[152]

Reading retrospectively, the margin of appreciation was not contemplated in the African Charter or by any other instrument of the African Court for that matter. Thus, contracting states members to the African Court could not have made any reliance on the margin of appreciation while ratifying

[151] Rwanda withdraws from African Court Declaration, The New Times, available at https://www.newtimes.co.rw/section/read/197697, accessed on 25/03/2022.

[152] *Ibid*.

the Charter and depositing a declaration under Art. 34(6) of the African Protocol. Thus, the original commitment was to the standards set out by the Charter. Therefore, states could not have legitimately expected any standard lower than that set by the African Charter.

It was only later in its jurisprudence that the African Court introduced a margin of appreciation, thus paving the way for lower standards. And coincidentally, as indicated above, that was in a case that involved Rwanda. As more cases started to be filed by Rwandese under Art. 34(6) of the Protocol establishing the African Court, however, Rwanda invoked complete denial of access to the Court for genocide convicts and fugitives. This begs the question of whether the margin of appreciation could be stretched to include complete denial of access to the Court? Put differently, whether it is possible to have a margin of appreciation without margin? This, in turn, would require us to check how the margin of appreciation has been delineated by the African Court. Nevertheless, this paper has already established in the above sections that the African Court, in its instruments and jurisprudence, clearly delineated the scope of the margin of appreciation. Nor did it make efforts to specify the criteria to be considered while assessing whether or not a margin of appreciation should be granted. However, it is the argument of this paper that it seems too far to stretch the margin of appreciation to include complete denial of access to the African Court because the margin of appreciation is meant to operate within margins.

And, considering the position of Rwanda in the other relevant cases, it is difficult to assume that Rwanda lacked the knowledge of what constitutes a margin of appreciation – that is, at least the knowledge that a margin of appreciation can only operate within margins. But Rwanda shifted to seeking complete denial of access to the Court, and once the Court did not uphold this, it immediately revoked its declaration denying individuals and NGOs from accessing and filing a case before the same.

Again in order to explore the same issue within the European court, we consider the prisoners case against Russia. In the case of *Anchugov and Gladkov,* the applicants challenged the constitutional provision of Russia providing for the complete disenfranchisement of prisoners.[153] The Court held that although the right provided under Art. 3 of Protocol No. 1 is not absolute, but it is for the Court to determine the actual margins available for states.[154] And concluded that in so far as the Constitutional provision imposes blanket restriction against convicted prisoners, it violates Art. 3 of Protocol No. 1.[155] In response, the Russian Constitutional Court devised a mechanism to deny the binding nature of the decisions of the European Court and used the same to declare the unenforceability of the decisions of the European Court on prisoners' rights to vote.[156] This means although Russia's argument was along the lines of margin of appreciation, she later devised a mechanism completely unrelated to the doctrine of margin of appreciation. And, what the European Court was not willing to accept was blanket denial. In this sense, Rwanda and Russia sought a margin of appreciation without margin.

Consequently, while Russia decided to keep its declaration, Rwanda immediately withdrew it. This means individuals can file against Russia but not against Rwanda. Nevertheless, the Russian Federation Constitutional Court has devised a mechanism to review whether decisions rendered by European Court bind Russia. Consequently, not all cases filed by individuals and/or NGOs may be complied with by Russia. Unfortunately, Russia's resistance culminated in the complete

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[153] *Anchugov and Gladkov v. Russia* (Judgment), Applications nos. 11157/04 and 15162/05, 4 July 2013. The challenged provision of Russian Constitution is Art. 32.

[154] *Ibid*, paras. 95 and 96.

[155] *Ibid*. paras. 101 and 112.

[156] Alexei Trochev and Peter Solomon: Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state, Communist and Post-communist Studies (2018), p. 8.

withdrawal of its membership from the European Court - this time for reasons like the war in Ukraine - setting an unfortunate precedent.

The two cases discussed above illustrate that there are situations where even a margin of appreciation is not enough. In effect, the margin of appreciation without margin was sought in both cases. And, contrary to the understanding of its proponents, the above discussion seems to suggest the limitations *[inherent]* to the doctrine of margin of appreciation, for it lowers the expectation of member states.

CHAPTER THREE:
CONCLUDING REMARKS

Despite their significant work, regional human rights courts face constant challenges of enforcing their decisions. Admittedly there are diverse factors with a bearing on compliance challenges. And their impact may differ from one jurisdiction to another.

This paper picked and explored the legal status of regional human rights conventions with in the hierarchy of municipal laws. The data of 138 constitutions shows that a great deal of constitutions do not provide for the legal status of international treaties. In general, the majority of those that provide tend to rank international treaties at the level of legislation. Legal status matters for compliance to the extent that municipal courts and other authorities are obliged to observe the hierarchy of municipal law.

It is the finding of this research (relying on primary data of 138 constitutions) that there are more than seven possible legal status of international treaties including superior to ordinary but inferior to organic laws, superior to legislation, equal to the constitution and superior to the constitution. The implication is that, at least in theory, states that offer human rights conventions constitutional or supra-constitutional status would find it easier to comply with the decisions of regional human rights courts than those that subordinate it to legislation – especially when they require, for instance, amendments of constitutional provisions. However, this research shows that those that grant constitutional or supra-constitutional legal status are exceptionally rare.

And, one way of improving compliance is therefore by enhancing the legal status of regional human rights conventions in the hierarchy of municipal laws. In this regard the practice of regional courts presents useful tool. That is by comparison with the margin of appreciation (though this too

aid compliance in its own way) the doctrine of conventionality test seems helpful. Probably it is because of the application of this doctrine that constitutions of member states to the American Court tend to grant a higher legal status than their European and African counterparts. Importantly, this paper finds that the margin of appreciation as applied by the European and African human rights courts are not the same in that the latter doesn't consider consensus in the practice of contracting states. To that extent, the African Court is insulated from the criticism levelled against the European Court. However, the African Court continues to reference the European Court's relevant jurisprudence on this matter. Importantly the margins of margin of appreciation as applied by the African Court are not clearly delineated. Finally, a close examination of the cases against Rwanda and Russia suggests that margin of appreciation has the inherent limitation of encouraging states to expect less to the extent of seeking margin of appreciation without margins.

Accordingly, the following recommendations are submitted.

On the legal status of international treaties it is recommended that: first, at the treaty level, states are advised to use the mechanism of treaty reservation rather than subordinate the entire treaty documents to their municipal laws. Second, this paper finds the French model attractive because it enables the state to maintain the supremacy of its constitution at the same time complying with its obligation under the convention. Third, it is recommended that constitutional advisors and promoters of the rule of law ensure that human rights treaties are offered, if possible, supra-constitutional legal status, which is in accordance with the law of treaties.

On the margin of appreciation it is recommended that the African Court: first, it is recommended that the African Court be cautious while referring to the jurisprudence of the European Court particularly because their margin of appreciation are not the same. Second, it is recommended that

the African Court clearly delineates the margins of margin of appreciation. Third, ensure that the doctrine itself is included in its Charter/Protocol in conformity with the principle of the rule of law.

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