Overcoming State Sovereignty to Address the Rights of the Neediest: the Case for Individual Standing and Strong Enforcement Mechanisms at the new African Court of Justice and Human Rights

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List of Abbreviations

ACHPR - African Court of Human and Peoples' Rights
African Commission - African Commission on Human and Peoples' Rights
American Convention – American Convention on Human Rights
AU - African Union
Banjul Charter - African Charter on Human and Peoples' Rights
CE – Council of Europe
CFI – Court of First Instance
CJAU – Court of Justice of the African Union
CJHR – Court of Justice and Human Rights
EC – European Community
ECHR – European Court of Human Rights
ECJ – European Court of Justice
European Commission – European Commission on Human Rights
European Convention - Convention for the Protection of Human Rights and Fundamental Freedoms
IACHR – Inter-American Court of Human Rights
ICC – International Criminal Court
ICTR – International Criminal Tribunal for Rwanda
Inter-American Commission – Inter-American Commission on Human Rights
NGO – non-governmental organization
OAS – Organization of American States
OAU - Organization of African Unity
UN – United Nations

Introduction

A general culture of impunity exists in Africa with respect to human rights abuses, war crimes, and crimes against humanity committed across the continent.[1] Violations of customary international law[2] and humanitarian law occur frequently and without legal action against those responsible, including past leaders such as Mobutu Sese Seko in what is now the Democratic Republic of the Congo,[3] Idi Amin in Uganda,[4] Hissène Habré in Chad,[5] and Sid Taya in Mauritania.[6] The trend of impunity continues today, with those currently in power such as Robert Mugabe in Zimbabwe[7] and members of the Sudanese government in Khartoum responsible for the genocide (or at a minimum, for complicity in genocide) in Darfur.[8] The general failure of both municipal courts and the international community to hold accountable those responsible for such crimes creates further injustice for the victims, instills disrespect for the rule of law, and can further protract conflicts.

Central reasons for this failure include the fact that some African states lack an independent judiciary, restrict the free press, respond to political opposition with violence, and suffer from widespread corruption.[9] Hundreds of thousands of lives have been lost in conflicts around the continent, including particularly large conflicts in Rwanda, Burundi, the Democratic Republic of the Congo, Sierra Leone, and Sudan.[10] Additionally, political persecution of vocal opponents, journalists, and human rights advocates remains common practice in many African states.[11] As one scholar noted on the widespread problem of human rights abuses in Africa, " . . . domestic judicial institutions are not enough to guarantee the human rights enshrined in the national constitutions, domestic legislation, and international law. Additional mechanisms are clearly needed for effective response."[12]

Although notions of amnesty and forgiveness are important to several traditions of African

peacemaking,[13] impunity is not. The diversity of dispute resolution traditions in Africa has produced several transitional justice mechanisms, ranging from the *Gacaca* community courts in Rwanda[14] to the Truth and Reconciliation Commissions in Sierra Leone, Chad, Ghana, Nigeria, Uganda, and South Africa.[15] The African Commission for Human and Peoples' Rights (hereinafter African Commission) is another forum where people can file claims, even though the Commissions' reports are not binding on member states. The International Criminal Tribunal for Rwanda (hereinafter ICTR) and the International Criminal Court (hereinafter ICC) are criminal tribunals that have tried alleged perpetrators of crimes against humanity with most of the due process safeguards envisioned in the African Charter. Individuals, however, are not permitted to bring charges in either of these courts. Despite the successes of many of these models in promoting peace and transitional justice, there is no permanent judicial institution for the continent that individual Africans can utilize to bring human rights abusers to justice with an enforceable court order.

Given the scale of many of these offenses, it is hard to imagine that there are not at least some victims or groups of victims who want to press charges against the perpetrators. These claims, civil or criminal, may not be pursued in domestic courts for several reasons. First, in areas of prolonged, intense conflict, fighting may render domestic courts inoperative or prevent people from accessing the courts. Second, many Africans are too poor to afford initiating a court case. Third, many African governments, especially those that perpetrate or are complicit in crimes against humanity, do not have a sufficiently independent judiciary that would try government officials in a fair manner.[16] In effect, there is often no guarantee to a fair trial in domestic courts, despite codification of fair trial rights in article seven of the African Charter on Human and Peoples' Rights (hereinafter Banjul Charter).[17] Article 7(1) of the Banjul Charter provides:

> Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his

> fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.[18]

All fifty-three member states of the African Union (hereinafter AU) have ratified the Charter and are obligated to incorporate its principles into their domestic law.[19] Despite states' widespread acceptance of these substantive legal rights, many have been slow to integrate them effectively into domestic judicial systems, leaving individuals with no judicial recourse.

The Banjul Charter represents a groundbreaking human rights treaty that includes a variety of approaches to human rights. For example, the Charter contains liberal western notions of civil and political rights related to the exercise of free will and equality before the law, as well as economic, social, and cultural rights which seek an equal distribution of social and economic goods.[20] One African innovation to international human rights law was the inclusion of "solidarity rights" (also known as peoples' rights) into the Charter, which characterizes those rights belonging to groups of people as a whole. This innovation stemmed largely from the high importance of family and community in most African cultures – values that also inspired duties the Charter places on citizens, including duties to the family, society, state, and international community to respect others without discrimination, to develop family, to serve the nation, to pay taxes, and to promote African unity.[21]

Attempting to further protect human rights, twenty-three member states of the African Union ratified a protocol that established an African Court of Human and Peoples' Rights (hereinafter ACHPR) that seeks to adjudicate claims of human rights abuses.[22] Although the AU selected judges for that Court in July 2006, the AU decided to merge that Court with the yet-to-be established Court of Justice of the African Union (hereinafter CJAU) to create a Court of Justice and Human Rights (hereinafter CJHR). The details of the merger are unclear – the AU expects

their experts to submit a draft protocol of the functions, jurisdiction, and rules of procedure of the newly merged court in January 2007. Analysis of the rules of procedure of the two initial courts, the ACHPR and the CJ, will help to predict the rules of the new court.

Regardless of what the final rules permit, there is a clear need for individuals to bring claims against government and military officials, especially in countries whose court systems are underdeveloped and/or unable to hear cases against members of its own government. In some instances, these individuals have no other form of redress. Additionally, strong enforcement mechanisms are needed to ensure the legal remedies actually redress individual grievances and guarantee that the new court's judgments are not as toothless as other regional human rights bodies. This paper will demonstrate that although the need for individual standing and strong enforcement mechanisms may frustrate state sovereignty, they are necessary components of an effective human rights machinery.

This paper argues that individual and NGO standing and strong enforcement mechanisms are paramount to the success of the new court if it seeks to protect human rights effectively. Part I provides background on the establishment and relevant rules of procedure of the African Commission on Human and Peoples' Rights, the African Court of Human and Peoples' Rights, and the Court of Justice of the African Union. Part II analyzes the enforcement mechanisms and the ability of individuals to file claims before regional judicial bodies, specifically the European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights. Part III applies the lessons learned from regional courts to the newly merged court and argues for more stringent enforcement mechanisms and against the probable requirement of state consent to individual standing. Part IV examines and rebuts the main arguments against these recommendations for the new court.

The new merged court, the Court of Justice and Human Rights, would be more effective in

protecting human rights if it eliminated the requirement of state consent to individual standing and its judgments had stringent enforcement mechanism. Simply put, when a state commits human rights abuses, it will not knowingly subject itself to criminal prosecution. Without the threat of enforceable judgments against governments that abuse human rights, little progress will be made against the most egregious regimes, and the justice will continue to elude the neediest victims.

I. Continental Judicial Bodies in Africa

Two continent-wide judicial bodies exist in Africa: the African Commission on Human and Peoples' Rights, located in Banjul, the Gambia (hereinafter African Commission), and the African Court on Human and Peoples' Rights, which likely will be located in Arusha, Tanzania.[23] A third body, the Court of Justice of the African Union, has yet to be established due to a lack of ratifications of the relevant protocol. Below is an analysis of the availability of individual standing and the enforcement mechanisms of each of these institutions. The focus on the latter two courts is important because the AU voted to merge them into the new Court of Justice and Human Rights.

b. African Commission on Human and Peoples' Rights

An examination of the African Commission is necessary because it provides the background for cases submitted before the African Court on Human and Peoples' Rights. The predecessor to the African Union, the Organization of African Unity (hereinafter OAU), established the African Commission through the Banjul Charter.[24] Besides being the premier human rights instruments in Africa that every member state has ratified, the Banjul Charter established the rules and procedures for the African Commission. With only eleven members[25] who serve six year terms,[26] the Commission's mandate is to promote and protect human and peoples' rights and in particular,

> (a) To collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
>
> (b) To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.[27]

Although this mandate may give the Commission broad advisory and investigatory powers, it fails to ensure that state parties comply with the Commissions' recommendations.

i. Individual Standing

Individuals can bring claims before the African Commission, but under Article 55 of the Banjul Charter, a simple majority of Commission members must vote to consider the communication.[28] Article 56 puts even more stringent requirements on individual communications: they cannot be anonymous, they must be compatible with the Charter, they cannot be written in disparaging or insulting language, and cannot be based exclusively on information from mass media.[29] Further, individuals must submit the communication within a "reasonable time" after exhausting local remedies (unless it is "obvious" that pursuing local remedies would be an "unduly prolonged" process) and cannot submit cases that states have already settled in accordance with the principles of the Banjul Charter.[30] The latter group of requirements imposes an undue burden on individuals without the financial means to go through several rounds of domestic litigation before filing a complaint. Further, the vagueness of the requirement that communications must be submitted within a "reasonable time" after exhausting local remedies can potentially be used arbitrarily against a petitioner to block his claim.

ii. Enforcement Mechanisms

As mentioned previously, perhaps the biggest drawback of the African Commission is that

its reports are not binding on state parties – a significant obstacle to the enforcement of human and peoples' rights in Africa. Although advisory opinions and reports can send an important message, they do not compel persistent and egregious human rights abusers to reform. For this reason, critics fault the Commission for lacking the teeth necessary to affect real and positive change on the human rights landscape.[31]

With the advent of the newly merged Court of Justice and Human Rights, the AU has the great opportunity to solve two fundamental problems that plague the Commission: the considerable barriers to individual and NGO standing and the complete lack of enforcement mechanisms to ensure that parties comply with judgments.

c. Court of Justice of the African Union

Article 18 of the Constitutive Act of the African Union established the Court of Justice of the African Union (CJAU).[32] The Protocol providing for the details of the CJAU's composition and functions requires fifteen member states' ratification before the instrument can enter into force.[33] As of August 2006, only twelve of the requisite fifteen states had ratified the protocol.[34] Unlike other regional courts, the CJAU is designed primarily to focus on disputes over AU protocols and questions of international law, not as a forum for individuals to gain legal redress. Under article 19 of the protocol, CJAU jurisdiction includes disputes over African Union law, policy, and treaties; any question of international law; and any matters that state parties agree to have heard by the Court.[35] Further, according to Article 19 of the relevant protocol, the Court can hear disputes over "the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union," and "the nature or extent of the reparation to be made for the breach of an obligation."[36] The Assembly of the AU can confer jurisdiction on the Court to hear any type of dispute not referred to in Article 19.[37]

i. Individual Standing

Article 18 of the establishing protocol, governing the eligibility to submit cases, provides that the following groups can submit claims before the CJ: state parties to the CJ protocol, various African Union organs, and third parties under conditions to be determined by the Assembly of the African Union and "with the consent of the State Party concerned."[38] Further, section two of the same article requires that the "conditions under which the Court shall be open to third parties shall, subject to the special provisions contained in treaties in force, be laid down by the Assembly . . . ".[39] Although this provision is open-ended, it is clear that a state party must explicitly consent to the submission of third party claims to the CJAU before such a claim can be brought against it.[40] It is unlikely that many states will consent to such claims because no incentive exists to expose themselves to liability from individual plaintiffs.

In a somewhat vague manner, the protocol requires that a third party claim not place parties in a "position of inequality" before the Court.[41] It is unclear whether this clause pertains to the retention of counsel, the filing of amicus briefs, or the equality of procedures in general. Notably, the protocol prohibits disputes involving non-member states from appearing before the court.[42]

ii. Enforcement Mechanisms

The protocol establishes a strong mechanism to enforce the CJAU's judgments. The protocol requires state parties to comply with and guarantee execution of a judgment in any dispute to which it is a party.[43] When a party fails to comply with the judgment, the CJAU may refer the matter to the AU Assembly of Heads of State, which can take measures to give effect to the judgment, including the imposition of sanctions.[44] Although these enforcement provisions are strong, the small likelihood that the CJAU will hear individual claims reduces its effectiveness for individuals.

d. <u>African Court of Human and Peoples' Rights</u>

The Protocol establishing an African Court on Human and Peoples' Rights (ACHPR) came

into force on January 25, 2004.[45] The Executive Council of the AU decided on January 22, 2006, to elect the first eleven judges of the Court,[46] who were sworn in at the Court's first meeting in July 2006.[47] The ACHPR permits parties to bring allegations of human rights violations on the basis of any international legal instrument, including international human rights treaties ratified by the relevant state party.[48] The ACHPR can use the Banjul Charter, as well as "other relevant human rights instruments ratified by the States concerned" as the sources of relevant law.[49] There is no provision requiring cases be of a certain gravity to be heard – permitting the resolution of a broad range of human rights violations. Although forty-eight states signed the protocol, only twenty-three states ratified the protocol as of July 25, 2006, and the Court's decisions are only binding on those twenty-three states.[50]

iii. Individual Standing

Former chair of the African Commission, Ambassador Badawi, noted that "[t]he question of allowing NGO's and individuals to submit cases to the Court was one of the most complicated issues during the consideration of the Draft Protocol,"[51] most likely due to states' sovereignty concerns. According to Article 5 of the Protocol establishing the Court, the following parties can submit claims before the ACHPR: the African Commission, a state party that has lodged a complaint with the Commission, a state party against which a complaint has been lodged at the Commission, a state party whose citizen is a victim of a human rights violation, and African Intergovernmental Organizations.[52] When a state party has an interest in a case, it may file a petition to join.[53] Notably, a state is permitted to file a claim on behalf of an aggrieved citizen, but that citizen is not automatically allowed to file a claim him or herself. Unfortunately, the considerable barriers to individual claims before the Commission discussed previously likely will reduce the pool of such claims the Commission refers to the ACHPR.

Importantly, Article 5(3) of the Protocol permits individuals and non-governmental

organizations with observer status at the African Commission for Human and Peoples' Rights to file claims before it.[54] Under Article 34(6), however, the state party must explicitly declare its support of the Court's competence to hear any petition under Article 5(3).[55] Requiring state consent to individual standing likely will preclude any individual claims from being heard, especially from any suspect state that does not want to expose itself to liability in a human rights court. This clause protects state sovereignty in a meaningful way, but by doing so remains an impediment to the realization of the important goal of ending impunity for human rights abusers. So far, Burkina Faso is the only state that has formally declared it will permit individuals to file claims under Article 34(6).[56]

Article 10(3) requires that "any person, witness or representative of the parties who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court."[57] This clause represents another important mechanism that will protect individuals and groups that seek to appear before the ACHPR, as well as any witnesses who testify on their behalf – a crucial task for the effective protection of human rights.

Although the Protocol is silent on the issue of exhausting local remedies, international law generally requires the applicant to utilize, or make a good faith effort to utilize, all available domestic judicial and administrative procedures before seeking international remedy. The Banjul Charter makes an exception for those cases unduly prolonged by local procedures.[58] As with the African Commission, the requirement of exhaustion of local remedies may bias those without the resources to work their way through the domestic legal system. This general requirement fails to acknowledge that in Africa, there are instances where no domestic remedies exist to protect a party's human rights (either due to live conflict, lack of infrastructure, or contrary domestic law or policy). Relaxing the interpretation of this requirement would therefore better serve those people

the ACHPR seeks to protect.

iv. Enforcement

Under Article 27, when the ACHPR holds proceedings and determines that there was a violation of a human or peoples' right, it will order a remedy for that violation, including the payment of fair compensation or reparation.[59] In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to individuals, the Court shall adopt such provisional measures as it deems necessary with respect to the remedy required.[60] The ACHPR's ability to grant fair compensation and reparations isan enormous one that should not be taken lightly. Such remedies are crucial to restoring the victim to the status quo and serve as an important deterrent because other states would be less likely to repeat abuses if they know they will be subject to stiff financial penalties.[61] If the Court chooses a broad interpretation of Article 27, it will be able to grant structural remedies or order non-compliant states to stop practices and revoke laws that violate human rights.[62]

The Court's decisions are final and not subject to appeal.[63] All -twenty-three state parties to the Protocol have agreed to comply with judgments in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.[64] This last clause is problematic because it places the onus on the state to enforce judgments against itself for violating human rights treaties. The clause also ignores the highly likely proposition that a state guilty of violating its citizens' human rights will fail to respect an ACHPR order requiring it to change its behavior or compensate victims.

The use of public shaming is another enforcement mechanism at the ACHPR's disposal. Article 31 requires the Courtto report annually to the AU Assembly and include the cases in which a state failed to comply with the Court's judgment.[65] When considerable aid and trade packages are linked to good governance and respect for human rights, the threat of such shaming can have a

strong impact on state behavior.[66] The AU Assembly also has the power under the AU Constitutive Act to take affirmative action, such as the passing of resolutions urging compliance with the Court's orders[67] or applying economic sanctions to a non-compliant state.[68]

Lastly, the Protocol's requirement that the Court render its judgment within ninety days after completing its deliberations[69] promotes efficiency and helps ensure that justice is not delayed. Although this judgment is final and not subject to appeal, the Court may review it later if new evidence is found.[70] The finality provision, with its safeguard for good cause, also promotes efficiency and effective enforcement.

iii. Advisory Jurisdiction

It is also important to note the ability of "any African organization recognized by the OAU" to bring a matter to the Court for clarification of any legal issue related to the Banjul Charter, the Protocol, or importantly, to "any other pertinent human rights instrument ratified by the States concerned."[71] Although the definition of a "recognized" organization is unclear, this provision broadens the ability of individuals and NGOs to at least resolve questions of international or human rights law before the Court. The subsequent advisory proceeding may not be binding on a state party, but it will carry substantive legal weight and would make a good bargaining tool should individuals or NGOs seek to negotiate with the offending state party.

V. Comparative Analysis of Other Regional Human Rights Systems

Many scholars note the utility of comparing regional human rights systems.[72] In arguing the need for an effective African Court to try alleged human rights violators, one scholar notes that "the relative successes of the Inter-American and European regional human rights systems – both of which rely on courts for their effectiveness- gave further impetus to the growing call for a human rights court in Africa."[73] A comparative analysis of these institutions will reveal the strengths and

weaknesses of each system and how their positive aspects can best be applied to the African context.

b. European Court of Justice

The treaty establishing the European Coal and Steel Community also established the European Court of Justice (hereinafter ECJ) in 1951, which became an independent institution in 1958.[74] After undergoing several transformations, the ECJ became the highest court in Europe that governs matters related to the European Community (hereinafter EC). In October 1988, the European Council set up an autonomous Court, the Court of First Instance (hereinafter CFI), to assist the ECJ in hearing specific actions or proceedings and to serve as a court where individuals could file claims on matters related to EC law.[75] The CFI thus enabled the ECJ to focus on ensuring the uniform interpretation of EC law. The Court of Justice has played a central role in the progress of European integration, especially through its case law, and in the establishment of the European Community.[76]

i. Individual Standing

According to EC law, individuals and economic operators enjoy various remedies for their legal claims.[77] Although private parties cannot bring a case before the ECJ, they can bring a lawsuit in a member state's national court and ask that court to refer questions of EC law to the ECJ for a preliminary ruling under Article 234 of the treaty that governs the EC.[78] It is important to note that the ECJ does not work under a certiorari system like the U.S. Supreme Court.[79] Notably, private tribunals such as arbitration panels cannot refer claims; only those bodies that satisfy a set of factors regarding independence, procedure, and permanence can refer cases to the ECJ.[80]

As a second route to achieve legal redress, individuals and economic operators have the right to bring an action to nullify an EC organ's decision according to Article 230 of the EC

Treaty.[81] Article 230 limits the conditions on which such standing can occur, however, by narrowly defining the concept of individual concern.[82] The ECJ has actively rejected proposals to broaden the scope of petitioners eligible under Article 230.[83]

Both individuals and member states can file claims regarding the interpretation and application of EC law with the Court of First Instance (CFI). A party can then appeal CFI judgments to the ECJ, which only decides matters of law. Causes of action that can be brought before the CFI include actions for an EC institution's failure to act and action for the reparation of damage caused by an EC institution's unlawful conduct. The CFI can also decide cases based on subject matter jurisdiction, including agriculture, state aid, social policy, and regional policy, among others. This relatively broad jurisdictional grant encompasses several potential human rights claims and therefore can act as an alternative avenue for an individual victim's redress.

ii. Enforcement

Of all the institutions surveyed in this paper, the ECJ has the most strict and effective enforcement mechanisms. Its rulings have direct effect and primacy over the national law of all EC member states.[84] The direct effect of EC law in member countries means that parties can invoke that law before any national court of a member state.[85] Invocation of EC law before domestic courts gives a consistency to law throughout the member states, thereby promoting more rapid integration. Primacy, also known as supremacy, means that EC law always trumps conflicting municipal law – another factoradding to the consistency of EC law.[86] Additionally, the ECJ recognizes a state liability doctrine, which makes member states liable, in specific circumstances, to pay damages to individuals and economic operators for violations of EC law.[87] Although the principles of direct effect, primacy, and state liability infringe to some extent on state sovereignty, they make for a strong, unified, consistent approach to matters of social and economic integration[88] – issues that will be highly relevant to Africa's new CJHR.

c. European Court of Human Rights

The European Court of Human Rights (ECHR) is a central human rights body in Europe[89] and is among the most progressive in the world in its permission of individual standing and its enforcement of judgments. In 1950, the Council of Europe adopted the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention), which established the ECHR in conjunction with the European Commission on Human Rights (hereinafter European Commission).[90] The European human rights machinery began slowly - although 5,960 complaints were filed with the Commission between 1959 and 1972, it only admitted 120 cases, ten of which were referred to the ECHR.[91]

i. Standing

Initially, individuals did not have direct standing before the ECHR. Member states could file claims against one another pursuant to article 33 of the Convention. Private parties, however, had to apply to the European Commission of Human Rights, which would file a case in the ECHR on the individual's behalf if it found the case to have merit. Mirroring the current situation with the ACHPR, European states could choose whether to adopt the specific clause providing individual access to the Commission.[92] In 1994, Protocol 9 changed this process when it enabled individual applicants to bring their cases before the ECHR, but was subject to ratification by the respondent state and approval from a screening panel.[93]

After coming into force on 1 November 1998, Protocol 11 revolutionized the human rights machinery in Europe. Protocol 11 replaced the existing, part-time Court and European Commission of Human Rights with a single, full-time Court.[94] The protocol also assigned the ECHR the powers and functions of the old Commission, and significantly, provided for individual standing before the ECHR.[95] All states parties accepted the jurisdiction of the Court to rule over

cases brought against them by individuals.[96]

Article 34 of the current European Convention (incorporated as a result of Protocol 11) greatly broadened the ability of individuals to seek legal redress for human rights abuses and provides model language for the rest of the world. It reads,

> **Article 34. Individual applications**
> The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

While the first sentence encapsulates the substance of the article, the second sentence is perhaps more important because it prohibits state parties from interfering with the effective exercise of individual applications. Such strong language represents a movement away from traditional state-centered international law and virtually guarantees individual Europeans the right to be file applications alleging human rights violations, either committed by a state or a private party. If the African Court followed this practice, and permitted individual applications without reservation, it would accomplish more fully its mandate to promote and protect human rights on the African continent.

1. Proposed Law – Protocol 14

Over the three years following the adoption of Protocol 11, the ECHR caseload grew at an unprecedented rate. Due in some respect to the drastic enlargement of the European Community, the total number of applications to the ECHR increased from 5,279 in 1990 to 10,335 in 1994 (+96%), 18,164 in 1998 (+76%) and 34,546 in 2002 (+90%).[97] The number of applications the ECHR decided rose from 5,979 in 1998 to 13,858 in 2001, an increase of approximately 130%.[98]

This increase in volume led the ECHR to pursue further reforms in Protocol 14 to promote judicial economy and the efficient processing of claims. Russia is the only one of the forty-six member states of the Council of Europe that has not ratified Protocol 14, thus preventing the

protocol from entering into force.[99] Protocol 14 would stem the increasingly large flow of individual claims before the court and "improve[s] and accelerate[s] the execution process" with respect to ECHR judgments.[100] The protocol would permit individual judges, instead of groups of three judges, to either accept or deny an individual petition. Also, a panel of three judges could rule on a case when highly similar precedent gives a clear answer as to the outcome. Despite the criticism of some observers who want a more universal consideration of petitions,[101] Protocol 14 seeks to shift the ECHR focus to those petitions that allege "serious harm" instead of those that allege lesser harms – largely because of the overwhelming caseload the court faces.

Protocol 14 has another mechanism to limit the number of applications before the ECHR - it amends Article 35 of the European Convention to require the ECHR to declare an application inadmissible if it is "incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application" or if "the applicant has not suffered a significant disadvantage."[102] The latter clause makes an exception for those instances where "respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal." Despite this exception, the refusal to hear cases where the applicant has not suffered a "significant disadvantage" is problematic. What constitutes a "significant" violation? It is difficult to quantify degrees of human rights violations in an attempt to describe those more serious harms – all violations involve an infringement on a fundamental right and can therefore be damaging to the complainant.

ii. Third Party Intervention

Third parties can intervene only in cases of individual applications and only with regard to the state in question.[103] These parties can submit documents and participate in hearings in all cases

before a chamber or the Grand Chamber.[104] The President of the ECHR may also permit, in the interest of justice, third parties to participate in hearings or submit documents.[105]

iii. Enforcement Mechanisms

Article 46(1) of the European Convention obliges states to "undertake to abide by the final judgment of the Court in any case to which they are parties."[106] This undertaking requires states to remedy both the damage to individual applicants (individual measures), as well as to take general steps to change the violating law, policy, or practice so as to prevent similar violations from occurring in the future (general measures).[107] Individual measures often include a payment of monetary damages to the applicant to cover expenses and restore the victim to the status quo, but can also be non-monetary damages including the re-opening of unfair procedures, destruction of illegally gathered information, or revocation of deportation.[108] General measures include a review of legislation, rules, regulations, or case law in order to help prevent similar violations in the future.[109]

In a notable bow to state sovereignty, states have substantial freedom in the choice of the individual and general measures they take to meet these requirements, as demonstrated in the ECHR judgment in *Scozzari and Giunta v. Italy* in 2000.[110] Acting as a check on state discretion, the Council of Europe's Committee of Ministers closely monitors the states' choices, but cannot compel the state to do comply with an ECHR judgment. As the main political body of the Council of Europe, the Committee of Ministers can require reports from the state party, and in conjunction with the Directorate of Human Rights, recommend action for the state to follow. In sum, the Ministers' supervisory power has no bite.

In contrast to the ECJ, the ECHR does not have direct effect.[111] Although the European Convention applies to all member states, domestic law governs the effect of ECHR decisions in

practice.[112] The ECHR does not have offices in each country to oversee the implementation of its judgments, instead national courts have a good amount of discretion to enforce ECHR decisions.[113] Depending on the political structure of the member state, either a national court can invoke the Convention, or the government incorporates the Convention into the domestic legal system.[114] In either situation, the domestic government interprets and applies the law. The oversight of the Committee of Ministers helps to ensure implementation through political bargaining and close monitoring of the situation, but does not have a strong enforcement mechanism to ensure implementation, thus leaving the execution of the law to state parties.

1. Proposed Law – Protocol 14

As discussed previously, Protocol 14 requires Russia's ratification before it enters into force.[115] Article 16 of Protocol 14 provides for the amendment of article 46 of the European Charter governing the binding force and execution of ECHR judgments. Under Protocol 14, Article 46 would require all state parties to abide by the final judgment of the ECHR in any case to which they are a party.[116] The final judgment would then be sent to the Committee of Ministers, which supervises its execution and can, by a 2/3 vote, refer the matter back to the ECHR for infringement proceedings if there is a problem with state interpretation or enforcement of the judgment.[117] If the ECHR determines the state failed to correctly interpret or enforce the judgment, the ECHR refers the matter back to the Committee of Ministers, who will take steps to remedy the situation.[118] As the ECHR notes in its own internal documents, "The Convention is now one of the keystones of the European political framework precisely because the execution of each individual judgment in which a state is found to have violated the Convention is closely and systematically monitored by the other states through their representation in the Committee of Ministers."[119]

The Explanatory Report to Protocol 14 also recommends that states give retroactive effect to ECHR measures and remedies and that the Committee of Ministers to prioritize consideration of

judgments that identify structural problems that are responsible for a significant number of repetitive applications in an attempt to solve and dismiss those problems efficiently.[120] The most significant amendment to the European Convention, however, would enable the Committee of Ministers to bring infringement proceedings in the ECHR against any non-compliant state party.[121] These changes implement a concrete set of procedures to overview the implementation of ECHR judgments. Although they do not go as far as the Court of Justice of the African Union and permit the sanctioning of a violating party, a mechanism exists that closely monitors state compliance.[122] The ACJHR should at a minimum have such a monitoring mechanism, but would be more effective in implementing judgments with the threat of sanctions.

d. Inter-American Court of Human Rights

Upon the American Convention on Human Rights' entry into force (hereinafter American Convention), the Organization of American States established the Inter-American Court of Human Rights (hereinafter IACHR) in 1979 to promote and protect human rights in the Convention.[123] Although the Court has successfully adjudicated many human rights cases, its effectiveness is limited because only state parties and the Inter-American Commission on Human Rights (hereinafter Inter-American Commission) can file claims, and its decisions are not binding on state parties.[124] Further weakening the IACHR, state parties can withdraw at any time from the court's already limited jurisdiction.

i. Individual Standing

Unlike the ECHR, private individuals and organizations not have direct standing before the IACHR. Only member states and the Inter-American Commission can submit cases to the Court.[125] As one observer noted, the narrower terms of access explains why the IACHR issued only one-tenth of the judgments that the ECHR gives per year.[126]

Individuals, NGOs, and groups can file claims with the Inter-American Commission, which

can then refer the case to the IACHR, but in practice, such activity is rare. One observer noted the negative effect of the absence of individual standing and the lack of funding for the IACHR as compared to other institutions:

> While the ECHR has eventually become a fundamental institution, much cherished by its constituency for fostering democracy and *individual's* rights and freedoms in Europe, in Latin America the IACHPR is still coping with uneven and erratic support. In 1998, the Inter-American Court's budget was only four percent of that of its European analogue. It had one-tenth of the personnel and no fund to assist claimants to pay the costs of litigation. At the same time, its docket is as crowded as ever.[127] (emphasis added)

In sum, the lack of funding, compounded with its inability to hear individual complaints, makes the IACHR a weak court.

ii. Enforcement

The judgments of the IACHR are final and not subject to appeal.[128] If parties disagree over the meaning or scope of the judgment, the IACHR reserves the right to interpret the judgment at the request of the parties, as long as the request is made ninety days from the judgment.[129] Article 68 of the American Convention requires state parties to comply with the IACHR judgment in any case to which they are parties.[130] Beyond this clause, however, there is no machinery to oversee or ensure states' compliance with the judgments. The American Convention even permits domestic procedures regarding the collection of compensatory damages from a violator state to trump the directions of the IACHR judgment.[131] This clear bow to state sovereignty can preclude one of the most critical forms of justice the IACHR is capable of delivering – the restoration of the victim to the status quo.

Additional problems plague the IACHR. In contrast to the ECHR, where ratification of the 1950 European Convention and its relevant protocols implies state consent to ECHR jurisdiction, states can give piecemeal consent to IACHR jurisdiction.[132] For example, states can give consent either unconditionally or on condition of reciprocity, for a specific period or for specific cases, by

way of a declaration presented to the Secretary General of the Organization of American States (hereinafter OAS).[133] This practice significantly restricts access to and effectiveness of the IACHR in that states can conveniently choose to only participate in those cases it deems politically favorable. Further, several OAS member states do not cooperate with the IACHR - Peru and Trinidad and Tobago went so far as to withdraw from the its jurisdiction.[134] The resulting atmosphere hampers the IACHR's image and effectiveness.

VI. Looking Forward to the new African Court

The application of lessons learned from Europe and the Americas with respect to individual standing and enforcement of judgments will help Africa generate a more effective and efficient Court of Justice and Human Rights. Having looked at the strengths and weakness of other regional judicial systems, this section makes recommendations for the different divisions of the newly merged court.

g. Background on the Merger: Court of Justice and Human Rights

The Assembly of the African Union decided to merge the Court of Justice of the African Union (CJAU) and the African Court of Human and Peoples' Rights (ACHPR) into the Court of Justice and Human Rights of the African Union (CJHR) at the AU Summit in 2004 for their increased effectiveness and to preserve scarce financial resources.[135] In July 2005, the Assembly decided that a single legal instrument would govern the merged courts.[136] The Algerian Minister of Foreign Affairs and the former President of the International Court of Justice, Mr. Mohamed Bedjaoui, is in charge of drafting that instrument.[137] In the 7th AU Summit held in Banjul, the Gambia, the AU Assembly requested the AU Commission and Ministers of Justice further review the Draft Protocol on the Statute of the African Court of Justice and Human Rights and make recommendations to the AU in January 2007.[138]

Unfortunately, the draft protocol contains no language on admissibility of individual petitions or regarding enforcement mechanisms.[139] The lack of a final governing instrument prevents a fully accurate prediction of the CJHR, but because both its predecessor courts require state consent for individual or third party standing, it is reasonable to believe the same requirement will be in force in the new merged court.

Although many questions remain, it seems clear that the new court will separate into a General Affairs Division and a Human Rights Division,[140] mirroring the functions of its predecessor courts, the CJAU and the ACHPR, respectively. Below are proposals to maximize the effectiveness of each division based on the experiences of other regional human rights bodies and their transferability to the African context.

h. Proposals for the General Affairs Division

Comparing the standing and enforcement rules of the CJAU and the ECJ is useful to predict the correct policies for the General Affairs Division of the CJHR, because those courts have a broadly similar mandate in that they handle general matters of regional law and policy regarding social and economic integration.

i. Individual Standing

Noting that the CJAU deals primarily with AU law and policy and the enforcement of various treaties, its restriction on individual standing is understandable because the relevant parties to such disputes generally will be states. The possibility of individual claims should not be precluded, however, as evidenced by the need to file such claims before the ECJ. Indeed, the ECJ recently opened a second autonomous court, the Court of First Instance, to process individual complaints and handle preliminary procedural and factual matters. After a few years of practice, the General Affairs Division could copy this format if needed to make a more efficient and effective system. The general workload of the new court and an estimation of the number of

potential individual petitions, based on instances of alleged individual harm from the violation of AU laws and treaties, would likely indicate whether the installation of an African Court of First Instance is necessary.

ii. Enforcement Mechanisms

The General Affairs Division should keep the strong enforcement mechanisms of the CJAU that permit the implementation of AU sanctions. Actual enforcement of judgments would make the CJHR a substantive body with real world effects, as opposed to other human rights bodies that often fail to implement change in state practice because they lack any legally binding authority.

To help further the important goals of law enforcement and regional integration, the new court should adopt the ECJ principles of direct effect, primacy, and state liability. In practice, if a state fails to implement an ECJ directive or implements it incorrectly, individuals can cite that EC law in a municipal court, and the court will have to then set aside the provision in the national law that conflicts with the EC directive.[141] The same concepts should apply to African states, as such practice firmly ingrains the regional law into domestic law, thus promoting a closer, more integrated union.

Some critics may argue this approach embodies an unacceptable infringement on state sovereignty. These critics would be forgetting the crucial point, however, that the EC member states, much like the AU member states, came together to become a more powerful socially, economically, and politically integrated union. To do so requires at least some sacrifice of state sovereignty, for if each member state of the EC refused to directly apply EC law, or refused to be liable for damages when violating the EC law, the efficacy of the union would be severely diminished – in fact, such an arrangement would not be a union, but a mere list of states that acknowledge each other's presence.

e. <u>Proposals for the Human Rights Division</u>

An analysis of the existing rules of standing and enforcement of the African Court of Human and Peoples' Rights (ACHPR), the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR) is useful to the Human Rights Division of the Court of Justice and Human Rights (CJHR), because all these courts have a similar mandate to protect and promote human rights for their respective continents.

i. Individual Standing

As demonstrated by the relatively high degree of effectiveness of the ECHR compared to the IACHR, removing the barrier to individual standing before the CJHR is fundamental to the protection of human rights in Africa. The new court should not mirror the pre-Protocol 9 procedures of the ECHR requiring state consent to individual, but adopt the newer ones, such as Article 34 that provide for individual standing. The drafters of the protocol governing the new court should take advantage of the decades of experience of the ECHR, which has continuously re-drafted its rules to maximize effectiveness in promoting and protecting human rights in an increasingly large jurisdiction.

The last clause of Protocol 14 limiting the ECHR consideration cases to those instances where the applicant has suffered a "significant harm" should not be repeated in the new African Court because it gives the judge too much discretion to limit the admissibility of cases. What criteria determine a 'significant' human rights abuse versus an insignificant one, and why should one deserve adjudication and not the other? In an important due process case in the United States, the U.S. Supreme Court ruled that judicial economy and government efficiency are insufficient reasons to deny someone a hearing and an opportunity to be heard when the government is alleged to have deprived that person of life, liberty, or property.[142] Similarly, the Human Rights Division should not deprive an individual applicant the right to be heard when alleging violations of human

rights. This opportunity is particularly important when the state vidates the individuals' rights and cannot give a fair trial or an opportunity to be heard. In such cases, the new court may be the only source for these applicants to seek legal redress.

ii. Enforcement Mechanisms

The new court should keep the enforcement mechanisms of the ACPHR, such as the ordering of fair compensation and the flexibility of judgments in extreme situations. This practice gives victims the redress sought and permits non-traditional or non-economic remedies when relevant.

Due to the fact that the protocol for the ACHPR currently puts the onus on states to enforce judgments, the CJHR should adopt two of the main principles used the ECJ, namely direct effect and state liability. Direct effect and state liability together will help instill CJHR law into member states while holding them responsible for non-compliance or misapplication of CJHR law. Adopting the ECJ's third main principle of primacy would be problematic because having two divisions with primacy would invariably lead to contradictory law and confusion among member states.

The Human Rights Division can also learn the best avenue forward by examining some of the shortfalls of the other regional human rights bodies. For example, the IACHR has no effective oversight or enforcement mechanisms to ensure state compliance with its judgments. As mentioned previously, the American Convention allows domestic procedures regarding the collection of compensatory damages from a violator government to trump the Court's judgment.[143] While the ECHR goes one step further and permits the Committee of Ministers to closely review the implementation of the ECHR directive, the domestic legal system still governs the implementation of that directive. Both the IACHR and the ECHR's bow to state sovereignty in

implementing judgments can preclude the restoration of the victim to the status quo and therefore should not be included in the new CJHR protocol. Adopting the more strict enforcement measures of Protocol 14 to the European Convention, such as the oversight and referral powers of the Committee of Ministers, would increase the CJHR's effectiveness.

Another practice the Human Rights Division should avoid is the piecemeal consent to IACHR jurisdiction, in contrast to the European Convention and its relevant protocols, which imply unlimited state consent to ECHR jurisdiction.[144] As noted earlier, the former practice decreases a court's effectiveness because states canchose not to participate in those cases it deems politically inconvenient, or states can withdraw from the court's jurisdiction altogether. The protocol governing the CJHR should make it clear that ratification embodies the state's complete consent to CJHR jurisdiction.

f. Proposals for Both the Human Rights and General Affiars Divisions

With respect to third party standing, the admission of amicus curiae briefs before both the ECHR and the IACHR resulted in a broader range of arguments before these courts, which further develops their jurisprudence.[145] Accordingly, third party standing before the international courts can benefit the development of international law itself and should be encouraged at the CJHR.

To further increase its effectiveness, the CJHR should maintain the ACHPR's ability to shame non-compliant member states, as well as the provision requiring final judgment to be rendered within ninety days of the end of deliberations – two mechanisms that promote the importance and the finality of judgment, thus increasing respect for the rule of law.

When relevant, both divisions should require the protection of parties appearing before the court – an important provision to ensure the safety and integrity of witness testimony. A court cannot function without ensuring the safety of witnesses, as they are often a primary source of

evidence in human rights cases.

Lastly, the new CJHR protocol should relax the provision requiring the exhaustion of local remedies and consider the importance and relevance of this requirement on a case-by-case basis. As mentioned earlier, the lack of infrastructure, lack of an independent judiciary, or the presence of active conflict can all result in the inability of an individual to utilize local remedies in many African states. A good faith effort should be sufficient in most instances to satisfy this requirement in cases where the petitioner, whether state or individual, is too poor to pursue all available local remedies.

IX. Analysis of Counter-Arguments

Given the CJHR's potential to significantly impact a broad range of African individuals, communities, and governments, arguments against the purpose and reach of the new court will undoubtedly arise. Below is an analysis of the main counter-arguments against the standing and enforcement mechanisms advocated in the previous section – namely, the defense of state sovereignty, African cultures' focus on community over individuality, and the widespread poverty that might prevent popular participation in the new court.

g. Problem: Citing concerns of state sovereignty, state will resist consenting to individual standing and strong enforcing mechanisms.

Historically, African states have been reluctant to relinquish any of their sovereignty because many of them fought long and hard to win it from colonial regimes. After recognizing that the OAU Charter emphasizes the importance of state "sovereignty. . . territorial integrity, and independence," one scholar notes that these principles were "essential in order to consolidate African states' hard-won independence and struggle against neo-colonialism in all its forms."[146]

The principle of non-intervention, enshrined in Article III(2) of the OAU Charter, underscores the importance of defending the sovereignty and independence of African states.[147]

Although this defensive mentality is understandable, it is ironically the respect for state sovereignty that poses the biggest threat to the effectiveness of the CJHR, especially with respect to permitting individuals to file claims and enforcing judgments. States object to strong language regarding these two principles because it exposes them to liability. The words of Thomas Buergenthal encapsulate the tension between state sovereignty and the progressive recognition of individual rights in international law:

> [T]he acceptance of the notion that individuals have rights enforceable on the international plane without the intervention of their state of nationality [has] played havoc with certain basic international law principles and assumptions. A legal system developed over centuries to regulate relations between states must make considerable conceptual adjustments to accommodate the extension of its normative reach to individuals.[148]

Notwithstanding the importance of state sovereignty, a general trend has developed in the international community over the past few decades toward the acceptance of fundamental, non-derogable human rights. The Universal Declaration of Human Rights may have been the catalyst for this movement, the important components of which include the various international human rights courts and commissions discussed earlier, the evolving human rights machinery at the United Nations (not least of which is the newly established Human Rights Council), and the considerable increase in the breadth and number of international human rights treaty bodies (CEDAW, UNCAT, ICCPR, CERD). Additionally, there is a growing trend of eroding state sovereignty to promote the prosecution of war crimes and crimes against humanity, as demonstrated by the increasing number of international criminal tribunals, hybrid war crimes tribunals, and the establishment of a permanent International Criminal Court in The Hague.[149]

Indeed, the twenty-eight African states who ratified the Rome Statute of the ICC

consequently surrendered some sovereignty to that court.[150] Although the ICC respects the fundamental principle of complimentarity,[151] these states have indirectly exposed their citizens to criminal prosecution in the event that state is unwilling or unable to investigate or prosecute the alleged crimes.[152] Because the target of investigations of abuses of human rights and humanitarian law are often government leaders themselves, it makes sense for them not to expose themselves to liability when they are not obligated to do so. Fear of liability is a primary reason why some states refuse to become members of the ICC or the ACJHR.

Although the ICC does not permit individuals to bring claims, it does allow for individuals and organizations to suggest cases to the ICC Prosecutor for investigation, after which the Prosecutor may initiate an investigation that leads to a criminal prosecution.[153] The bulk of the ICC Prosecutor's investigatory work takes place in Africa, with three active investigations (Sudan, Uganda, and the Democratic Republic of the Congo) and an intensive analysis of two other situations (Ivory Coast and the Central African Republic).[154] The extent of the abuses of human rights and humanitarian law, as well as the limited judicial capacity of these states likely motivated the Prosecutor's decisions. If given the tools to operate effectively, the new CJHR will be able to replace or at least complement the jurisdictional reach of the ICC in Africa.

Further, those states that ratified the Banjul Charter have notice of the possibility that they will face investigations and inquiries for their illegal acts through the African Commission.[155] Member states have therefore already relinquished some sovereignty with respect to the investigation of human rights abuses.

h. Problem: Given many African societies' emphasis on community and peoples' rights, there will be cultural resistance to individual standing because it does not address situations of group harm.

Although the African focus on community is highly relevant to the complaints before the new court, there are several reasons why it should not prevent individuals from filing claims. First,

the Banjul Charter emphasizes both individual[156] and peoples'[157] rights, thus a focus on one over the other is not necessarily an impediment to justice in the African context.

Second, class actions can be filed that benefit both the group and the individual. This method is encouraged to promote the greater accountability of perpetrators, as well as an increased sense of justice among the victims. Another benefit of class actions is that they tend to affect policy changes and therefore impact communities on a greater scale than a judgment in one individual's case. Similarly, the ECHR's use of general measures demonstrates that an individual application can result in broad changes to law, policy, and regulations, that can remedy the suffering of a group of similarly-situated people.

Third, regional practice indicates a broad acceptance of the notion of an individual's right to access courts directly, as evidenced by the practice of the Economic Community of West African States, the Tribunal of the Southern African Development Community, the Court of Justice of the West African Economic and Monetary Union, the COMESA Court of Justice, and the Court of Justice of the East African Community.[158]

Despite the high value of family and community in many African cultures, these important considerations should not preclude the right of the individual to seek legal redress if he or she chooses to do so.

i. Problem: The high poverty rate on the continent will prevent many individuals from bringing claims.

Just because an impoverished farmer might not be able to bring a human rights claim against his own government does not mean that this option should not be available. There are instances in the past where NGOs have acted on behalf of individuals to file claims before regional human rights bodies.[159]

In fact, many scholars have called for the CJHR to establish a legal aid program to comply with article 10(2) of the Protocol establishing the African Court of Human and Peoples' Rights,

which requires "[a]ny party to a case shall be entitled to be represented by a legal representative of the party's choice. Free legal representation may be provided where the interests of justice so require." A liberal interpretation of this clause could result in the establishment of a legal aid office with permanent staff and the ability to utilize pro bono assistance from attorneys from across the world. Ideally, such an office would overcome the most significant barrier to a poor man's filing of a lawsuit: legal fees.

One problem is that states are not required to provide counsel for their indigent citizens before the ACHPR. Article 7(c) of the Banjul Charter, however, gives every individual "the right to defence, including the right to be defended by counsel of his choice."[160] Perhaps an early precedent-setting case before the CJHR could apply this article from the Banjul Charter to require legal aid attorneys for indigent individuals in all cases, similar to the effect of *Gideon v. Wainwright* on criminal defendants in the United States.[161]

X. Conclusion

As one scholar notes, "The supreme test of any international human rights program is, of course, the good that it actually does for individuals."[162] In order for the new African Court of Justice and Human Rights to be a useful and effective forum for individuals to voice their claims, it must first allow those claims to be filed, and second, utilize strong enforcement mechanisms to ensure state liability and reinforce the binding nature of its decisions.

The main obstacles to effectiveness in the African system is that most states, especially those that commit widespread human rights abuses, will likely not consent to individual standing before the ACJHR, nor will they impose strong enforcement mechanisms for its judgments. Although some states will fear the erosion of state sovereignty at the CJHR, South African President Thabo Mbeki offered a good reply to these concerns in a 2003 speech:

> [B]ecause of our interdependence and indeed because we share a common destiny, we have to agree that we cannot be ruled by a doctrine of absolute national sovereignty. We should not allow the fact of the independence of each one of our countries turn us into spectators when crimes against the people are being committed . . . … we will have to proceed from the position that we are each our brothers and sisters keeper.[163]

This profound quotation addresses the fundamental obstacles facing the CJHR and the reasons why it should permit individual standing and strong enforcement mechanisms – so that respect for state sovereignty does not engender complicity to massive abuses of human rights and humanitarian law, as is arguably the case in Darfur. Notably, Mbeki reiterated that "[n]ational sovereignty can no longer be used as a cover for gross abuse," adding that new institutions of continental governance present 'a sound basis to stop these violations.'"[164]

The central problem with the protocols governing the two predecessors to the CJHR is the requirement that the violator states consent to individuals and NGOs bringing claims before the court while simultaneously relying on the state to enforce the judgment. This over-reliance on the state is adequate in cases where states respect the court and international law in general, but these states are generally not the ones committing large-scale human rights abuses. Rogue states like Sudan and Zimbabwe, on the other hand, have leaders that consistently snub international law and the international community in general. It is unrealistic, therefore, to assume that the CJHR will be able to address the needs of the most vulnerable people living under the most brutal regimes. For this reason, the newly merged court must include provisions that permit individuals to file claims, as well as improved enforcement mechanisms.

[1] Exceptions to this impunity include the criminal trials at the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and just recently, the International Criminal Court. There remain, however, several high-intensity conflicts and instances of human rights abuses in Africa where no parties have been held accountable.

[2] For a detailed explanation of customary international law, the violations of which can be the basis of individual claims before the Court of Justice of the African Union and the African Court for Human and Peoples' Rights, see Jean-Marie Henckaerts and Louise Doswald-Beck, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (International Committee for the Red Cross and Cambridge University Press, 2005).

[3] *See* Howard M. French, *Anatomy of an Autocracy: Mobutu's 32-Year Reign*, N.Y. TIMES, May 17, 1997, *available at* http://partners.nytimes.com/library/world/africa/051797zaire-mobutu.html (describing the autocratic reign of Mobutu Sese Seko).

[4] *See* Ethan Bronner, *The Obscenely Easy Exile of Idi Amin*, N.Y. TIMES, Aug. 19, 2003, *available at* http://www.globalpolicy.org/intljustice/icc/2003/0819amin.htm (noting Idi Amin's gross human rights violations).

[5] *See* Human Rights Watch, *The Case Against Hissène Habré, "an African Pinochet,"* May 2006, *available at* http://hrw.org/english/docs/2005/09/30/chad11786.htm (estimating Habré's responsibility for 40,000 political murders and noting the existence of government documentation that describes serious violations of over 12,000 citizens' human rights, including ethnic cleansing).

[6] *See generally* Amnesty International, *Mauritania: A Future Free From Slavery*, Nov. 7, 2002, *available at* http://web.amnesty.org/library/index/engafr380032002 (noting Sid Taya's denial of the existence of slavery under his rule, despite the "extensive human rights concerns in Mauritania which arise from slavery").

[7] *See* BBC Online, *Soyinka urges Zimbabwe Sanctions*, http://news.bbc.co.uk/2/hi/africa/4703021.stm (last visited Dec. 2, 2006) (discussing Mugabe's poor human rights record in general and the government-sponsored demolition of 200,000 slum dwellings in Zimbabwe's cities).

[8] *See generally* Human Rights Watch, *Crisis in Darfur*, http://www.hrw.org/doc?t=africa&c=darfur (last visited Dec. 2, 2006) (containing several reports that detail the Sudanese government's complicity in war crimes and crimes against humanity through its support of the Janjaweed militias).

[9] Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late than Never,* 3 HUM. RTS. & DEV. L.J. 45, 50-51 (Yale 2000).

[10] Id. at 51-52.

[11] Id. at 53.

[12] Id.

[13] *See generally* Laurence Juma, *Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for*

Tradition in African Peace Initiatives, 13 Mich. St. J. Int'l L 417 (2005) (arguing for the increased use of traditional African peacebuilding structures to resolve African conflicts).

[14] *See generally* Government of Rwanda, *National Service of Gacaca Jurisdictions*, http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm (last visited Dec. 2, 2006) (providing an overview of the purpose and function of the Gacaca Courts in Rwanda which use traditional models of justice to hold participants in the 1994 genocide accountable for their actions).

[15] *See generally* United States Institute for Peace, Truth Commissions Digital Collection, http://www.usip.org/library/truth.html (last visited Dec. 2, 2006) (describing truth and reconciliation commissions around the world).

[16] *See* Nicholas J. Leddy, *The United Nations Faces Challenges to Effective Action in Darfur,* 13 No. 3 Hum. Rts. Brief 59, 60 (2006) (noting that as of December 2005, the Special Court for Darfur tried only twenty-six people, mostly low-level members the armed forces and civilians, for crimes such as armed robbery and possession of a firearm without a license, despite the deaths of an estimated 400,000 people at the hands of government-sponsored forces) *available at* http://www.wcl.american.edu/hrbrief/13/133.pdf?rd=1.

[17] African Charter of Human and Peoples' Rights, art. 7(1), adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [hereinafter Banjul Charter], *available at* **http://www.achpr.org/english/_info/charter_en.html**.

[18] Id.

[19] For a list of the dates when states signed and ratified the Banjul Charter, see http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf.

[20] Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter*, 40 Stan. J. Int'l L. 105, 112-118 (2004).

[21] Banjul Charter, *supra* note 17, art. 27-29; *see also* Udombana, *supra* note *9*, at 61.

[22] *See* List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on Protocol to the Africa Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (noting that 48 of the 53 AU states signed the protocol, and 23 ratified it) *available at http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf*.

[23] Project on International Courts and Tribunals, *African International Courts and Tribunal: African Court of Human and Peoples' Rights*, New York University, http://www.aict-

ctia.org/courts_conti/achpr/achpr_home.html (last visited Dec. 4, 2006).

[24] Banjul Charter, *supra* note 17, art. 30.

[25] Id. at art. 31.

[26] Id. at art. 36.

[27] Id. at art. 45.

[28] Id. at art. 55.

[29] Id. at art. 56(1)-(4).

[30] Id. at art. 56(5)-(7).

[31] *See* Deon Geldenhuys, *Brothers as Keepers: Africa's New Sovereignty Regime*, Strategic Review for Southern Africa (University of Pretoria, Institute for Strategic Studies) May 1, 2006, at sec. 3.2.7. (describing the Commission as "ineffectual" over its eighteen year existence).

[32] Constitutive Act of the African Union, art. 18, July 11, 2000. OAU Doc. CAB/LEG/23.15, *entered into force* May 26, 2001 [hereinafter Constitutive Act] *available at* http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm.

[33] Protocol of the Court of Justice of the African Union, art. 60, July 11, 2003 (not yet entered into force) [hereinafter CJAU Protocol] *available at* http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm.

[34] *See* List of Countries Which Have Signed, and Ratified/Acceded to the African Union Convention on Protocol of the Court of Justice of the African Union, *available at* http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm (indicating that only Comoros, Egypt, Lesotho, Libya, Mali, Mauritius, Mozambique, Niger, Rwanda, South Africa, Sudan, and Tanzania ratified this protocol).

[35] CJAU Protocol, *supra* note 33, art. 19(a)-(e).

[36] Id. at art. 19(f)(g).

[37] Id. at art.18(2).

[38] Id. at art. 18 (permitting the following to submit cases to the Court: "(a) States Parties to this Protocol; (b) The Assembly, the Parliament and other organs of the Union authorised by the Assembly; (c) The Commission or a member of staff of the Commission in a dispute between them within the limits and under the conditions laid down in the Staff Rules and Regulations of the Union; (d) Third Parties under conditions to be determined by the Assembly and with the consent of the State Party concerned.")

[39] Id. at art.18(2).

[40] Id. at art.18(1)(d).

[41] Id. at art.18(2).

[42] Id. at art.18(3).

[43] Id. at art. 51.

[44] Id. at art.52.

[45] List of Countries which have Signed,Ratified/Acceded to the African Union Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *available at* http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm.

[46] *Executive Council Decision on the Election of Judges of the African Court on Human and Peoples' Rights*. Decision 261. Eighth Ordinary Session Jan. 2006. Khartoum, Sudan.

[47] Open Society Institute Justice Initiative, *African Human Rights Court Judges Sworn In*, July 17, 2006, http://www.justiceinitiative.org/db/resource2?res_id=103299.

[48] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 3(1), June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) [hereinafter ACHPR Protocol], *available at* http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm.

[49] Id. at art. 7.

[50] *See* List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (listing the following state parties as having ratified the protocol: Algeria, Burkina Faso, Burundi, Cote D'Ivoire, Comoros, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, and Uganda) *available at* http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf.

[51] Udombana, *supra* note 9, at 87-88.

[52] ACHPR Protocol, *supra* note 48, at art. 5.

[53] Id. at art. 5(2).

[54] Id. at art. 5(3).

[55] Id. at art. 34(6).

[56] Amnesty International, *Public Statement to the African Commission on Human and Peoples' Rights: Oral statement on Item 11: The Establishment of the African Court on Human and Peoples' Rights*, Nov. 23, 2005, *available at* http://web.amnesty.org/library/index/engior100052005.

[57] ACHPR Protocol, *supra* note 48, at art. 10(3).

[58] Banjul Charter, *supra* note 17, at art. 56(5).

[59] ACHPR Protocol, *supra* note 48, at art. 27(1).

[60] Id. at Art. 27(2).

[61] Udombana, *supra* note 9, at 94.

[62] Id.

[63] ACHPR Protocol, *supra* note 48, at art. 28(2).

[64] Id. at art. 30.

[65] Id. at art. 31.

[66] *See* Deon Geldenhuys, *Brothers as Keepers: Africa's New Sovereignty Regime*, Strategic Review for Southern Africa (University of Pretoria, Institute for Strategic Studies), May 1, 2006 (noting the massive donor assistance for NEPAD is conditional on good governance and greater accountability through peer review mechanisms).

[67] Constitutive Act, *supra* note 32, at art. 9.

[68] Id. at art. 23(2).

[69] ACHPR Protocol, *supra* note 48, at art. 28(1).

[70] Id. at art. 28(2)-(3).

[71] Id. at art. 4(1).

[72] *See generally* Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons From the European and Inter-American Courts of Human Rights*, 43 (2) JOURNAL OF AFRICAN LAW 201 (1999).

[73] Udombana, *supra* note 9, at 76.

[74] European Navigator, *The Court of Justice and the Court of First Instance of the European Communities, available at* http://www.ena.lu/mce.cfm (last visited Nov. 26, 2006).

[75] Id.

[76] Id.

[77] Carl Baudenbacher, *Judicialization: Can the European Model be Exported to Other Parts of the World?*, 39 TEX. INT'L L.J. 382, 387 (2004).

[78] Treaty Establishing the European Community, art. 234, Nov. 10, 1997, O.J. (C 340) 3 [hereinafter EC Treaty].

[79] Baudenbacher, *supra* note 77, at 387.

[80] Id.

[81] EC Treaty, *supra* note 78, art. 230.

[82] Id.

[83] *See* Case C-50/00, Uniun de Pequenos Agricultores v. Council, 2002 E.C.R. I-6677, [2002] 3 C.M.L.R. 1 (2002); Case T-177/01, Jego-Quere & Cie SA v. Commission, 2002 E.C.R. II-2365, [2002] C.M.L.R. 44 (2002), *as cited in* Baudenbacher, *supra* note 77, at n. 33.

[84] Baudenbacher, *supra* note 77, at 391.

[85] Id.

[86] Id.

[87] Id.

[88] *See* Clemens Rieder, *Protecting Human Rights Within the European Union: Who is Better Qualified to Do the Job – the European Court of Justice or the European Court of Human Rights?* 20 TUL. EUR. & CIV. L.F. 73, 76 (2005) (noting that the ECJ now sees itself as a court "determined to preserve the *integrity, unity,* and *uniformity* of the system it had evolved" and that the doctrine of primacy is fundamental to the uniformity of EU law and ECJ's smooth functioning (quoting Joseph H.H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1118-19 (1986))) (emphasis in original).

[89] *See* Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting From the Expanding Case Load and Membership*, 21 PENN STATE INT'L L. REV. 101, 105 (2002) (noting that the ECHR has the fundamental role of infusing "national legal systems with the democratic values and the legal principles of the Convention and helps to ensure that Conventions standards are implemented in everyday practice" (quoting the Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, p. 8, EG Court (2001)1 Council of Europe (Sept. 27, 2001))).

[90] European Court of Human Rights, *Historical Background,* http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/.

[91] A. Glen Mower, Jr., *The Effectiveness of an International Human Rights Program*, INTERNATIONAL ORGANIZATION Vol. 29, n, 2, p. 546 (1975) (noting that the ECHR ruled in favor of the plaintiff in five of the ten cases before it between 1959 and 1972).

[92] European Court of Human Rights, *Historical Background,* http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/.

[93] Id.

[94] Id.

[95] Id.

[96] Id.

[97] Council of Europe, Committee of Ministers, *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, Apr. 10, 2005, at 2 [hereinafter *Explanatory Report*] (noting that " . . . between the opening of Protocol No. 11 for signature in May 1994 and the adoption of Protocol No. 14, thirteen new States Parties ratified the Convention, extending the protection of its provisions to over 240 million additional individuals.") *available at* http://www.echr.coe.int/NR/rdonlyres/1EC62EF1-E72F-4B6A-976C-

7CBB22CFCAC8/0/Protocol14Explanatory.pdf.

[98] European Court of Human Rights, *Historical Background,* http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/.

[99] Council of Europe, *List of Signatures and Ratifications to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, CETS No.: 194, *available at* http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=8&CL=ENG.

[100] *Explanatory Report, supra* note 97, at 4.

[101] International Federation for Human Rights, *10 Keys To Understand And Use The African Court On Human And Peoples' Rights: A User's Guide for Victims of Human Rights Violations in Africa and Human Rights Defenders* 82 (November 2004), *available at* http://www.fidh.org/IMG/pdf/COUR_AF_ANGLcadre.pdf

[102] Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, art. 12, ETS No. 194, opened for signature May 13, 2004 (not yet entered into force) [hereinafter Protocol 14] *available at* http://www.echr.coe.int/NR/rdonlyres/D62AC993-3D21-4CB7-BA5A-D5ED5ED73640/0/Protocol14.pdf.

[103] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 36, ETS 005 (entered into force 1953) [hereinafter European Convention] *available at* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm.

[104] Id. at art. 36(1).

[105] Id.

[106] Id. at 46(1).

[107] Council of Europe, *Execution of Judgments of the European Court of Human Rights*, http://www.coe.int/T/E/Human_rights/execution/01_Introduction/01_Introduction.asp#TopOfPage (last visited Dec. 2, 2006) [hereinafter *Execution of Judgments*].

[108] Id.

[109] Id.

[110] *Scozzari and Giunta v. Italy* ([GC] nos. 39221/98 and 41963/98, ECHR 2000-VIII).

[111] Baudenbacher, *supra* note 77, at 391.

[112] Id.

[113] *See* Rieder, *supra* note 88, at 100 (noting that there is no "schematic way" of enforcing ECHR decisions and that national courts have a considerable amount of discretional power in enforcement).

[114] Baudenbacher, *supra* note 77, at 391.

[115] Russia's hesitancy to ratify Protocol 14 probably stems from the fact that in 2003, there were more complaints against Russia than any other state. Russian Justice Initiative, *Russia and the ECHR*, http://www.srji.org/en/echr/russia/ (last visited Dec. 4, 2006). Also, over 200 cases on alleged Russian military abuses in Chechnya are before the ECHR in 2006. David McDuff, *A Step at a Time: Russia Guilty in ECHR Case*, July 27, 2006, http://halldor2.blogspot.com/2006/07/russia-guilty-in-echr-case.html (last visited Dec. 4, 2006).

[116] Protocol 14, *supra* note 102, at art. 16.

[117] Id.

[118] Id.

[119] Execution of Judgments, *supra* note 107.

[120] *Explanatory Report*, *supra* note 97, at p. 4.

[121] Id.

[122] *See e.g. Council of Europe,* Cases Pending for Supervision of Execution as Appearing in the Annotated Agendas of the Committee of Ministers' Human Rights Meetings and Decisions Taken (Sections 2, 3, 4 and 5) (detailing in over 230 pages the exact steps the Committee of Ministers has taken to oversee state compliance with the individual and general measures in ECHR judgments), *available at* http://www.coe.int/t/e/human_rights/execution/02_Documents/PPcasesExecution.asp#TopOfPage.

[123] Christine M. Cerna, *The Inter-American Court of Human Rights*, in Mark W. Janis, International Courts for the Twenty-First Century, 117, 117 (Brill 1992).

[124] American Convention on Human Rights, art. 61-62, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992) [hereinafter American Convention].

[125] Id. at art. 61.

[126] Project on International Courts and Tribunals, *Inter-American Court of Human Rights*, New York University, *available at* http://www.pict-pcti.org/courts/IACHR.html (last visited Nov. 28, 2006).

[127] Id.

[128] American Convention, *supra* note 124, at art. 67.

[129] Id.

[130] Id. at art. 68(1).

[131] Id. at art. 68(2).

[132] Project on International Courts and Tribunals (PICT), *Inter-American Court of Human Rights*, New York University, *available at* http://www.pict-pcti.org/courts/IACHR.html (last visited Nov. 28, 2006).

[133] American Convention, *supra* note 124, at art. 62.

[134] Project on International Courts and Tribunals (PICT), *Inter-American Court of Human Rights*, New

York University, *available at* http://www.pict-pcti.org/courts/IACHR.html (last visited Nov. 28, 2006).

[135] Decision on the Seats of the African Union, Assembly/AU/Dec.45 (III), Third Ordinary Session of the Assembly of the African Union, July 2004, *signed in* Addis Ababa, Ethiopia.

[136] Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec.83(V), Fifth Ordinary Session of theAssembly of the African Union, July 4-5, 2005, *signed in* Sirte, Libya.

[137] Id.

[138] Decision on the Draft Single Instrument on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec.118(VII), Seventh Ordinary Session of the Assembly of the African Union, July 2006, *signed in* Banjul, the Gambia.

[139] Draft Protocol on the Integration of the African Court of Human and Peoples' Rights and the Court of Justice of the African Union, EX.CL/195 (VII) Annex I**,** *signed in* Sirte, Libya, July 2005 [hereinafter Draft Protocol], *available at* http://www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/au/sirtejul05/protcourts.pdf. One observer noted that the AU likely will fund the new African human rights court, and that a member states' failure to pay dues should result in a loss of privileges. Jacob Lilly, *Peace with Justice: Options for Bringing to Trial Human Rights Violators in Africa and a Proposed Solution to Cover the Gap in Enforcement Mechanisms Between International Criminal Law and Human Rights Violations,* 6 GONZ. J. INT'L L. 1 (2002-03). Such an enforcement mechanism may be a good incentive, but may also unduly punish those states that are honestly too poor to pay the dues.

[140] *See generally* Draft Protocol, *supra* note 139 (proposing that the new court be split into a Human and Peoples' Rights Division and another general division); *see also* Coalition for an Effective African Court on Human and Peoples' Rights, *Submission on the Single Legal Instrument Relating to the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union*, Mar. 28, 2006, *available at* http://www.africancourtcoalition.org/eng_latest_new.html (noting the likely split of the new court into a human rights section and a general affairs section).

[141] Baudenbacher, *supra* note 77, at 390.

[142] Matthews v. Eldridge, 424 U.S. 319 (1976).

[143] American Convention, *supra* note 124, at art. 68(2).

[144] Project on International Courts and Tribunals, *Inter-American Court of Human Rights*, New York University, *available at* http://www.pict-pcti.org/courts/IACHR.html (last visited Nov. 28, 2006).

[145] *See generally* Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, 8 MSU-DCL J. INT'L L. 377 (1999) (noting that the submission of

amicus curiae from NGOs and private organizations often enable the courts to make a more informed judgment and administer justice more precisely).

[146] Udombana, *supra* note 9, at 56. For an explanation of a history of the influence state sovereignty, see Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?* 31 N.Y.U. J. Int'l L. & Pol. 753 (1998-99).

[147] Charter of the Organization of African Unity, art. III(2), 479 U.N.T.S. 39, *entered into force* Sept. 13, 1963.

[148] Thomas Buergenthal, The Advisory Practice of the Inter-American Human Rights Court, 79 Am. J. Int'l L. 1, 15 (1985), *as cited in* Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights,* 8 MSU-DCL J. Int'l L. 377, 393 (1999).

[149] Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. Int'l L. & Pol. 417 (1998-1999).

[150] Coalition for the International Criminal Court, *State Parties to the Rome Statute of the ICC*, Nov. 1, 2006, http://www.iccnow.org/documents/RATIFICATIONSbyRegion.pdf (last visited Dec. 4, 2006).

[151] *See* Office of the Prosecutor of the International Criminal Court, "The Principle of Complimentarity" *available at* http://www.icc-cpi.int/organs/otp.html (noting that "[t]he Preamble of the Rome Statute recognises that the Court itself is but a last resort for bringing justice to the victims of genocide, war crimes, and crimes against humanity. It therefore calls upon all States to take measures at the national level and enhance international co-operation to put an end to impunity, and reminds States of their duty to exercise criminal jurisdiction over those responsible for such crimes. Thus, the Rome Statute assigns the Court a role that is complementary to national systems. Emphasising the primary responsibility of States to investigate and prosecute international crimes, the Statute provides that a case is inadmissible before the Court where the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. The Chief Prosecutor is obliged to consider this requirement of the Statute when deciding whether or not to start an investigation.")

[152] Rome State of the International Criminal Court, art. 17, UN Doc. A/CONF. 183/9 (1998) (signed in Rome, Italy on July 17, 1998) (entered into force April 11, 2002).

[153] Id. at art. 13, 15, 17-19.

[154] Office of the Prosecutor of the International Criminal Court, *Update on Communications Received by the Office of the Prosecutor of the ICC*, Feb. 10, 2006, *available at* http://www.icc-cpi.int/organs/otp/otp_com.html.

[155] Banjul Charter, *supra* note 17.

[156] Id. at art. 1-17.

[157] Id. at art. 18.

[158] *See generally* Project on International Courts and Tribunals, *African International Courts and Tribunals*, New York University, *available at* http://www.aict-ctia.org/index.html (last visited Dec. 4, 2006) (including information on individual standing before these courts); *see also* Economic Community of West African States Protocol on the Community Court of Justice, art. 23, Protocol A/P1/7/91, July 6, 1991, *signed in* Abuja, Nigeria (entered into force on Nov. 5, 1996); Southern African Development Community Protocol on the Tribunal and Rules of Procedure Thereof, art. 15, *available at* http://www.sadc.int/english/documents/legal/protocols/tribunal.php.

[159] The Institute for Development and Human Rights in Africa assists individual and NGO litigants prepare their claims before the African Commission on Human and Peoples' Rights. Also, the International Human Rights Clinic at the Washington College of Law assists individuals bringing claims before the Inter-American Commission on Human Rights and the African Commission on Human Rights.

[160] Banjul Charter, *supra* note 17, at art. 7(c).

[161] Gideon v. Wainright, 372 U.S. 335 (1963).

[162] A. Glen Mower, Jr. *The Effectiveness of an International Human Rights Program*, INTERNATIONAL ORGANIZATION Vol. 29, n, 2, p. 545-556 (1975).

[163] Thabo Mbeki, President of South Africa, "Guardian" Lecture to the Nigerian Institute of International Affairs, Lagos, Nigeria, (Dec. 4, 2003), p.3, *available at* http://0-biblioonline.nisc.com/raulib.ac.za, *as cited in* Deon Geldenhuys, *Brothers as Keepers: Africa's New Sovereignty Regime*, Strategic Review for Southern Africa (University of Pretoria, Institute for Strategic Studies) May 1, 2006.

[164] This Day (Johannesburg), Nov. 24, 2003, as cited in Deon Geldenhuys, *Brothers as Keepers: Africa's New Sovereignty Regime*, Strategic Review for Southern Africa (University of Pretoria, Institute for Strategic Studies) May 1, 2006.