

Access to the African Court on Human and Peoples' Rights: A Case of the Poacher turned Gamekeeper

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Abstract

The last two decades have witnessed significant advances in the human rights landscape in Africa. The period has witnessed a modest though steady growth of human rights, reflected in the growth of norms and institutions for the protection and promotion of human rights in the continent. A recent entrant to the growing institutional edifice, the African Court on Human and Peoples' Rights, stands out in particular.

Although an invaluable addition to the machinery for the protection of human rights, the restrictive access to the Court may undermine the utility of the Court. Under the Protocol establishing the Court, States Parties have automatic access to the Court, whereas individuals and non-governmental organizations (NGOs) can only institute cases before it if the State Party concerned makes a declaration accepting the competence of the Court to receive such cases. Even so, the Court still has discretion to receive such cases. This scheme of access to the Court defies the primary *raison d'être* of international human rights law, namely to protect the individual or groups against inimical conduct of the state. Moreover, states have no incentive to refer human rights cases to international human rights tribunals. Put more bluntly, to rely on the 'predatory' state to institute cases before the African Court may well be a case of the poacher turned gamekeeper.

1. Introduction

The adoption of the African Charter on Human and Peoples' Rights¹ marked a watershed in Africa's history. Adopted at a time when most African states were either authoritarian or simulations of democracy,² the move signaled a fresh start for the human rights project in the continent. Over the last two decades following the entry into force of the Charter, significant progress has been registered in the human rights landscape in Africa. The period has witnessed a modest albeit steady development of human rights, reflected in the growth of norms and institutions for human rights protection and promotion.³ Of these

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¹ African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 Oct. 1986, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, hereinafter the African Charter or the Charter.

² See R. Cohen et al., *Human Rights and Governance in Africa* (Gainesville, Florida: University Press of Florida, 1993.)

³ At the normative level, regional instruments and principles have been adopted under the aegis of African organizations to strengthen the legal framework for the protection and promotion of human rights. These include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, entered into force 25 Nov. 2005; African Charter on the Rights and Welfare of the Child,

developments, the establishment of an African Court on Human and Peoples' Rights⁴ stands out in particular.

Without doubt, the establishment of this Court is a significant advance in the institutionalization of human rights in Africa. Through its advisory and contentious jurisdiction,⁵ the Court comes with the prospect of strengthening the African human rights system and ensuring the protection and fulfillment of fundamental rights and duties in the continent. Yet others have cautioned that the establishment of the Court is by no means a panacea to the normative and institutional pitfalls of the African human rights system,⁶ and the African Commission on Human and Peoples' Rights,⁷ whose functions the Court is mandated to 'complement and reinforce'.⁸ A particular concern has been the restricted direct access of individuals to the Court.⁹

Under Article 5(1) of the African Protocol, only the Commission, States Parties and African Intergovernmental Organizations have automatic access to the Court. In contrast, the Court has the discretion to allow relevant NGOs with observer status with the African Commission and individuals to institute cases directly before it,¹⁰ provided that the state concerned makes a declaration accepting the competence of the Court to receive such cases at the time of the ratification of the Protocol or any time thereafter.¹¹ Accordingly, direct

adopted 11 July 1990, entered into force 29 Nov. 1999; and the Convention Governing Specific Aspects of Refugee Problems in Africa, adopted 9 Sept. 1969, entered into force 20 June 1974. These instruments have established monitoring mechanisms which compose the main legal infrastructure for human rights oversight in Africa, although there are also non-treaty based institutions. See generally *Compendium of Key Human Rights Documents of the African Union* (Cape Town: Pretoria University Law Press, 2005) and C. Heyns (ed) *Human Rights Law in Africa*, vol. 1 (Leiden: Martinus Nijhoff Publishers, 2004).

⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted June 1998, entered into force Jan. 2004, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), hereinafter the African Protocol. Art. 1 of the Protocol establishes the African Court on Human and Peoples' Rights, hereinafter the African Court. Pursuant to the African Protocol, the Assembly of Heads of State and Government of the African Union appointed Judges at its 6th Ordinary Session held in Khartoum between 23-24 Jan. 2006. See Assembly/AU/Dec.100 (VI) Decision on the Election of Judges of the African Court on Human and Peoples' Rights (Doc. EX.CL/241 (VIII)).

⁵ Arts. 3 and 4 of the African Protocol. For an analysis of the Court's jurisdiction, see I. Österdahl, 'The jurisdiction *ratione materiae* of the African Court on Human and Peoples' Rights: A Comparative Critique,' (1998) 7(2) *Review of the African Commission on Human and Peoples' Rights* 132; and A.P. van der Mei 'The new African Court on Human and Peoples' Rights: Towards an effective human rights protection mechanism for Africa?' (2005) 18 *Leiden Journal of International Law* 113.

⁶ For these arguments, see for example M. Mutua, 'The African Human Rights Court: A Two Legged Stool?' (1999) 21 *Human Rights Quarterly* 342 at 357-362 and also F. Viljoen, 'A Human Rights Court for Africa, and Africans,' (2004) 30 *Brooklyn Journal of International Law* 1 at 14-22.

⁷ The African Commission on Human and Peoples' Rights (hereinafter the African Commission or the Commission) was established under art. 30 of the African Charter.

⁸ Preamble to the African Protocol, para. 7.

⁹ Mutua, n. 6 above, 355, 360; J. Harrington, 'The African Court on Human and Peoples' Rights,' in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986 - 2000* (Cambridge: Cambridge University Press, 2002) at 319, 320; A.A. Mohammed, 'Individual and NGO Participation in Human Rights Litigation before the African Court on Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights,' (1999) 43(2) *Journal of African Law* 201 at 202, 203; E. de Wet, 'The Protection Mechanism under the African Charter and the Protocol on the African Court on Human and Peoples' Rights,' in G. Alfredsson et al., *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Moeller* (The Hague: Martinus Nijhoff, 2001) at 724, 725.

¹⁰ Art. 5(3) of the African Protocol.

¹¹ Art. 34(6) of the African Protocol.

access by individuals and NGOs to the Court is limited at two levels. First, it is contingent upon a state making a declaration, and second, the Court still has the discretion to admit the case. This is an assault on the African human rights system.¹²

This paper is structured as follows. Part 1 is the introduction. Part 2 is the home of a consideration of the paradox of the restricted access to the Court. Part 3 contains a substantive analysis of the provisions on access to the Court, with a critique on its 'state-centric' nature. Following this itinerary, the paper concludes that given the putative inertia likely to be witnessed on the part of State Parties in signing declarations accepting the competence of the Court or instituting cases altogether, the restricted access of individuals and NGOs is a case of the poacher turned gamekeeper.

2. The Paradox of Restricted Access to the African Court

The restrictive access of individuals and NGOs to the African Court, in contrast to the unfettered access of States Parties, and the granting of optional jurisdiction to the Court in cases lodged by individuals and NGOs, is paradoxical, in fact a fundamental flaw for the following reasons.

First, a scheme of access to a human rights court in which primacy is given to the state defies the conventional understanding of international human rights law.¹³ Even though the debate on the foundations, scope and content of universal human rights has hardly been settled,¹⁴ there is agreement that the concept of human rights developed largely to protect the individual or groups of individuals from inimical conduct of the state.¹⁵ According to this thesis, human rights are conceived as an antidote for taming the 'predatory state,'¹⁶ and as such the same state cannot be relied upon to act as the primary protector of these rights. Bluntly put, reliance on the state as the primary protector of human rights is 'the best illustration of the poacher turned gamekeeper.'¹⁷

Second, the limitation contradicts the intent of the internationalization¹⁸ of human rights and the development of the regional human rights system as a complementary layer

¹² Mutua, n. 6 above, 355, 360; Harrington n. 9 above, 319, 320; de Wet, n. 9 above at 724, 725.

¹³ H. J. Steiner, 'International Protection of Human Rights,' in M. D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003) at 760.

¹⁴ See J. Donnelly, *Universal Human Rights in Theory and Practice*, 2nd Edition (Ithaca, NY: Cornell University Press, 2003) at 18- 21.

¹⁵ C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003) at 6-23; C. Douzinas, *The End of Human Rights* (Oxford: Hart Publishing, 2000) at 375. See also M. Mutua, 'The Ideology of Human Rights,' (1996) 36 *Virginia Journal of Human Rights* 589, at 594, referring to the state as the 'basic obligor' of human rights.

¹⁶ See M. Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights,' (2001) 42 *Harvard International Law Journal* 201 at 221; and Douzinas, n. 15 above, at 119.

¹⁷ Expression borrowed from Douzinas, n. 15 above.

¹⁸ Historically, the treatment of persons within a state's territory was regarded as that state's prerogative. Human rights were similarly regarded as domestic matters only within the competence of the state concerned. This approach obtained until after the Second World War when human rights issues entered the international arena, being articulated largely under the aegis of the United Nations. This era marked the beginning of the 'full blown' internationalization of human rights, and since then human rights has remained one of the most conspicuous subjects in international law. See L. Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) at 14, 15.

for supranational protection.¹⁹ Conceived to contain the state and ensure inter-state accountability for human rights,²⁰ the regional layer of protection must ‘exercise authority ... broader than the sovereign state...’²¹ This requires that access to supervisory mechanisms established by the regional human rights system is liberal, both for the individual as the complainant on one hand and the state as the repository of the duty to enforce the rights guaranteed under the regime on the other.²² Anything short of this, as is the case with the African Court, where States Parties have the discretion to accept its competence to receive direct individual complaints, undermines the intent of international supervision and monitoring.

Further, provisions on access to the African Court proceed from an assumption that State Parties, African Intergovernmental Organizations and the Commission will be willing to lodge cases before the Court. Whereas the Commission is expected to refer cases to the Court, the same cannot be guaranteed of States Parties to the Protocol, or African inter-governmental organizations, their alter ego. The reality is that even though states (and contracting intergovernmental organizations) are bound by the principle of *pacta sunt servanda* to give effect to their international legal obligations, there is no guarantee for such commitment, particularly in human rights treaties.²³ African states are likely to be reluctant in submitting cases to the Court, let alone permitting individuals and NGOs to petition the Court by signing the declarations, at least initially.²⁴

By the same token, the provision that a State Party against which a complaint has been lodged at the Commission is entitled to lodge the case before the Court may also become a dead letter considering that a state would rather ‘investigate’ domestically, than initiate a case against itself at an international court as contemplated by Articles 5(1)c and 5(1)d of the Protocol. A reference of a case by a state against itself to the Court is thus likely to be an exception rather than the rule. Such an exception came before the Inter-American Court of Human Rights in *Viviana Gallardo et al.*,²⁵ in which the Republic of Costa Rica asked

¹⁹ For an account on the rationale of the technique of regional human rights protection, see generally H. J. Steiner and P. Alston (eds.) *International Human Rights in Context*, 2nd Edition (New York: Oxford University Press, 2000) at 781-783; United Nations, Twenty-Eighth Report of the Commission to Study the Organization of Peace (1980) reprinted in Steiner and Alston, *ibid.*, at 783, 784; B. H. Weston et al., ‘Regional Human Rights Regimes: A Comparison and Appraisal,’ (1987) 20(4) *Vanderbilt Journal of International Law* 587 and G. W. Mugwanya, *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System* (New York: Transnational Publishers, 2003) at 32-36.

²⁰ S. P. Marks and B. H. Weston, ‘International Human Rights at Fifty: A Foreword,’ (1998) 8 *Transnational Law and Contemporary Problems* 113 at 115, and R. Bilder ‘An Overview of International Human Rights Law’ in H. Hannum (ed.) *Guide to International Human Rights Practice*, 3rd Edition (New York: Transnational Publishers, 1999) at 3.

²¹ C. Tucker, ‘Regional Human Rights Models in Europe and Africa: A Comparison,’ (1983) 10 *Syracuse Journal of International Law and Commerce* 135 at 139.

²² Traditional civil and political rights generally require governments or external agents to stay away from the individual, whereas socio-economic rights require affirmative governmental action. See generally H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980) and H. J. Steiner and P. Alston, n. 19 above, 136- 320.

²³ See O. A. Hathaway, ‘Do Human Rights Treaties Make a Difference,’ (2002) 111 *Yale Law Journal* 1935 and ‘The Cost of Commitment,’ *Yale Law School Public Law and Legal Theory Research Paper No. 47*, (2003) available at <http://papers.ssrn.com>. Last accessed 3 June 2006.

²⁴ Harrington, n. 9 above, 330.

²⁵ *In the Matter of Viviana Gallardo et al.*, No. G 101/81. Series A (1984) and Series B (1986).

the Court to 'investigate an alleged violation by Costa Rican authorities of human rights'²⁶ guaranteed by the [American] Convention [on Human Rights].²⁷ According to one writer, the referral of the case was not actuated by the need to utilize the Court, but rather by Costa Rica's intention to avoid the use of the Inter-American Commission whose work it did not then trust.²⁸

Finally, it should be considered that individuals are the typical consumers of human rights courts,²⁹ and as such they should have unfettered access to these institutions. Furthermore, NGOs have played a phenomenal role in the African human rights system, as evidenced by the fact that most of the individual communications before the African Commission have been lodged by or at the initiative of these organizations.³⁰

Without foreclosing debate on these issues, this paper poses some critical questions worth further reflection. As currently designed, is the Court a forum for states or a forum for adjudicating individual human rights violations? Is the inherent tension between the state and the individual in liberal theory likely to undermine reference by states of cases to the African Court? Is there a compelling case, given the human rights landscape in Africa, for individuals and NGOs to have *locus standi*³¹ before the African Court on Human and Peoples' Rights, absent a declaration by an interested State Party accepting the competence of the Court to receive such cases as required by Articles 5(3) and 34(6) of the Protocol establishing the Court?

This paper argues that access to the African Court as currently constituted is a case of the poacher turned gamekeeper. Although the Court is established with a protective mandate, it has optional jurisdiction in cases lodged by individuals or NGOs, and mandatory jurisdiction only in the cases instituted by States Parties, the African Commission, and African Intergovernmental Organizations. Yet the conventional matrix of human rights pits the individual as the 'victim' in human rights violations and the state as the 'poacher' or 'savage'.³² Similarly, there is recognition of the fact that states have generally no incentive for referring cases to international human rights courts.³³

A caveat is in order. The African Court is in its infancy stage, and the paper proceeds without the benefit of its procedural rules or practice. But insofar as the questions raised

²⁶ Para. 1, Order of the President the Inter-American Court of Human Rights of 15 July, 1981 (1981) available at <http://www1.umn.edu/humanrts/iachr>. Last accessed 3 June 2006.

²⁷ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, adopted on 22 Nov. 1969, entered into force 18 July 1978, reprinted in 'Basic Documents Pertaining to Human Rights in the Inter-American System', OEA/Ser.L.V/IL.82 doc.6 rev.1 at 25 (1992), hereinafter the American Convention.

²⁸ C. Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture,' (1990) 12 *Human Rights Quarterly* 439 at 450, 451. Art. 61 of the American Convention entitles State Parties to the Convention and the Inter-American Commission on Human Rights to submit cases to the Inter-American Court.

²⁹ *Mutua*, n. 6 above, 355, 361; *Harrington*, n. 9 above, 320.

³⁰ See generally C. E. Welch (ed.) *Protecting Human Rights in Africa: Roles and Strategies of Non-governmental organizations* (Philadelphia: University of Pennsylvania Press, 1995) and A. Motala, 'Non-governmental organizations in the African Court on Human and Peoples' Rights,' in Evans and Murray, n. 9 above, at 257. For the cases, see <http://www.achpr.org>. Last accessed 3 June 2006.

³¹ *Locus standi* here is used to denote the capacity of an entity to bring a case before a court, and not merely an interest. It is used interchangeably with the concepts of 'standing' and 'access' in this paper.

³² See *Mutua*, n. 16 above at 221;

³³ See O. A. Hathaway, 'The Cost of Commitment,' n. 23 above at 108; A. Rosas, 'State Sovereignty and Human Rights: Towards a Global Constitutional Project,' (1995) *XLIII Political Studies* 61 at 72.

bear theoretical and practical plausibility, debate on the Court should remain on the front burners. The paper will thus be a deductive enterprise, supplemented with inductive illustrations on existing human rights systems and practices on access to regional human rights courts.

3. Thawing the Issues: A Critical Analysis of Access to the African Court

The sanctity and legitimacy of any human rights system depends on its effectiveness in protecting and promoting respect for and observance of human rights guaranteed by the regime. Thus most international human rights instruments do not stop at establishing norms; they also incorporate mechanisms for supervision and adjudication of individual complaints, where appropriate. This international system is envisaged as complementary to the national system, the main situs and locus for the enforcement of human rights.³⁴

Where a victim of alleged human rights violations has exhausted local remedies and feels that there has been no adequate or appropriate redress, in principle the individual should have unfettered access to a supranational mechanism above the state.³⁵ This is indeed the underlying principle that animates international human rights law. It also follows that in order to play this complementary role, international and regional human rights mechanisms must be accessible to all players in the equation of enforcement, individuals and NGOs included.³⁶

The restricted access to the African Court brings to the fore a number of conundrums. First, regard must be paid to the fact that states are generally unwilling to surrender or succumb to structures and processes that would pin them down to international scrutiny.³⁷ Any opportunity for exit from a regime that places them on the radar screen of international scrutiny and criticism is a godsend. To illustrate this point, only one state³⁸ of the twenty states that have ratified the Protocol has made such declaration accepting the competence of the Court.

Second, the provisions on access to the Court seem to give primacy to States Parties. Out of the five clauses on automatic access to the Court, four are dedicated to States Parties and the fifth one to African Intergovernmental Organizations, who may well be considered their alter ego. Conspicuously absent are individuals and NGOs. These provisions are no doubt state-centric. The question that arises is whether States Parties have the incentive or goodwill to seek the enforcement of human rights inter se or against themselves, or whether

³⁴ R. Bilder, n. 20 above, 3.

³⁵ See generally D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 1999).

³⁶ Some scholars, such as Harold Hongju Koh, have argued that the province of enforcement of international law does not unilaterally repose in states but rather in a 'transnational legal process' of interaction, internalization, interpretation and application by states, individuals, NGOs and other non-state actors. See H. H. Koh, 'Transnational Legal Process,' (1996) 75 *Nebraska Law Review* 181 at 183.

³⁷ This is premised on the idea of sovereign states which recognizes the autonomy of states in decision making and freedom from the power of others, including scrutiny. See Fiona Robinson, 'The Limits of a Rights-based Approach to International Ethics', in T. Evans (ed.), *Human Rights Fifty Years On: a Reappraisal* (Manchester: Manchester University Press, 1998) at 58- 63.

³⁸ Only Burkina Faso has declared that the Court may receive cases against it directly from individuals and NGOs. Communication with the Secretariat of the African Commission on Human and Peoples' Rights (28 June 2006).

individuals and NGOs should have *locus standi* to bring cases directly against erring states. What, then, is the point of this Court?

Third, it needs to be recalled that the idea of regional human rights systems is to provide an external mechanism for protecting individuals from the state, at an intermediate level between the municipal and global systems.³⁹ They must therefore, in principle, be accessible to the individual, and be seen to be independent of the state. Whereas it is acknowledged that the Court will have optional jurisdiction with respect to these contentious cases, once lodged there should be no fetters on the way an individual seeks redress, as long as the individual has sought and exhausted local remedies or can demonstrate that such are unavailable.⁴⁰

But does the design of the means of access to the African Court on Human Rights as currently constituted pay homage to these realities? What is the place of the individual in this equation? What are the implications of the provisions on access on the institution's protective role under the African human rights system? These and other questions will animate the ensuing analysis. Each of the institutions with automatic access to the Court under Article 5(2) of the African Protocol, and finally individuals and NGOs, will be considered in turn below.

3.1 The Commission (Article 5(1) a of the African Protocol)

The regional human rights commission is a common feature in almost all the regional human rights systems, now with the exception of the European human rights system.⁴¹ Although there is no template for the structure and functions of regional human rights commissions, these institutions have a general function of providing a technique for monitoring human rights in a region through state reporting, country reports, *in loco* visits and adjudication of individual communications.

An overarching goal of the Protocol establishing the African Court is to create an institutional framework for complementarity between the Court and the African Commission on Human and Peoples' Rights.⁴² The Court, it is envisaged, will complement and reinforce the protective mandate of the Commission.⁴³ Accordingly, the Commission has been granted the automatic right to present cases to the Court.⁴⁴ This provision is particularly important, as it is likely to be the main entry point to the Court.⁴⁵

The design of access to the Inter-American Court on Human Rights is apposite to the present discussion. Under the Inter-American human rights system,⁴⁶ individual complaints procedures are commenced at the Commission,⁴⁷ and any person, group of persons or NGO may lodge petitions before the body. Cases submitted to and determined by the Commission may then be submitted to the Court by the State Party concerned or the

³⁹ Tucker, n. 21 above, 139.

⁴⁰ See the I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC-11/90 of 10 August 1990 (Series A, No. 11).

⁴¹ Eleventh Protocol to the European Convention, ETS 155, adopted 11 May 1994, entered into force 1 Nov. 1998. This Protocol merged the Court and the Commission into a single court.

⁴² Para. 7 of the Preamble to the African Protocol.

⁴³ Arts. 30 and 45(2) of the African Charter.

⁴⁴ Art. 5(1) of the African Protocol.

⁴⁵ F. Viljoen, 'Admissibility under the African Charter,' in Evans and Murray, n. 9 above, at 95.

⁴⁶ See generally D. J. Harris and S. Livingstone (eds.) *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998).

⁴⁷ Art. 44 of the American Convention.

Commission,⁴⁸ the only entities with the right to lodge contentious cases before the Court.⁴⁹ The Inter-American Court has explained the importance of the Commission as follows:

Considering that individuals do not have standing to take their case to the Court and that a Government that has won a proceeding in the Commission would have no incentive to do so, in these circumstances the Commission alone is in a position, by referring the case to the Court, to ensure the effective functioning of the protective system established by the Convention. In such a context, the Commission has a special duty to consider...[seizing] the Court.⁵⁰

A case may be made that, since individuals and NGOs have unlimited direct access to the Commission,⁵¹ there is no need to guarantee the same right before the African Court, as the Commission would exercise its right of access on behalf of these individuals and NGOs. Yet it is difficult to sustain such an argument, let alone endorse it, for the following reasons.

First, although the principle of complementarity has been enshrined in the African Protocol, there is no legal obligation on the Commission to exercise its right to bring cases to the African Court.⁵² The Protocol is unclear about the relationship between the Court and the Commission in such cases to be referred by the Commission. It is also not clear whether this is a certificate for the creation of a two-tier system of adjudication. Questions such as whether there are any indicia for the category of cases that qualify for referral to the Court arise. At what stage should the Commission refer a case,⁵³ and if referred after a decision on admissibility, should the Court still consider the question? Can the Commission refer a case to the Court as an appeal by an individual or NGO? Can the Court refer back a case submitted by the Commission as contemplated by Article 6(3) of the Protocol? Does the Commission become *functus officio* upon referring a case, or does it have a role in the proceedings? It appears that only the Court's procedural rules and practice may answer some of these questions.

Second, unlike the Court, whose jurisdiction *ratione materiae* extends to the African Charter and 'any other relevant human rights instrument ratified by the states concerned',⁵⁴ the

⁴⁸ See art. 50(1) of the American Convention. In cases where a respondent state is not party to the Convention, a case may not be submitted to the Court. Similarly, a case may only be submitted if the State Party concerned has accepted the competence of the Court, pursuant to art. 62 of the American Convention.

⁴⁹ Art. 61 of the American Convention.

⁵⁰ Inter-Am. Ct H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Series A. No. 5, 86 (1985), at para. 25, available at http://www.corteidh.or.cr/seriea_ing/index.html. Last accessed 4 June 2006.

⁵¹ Pursuant to arts. 55 and 58 of the African Charter. Although art. 55 only provides that the Commission shall consider communications other than those of State Parties, the interpretation of the article and the practice of the Commission, evolving and culminating in art. 114(2) of the Rules of Procedure of the Commission, now repealed, has seen the granting of *locus standi* to individuals and organizations including non-African NGOs. See C. A. Odinkalu, 'The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment,' (1998) 8 *Transnational Law and Contemporary Problems* 359 at 398.

⁵² On a similar question on whether the Inter-American Commission has a legal duty to refer cases for adjudication, the Inter-American Court held that 'there is no legal obligation to do so' in its advisory opinion on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Series A. No. 5, 86 (1985), at para. 25, available at <http://www.corteidh.or.cr>. Last accessed 4 June 2006.

⁵³ A distinction needs to be made between the 'old' European system of protection and the Inter-American system on one hand, and the African system on the other hand, in respect of the stage at which a case may be referred. In both the former systems, reference of the case is made after 'consideration' of the case, and the adoption of the case. The African Protocol is not clear on this, and only the provision's interpretation and subsequent practice will settle this question. See D.J. Harris et al., *Law of the European Convention on Human Rights* (London: Butterworths, 1995) at 602- 711).

⁵⁴ Art. 3 (1) of the African Protocol.

Commission is only competent to receive communications alleging violation of the Charter.⁵⁵ The upshot of this is that victims of violations of human rights not guaranteed under the Charter may not access the Court through the Commission, except in cases where a State Party to the Protocol has made a declaration consenting to the direct access of individuals and NGOs. This is without doubt a major setback, particularly if the two-tier system is adopted by the Court, with the Commission having a mandatory role in filtering out cases and referring admissible ones to the Court. Cases alleging violations other than those in the African Charter may not be admissible before the Commission, and even so, many potential cases that may otherwise be candidates for adjudication 'before the Court [may] be choked off at the source [Commission].'⁵⁶

Third, the Commission holds only two sessions every year, and may hold an extraordinary session if need be,⁵⁷ and so, in cases of extreme gravity and urgency requiring judicial protection measures, the Commission may be 'indisposed' to seize the Court.⁵⁸ Further, the protective role of the African Commission through interim measures is a relatively weak one, as states have not taken the Commission's preliminary rulings as binding.⁵⁹ It goes without saying that the same states that defy interim rulings of the Commission will be unwilling to seize the Court for the same orders in favour of the individual.

In the case of ordinary communications not requiring urgent action, the protracted nature of the proceedings at the Commission is likely to delay reference to the Court for adjudication.⁶⁰ This is not to say that such may not be the case with the Court. However, unless other institutional defects affecting the Commission are addressed, the Commission will remain plagued with its problems, which will no doubt affect its new role of seizing the Court or taint the image of the new institutional set-up. It is for these reasons that there has been a clamour for reform of the system,⁶¹ normative and institutional, the latter including enhancing the Commission's independence,⁶² capacity and effectiveness. This may also

⁵⁵ Under art. 61 of the Charter, the Commission is enjoined to take into consideration other sources and principles of international law only as subsidiary means of interpretation.

⁵⁶Harrington, n. 9 above, 322.

⁵⁷See <http://www.achpr.org>. Last accessed 3 June 2006.

⁵⁸ Even though the Court is also session-based, its President shall serve on a full-time basis. See art. 21(2) of the Protocol.

⁵⁹See Harrington, n. 9 above, 322-326, citing non-compliance with provisional measures in Communications 137/94, 139/94, 154/96, and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organization v. Nigeria*, African Commission on Human and Peoples' Rights.

⁶⁰The procedural history of a typical case before the Commission spans over five years. In the *Ogoni Case*, for example, the case procedures lasted between 14 Mar. 1996 when the Commission received the communication and 13 to 27 Oct. 2001 when the Commission reached a decision on the merits of the communication. See Communication 155/96 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights.

⁶¹See for example C Heyns, 'The African Human Rights system: in need of reform?' (2001) 2 *African Human Rights Law Journal* 155.

⁶²The independence of the Commission has been questioned, particularly due to the fact that, although Commissioners serve in their individual capacities, most of them are serving, or have served as state officials, which capacities may undermine their independence from their governments. See M. Evans and R. Murray, 'The Reporting Mechanism of the African Charter on Human and Peoples' Rights' in Evans and Murray n. 9 above, 44; N.M. Baraza, *An Appraisal of the Mechanism of State Reporting in the African Charter on Human and Peoples' Rights: Towards a More Effective Enforcement Regime*, Unpublished LL.M Dissertation Thesis (Nairobi: University of Nairobi, 2005), at 46 (on file with the author).

involve reconstructing the body as a 'political' organ,⁶³ with a largely promotional role rather than a protective or judicial role envisaged by the African Charter and the African Protocol.⁶⁴ On balance, the granting of this power to the Commission should not be gainsaid altogether. The Commission can, if proactive, track cases which States Parties or inter-governmental organizations are unwilling and/or have neglected to submit to the Court, and refer them to the body. Moreover, since findings of the Commission are not *strictu sensu* binding,⁶⁵ this provision gives the Commission a vantage point to refer cases with a potential of setting landmark precedents. The practice in the European human rights system is instructive in this respect. Under Article 30 of the European Convention on Human Rights, a Chamber of the European Court of Human Rights may, in cases raising a serious question or in which its resolution may be inconsistent with a judgment previously delivered by the Court, relinquish jurisdiction in favor of the Grand Chamber, provided that none of the parties to the case object. So should the African Commission, in favour of the African Court.

3.2 The State Party which had lodged a complaint to the Commission (Article 5(1) b of the African Protocol)

This provision envisages an 'inter-state case' 'transferred' from the Commission to the Court. What is not clear is at what point the 'complainant' state party may refer such communication to the Court, although it may appear that the intention was to afford a State Party which had lodged a complaint to the Commission a forum for appealing a decision of the Commission. Possibilities under this provision may include urgent cases requiring interim measures, human rights situations in which there is a threat of escalation, situations of massive and gross violations, or in areas in which there is emergency rule or state failure, hence the need for external intervention.⁶⁶

The inter-state complaint mechanism proceeds from the premise that a breach of a human rights treaty 'should be regarded as involving a "non-material" injury to other parties, whether or not they are specifically affected by the breach.'⁶⁷ Every state has an international duty to ensure the observance of these norms; they are, as affirmed in the *Barcelona Traction Case*,⁶⁸ obligations *erga omnes*. In practice, however, the inter-state complaints procedure has

⁶³For example, Makau Mutua has argued that the Commission should have soft promotional functions such as monitoring and oversight through state reporting procedures and technical support in legislation and policy. See Mutua, n. 6 above, at 360, 361.

⁶⁴The Commission is mandated *inter alia* to perform judicial roles such as advising the Court on admissibility of cases, and considering cases. See arts. 6 and 8 of the African Protocol.

⁶⁵ Under art. 58 of the Charter, the Commission is only empowered to draw the attention of the Assembly of Heads of State and Government of the African Union to special cases of violations, following its consideration of individual communications. The Assembly may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its 'findings' and 'recommendations.' See R. Murray, 'Decisions of the African Commission on individual communications under the African Charter on Human and Peoples' Rights,' (1997) 46 *International and Comparative Law Quarterly* 412 at 414 and F. Viljoen and L. Louw, 'The Status of the findings of the African Commission: from moral persuasion to legal obligation,' (2004) 48 *Journal of African Law* 1-22.

⁶⁶S.C. Prebensen, 'Inter-state Complaints Under Treaty Provisions- The Experience Under the European Convention of Human Rights,' in Alfredsson, n. 9 above, 538.

⁶⁷O. Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991) at 206.

⁶⁸*Barcelona Traction Case*, ICJ Reports 1970, at 32. The International Court of Justice stated that in obligations relating to 'the basic rights of the human person...all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.'

generally had an unhappy history of disuse.⁶⁹ Although provided by a number of international human rights instruments,⁷⁰ states have been very reluctant to use or accept it. This is because of the political or economic sensitivity of such complaints, the risk being hostility and souring of political and economic relations between the states involved.⁷¹ Yet others have also noted that this mechanism can be abused by some states for extraneous reasons.⁷²

In the present case, in which the Protocol grants a State Party which had lodged a complaint to the Commission a right to refer such complaint to the Court, the situation may be further complicated by the fact that the 'complaining' state is likely to be fatigued by a similar adjudicatory process before the Court. Even so, states are generally reluctant to become a "prosecutor" on behalf of the [international] community in judicial proceedings.⁷³

Because this technique is conceived as an inter-state-like procedure, its utility is likely to be haunted by the inertia and optional nature of inter-state complaints generally, as well as the theory of non-intervention. The latter is particularly apposite since the principle of 'non-interference in the internal affairs of another state' is expressly ordained under Article 4(g) of the Constitutive Act of the African Union.⁷⁴ If the current status quo is something to go by, in which only one inter-state complaint has been lodged at the African Commission since the coming into force of the Charter two decades ago,⁷⁵ then this point needs no further emphasis.

These caveats notwithstanding, African states should emulate the practice obtaining in the European human rights system on the inter-state complaints procedure. Conceived as a system of 'collective enforcement,'⁷⁶ States Parties to the Convention accept the compulsory jurisdiction of the Court to consider inter-state cases,⁷⁷ although there is a paucity of inter-state cases in comparison with individual complaints.⁷⁸ However, of those cases that were 'decided' by the Commission under the 'old' system, only one was referred to the Court.⁷⁹ Considering this experience and the paucity of inter-state complaints generally,

⁶⁹See S. Leckie, 'The Inter-State Complaints Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10 Human Rights Quarterly 249 at 249, 250.

⁷⁰Art. 41 of the International Convention on Civil and Political Rights (ICCPR); arts. 21 and 22 of Convention Against Torture; arts. 11- 14 of the Convention on the Elimination of Discrimination Against Women; arts. 44-45 of the American Convention; art. 49 of the African Charter; and arts. 24 and 25 European Convention.

⁷¹ Leckie, n. 69 above, 251-255.

⁷²Schachter, n. 67 above, 212.

⁷³Ibid., discussing the concept of *erga omnes*, and whether states could use it to lodge diplomatic claims or (quasi) judicial claims against recalcitrant states.

⁷⁴ See G. J. Naldi, 'Future Trends in Human Rights in Africa: The Increased Role of the OAU,' in Evans and Murray, n. 9 above, 2, 3, discussing the restrictive use by African states of the concept of non-interference.

⁷⁵Communication 277/99, Democratic Republic of Congo v. Burundi, Rwanda and Uganda, African Commission on Human and Peoples' Rights.

⁷⁶Para. 5 of the Preamble to the European Convention, reaffirmed in several cases such as *Loizidou v. Turkey*, Eur. Ct H. R. A 310, paras. 70, 75 and 93, (1995), *Austria v. Italy*, Eur. Ct H. R. No 788/60, 4 YB 112, 140 (1961) and *Cyprus v. Turkey*, Eur. Ct H. R. No 8007/77, 13 DR 85 (1978). Writing on this subject, Prebensen explains that the European system was initially intended as a collective enforcement regime by states, hence the primacy and flexibility granted to the inter-state mechanism in the 'old' system. See Prebensen, n. 66 above, at 538-542.

⁷⁷Art. 33 of the European Convention.

⁷⁸See Prebensen, n. 66 above, at 538-542.

⁷⁹*Ireland v. UK*, Eur. Ct. H.R. No. 5310/71, 15 YB 76 (1972), cited in D. J. Harris, n. 53 above, 615.

the African Court may also be a recipient of very few inter-state cases originating from the Commission, before which, so far, only one such case has been lodged.

3.3 The State Party against which the complaint had been lodged at the Commission (Article 5(1) c of the African Protocol)

There are two possibilities that may give rise to the right of a State Party to seize the African Court pursuant to this provision. The first scenario arises out of a process of individual communications lodged against the state,⁸⁰ whereas the second possibility arises out of a process of inter-state communications through which a State Party to the African Charter may lodge a complaint against another State Party for alleged violation of the provisions of the Charter.⁸¹ This latter possibility has been analyzed in the preceding part, and so the analysis below will consider the possibility of a state referring a case which was the subject of an individual communication before the Commission.

This provision raises some practical difficulties. First, states do not want to engage in transnational litigation in human rights issues because of the publicity involved in the process. Under this provision, a State Party against which a complaint had been lodged before the Commission would be accusing itself, or bringing itself to further international scrutiny, if it were appealing a decision of the Commission. An inspection of other regional systems, such as the Inter-American human rights system, reveals that there has been a paucity of such cases brought pursuant to a similar procedure.⁸²

The point at which such a case may be lodged by the State Party concerned is another issue, and seems not clear from a textual reading of the article. What appears is that this provision may also be used as a basis for appeal from a decision of the Commission. If this is the case, then the provision defies the principle of equality of arms, as there is no similar provision for appeal by the individual who had triggered the complaint at the Commission, unless the State Party concerned has made a declaration accepting the Court's competence to receive direct individual complaints.⁸³

3.4 The State Party whose citizen is a victim of human rights violation (Article 5(1) d of the African Protocol)

A textual interpretation of this provision suggests that it is a form of diplomatic protection by a State Party of its citizen(s). The idea of diplomatic protection in international law allows a state to 'secure reparation for injury to [its] national ... premised on the principle that an injury to a national is an injury to the State itself.'⁸⁴ Such a state has therefore the standing and legal interest arising out of the injury to itself and its nationals,⁸⁵ to bring a claim against the alleged offending state. In this sense, the technique is also implicitly a variant of the inter-state complaints mechanism.

⁸⁰Arts. 55-59 of the African Charter govern individual communications under the system.

⁸¹Art. 47 of the African Charter.

⁸²Art. 61 of the American Convention entitles States Parties and the Commission to submit cases to the Inter-American Court. See Viviana Gallardo, n. 25 above. For this discussion, see Medina, n. 28 above, 449.

⁸³In contrast, for example, the 'appellate' system pursuant to art. 43 of the European Convention allows any party to the case, in exceptional circumstances, to request that a matter arising out of the 'ordinary' Chamber be considered by the Grand Chamber.

⁸⁴Official Records of the General Assembly, Fifty-sixth Session, Fifth Report on Diplomatic Protection, A/CN.4/538 (Geneva, 2004) at para. 17.

⁸⁵Schachter, n. 67 above, 206.

Although the provision is framed in the language of a State Party's right to seize the Court,⁸⁶ a question that arises is whether a state has a duty in relation to its citizens to bring a case before the Court. The answer to this question appears unsettled.⁸⁷ In the case of *Victor Saldaño v. Argentina*,⁸⁸ the petitioner filed a complaint against the Argentine Republic alleging that its failure to exercise diplomatic protection in favor of Victor Saldaño triggered its responsibility. Victor Saldaño, the petitioner's son, had been sentenced to death in the United States of America, in circumstances which the petitioner contended were in breach of substantive provisions of the American Declaration of Human Rights,⁸⁹ thereby necessitating protection by Argentina.

In dismissing the petition, the Inter-American Commission of Human Rights held that absent any evidence connecting Argentina with the alleged violations, no responsibility would accrue and that Argentina had no obligation in international law to protect its nationals against violations committed abroad by another state.⁹⁰ This ruling notwithstanding, could it be argued that if individuals and NGOs do not have direct access to the African Court, States Parties to the Protocol, which have automatic access to the Court have an obligation to seize the institution on their behalf? The answer to this question must be yes, since diplomatic protection is increasingly recognized as instrumental to the protection of human rights.⁹¹

A case that is illustrative of the utility of this device is the landmark case of *Soering v. United Kingdom*,⁹² in which Germany seized the European Court on Human Rights on behalf of its national, Soering, to injunct his imminent extradition by the United Kingdom, where he was detained, to the United States to face the so called 'death-row' phenomenon. Another case is *Lozidou v. Turkey*,⁹³ a case referred to the Court by Cyprus. Originating from an individual petition before the Commission by Lozidou, a Greek Cypriot, the case was lodged at the Court by Cyprus on behalf of Lozidou on the grounds that she had been denied access to her property by the Turkish invasion in 1974.

3.5 African Inter-governmental Organizations (Article 5(1) e of the African Protocol)

⁸⁶ See *Mavrommatis Palestine Concessions Case*, P.C.I.J. Series A, No. 2 (1924). The judgment mirrors the language of a right of a state '...to protect its subjects, when injured by acts contrary to international law committed by another State...'

⁸⁷ It would be useful to retrieve the debates in the International Law Commission on the issue of whether states have an obligation under international law to exercise diplomatic protection. The Commission omitted such duty in its Draft Articles on Diplomatic Protection. See Official Records of the General Assembly, Fifty-eighth Session, Sixth Report on Diplomatic Protection, A/CN.4/567, at paras. 22-24. However, some scholars posit that there is such duty, or at least on the municipal plane as supported by caselaw. See *Abbasi and Anor v. Secretary of State for Foreign and Commonwealth Affairs* All E.R. (D) (2002) 70; and *Kaunda and Others v. President of the Republic of South Africa and Others* (4) South African Law Reports (2005) 235. See also *Encyclopedia of Public International Law* (Amsterdam: North Holland, 1992) vol. I, at 1052.

⁸⁸ *Victor Saldaño v. Argentina*, No.38/99, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. en 289 (1998).

⁸⁹ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in 'Basic Documents Pertaining to Human Rights in the Inter-American System', OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

⁹⁰ *Saldaño*, n. 88 above, para. 22.

⁹¹ E. Milano, *Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?* (2004) 35 *Netherlands Yearbook of International Law* 85, 86.

⁹² Eur. Ct. H.R Ser. A 161 (1989).

⁹³ *Lozidou* n. 76 above.

A remarkable innovation in the Protocol is the granting of the right to African Intergovernmental Organizations to lodge cases before the African Court. This provision contemplates that any intergovernmental organization established by African states may submit a case to the Court alleging violation of the African Charter or any other relevant human rights instrument ratified by the State concerned. The clause comes at a time when there has been an increase in the number of intergovernmental institutions in Africa and as such some conceptual clarity is needed on the category of organizations that may qualify under this provision.⁹⁴

From an understanding of the law of international organizations, intergovernmental organizations, although variant in nature, are institutions whose members include states and/or other international or regional organizations established by treaty or other formal agreement as a separate legal personality from its members.⁹⁵ Following this broad conception of an intergovernmental organization, it is not clear whether those whose functions are not executive but rather judicial or quasi-judicial or legislative would also be competent to refer cases to the Court.⁹⁶

It appears that this provision was conceived as a peer review mechanism which has in recent years gained ground in most African states.⁹⁷ The innovation here is that the body need not be a purely human rights organization, but rather any intergovernmental organization established as such by African states. These intergovernmental organizations have the potential to improve the human rights contours in Africa as the engagement of states on mutual tasks will most likely result in the enlargement of cooperation in the realization of human rights, even if not originally contemplated as a function.⁹⁸ This is also likely to influence intergovernmental organizations in Africa to adopt the rights-based approach, otherwise they also stand to be impeached for their human rights practices.

Although it is conceded that intergovernmental institutions in Africa are increasingly appropriating an oversight role in human rights, the utility of this provision cannot be granted. This is because most intergovernmental organizations are the venue of 'high' politics, and may not be independent of their members. Unlike international human rights machinery, in which members serve in their personal capacity, the membership of intergovernmental organizations comprises states acting through their representatives. Thus the latter's representation in these organizations is the will of their states. There is thus likely to be inertia in referring cases to the Court. Moreover, the limitation of this provision to

⁹⁴For discussions on some of these intergovernmental organizations, see for example Heyns, n. 3 above, 620-773. These include the African Union and its 'family' organizations, as well as sub-regional intergovernmental organizations such as the Arab Maghreb Union, the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Inter-governmental Authority on Development (IGAD) and the Southern African Development Community (SADC).

⁹⁵ See P. Sands and P. Klein, *Bowett's Law of International Institutions*, 5th Edition (London: Sweet and Maxwell, 2001) at 16, 17; H.G. Schermers & N.M. Blokker, *International Institutional Law*, 3rd Revised Edition (The Hague: Martinus Nijhoff Publishers, 2001) at 39, 40 and M.P. Karns and K.A. Mingst, *International Organizations: The Politics and Processes of Global Governance* (Boulder: Lynne Rienner Publishers, 2004) at 7-10.

⁹⁶ Most intergovernmental organizations are mostly involved in cooperation on executive functions. See Schermers & Blokker, *ibid*.

⁹⁷ See generally J. Cilliers, 'NEPAD's Peer Review Mechanism,' Institute for Security Studies Paper No. 64 (2002) available at <http://www.iss.co.za>. Last accessed 6 June 2006.

⁹⁸See B. H. Weston n. 19 above, 589.

African Inter-governmental Organizations also blocks other potential international institutions from this arena.

3.6 Individuals and NGOs (Articles 5(3) and 34(6) of the African Protocol)
Although the African Court is established to complement the protective mandate of the African Commission,⁹⁹ the paradox is that individuals and NGOs, the primary users of the protective functions, are not automatically entitled to lodge cases before the Court, unless the State Party concerned has made a declaration accepting the competence of the Court to receive individual petitions at the time of ratification of the Protocol or any time thereafter. Even so, the Court still has optional jurisdiction in cases referred by individuals and NGOs, where the State Party concerned has accepted the competence of the Court to receive such cases.

The qualified *locus standi* of individuals and NGOs must be considered retrogressive for the following reasons. First, the provisions on *locus standi* of individuals and NGOs are to be contrasted with provisions relating to automatic access of States Parties to the African Court, as well as the unrestricted access of individuals and NGOs to the African Commission.¹⁰⁰ This qualified access to the Court leaves aggrieved individuals hostage to the state, and reverses the liberal provisions on *locus standi* to the African Commission under the African Charter.¹⁰¹

Second, these provisions are likely to undermine the utility of the African Court in protecting human rights if the said Court is not accessible to individuals and NGOs. This view proceeds from the premise that states are generally not inclined towards subjecting themselves to international tribunals,¹⁰² and as such there is likely to be reluctance and inertia in the signing of the declarations required by the African Protocol.

Third, NGOs play an important role in the enforcement of international human rights law, and particularly under the African human rights system,¹⁰³ and as such there is a case for unlocking their access to the African Court.

4. Conclusion

From the foregoing, although the establishment of the African Court on Human and Peoples' Rights must be regarded as part of the genius in the development of human rights in Africa, the restrictive access to the body must be considered suspect. It needs noting that the primary object of the protective mandate of the Court is to offer individual victims, complainants or their representatives a forum for the adjudication of their claims. This requires that there is an unambiguous pathway to the tribunal. However, individuals or their representatives are not competent to access the Court directly, unless the State Party concerned has declared the Court's competence to do so. Only States Parties, the African Commission and African Intergovernmental Organizations have automatic standing before the Court, and of these, only the African Commission is likely to refer cases to the Court.

⁹⁹ Para. 7 and art. 2 of the African Protocol.

¹⁰⁰ Pursuant to arts. 55 and 58 of the African Charter.

¹⁰¹ Harrington, n. 9 above, 320.

¹⁰² See for example P. van Dijk and G.J. van Hoof, *Theory and Practice of the European Convention* (The Hague-Boston-London: Kluwer Law International, 1998) at 43, citing the indifference of states towards lodging cases under the European human rights system.

¹⁰³ *Ibid.*

But even the Commission is not without challenges, particularly those that may undermine its capacity to refer cases to the said Court.

There is thus a compelling case for direct access of individuals and NGOs to the African Court. The thesis that the restricted access to the tribunal is inconsistent with the philosophy of human rights, as well as with the *raison d'être* of regional human rights systems can hardly be emphasized enough. Generally, states have no incentive to refer cases of human rights violations before international or regional tribunals. This is because in most cases these violations may be attributable to the state, or they may be the violators. Yet in some cases, states may have no interest if such violations do not take place in their territories. If this is the case, then the primacy granted to States Parties to lodge cases before the African Court, and the discretion to recognize the competence of the Court to handle individual complaints must be considered a paradox to international and regional human rights protection.

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