

NECESSARY CHECK POINTS OR IMMOVABLE ROADBLOCKS? ACCESSING THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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ABSTRACT

The African Court on Human and Peoples' Rights is in many ways an ideal destination for litigating alleged human rights violations. Unlike other regional human rights courts, the African Court has jurisdiction to consider alleged violations not only of its key regional human rights instrument, the African Charter on Human and Peoples' Rights, but also other international human rights instruments. In its young history, the African Court has also demonstrated its ability to tackle sensitive issues and deliver robust judgments on a range of topics including freedom of expression, the right to fair trial and participation in government. Moreover, the African Court has the power to issue provisional orders and award reparations. However, accessing the African Court remains difficult. In order for individuals and NGOs to petition the African Court directly, the AU member state subject to the application must have undertaken a triple layer of ratifications, something that, at the time of writing, only eight out of 55 have done. This paper examines how applicants can petition the African Court. It reviews the three layers of ratification and suggests how potential applicants may be able to use the African human rights system more widely to circumnavigate jurisdictional hurdles. The paper concludes that with proper access, the African Court has the potential to be a truly continental court—what is required is further actions from the African Court, member states, and civil society to put this into action.

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<i>Vol. 35, No. 2</i>	<i>Necessary Checkpoints?</i>	459
Abstract.....		458
Introduction.....		459
I. The Creation of the African Court on Human and Peoples’ Rights.....		461
II. What Rights Can the African Court Protect?		465
III. Accessing the African Court.....		467
A. Jurisdiction.....		467
1. Ratification of the African Court Protocol.....		467
2. Signature of the Additional Declaration		468
3. An Alternative Way?		475
IV. Exhaustion of Local Remedies		482
V. Conclusion.....		483

INTRODUCTION

Every African Union (AU) member state, save for the recently readmitted Morocco, has ratified the African Charter on Human and Peoples’ Rights.¹ This means, at least in theory, that almost every African Union member state must ensure their actions, and domestic laws adhere to and promote the rights contained in the African Charter. The African Charter contains many of the rights enshrined in similar continental human rights instruments, such as the right to life, the right to fair trial, and freedom of expression.² It also contains peoples’ rights such as the right to natural resources, and the right to a satisfactory environment.³ Indeed, with rights that encompass both individual and peoples’ rights, the African Charter can be seen as a wide-ranging and ambitious human rights instrument, at least on paper. But, how can these rights go from existing merely on paper to existing in reality? And how

¹ African Charter on Human and Peoples’ Rights, adopted June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986) [hereinafter African Charter]. It should be noted that Morocco recently rejoined the African Union, after a thirty-three year absence to become the African Union’s fifty-fifth member. At the time of writing, Morocco’s ratification of the African Charter is not reflected on the African Union website. See John Aglionby & Heba Saleh, *Morocco rejoins African Union after 33-year absence*, FIN. TIMES (Jan. 31, 2017), <https://www.ft.com/content/6479ea72-e718-11e6-893c-082c54a7f539>; see also AFRICAN UNION, LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS (2017), https://au.int/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_2.pdf; *Ratification Table: African Charter on Human and Peoples’ Rights*, AFR. COMM’N ON HUMAN & PEOPLES’ RIGHTS (Feb. 2, 2018, 11:56 AM), <http://www.achpr.org/instruments/achpr/ratification/?s=state>.

² See African Charter, *supra* note 1, art. 4, 7, 8.

³ *Id.* art. 21, 24.

can they be used to empower those who believe their African Charter rights have been violated? In 2004, this challenge was answered in part when an additional protocol to the African Charter creating the African Court on Human and Peoples' Rights was ratified by over fifteen member states.⁴ The African Court was created to complement the African Commission on Human and Peoples' Rights⁵ whose existence is included in the African Charter. The African Court has jurisdiction to consider applications alleging violations of the African Charter, as well as other international human rights instruments to which a member state subject to a petition has ratified. Despite its relative young age, the African Court has begun to establish itself as a court willing to consider complex and often controversial cases in depth. As of December 2017, the African Court has found in favor of every applicant when considering cases on their merits, ensuring that applicants enjoy a 100% success rate before the African Court.⁶ This paper will discuss the creation of the

⁴ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *adopted* 10 June 1998, OAU Doc. OAU/LEG/AFCHPR/PROT (III), http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf [hereinafter African Court Protocol].

⁵ Hereinafter "African Commission."

⁶ See *Jonas v. Tanzania*, No. 011/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 100 (Sept. 28, 2017), <http://www.african-court.org/en/images/Cases/Judgment/011-2015-Christopher%20Jonas%20v.%20United%20Republic%20of%20Tanzania-Judgment-28%20September%202017.pdf>; *Onyachi v. Tanzania*, No. 003/2015, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 169 (Sept. 28, 2017), <http://www.african-court.org/en/images/Cases/Judgment/003-2015-Kennedy%20Owino%20Onyachi%20and%20Charles%20John%20Mwanini%20Njoka%20v.%20United%20Republic%20of%20Tanzania-Judgment-28%20September%202017.pdf>; *African Comm'n on Human & Peoples' Rights v. Kenya*, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 227 (May 26, 2017), <http://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya.pdf>; *Actions pour La Protections Des Droits De L'Homme (APDH) v. Cote d'Ivoire*, No. 001/2014, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 151 (Nov. 8, 2016), http://en.african-court.org/images/Cases/Judgment/JUDGMENT_APPLICATION%20001%202014%20_%20APDH%20V.%20THE%20REPUBLIC%20OF%20COTE%20DIVOIRE.pdf; *Abubakari v. Tanzania*, No. 007/2013, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 242 (June 3, 2016), <http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl%20%20007%20-%202013%20Mohamed%20Abubakari%20v%20Tanzania.pdf>; *Onyango v. Tanzania*, No. 006/2013, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 193 (Mar. 18, 2016), http://en.african-court.org/images/Cases/Judgment/Onyango_Judgment.pdf; *Konaté v. Burkina Faso*, No. 004/2013, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 176 (Dec. 5, 2014), <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.004->

African Court, its place within the African human rights system, and the rights it is designed to protect. It will then focus on some of the issues surrounding access to the African Court, examining how states, inter-governmental organizations, the African Commission, individuals, and non-governmental organizations (NGOs) can access the African Court, noting in particular the restrictions placed on individuals and NGOs in bringing cases before the African Court. The paper concludes that whilst the African Charter is a wide-ranging human rights instrument with the capability of ensuring the rights of individuals and peoples across Africa, there is still much to be done to ensure the African Court can fulfill its mandate as a truly continental human rights court.

I. THE CREATION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

In order to understand the role of the African Court, and how one can successfully petition it, it is first important to establish how it came into existence. A principal element in the establishment of the African Court is the presence of the African Court's judicial cousin, the African Commission based in Banjul, The Gambia.⁷ Just after the African Charter came into force, the African Commission was created in 1987 and by virtue of Article 31 of the African Charter, was charged with the oversight of the African Charter.⁸ Since the creation of the African Commission is baked in to the African Charter itself, all state parties who have ratified the African Charter automatically accept the jurisdiction of the African Commission, including the power to review applications brought before it alleging violations of the rights contained in the African

2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf; Zongo v. Burkina Faso, No. 013/2011, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 203 (Mar. 28, 2014), <http://en.african-court.org/images/Cases/Judgment/Nobert%20Zongo%20Judgment-%20English.pdf>; Tanganyika Law Soc'y v. Tanzania, No. 009/2011, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 126 (June 14, 2013), <http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20009-011-2011%20Rev%20Christopher%20Mtikila%20v.%20Tanzania-1.pdf>.

⁷ See AFR. COMMISSION ON HUM. & PEOPLES' RTS., <http://www.achpr.org> (last visited Feb. 2, 2018). The African Commission is made up of 11 Commissioners elected for a six year period and eligible for re-election. See African Charter, *supra* note 1, art. 31, 36; *About ACHPR*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS, <http://www.achpr.org/about/> (last visited Feb. 2, 2018) (outlining a list of current members).

⁸ See African Charter, *supra* note 1, art. 31.

Charter.⁹ Since every AU member state has ratified the African Charter, the African Commission can consider applications from citizens, and NGOs from every AU member state, giving the African Commission a truly continent-wide remit. When considering this expansive remit, it is interesting to note that judicial activity is only one of several areas of human rights protection in which the African Charter envisioned the African Commission partaking. As detailed in Article 45 of the African Charter, the African Commission has a mandate to promote human and peoples' rights through, *inter alia*, the collection of documents, the organizing of symposia, the dissemination of information, all ensuring the protection of the rights found in the African Charter.¹⁰ It is with these activities in mind that the African Commission has evolved to consider applications made not only from member states, but also from individuals and NGOs.¹¹ This evolution has led to the African Commission considering applications alleging violations of the African Charter concerning numerous AU member states.¹² The African Commission considers these applications or "communications" and can make recommendations by drawing inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organization of African Unity, and the Universal Declaration of Human Rights.¹³ But crucial to understanding the creation of the African Court, the African Commission's findings are simply recommendations and essentially non-binding on the member state subject to the application in question.

Therefore, despite the African Commission's ability to consider applications from all AU member states, given its inability to render binding judgments, over time there was a feeling amongst member states and the African Union itself that what was required, *in addition* to the

⁹ *Id.* art. 45.

¹⁰ *Id.*

¹¹ African Commission decisions can be found at the African Commission's website. AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS, *Decisions on Communications*, <http://www.achpr.org/communications/decisions> (last visited Feb. 2, 2018).

¹² In addition to African Commission decisions at the African Commission's website, African Commission decisions can also be accessed at the IHRDA website. *African Human Rights Case Law Analyzer*, INST. FOR HUMAN RIGHTS & DEV. IN AFR., <http://caselaw.ihrda.org/> (last visited Feb. 2, 2018).

¹³ African Charter, *supra* note 1, art. 60.

African Commission, was something more judicial in nature.¹⁴ This would comprise of a court with international lawyers serving as judges, issuing binding judgments, rather than recommendations, and the power to report the non-implementation of those judgments within the AU framework.¹⁵ It was thought that such a court could complement the work of the African Commission, which at its heart held a more wide-ranging mandate, including the promotion and dissemination of human rights information.¹⁶ The drafting of a protocol to create such a court lasted several years, and eventually lead to the creation of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) in June 1998.¹⁷ The African Court Protocol came into force on January 25, 2004, upon ratification by more than fifteen AU member states.¹⁸ Currently thirty member states have ratified the African Court Protocol.¹⁹ It is important to note that from the outset the African Court was intended to complement the "protective mandate" of the African Commission.²⁰ The relationship between the African Commission and African Court is further elaborated on in the African Court's Rules of Procedure (African Court Rules), which state that the African Commission and African Court should meet at least once a year, and whenever necessary, in order to ensure a good working relationship between the two organizations.²¹

On a practical level, the African Court is composed of eleven judges (all nationals of member states of the African Union) with one judge serving as President and one as Vice-President.²² The President is assisted by a Registrar who performs managerial and administrative functions.²³ The African Court officially started its operations in Addis

¹⁴ *Establishment of the Court*, AFR. COURT ON HUMAN & PEOPLES' RIGHTS, <http://en.african-court.org/index.php/about-us/establishment> (last visited Feb. 2, 2018).

¹⁵ *Id.*

¹⁶ Julia Harrington, *The African Court on Human and Peoples' Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2000* 305, 306 (Malcolm D. Evans & Rachel Murray eds., 2002).

¹⁷ African Court Protocol, *supra* note 4.

¹⁸ *Id.* art. 34(3).

¹⁹ *See* AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, *supra* note 1.

²⁰ African Court Protocol, *supra* note 4, art. 2.

²¹ *See* Rules of Court, African Court on Human and Peoples' Rights, 2010, r. 29(1).

²² *See id.* r. 11 (describing the President's functions); *see also* African Court Protocol, *supra* note 4, art. 11.

²³ *See* African Court Protocol, *supra* note 4, art. 24; *see also* Rules of Court, *supra* note 21, r. 20, 25.

Ababa, Ethiopia, in November 2006, but in August 2007 moved to its permanent seat in Arusha, Tanzania.²⁴ African Court judgments are final and not subject to appeal.²⁵

Two of the African Court's powers merit particular mention. First, the African Court has the power to order provisional measures to prevent something happening that would cause significant or irreversible damage to the applicant or the subject of the application.²⁶ Whilst the African Court must consider whether it has jurisdiction to consider a case before proceeding to consider the merits, for provisional measures the African Court need only consider whether, *prima facie*, it has jurisdiction over a case.²⁷ In addition, while an applicant can request provisional measures when making an application, the African Court also has the power *proprio motu* to order provisional measures in cases of extreme gravity and when necessary to avoid irreparable harm to persons, and when the African Court deems necessary to adopt in the interest of the parties or of justice.²⁸ For example, the African Court has used the power to issue provisional measures *proprio motu* to halt the execution of applicants currently on death row in Tanzania who are petitioning the African Court alleging violations of their right to fair trial.²⁹

Second, the African Court has the power to award reparations to successful applicants.³⁰ Reparations were awarded for the first time in the case of *Zongo and Others v. Burkina Faso*.³¹ In this case, the African

²⁴ See AFRICAN COURT ON HUMAN & PEOPLES' RIGHTS, *supra* note 14; see also Host Agreement, African Union-Tanz., Aug. 31, 2007, <http://en.african-court.org/images/Protocol-Host%20Agrmt/agreement-Tanzania%20and%20AU.pdf>.

²⁵ See African Court Protocol, *supra* note 4, art. 28.2.

²⁶ See *id.* art. 27.2; see also Rules of Court, *supra* note 21, r. 51.

²⁷ See *Guehi v. Tanzania*, No. 001/2015, Order for Provisional Measures, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 10 (Mar. 18, 2016), <http://www.african-court.org/en/images/Cases/Orders/Order%20for%20Provisional%20Measures%20Appl.001-2015%20Armand%20Guehi%20v%20United%20Republic%20of%20Tanzania.PDF>; *Rajabu v. Tanzania*, No. 007/2015, Order for Provisional Measures, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 9 (Mar. 18, 2016), <http://www.african-court.org/en/images/Cases/Orders/Order%20for%20Provisional%20Measures%20Appl.007-2015%20Ally%20Rajabu%20&%20Others%20v%20United%20Republic%20of%20Tanzania.PDF>.

²⁸ See African Court Protocol, *supra* note 4, art. 27(2); Rules of Court, *supra* note 21, r. 51(1).

²⁹ See *Guehi v. Tanzania*, No. 001/2015, Order for Provisional Measures, ¶ 10; *Rajabu v. Tanzania*, No. 007/2015, Order for Provisional Measures, ¶¶ 15, 17.

³⁰ See African Court Protocol, *supra* note 4, art 27(1).

³¹ *Zongo v. Burkina Faso*, No. 013/2011, Judgment on Reparations, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 111 (June 5, 2015), <http://www.african-court.org/en/images/Cases/Ruling%20on%20Reparation/Application%20No%200013-2011%20Beneficiaries%20of%20late%20Norbert%20%20Zongo-Ruling%20on%20Reparation.PDF>;

Court awarded significant reparations to the families of an investigative journalist and his associates where it had found Burkina Faso had violated numerous articles of the African Charter by failing to properly investigate their deaths.³²

II. WHAT RIGHTS CAN THE AFRICAN COURT PROTECT?

As mentioned above, every African Union member state, save Morocco, has ratified the African Charter to date.³³ The African Charter entered into force in October 1986,³⁴ and contains many familiar rights found in other international human rights instruments, such as the right to freedom from discrimination (Article 2), right to life (Article 4), the prohibition of torture and cruel, inhuman and degrading treatment (Article 5), the right to fair trial (Article 7), and freedom of expression (Article 9). It also includes peoples' rights, including the right of all peoples to equality (Article 19), the right to self-determination (Article 20), right to free disposal of wealth and natural resources (Article 21), the right to economic, social and cultural development (Article 22), and the right to a general satisfactory environment (Article 24).³⁵ Although

see also Zongo v. Burkina Faso, No. 013/2011, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 203 (Mar. 28, 2014), <http://en.african-court.org/images/Cases/Judgment/Nobert%20Zongo%20Judgment-%20English.pdf>.

³² Zongo v. Burkina Faso, No. 013/2011, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶111 (June 21, 2013), <http://en.african-court.org/images/Cases/Judgment/Nobert%20Zongo%20Judgment-%20English.pdf>; *see also* Zongo v. Burkina Faso, No. 013/2011, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 199–203 (Mar. 28, 2014), <http://en.african-court.org/images/Cases/Judgment/Nobert%20Zongo%20Judgment-%20English.pdf>.

³³ The most recent ratification was by South Sudan on May 19, 2016. *See* AFRICAN UNION, RATIFICATION TABLE: AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, https://au.int/sites/default/files/treaties/7770-sl-african_charter_on_human_and_peoples_rights_2.pdf.

³⁴ The African Charter entered into force on 21 October 1986. *See* AFRICAN UNION, *supra* note 1.

³⁵ In detail, the African Charter includes: Article 1: Obligations of Member States, Article 2: Right to Freedom from Discrimination, Article 3: Right to Equality before the Law and Equal Protection of the Law, Article 4: Right to Life, Article 5: Prohibition of Torture and Cruel, Inhuman and Degrading Treatment, Article 6: Right to Personal Liberty and Protection from Arbitrary Arrest, Article 7: Right to Fair Trial, Article 8: Right to Freedom of Conscience, Article 9: Right to Receive Information and Free Expression, Article 10: Right to Freedom of Association, Article 11: Right to Freedom of Assembly, Article 12: Right to Freedom of Movement, Article 13: Right to Participate in Government, Article 14: Right to Property, Article 15: Right to Work, Article 16: Right to Health, Article 17: Right to Education, Article 18: Protection of the Family and Vulnerable Groups, Article 19: Right of All Peoples to Equality and Rights, Article 20: Right to Self-Determination, Article 21: Right to Free Disposal of Wealth and Natural Resources, Article 22: Right to Economic, Social and Cultural Development, Article 23:

the African Court was chiefly created to consider violations of the African Union's flagship human rights instrument, the African Charter, it also has the power to consider applications for violations of other international human rights instruments to which the member state in question has ratified.³⁶ This ability to consider other human rights instruments in addition to the African Court is wider than other regional human rights Courts such as the European Court of Human Rights.³⁷ In the recent case of *APDH v. Cote D'Ivoire*, the African Court considered what exactly these "other international human rights instruments" might include, concluding that the African Charter on Democracy, Elections, and Governance and the ECOWAS Protocol on Democracy and Good Governance met the standard and found violations of both instruments in addition to violations of the African Charter.³⁸ This decision from the African Court appears to demonstrate a willingness on the part of the African Court to widen its remit beyond assessing violations of the African Charter. This approach will likely be tested further by the pending case of *APDH and IHRDA v. Mali*, which alleges violations of the African Charter on the Rights and Welfare of the Child (ACRWC), the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, but not

Right to National and International Security and Peace, Article 24: Right to a General Satisfactory Environment, Article 25: Duty to Promote Human Rights, Article 26: Duty to Guarantee Independence of Courts. See African Charter, *supra* note 1; THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2000 (Malcolm D. Evans & Rachel Murray eds., 2002); FATSAH OUGUERGOUZ, THE AFRICAN CHARTER OF HUMAN AND PEOPLE'S RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA 77–192 (2003).

³⁶ See Rules of Court, *supra* note 21, r. 26(1) ("Pursuant to the Protocol, the Court shall have jurisdiction: a) to deal with all cases and all disputes submitted to it concerning interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned . . ."); see also African Court Protocol, *supra* note 4, art. 3.

³⁷ The mandate of the Inter-American Court has subsequently been expanded by various OAS conventions conferring jurisdiction upon the Court. Nani J. Reventlow, *The Unique Jurisdiction of the African Court on Human and Peoples' Rights: Protection of Human Rights Beyond the African Charter*, DOUGHTY STREET INT'L L. BULL. (Feb. 2017), <http://doughty-street-chambers.newsweaver.com/International/j7yocx3x54x?a=1&p=1456996&t=174048>.

³⁸ *Actions pour La Protections Des Droits De L'Homme (APDH) v. Cote D'Ivoire*, No. 001/2014, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 5–6 (Nov. 18, 2016), http://en.african-court.org/images/Cases/Judgment/JUDGMENT_APPLICATION%20001%202014%20_%20APDH%20V.%20THE%20REPUBLIC%20OF%20COTE%20DIVOIRE.pdf.

the African Charter itself—a first for an application before the African Court.³⁹

III. ACCESSING THE AFRICAN COURT

Having established the creation of the African Court and the rights it is able to protect, the following section seeks to examine issues surrounding access to the African Court.

A. JURISDICTION

The African Court's jurisdiction to consider applications concerning a member state depends on the member state's ratification or signature of three instruments: the African Charter, the African Court Protocol, and the Additional Declaration.⁴⁰

1. Ratification of the African Court Protocol

As mentioned above, every AU member state has ratified the African Charter. To date, thirty AU member states have ratified the African Court Protocol establishing the African Court.⁴¹ According to the Articles 5(1) and 34(6) of the African Court Protocol and Rule 33 of the African Court Rules, upon ratification of the African Court Protocol, the African Court may receive complaints and/or applications submitted by: (i) the African Commission, (ii) from one of the state parties who have ratified the Protocol which has lodged a complaint at the African Commission or been subject to a complaint before the African Commission, (iii) a state party whose citizen is a victim of a human rights violation, or (iv) African Intergovernmental Organizations.⁴² This list is considerably broader than other regional systems since it includes not only the African Commission, but also state parties, African

³⁹ Association Pour le Progrès et la Défense Des Droits Des Femmes Maliennes (APDF) v. Mali, No. 046/2011, Case Summary, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 10 (July 26, 2016), http://en.african-court.org/images/Cases/Case%20Summaries/Case_summary_46-2016.pdf.

⁴⁰ See African Court Protocol, *supra* note 4, art. 3; see also Rules of Court, *supra* note 21, r. 33.

⁴¹ AFRICAN UNION, *supra* note 1.

⁴² See African Court Protocol, *supra* note 4, art. 5(1), 34(6); Rules of Court, *supra* note 21, r. 33.

intergovernmental organizations, and regional economic communities.⁴³ The ratification of the Protocol therefore effectively gives the thirty AU member states who have signed the African Court Protocol, intergovernmental organizations, and the African Commission direct access to the African Court, but signing the African Court Protocol does not provide direct access for individuals and NGOs.

2. *Signature of the Additional Declaration*

When a member state ratifies the African Court Protocol, an individual or NGO from that member state cannot automatically bring cases directly to the African Court. This severely limits the number of cases that can be heard by the African Court if one is to take a realistic approach to the chances of states bringing cases against each other or of self-referral. There is, however, a provision for individuals and NGOs with observer status before the African Commission to directly access the African Court.⁴⁴ To allow individuals and NGOs to make direct applications, a member state must sign an additional declaration pursuant to Articles 5(1) and 34(6) of the African Court Protocol (Additional Declaration).⁴⁵ It is important to underscore that this Additional Declaration is *in addition* to signing the African Court Protocol.

The requirement that the member state signs this Additional Declaration effectively creates a triple layer of ratifications for individuals and NGOs with observer status before the African Commission to petition the African Court directly: African Charter, African Court Protocol, and Additional Declaration.

At this stage, it is also important to emphasize that signing the Additional Declaration allows only NGOs “with observer status” before the African Commission to petition the African Court directly.⁴⁶ This observer status is crucial, but is often overlooked. Observer status is a separate standing granted by the African Commission and must be

⁴³ Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples’ Rights, No. 002/2013, Advisory Opinion, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 58–76 (Dec. 20, 2014), <http://en.african-court.org/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Advisory%20Opinion%20no%20%20002-2013.pdf>.

⁴⁴ African Court Protocol, *supra* note 4, art. 5(1), 34(6).

⁴⁵ *Id.* art. 5(3), 34(6).

⁴⁶ *Id.* art. 5(3).

applied for in addition to any in-country registration.⁴⁷ For example, in *Mtikila and Others v. Tanzania*, the first case to be decided by the African Court on its merits, the first assessment the African Court made was on the status of the two NGOs bringing the case.⁴⁸ From this case and subsequent similar cases, it is clear that in order to bring cases before the African Court, registration within a member state is not enough, and applications made by NGOs without observer status will fall at the first hurdle.

How an NGO obtains observer status is set out on the African Commission's website.⁴⁹ The application process appears straightforward in terms of requirements, if not for the quantity of paperwork. The requirements and other important details are found in the Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights.⁵⁰ The general requirements are that the NGO should: (i) have objectives and activities in consonance with the fundamental principles and objectives enunciated in the OAU Charter and in the African Charter on Human and Peoples' Rights; (ii) be organizations working in the field of human rights; and (iii) declare their financial resources.⁵¹

If these general requirements are fulfilled, the NGO must provide: (i) a written application addressed to the Secretariat stating its intentions, at least three months prior to the Ordinary Session of the Commission which shall decide on the application, in order to give the Secretariat sufficient time in which to process the said application; and (ii) its statutes, proof of its legal existence, a list of its members, its constituent organs, its sources of funding, its last financial statement, as well as a statement on its activities.⁵²

⁴⁷ *Network: Non-governmental Organisations*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS, <http://www.achpr.org/network> (last visited Jan. 26, 2018).

⁴⁸ *See* Tanganyika Law Soc'y v. Tanzania, No. 009/2011, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 91–105 (June 14, 2013), <http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20009-011-2011%20Rev%20Christopher%20Mtikila%20v.%20Tanzania-1.pdf>.

⁴⁹ *See* AFRICAN UNION, *supra* note 33.

⁵⁰ African Commission on Human and Peoples' Rights, Res. 33, Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the field of Human and Peoples' Rights (May 5, 1999), <http://www.achpr.org/sessions/25th/resolutions/33>.

⁵¹ *Id.*

⁵² *Id.*

It is also worth noting that the list of current NGOs enjoying observer status includes several based outside of Africa, such as NGO heavyweights Amnesty International and Human Rights Watch.⁵³ Based on the wording of the Additional Declaration, these non-African NGOs appear to have the authority to bring cases directly to the African Court concerning member states that have signed the Additional Declaration.⁵⁴ This authority is potentially significant for future cases and the development of human rights protection in Africa; not only does this significantly increase the number of prospective applicants, but it also adds significant potential resources and experience. As an example, an application regarding breaches of the African Charter in Mali could be brought by Amnesty International (as long as other admissibility requirements such as exhaustion of local remedies are met). One possible wrinkle is the word “relevant” contained in Article 5(3) of the Protocol (“The Court may entitle *relevant* Non Governmental organizations (NGOs) with observer status before the Commission . . . to institute cases directly before it . . .”).⁵⁵ Whether the African Court would find an international NGO such as Amnesty International “relevant” to any particular country is an interesting point the African Court has yet to address.

Turning now to who has signed the Additional Declaration, currently, only eight AU member states have made the Additional Declaration: Benin, Burkina Faso, Cote D’Ivoire, Ghana, Malawi, Mali, Tanzania, and Tunisia.⁵⁶ This, in effect, means that only citizens of these eight countries can directly petition the African Court alleging violations of their rights.⁵⁷ It should be noted that Rwanda had also signed the Additional Declaration, but in February 2016 sought to withdraw it, a first in the young history of the African Court.⁵⁸ Upon depositing its

⁵³ For a current list of NGOs, including international organizations, granted observer status by the African Commission, see AFRICAN COMMISSION ON HUMAN & PEOPLES’ RIGHTS, *supra* note 47.

⁵⁴ See African Court Protocol, *supra* note 4, art. 5(1), 34(6).

⁵⁵ *Id.* art. 5(3) (emphasis added).

⁵⁶ Tunisia is the latest signatory, signing the Additional Declaration in April 2017. Press Release, African Court on Human and Peoples’ Rights, Republic of Tunisia Signs African Court Declaration to Allow NGOs and Individuals to Access the Human and Peoples’ Rights Court Directly (Apr. 18, 2017), <http://en.african-court.org/index.php/news/press-releases/item/145-republic-of-tunisia-signs-african-court-declaration-to-allow-ngos-and-individuals-to-access-the-human-and-peoples-rights-court-directly>; see AFRICAN UNION, *supra* note 1.

⁵⁷ See African Court Protocol, *supra* note 4, art. 5(1), 34(6).

⁵⁸ *Umuhoza v. Rwanda*, No. 003/2014, Ruling on Jurisdiction, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 18 (Sept. 5, 2016), <http://www.african-court.org/en/images/Cases/Ruling%20on%20Jurisdiction/Apl.%20003->

withdrawal of its Additional Declaration, Rwanda argued that its withdrawal had immediate effect, thus barring individuals currently petitioning the African Court from continuing their cases.⁵⁹ As the African Court acknowledged, the African Court Protocol, African Court Rules, and African Charter have no provisions on the withdrawal of a member state from the African Protocol or Additional Declaration,⁶⁰ but the African Court decided in June 2016 that whilst the withdrawal was valid,⁶¹ it was subject to a twelve-month notice period meaning it would take effect on March 1, 2017.⁶² It is worth noting that the African Court's decision did, however, make clear that cases currently pending before the African Court would remain within the jurisdiction of the African Court.⁶³

Individuals have challenged the requirement that member states must sign the Additional Declaration for individuals and NGOs to directly petition the African Court in both the African Court and the East African Court of Justice. In the 2012 case of *Femi Falana v. African Union*, the applicant, noted human rights lawyer Femi Falana, argued that he had made several attempts to persuade the Nigerian government to sign the Additional Declaration, but to no avail.⁶⁴ Falana therefore filed a case against the African Union alleging violations of Articles 1, 2, 7, 13, 26, and 66 of the African Charter, since the requirement that a member state sign the Additional Declaration violated his right to freedom from discrimination, fair hearing, equal treatment and right to be

2014%20Ingabire%20Victoire%20Umuhoza%20v.%20Rwanda%20Ruling%20on%20Jurisdiction%20ENG.pdf; Umuhoza v. Rwanda, No. 003/2014, Dissenting Opinion of Judges Niyungeko and Ramadhani, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 2 (Feb. 3, 2017), <http://en.african-court.org/images/Cases/Dissenting-Separate%20Opinions/Application%2003-2014-Dissenting%20opinion%20of%20Judges%20Gerard%20Niyungeko%20and%20Augustino%20Ramadhani.pdf>; Umuhoza v. Rwanda, No. 003/2014, Individual Opinion of Judge Ouguergouz, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 1 (Apr. 11, 2017), http://en.african-court.org/images/Cases/Orders/Individual_opinion_of_Judge_Fatsah_Ouguergouz_english.pdf.

⁵⁹ See Umuhoza, No. 003/2014, Ruling on Jurisdiction, Afr. Ct. H.P.R., ¶ 18.

⁶⁰ *Id.* ¶ 53.

⁶¹ *Id.* ¶ 69.

⁶² See *id.* ¶ 69(iii).

⁶³ See *id.* ¶ 68.

⁶⁴ Falana v. African Union, No. 013/2011, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] ¶ 2 (June 26, 2012), <http://en.african-court.org/images/Cases/Judgment/Judgment%20Application%20001-2011-%20Femi%20Falana%20v.%20The%20AU.%20Application%20no.%20001.2011.EN.pdf>.

heard.⁶⁵ Falana argued that the African Court should declare Article 34(6) of the African Court Protocol null and void.⁶⁶ In response, the African Union argued that the Additional Declaration is a matter for individual member states to engage in, and no case can be brought against it for member states' failure to sign.⁶⁷ The majority found, by seven votes to three, that while the African Union enjoyed the status of a separate legal individual, and therefore could in theory be a member of a treaty or party to a protocol, the African Court was not able to hear the petition since Falana was asking for the African Union to be sued on behalf of its members who are separate and sovereign entities.⁶⁸ In their dissenting opinion, then-African Court President Justice Akuffo, Justice Ngoepe, and Justice Thompson agreed that the Additional Declaration was inconsistent with the African Charter and African Court Protocol,⁶⁹ but found that the African Court did not have the power to declare Article 34(6) of the African Court Protocol null and void.⁷⁰

In the subsequent African Court case of *Atemnkeng v. African Union*, the African Court found again, this time by six votes to three, that it was not able to entertain a petition against the African Union.⁷¹ In this case, the applicant, a staff member of the African Union Commission, petitioned the African Court arguing that the requirement to sign the Additional Declaration to allow individuals and NGOs direct access to the African Court was inconsistent with the Constitutive Act of the

⁶⁵ *Id.* ¶ 3.

⁶⁶ *Id.* ¶ 40.

⁶⁷ *Id.* ¶¶ 44–45.

⁶⁸ *Id.* ¶¶ 70–73.

⁶⁹ Falana v. African Union, No. 013/2011, Dissenting Opinion of Judges Affuko, Ngoepe, and Thompson, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 18 (June 26, 2012), <http://en.african-court.org/images/Cases/Dissenting-Separate%20Opinions/001-2011-Dissenting%20Opinion-Femi%20Falana%20-%20Jg%20Akuffo-Ngoepe%20-Thompson-E.pdf>; *see also* Falana v. African Union, No. 013/2011, Separate Opinion by Judge Mutsinzi, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (June 26, 2012), http://en.african-court.org/images/Cases/Dissenting-Separate%20Opinions/001-2011-Separate_Opinion_-_Femi_Falana-Mutsinzi.pdf; *see also* Falana v. African Union, No. 013/2011, Separate Opinion of Judge Ouguergouz, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (June 26, 2012), <http://en.african-court.org/images/Cases/Dissenting-Separate%20Opinions/001-2011-Separate%20Opinion-Falana-Ouguergouz-E.pdf>.

⁷⁰ Falana, No. 013/2011, Afr. Ct. H.P.R., Dissenting Opinion of Judges Affuko, Ngoepe, and Thompson, ¶ 18.

⁷¹ *Atemnkeng v. African Union*, No. 014/2011, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 46 (Mar. 15, 2013), <http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20014-2011%20Denis%20Atemnkeng%20V.%20African%20Union.pdf>.

African Union and the African Charter.⁷² Similar to the *Falana* case discussed above, the African Court declined to consider the issue, finding that since the application was made against the African Union, and not a AU member state that has ratified the Protocol or signed the Additional Declaration it lacked jurisdiction to hear the case.⁷³ The joint dissenting opinion of then-President Akuffo, Justice Ngoepe, and Justice Thompson, however, again agreed with the Applicants' argument that the Additional Declaration provides restrictions on the access to the African Court which are incompatible and inconsistent with the spirit of 'access for all' contained within the African Court Protocol and African Charter.⁷⁴ In their dissent, the justices agreed that this requirement violated the rights of the African people from petitioning the very court that was established to protect human rights.⁷⁵ Referring to the Additional Declaration as a "clog" in accessing the African Court, the minority went further than in its dissent in *Falana* and declared Article 34(6) of the African Court Protocol null and void, thus potentially indicating a growing dissent amongst the African Court's judges against the Additional Declaration.⁷⁶

In another challenge to the Additional Declaration requirement, the East African Court of Justice considered the case of *Democratic Party v. EAC, Uganda, Kenya, Rwanda and Burundi*.⁷⁷ In this case, the applicant, a Ugandan political party, sought to challenge Uganda's,

⁷² *Id.* ¶¶ 1, 17.

⁷³ *Id.* ¶ 40.

⁷⁴ *Atemnkeng v. African Union*, No. 014/2011, Afr. Ct. H.P.R., Dissenting Opinion of Judges Akuffo, Ngoepe, and Thompson, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], at 3–4 (Mar. 15, 2013), http://www.african-court.org/en/images/Cases/Dissenting-Separate%20Opinions/Application_014-2011-Dissenting_Opinion_of_Judge_Sophia_A.B_AKUFFO_Bernard_M_NGOEPE_and_Judge_Else_N_THOMPSON.pdf. *Cf.* *Falana*, No. 013/2011, Afr. Ct. H.P.R., Dissenting Opinion of Judges Affuko, Ngoepe, and Thompson.

⁷⁵ *Atemnkeng*, No. 014/2011, Afr. Ct. H.P.R., Dissenting Opinion of Judges Akuffo, Ngoepe, and Thompson, at 3–4. *Cf.* *Falana*, No. 013/2011, Afr. Ct. H.P.R., Dissenting Opinion of Judges Affuko, Ngoepe, and Thompson.

⁷⁶ *Atemnkeng*, No. 014/2011, Afr. Ct. H.P.R., Dissenting Opinion of Judges Akuffo, Ngoepe, and Thompson, at 5.

⁷⁷ *See Democratic Party v. Sec'y Gen. of the East African Cmty.*, No. 001/2014, Judgment, East African Court of Justice at Arusha Appellate Division, ¶ 2 (July 28, 2015), <http://eacj.org/wp-content/uploads/2015/08/Democratic-Party-vs-2c-SG-REVISED-Draft-2-FINAL-31-07-2015.pdf>; *Democratic Party v. Sec'y Gen. of the East African Cmty.*, No. 002/2012, Judgment, East African Court of Justice at Arusha First Instance Division, ¶ 2 (Nov. 29, 2013), <http://eacj.org/wp-content/uploads/2014/02/REFERENCE-NO-2-of-2012-Democratic-party-VS-SG-and-4-Others.pdf>. It should be noted that when Rwanda signed the Additional Declaration in August 2013 it was removed from the case.

Kenya's, and Burundi's failure to sign the Additional Declaration, arguing that this failure was an infringement of Articles 5, 6, 7(2), 8(1)(c), 126, and 130 of the East African Community Treaty, and Articles 1, 2, 7, 13, 26, 62, 65, and 66 of the African Charter.⁷⁸

In particular, the applicant argued that since state members signed up to the African Court by ratifying the African Court Protocol, they were also required to sign the Additional Declaration; an obligation also required by membership of the East African Community, which obliges member states' laws to adhere to universally accepted standard of human rights.⁷⁹ According to the applicant, the limited access to the African Court created a "disturbing situation which has seriously affected the entire system of judicial protection of human rights at the regional and continental level."⁸⁰ In response, it was argued that Article 34(6) of the African Court Protocol does not set a time limit on signing the Additional Declaration or render the making of the declaration mandatory.⁸¹ The First Instance Judgment was rendered in November 2013 with the EACJ finding that the EAC had done everything required of it by informing member states of the claim and that there was no cause of action against it.⁸² It further found that it could not delve into the state members' obligations as created by other international instruments such as the African Court Protocol, although it did suggest that under the EAC Treaty, the EACJ has jurisdiction to consider states who fail to honor commitments made to other international organizations long as this does not usurp the powers of these other organs.⁸³ On the central issue of whether member states ratifying the African Court Protocol are required to sign Article 34(6) of the Protocol, the EACJ found that nothing in the wording of the Protocol requires member states to sign, nor does it give any indication on timeframe.⁸⁴ The EACJ Appeals Chamber overturned the Court of First Instance's judgment in part, finding that it was within its jurisdiction to consider whether EAC member states adhered to the

⁷⁸ Democratic Party v. Sec'y Gen. of the East African Cmty., No. 001/2014, Judgment, East African Court of Justice at Arusha Appellate Division, ¶ 2; Democratic Party v. Sec'y Gen. of the East African Cmty., No. 002/2012, Judgment, East African Court of Justice at Arusha First Instance Division, ¶ 2.

⁷⁹ Democratic Party v. Sec'y Gen. of the East African Cmty., No. 002/2012, Judgment, East African Court of Justice at Arusha First Instance Division, ¶¶ 2, 3(a)–(b), 9.

⁸⁰ See *id.* ¶ 9.

⁸¹ See *id.*

⁸² *Id.* ¶ 49.

⁸³ *Id.* ¶ 58.

⁸⁴ *Id.* ¶¶ 62–63.

African Charter and the African Court Protocol, but that the language of Article 34(6) of the Protocol sets no time frame to depositing the Additional Declaration, and the matter is left to the sole discretion of the State members themselves.⁸⁵

3. *An Alternative Way?*

Undoubtedly, ratification by a member state of the African Court Protocol alone, without signing the Additional Declaration, restricts individuals and NGOs applying to the African Court. However, in such a scenario, there does exist the intriguing possibility of the African Commission itself transferring cases to the African Court concerning the twenty-two member states that have not signed the Additional Declaration, but have ratified the African Court Protocol. As discussed above, Article 5(1)(a) of the African Court Protocol sets out that ratification of the African Court Protocol gives the African Court jurisdiction to consider cases brought by the African Commission relating to that particular member state.⁸⁶ In a reciprocal clause, Article 6(3) of the African Court Protocol states that the African Court “may consider cases or transfer them to the Commission” without further explanation.⁸⁷ The African Court Rules also set out in detail the rules governing the transfer of a case from the African Commission to the African Court.⁸⁸ These rules include that any application brought by the African Commission should include a “report” alongside accompanying documentation, and give the African Court the ability to hear from Commissioners, legal officers, experts, and the original Applicants.⁸⁹ Similarly, the Rules of Procedure of the African Commission set out the scenario under which the African Commission can seize the African Court of a case currently before it. In particular, Rule 118.3 of the

⁸⁵ Democratic Party v. Sec’y Gen. of the East African Cmty., No. 001/2014, Judgment, East African Court of Justice at Arusha Appellate Division, ¶¶ 61, 74, 80 (July 28, 2015), <http://eacj.org/wp-content/uploads/2015/08/Democratic-Party-vs-2c-SG-REVISED-Draft-2-FINAL-31-07-2015.pdf>.

⁸⁶ See African Court Protocol, *supra* note 4, art. 5(1)(a) (“The following are entitled to submit cases to the court: a) The Commission . . .”).

⁸⁷ See Rules of Court, *supra* note 21, r. 29(5)(a) (“Where the Court decides to transfer a case to the Commission pursuant to Article 6(3) of the Protocol, it shall transmit to the Commission a copy of the entire pleadings so far filed in the matter accompanied by a summary report.”).

⁸⁸ Rules of Court, *supra* note 21, r. 29(3)(a)–(c).

⁸⁹ *Id.*; see also Rules of Procedure of the African Commission on Human and Peoples’ Rights, 2010, r. 115, 120.

African Commission Rules allows the African Commission to submit a communication to the African Court against a state party in a situation that, in its view, constitutes one of “serious or massive violations of human rights.”⁹⁰ A second scenario for transfer exists in Rule 118.1 and Rule 118. 2 of the African Commission Rules, which empower the African Commission to transfer a case to the African Court where a member states fails to implement either a decision or provisional measures issued by the African Commission.⁹¹ In addition, Rule 118.4 states that the African Commission may seize the African Court at “any stage of the examination of a communication if it deems necessary,”⁹² indicating a somewhat lesser standard than either Rule 118.3, or the non-compliance clauses found in Rule 118.1 and Rule 118.2.⁹³ Certainly, these rules buttressed by the African Court Protocol and African Court Rules present a scenario whereby member states that have not granted individuals and NGOs direct access to the African Court, by not signing the Additional Declaration, can still be brought before the African Court via transfer from the African Commission.⁹⁴ Whilst the standard to be applied to such a transfer is somewhat vague, there certainly appears to be scope for applicants to file a case before the African Commission, and for the African Commission to send it to the African Court for consideration. This scenario has occurred in two cases so far before the African Court, the first concerning Libya in relation to a judgment in default, and the second involving Kenya.

With regard to the Libya case, in *African Commission on Human and Peoples’ Rights v. Libya*, the African Commission applied to transfer a case lodged before it on behalf of Saif al-Islam Gaddafi (Gaddafi), the son of former Libyan leader Muammar Gaddafi.⁹⁵ In particular, Gaddafi filed a complaint before the African Commission alleging violations of Article 6 and 7 of the African Charter.⁹⁶ In January 2013, the African

⁹⁰ Rules of Procedure of the African Commission on Human and Peoples’ Rights, *supra* note 89, r. 118(3).

⁹¹ *Id.* r. 118(1)–(2).

⁹² *Id.* r. 118(4).

⁹³ *Id.*; *cf. id.* r. 118(1)–(3).

⁹⁴ *See id.* r. 115, 118(1)–(4), 120; *see also* African Court Protocol, *supra* note 4, art. 5(1)(a); Rules of Court, *supra* note 21, r. 29(3)(a)–(c), 29(5)(a).

⁹⁵ African Comm’n on Human & Peoples’ Rights v. Libya, No. 002/2013, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.] (June 3, 2016), <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl%20%20002–2013%20African%20Commission%20v%20Libya–%20Engl%20.pdf>.

⁹⁶ *Id.* ¶¶ 4, 9.

Commission applied to the African Court seeking provisional measures pursuant to Article 5(1) of the African Court Protocol, Rule 29(3) of the African Court Rules and Rule 3 of the African Commission Rules.⁹⁷ On March 15, 2013, the African Court ordered provisional measures which were, in effect, an attempt to force Libya to refrain from all judicial proceedings that would impinge on Gaddafi's African Charter rights, including allowing him access to a lawyer and visits from family.⁹⁸ The African Court gave Libya fifteen days to report back. Libya ignored the order.⁹⁹ From 2013 to 2016, numerous attempts were made by the African Court to cajole Libya into either complying with its March 2013 provisional measures order or engage on the merits of the allegations.¹⁰⁰ At the same time, the African Commission continued to lodge further applications, urging the African Court to enforce its March 2013 provisional measures order, and then later to make findings on the merits of its case before finally requesting the Court to render judgment in default pursuant to Rule 55 of the African Court rules, indicating a high level of engagement between the African Commission and the African Court.¹⁰¹

Libya's stance, or rather lack thereof, combined with the African Commission's urgings resulted in the African Court seriously considering delivering its first ever judgment in default.¹⁰² This decision may also have been hastened by the news in July 2015 that the Assize Court of Tripoli had sentenced Gaddafi to death *in absentia*.¹⁰³ Certainly, the African Court took these reports on the imposition of the death penalty seriously enough to issue a second order for provisional measures, reiterating its previous March 2013 order and obliging Libya to preserve Gaddafi's life.¹⁰⁴ Libya's response to this second order was sadly predictable; Libya ignored this order too, although Gaddafi was not

⁹⁷ *Id.* ¶ 5.

⁹⁸ *Id.* ¶¶ 15–16.

⁹⁹ *Id.* ¶¶ 17–18.

¹⁰⁰ *Id.* ¶¶ 18–35.

¹⁰¹ *Id.* ¶¶ 22, 24–25, 33–34.

¹⁰² African Comm'n on Human & Peoples' Rights v. Libya, No. 002/2013, Separate Opinion of Judge Ouguergouz, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 31 (June 3, 2016), <http://en.african-court.org/images/Cases/Dissenting-Separate%20Opinions/Opinion%20Commission%20africaine%20c%20Libye%20dissenting%20opinion%2016%20June%202016.pdf>.

¹⁰³ African Comm'n v. Libya, No. 002/2013, Judgment, Afr. Ct. H.P.R., ¶ 36.

¹⁰⁴ *Id.* ¶ 37.

in fact executed.¹⁰⁵ Whilst the judgment does not detail specifically when the African Court began earnestly considering a judgment in default, Libya not only ignored the African Court's entreaties, but brazenly violated its orders for a second time putting it again, clearly at odds with the African Court with no resolution on the horizon.

Unfortunately, for an understanding of the relationship between the African Commission and the African Court, the reasons why the African Commission decided to transfer the case to the African Court are not set out in the judgment with any clarity.¹⁰⁶ Certainly, Rule 34 of the African Court Rules allows the African Court to accept such cases, but the criteria or standard used set by either the African Commission or African Court on such transfers is not detailed. There is a hint in the judgment that the African Commission had ordered its own provisional measures, which if ignored may well have prompted the African Commission to transfer the case under Rule 118.2.¹⁰⁷ It is interesting to note, however, that the African Court confirmed that where the African Commission brings a case, assessing whether a member state has signed the Additional Declaration is not required.¹⁰⁸ With this clarification, later followed in the *African Commission v. Kenya* case discussed below,¹⁰⁹ it appears that individuals or NGOs with observer status coming from a member state who has not signed the Additional Declaration can use the African Commission as a route to the African Court, at least in theory. The key question remains how to persuade the African Commission to transfer the case.

Some clues on when the African Commission will transfer a case and how it can be litigated can be gleaned from the second transfer case of *African Commission v. Kenya*. This case involves a claim by the Ogiek people of the Mau Forest in the Rift Valley, Kenya.¹¹⁰ In their

¹⁰⁵ Various media outlets have reported that Gaddafi was not executed during detention, and was released in 2017. See, e.g., Rana Jawad, *What next for Saif al-Islam Gaddafi?*, BBC NEWS (June 12, 2017), <http://www.bbc.com/news/world-africa-40246964>.

¹⁰⁶ See, e.g., *African Comm'n v. Libya*, No. 002/2013, Judgment, Afr. Ct. H.P.R., ¶ 47 (stating that under Article 5(1) of the African Court Protocol, the African Commission is one of the entities/institutions entitled to submit cases to the African Court).

¹⁰⁷ *Id.* ¶ 6.

¹⁰⁸ See *id.* ¶ 51.

¹⁰⁹ *African Comm'n on Human & Peoples' Rights v. Kenya*, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 60 (May 26, 2017), <http://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya.pdf>.

¹¹⁰ *Id.* ¶¶ 3, 6.

claim, lodged initially before the African Commission, they argued that the Kenyan Government had violated the African Charter by serving them with a thirty-day eviction notice from their ancestral land.¹¹¹ The Ogiek argued that this eviction would have far reaching consequences on the political, social, and economic survival of their community.¹¹² Specifically, they contended that the eviction notice violates Articles 1, 2, 4, 17 (2), 17 (3), 21, and 22 of the African Charter.¹¹³

Why did the African Commission choose to refer the case to the African Court? Whilst the African Court's judgment does not delve into the issue of transfer too closely, the answer to this may well lie in the African Commission's prior dealing with Kenya on the issue of indigenous rights.¹¹⁴ In November 2009, the African Commission considered the case of *Endorois v. Kenya*.¹¹⁵ In this case, the Endorois people alleged violations resulting from their displacement from their ancestral lands around Lake Bogoria, Kenya, and surrounding areas and Kenya's failure to adequately compensate them.¹¹⁶ The African Commission found in the Endorois peoples' favor, ruling Kenya had violated Articles 1, 8, 14, 17, 21, and 22 of the African Charter.¹¹⁷ The African Commission recommended that Kenya recognize and restate the ownership rights of the Endorois, allow access to other important sites in the surrounding areas, pay compensation for the loss suffered, pay royalties for existing economic activities, grant registration of the Endorois Welfare Committee, engage with the Endorois in the effective implementation of the recommendations, and report back the African Commission within three months.¹¹⁸

It appears that Kenya did little to implement the African Commission's recommendations. Indeed, in November 2013, the African Commission issued, for the time in its history, a resolution calling on

¹¹¹ *Id.* ¶¶ 3, 10.

¹¹² *Id.* ¶¶ 4, 8.

¹¹³ *Id.* ¶ 10.

¹¹⁴ For some explanation for the transfer of the case, hinting at Kenya's lack of engagement, see *id.* ¶ 5.

¹¹⁵ Ctr. For Minority Rights Dev. v. Kenya, 276/2003, Decision, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Nov. 25, 2009), http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf.

¹¹⁶ *Id.* ¶¶ 1–2.

¹¹⁷ *Id.* ¶ 80.

¹¹⁸ *Id.*

Kenya to implement its recommendations.¹¹⁹ The resolution contains revealing information on Kenya's approach to the African Commission's finding. This includes Kenya's failure to send any representative to a workshop organized specifically by the African Commission's Working Group on Indigenous Populations/Communities to discuss the African Commission's decision, and the lack of feedback from Kenya on the measures it has taken to implement the decision.¹²⁰

Kenya's failure to implement the previous African Commission decision is important as, having seen Kenya fail to act on its decision regarding the Endorois and faced with a similar claim by the Ogiek, the African Commission may well have decided to transfer the case to the African Court. It is interesting to note on this point that the Ogiek peoples' representatives did not specifically request a transfer of the case to the African Court, but the African Commission did this *proprio motu*, again suggesting that the African Commission's prior dealing on similar issues was a persuasive factor in transferring the case.¹²¹

In both examples, what can be gleaned is that a member state's actions, whether ignoring the African Commission's provisional measures, or failing to implement decisions, may well have led the African Commission to transfer to the African Court. This is a potentially significant development, and may be a route through which applicants from member states who have not signed—and maybe are unwilling—to sign the Additional Declaration, but have signed the African Court Protocol can get their case before the African Court.

It is also worth noting that the Commission-to-Court structure also creates the seemingly confusing situation whereby the “applicant” is the African Commission rather than the individual or NGO.¹²² It is not

¹¹⁹ See African Commission on Human and Peoples' Rights, Res. 257, Resolution Calling on the Republic of Kenya to Implement the Endorois Decision (Nov. 5, 2013), <http://www.achpr.org/sessions/54th/resolutions/257/>.

¹²⁰ *Id.*

¹²¹ See Oliver Windridge, *African and the Environment Series: a Roundtable Discussion with Daniel Koei and Lucy Claridge*, ACTHPR MONITOR (Dec. 9, 2016), <http://www.acthprmonitor.org/africa-and-the-environment-series-a-roundtable-discussion-with-daniel-koei-and-lucy-claridge/>.

¹²² That the African Court considered the African Commission the applicant in transfer cases is particularly clear in the *African Commission v. Kenya* case. African Comm'n on Human & Peoples' Rights v. Kenya, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 55, 88 (May 26, 2017), <http://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya.pdf>.

entirely clear from the *Libya* judgment who is making the submissions concerning the violations. For example, was the African Commission able to take instructions from Gaddafi and put forward his claim accurately? Given the context in which this case occurred with Gaddafi held incommunicado, it seems highly unlikely that the African Commission could discuss the case with Gaddafi. Similarly, in the *Kenya* case, it is clear from the African Court judgment that the African Commission was represented and even called an expert witness. But again, were the Ogiek people and the NGOs representing them briefed on what arguments to raise and which expert they wished to call? These concerns raise practical issues moving forward with similar transferred cases. Is the African Commission “acting” for the complainant? Does the African Commission “represent” the complainant, or do they in effect step away from litigating the case once they have transferred it? If they remain representing the applicant, then they can no longer be considered neutral on the matter, and could this not lead to accusations that the African Commission has in effect decided the merits of the case which could potentially appear to be highly influential when the African Court comes to consider the merits of the case?

In terms of representation however, at the public hearing in the *Kenya* case held in November 2014, the Ogiek people themselves were heard and allowed to make submissions through their counsel, albeit through the convoluted process of their counsel making an additional application to be heard separately.¹²³ Nevertheless, it appears the African Court has, in effect, allowed the Ogiek people, as the original complainant to litigate the matter.¹²⁴ One very practical suggestion to at least clarify the nature of transfer cases is for the African Court to file such cases as the “Complainant v. Member State” and relegate the African Commission’s role in transferring the case to a note in the introduction or mention on the front page, for example “Transferred from the African Commission pursuant to Rule 34.” Although a practical suggestion that would increase clarity, this would require the African Commission to accept a role as a facilitator rather than an active participant in litigation. Alternatively, should the African Commission be determined to play a larger role in transferred cases, the African Court may consider amending the name of transfer cases to the name of the applicant in the case title for example, “Commission (Gaddafi) v. Libya.”

¹²³ *Id.* ¶¶ 14, 27–29.

¹²⁴ *See, e.g., id.* ¶¶ 28–29.

A change along these lines would at least help pre-empt future confusion when the African Court begins to entertain more than one transfer from the African Commission from the same member state. Without a change the African Court could be handling several “Commission v. Member State” cases with no obvious way of determining the actual applicant in each case.

IV. EXHAUSTION OF LOCAL REMEDIES

Whilst this paper has so far considered jurisdictional issues as they pertain to access to the African Court, the admissibility criteria laid out in the African Court Rules should not be ignored, albeit this only become relevant if and when applications satisfy the jurisdictional hurdles discussed above. Specifically, Rule 40 of the African Court Rules provides that pursuant to the provisions of Article 56 of the African Charter to which Article 6(2) of the African Court Protocol refers, applications to the African Court shall comply with seven conditions of admissibility.¹²⁵ Focusing on the exhaustion of local remedies requirement, most pertinent to issues of access, the African Court has applied an “availability, effectiveness and sufficiency” test.¹²⁶ In particular, the African Court has established that the test for the credibility of a local remedy does not require the remedy to be available, but require it also to effective and sufficient.¹²⁷ In the case of *Zongo et al v. Burkina Faso*, the African Court held that an effective remedy refers to “that which produces the expected result and, therefore the effectiveness

¹²⁵ Rules of Court, *supra* note 21, r. 40. These seven conditions are:

1. [D]isclose the identity of the Applicant notwithstanding the latter’s request for anonymity;
2. [C]omply with the Constitutive Act of the Union and the Charter;
3. [N]ot contain any disparaging or insulting language;
4. [N]ot be based exclusively on news disseminated through the mass media;
5. [B]e filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. [B]e filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seized with the matter; and
7. [N]ot raise any mater or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union.

Id.

¹²⁶ *See, e.g.*, African Comm’n v. Kenya, No. 006/2012, Judgment, Afr. Ct. H.P.R., ¶ 93.

¹²⁷ *See, e.g.*, Onyango v. Tanzania, No. 006/2013, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 88 (Mar. 18, 2016), http://en.african-court.org/images/Cases/Judgment/Onyango_Judgment.pdf.

of a remedy such as is measures in terms of its ability to solve the problem raised by the complainant.”¹²⁸ The African Court has also found that even where remedies may have not been exhausted, if the applicant is unable to access them, then they cannot be expected to have exhausted them.¹²⁹ Of note to future litigants may well also be the African Court’s recent apparent widening of its approach to the exhaustion of local remedies in the *African Commission v. Kenya* case. Specifically, the African Court stated that in order to satisfy the exhaustion of local remedies requirement, it is not necessary that the applicants themselves have brought the case before domestic courts, rather what is important is whether the matter has been brought before domestic courts.¹³⁰ This approach appears, at the very least, to have clarified for potential applicants that they need not have been involved in domestic litigation to satisfy the exhaustion of local remedies requirements, only that someone has brought the same issues before domestic courts. This position could potentially widen the pool of applicants since the African Court appears not to require they have necessarily seen a matter through since its beginning.

V. CONCLUSION

In conclusion, the African Court is in many ways an ideal destination, with jurisdiction to consider alleged violations of the African Charter and other international human rights instruments. The African Court has also provided carefully considered judgments, and enjoys a robust record of finding in favor of applicants.

Concerns remain, however, in relation to access. The difficult jurisdictional journey required to get to the African Court: the triple layer of ratifications (African Charter, African Court Protocol, and Additional Declaration) needed for individuals and NGOs, who are the overwhelming majority of potential applicants to access the African Court continues to leave the African Court hamstrung in its objective of

¹²⁸ Zongo v. Burkina Faso, No. 013/2011, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 68 (Mar. 28, 2014), <http://en.african-court.org/images/Cases/Judgment/Nobert%20Zongo%20Judgment-%20English.pdf>

¹²⁹ See African Comm’n on Human & Peoples’ Rights v. Libya, No. 002/2013, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 68 (June 3, 2016), <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl%20%20002-2013%20African%20Commission%20v%20Libya-%20Engl%20.pdf>.

¹³⁰ African Comm’n v. Kenya, No. 006/2012, Judgment, Afr. Ct. H.P.R., ¶ 94.

becoming a truly continent-wide human rights court. But, whilst onerous, the triple layer of ratifications should not be used as an excuse by member states not to fully back the African Court. At present, only eight member states, amounting to just a small fraction of the fifty-five strong African Union membership, allows full access to the African Court.¹³¹ With proper access, the African Court has the potential to be a truly continental court—what is required is further actions from both the African Court, member states, and civil society to put this into action.

¹³¹ For a list of signatures, see African Charter, *supra* note 1.