

ARTICLE

Does International Human Rights Law in African Courts Make a Difference?

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Is international human rights law effective in Africa? Extant studies assess effectiveness by focusing on the potential of individual African regional and sub-regional courts to promote human rights and influence domestic actors. However, few if any studies actually evaluate the entire human rights jurisprudence of the five major African courts with jurisdiction to hear human rights claims. In this Article, I examine the entire human rights caseload of these courts from 1988 through 2015 along four important dimensions of effectiveness: (1) court structure; (2) volume of cases; (3) compliance rate; and (4) funding and independence. The Article finds that African regional and sub-regional courts are facing significant challenges as they struggle with structural deficiencies, meager caseloads, low compliance rates, and persistent budgetary issues. The Article then describes the institutional, procedural, and operational challenges that limit the effectiveness of African regional and sub-regional courts and concludes that, based on a case-specific model of effectiveness, much improvement is necessary before the courts can become effective in vindicating human rights claims.

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INTRODUCTION

Most scholars of international law are familiar with the African Commission on Human and Peoples' Rights or the African Court on Human and Peoples' Rights. The Economic Community of West African States Community Court of Justice, the East African Court of Justice, and the South

African Development Community Tribunal, for example, are commonly known as well. But many will be surprised to hear that all of these regional and sub-regional adjudicatory bodies have jurisdiction to hear human rights claims for violations of regional and international treaties, that they have active caseloads, and that African states implement their judgments.¹ On a continent with such a poor human rights record, these courts look promising and have the potential to play a key role in adjudicating human rights claims and providing relief for the many victims of human rights violations.

The current trends seem positive as well. In 2015 alone, the African Union (“AU”) established in Senegal the Extraordinary African Chambers for the Trial of Hissèn Habré, the former Chadian dictator, who was subsequently convicted of war crimes.² The AU also granted the new African Court of Justice and Human Rights criminal jurisdiction over more international crimes than even the International Criminal Court had under its broad mandate.³ Between the AU’s recent attention to human rights and the rise of an African regional court system, it appears that Africa has finally committed itself to enforcing international human rights law.

In fact, the general proliferation of African regional and sub-regional courts,⁴ the new willingness of African economic and trade courts to exercise jurisdiction over human rights claims,⁵ and the human rights guarantees articulated in the African Charter on Human and Peoples’ Rights⁶ are all indicative of the increasing acceptance of courts as the proper forum for redressing human rights violations.⁷ As the human rights caseload of African

1. See generally KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014).

2. See Dionne Searcey, *Hissène Habré, Ex-President of Chad, Is Convicted of War Crimes*, N.Y. TIMES, (May 30, 2016), http://www.nytimes.com/2016/05/31/world/africa/hissene-habre-leader-chad-war-crimes.html?_r=0.

3. *Q&A: The Case of Hissène Habré Before the Extraordinary African Chambers in Senegal*, HUMAN RIGHTS WATCH (May 3, 2016, 6:00 AM), <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>; see Kristen Rau, *Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights*, 97 MINN. L. REV. 669, 708 (2012); *infra* notes 288–93.

4. See Lucyline Nkatha Murungi & Jacqui Gallinetti, *The Role of Sub-Regional Courts in the African Human Rights System*, 7 INT’L J. HUM. RTS. 119 (2010) (outlining the development of regional courts in Africa).

5. See Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT’L L. 737 (2013) (explaining the rise of the ECOWAS Court as a human rights court).

6. See generally African (Banjul) Charter on Human and Peoples’ Rights, June 27, 1981, 21 I.L.M. 58 (hereinafter Banjul Charter); U.O. Umozurike, *The African Charter on Human and Peoples’ Rights*, 77 AM. J. INT’L L. 902 (1983).

7. See Alter et al., *supra* note 5; James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice’s Human Rights Strategy*, 24 DUKE J. COMP. & INT’L L. 249 (2014) (describing the EACJ’s role as a human rights body).

regional courts increases,⁸ optimism about the impact of these courts is growing. For one prominent scholar, “human rights litigation in the [East African Court of Justice] is part of a broader strategy of political mobilization that is giving voice to actors who did not have such legal recourse to advance their claims in the past.”⁹

But for others, this picture is not as rosy. Scholars have identified the many weaknesses of the African Commission of Human and Peoples’ Rights and the African Court of Human and Peoples’ Rights — the two most important regional human rights bodies in Africa — by outlining their procedural deficiencies and, most importantly, the lack of state compliance with these human rights bodies.¹⁰ Others have pointed out that African regional courts struggle to operate due to lack of funding and staff¹¹ and that the judiciaries of African states are rarely aware of the decisions of regional and sub-regional courts.¹² Additionally, after the South African Development Community Tribunal issued a series of judgments condemning Zimbabwe for its human rights violations, the Tribunal’s member states stripped it of its human rights jurisdiction altogether.¹³

Things are not much better at the AU. While the AU’s new African Court of Justice and Human Rights (ACJHR) has broad criminal jurisdiction,¹⁴ it also provides African leaders and senior officials immunity from prosecution for human rights violations as long as they are in power.¹⁵ This policy thus gives those accused of human rights violations the incentive to serve as “President for life.” Some are also suspicious of the AU’s motivation in granting the ACJHR such a broad mandate, with some speculating that this is an attempt to weaken the International Criminal Court and ensure that if African leaders are tried at all, it will be in an African rather than a foreign court.¹⁶

8. See generally ALTER, *supra* note 1.

9. Gathii, *supra* note 7, at 296.

10. This is discussed at length in Sections II and III.

11. Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 BROOK. J. INT’L L. 811, 870 (2003).

12. RACHEL MURRAY & DEBRA LONG, *THE IMPLEMENTATION OF THE FINDINGS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE’S RIGHTS* 74 (2015).

13. See Catherine Sasman, *SADC Leaders Neuter Tribunal*, NAMBIAN (Aug. 21, 2012), <http://allafrica.com/stories/201208220540.html>; Cleophas Tsokodayi, *SADC Tribunal Decisions Null and Void*, EXAMINER (May 18, 2011), <http://www.examiner.com/article/sadc-tribunal-decisions-null-and-void-justice-ministers>.

14. *The Present and Potential Subject-Matter Jurisdiction of the AfCHPR*, PROJECT ARC (ADVICE, REPRESENTATION AND CASES), <http://arcproject.co.uk/2012/02/the-present-and-potential-subject-matter-jurisdiction-of-the-afchpr/>; see also *infra* notes 288–93.

15. Sarah Logan, *Africa’s Step Backward in International Law*, WORLD POL’Y BLOG (July 24, 2014, 8:48 AM), <http://www.worldpolicy.org/blog/2014/07/24/africas-step-backward-international-law>.

16. Max du Plessis, *Shambolic, Shameful and Symbolic: Implications of the African Union’s Immunity for African Leaders*, INST. FOR SEC. STUD., Nov. 2014, at 3, <https://www.issafrica.org/uploads/Paper278.pdf>.

How do we reconcile these two competing narratives about the African regional and sub-regional court system? Is this system effective in vindicating human rights claims? If so, how? If not, what are its prospects? One strand in the literature on the effectiveness of international courts focuses on the ability of a court to influence states subject to its jurisdiction,¹⁷ empower domestic actors,¹⁸ or develop international law through its jurisprudence.¹⁹ Building on these criteria of effectiveness, scholarship on the African court system generally focuses on in-depth case studies concerning the role of sub-regional courts in promoting human rights,²⁰ the impact of particular decisions by sub-regional courts on African domestic actors,²¹ and mechanisms to improve the relationship between African national judiciaries and international courts.²² While the literature on African courts certainly sheds light on the influence of individual courts in specific regions, it does not provide a broader evaluation of the entire African court system. In contrast, the approach employed in this Article focuses on the total volume of cases and level of state compliance with human rights decisions. A broader evaluation is not only key to measuring effectiveness but is also instrumental to assessing the role of legal decisions as a key mechanism to influence state actors to improve human rights practices. In other words, the effectiveness of the African court system rests in significant part on the adjudication of human rights decisions, which vindicate human rights claims and signal the court's willingness to hold states accountable.

To fill this gap in the literature, this Article provides perhaps the first comprehensive examination of the effectiveness of human rights jurisprudence in the entire African regional and sub-regional court system. This Article employs a case-specific model of assessing effectiveness by focusing on four salient dimensions that are common in the international law literature: (1) court structure; (2) volume of cases; (3) compliance rate; and (4) funding and independence. To make this assessment, I have reviewed the entire caseload of international human rights claims available in the African

17. YUVAL SHANY, *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 423–26 (2014).

18. Shalev Roisman, *Constraining States: Constitutional Lessons for International Courts*, 55 VA. J. INT'L L. 729, 780 (2015).

19. Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, 21 EUR. J. INT'L L. 967 (2010).

20. Laurence Boule, *Promoting Rights Through Court-Based ADR?*, 28 S. AFR. J. HUM. RTS. 1, 17 (2012).

21. *See, e.g.*, Matthew Scott & Leigh Swigart, *International Courts, Local Actors*, BRANDEIS INST. FOR INT'L JUDGES 2015, (Linda Carter et al. eds., 2015), <https://www.brandeis.edu/ethics/pdfs/internationaljustice/bijj/BIJ2015.pdf>.

22. *See, e.g.*, Michelle Gehrig, *International Courts and the Domestic Judiciary in Africa*, E-INT'L REL. (Jan. 19, 2012), <http://www.e-ir.info/2012/01/19/international-courts-and-the-domestic-judiciary-in-africa/>.

Human Rights Case Law Analyser,²³ a database maintained and operated by the Institute for Human Rights and Development in Africa,²⁴ over the last twenty-seven years. This database includes cases drawn from what I describe as the “African court system:” the African Commission on Human and Peoples’ Rights, the African Court on Human and Peoples’ Rights, the Economic Community of West African States Community Court of Justice, the East African Court of Justice, and the South African Development Community Tribunal. In addition, I have assembled qualitative data on state compliance with African court system judgments and quantitative data on the budgets and funding sources for each of the five courts. Using a case-specific approach to assessing effectiveness, this study suggests that the African court system is struggling to function as an effective adjudicator of human rights claims.

For Africa, with its poor human rights record and population of over 1.1 billion, the caseload of international human rights claims across the African court system totaled 337 cases.²⁵ Of these, only 113 resulted in a judgment finding a violation of a regional or international human rights treaty.²⁶ Relatively few of these 113 judgments were actually enforced, and according to available data, state compliance rates are poor.²⁷ Every court in the African court system — with the exception of one — substantially relies on foreign donors to operate, making it difficult for the African court system to demonstrate its independence and establish legal authority.²⁸ Although the results of this study show an African court system that faces significant structural, financial, and practical challenges, the study does not conclude that the African court system cannot, over time, become a more effective venue for human rights claims, or that other approaches to assessing effectiveness might produce different results. The study simply shows how the well-recognized, case-specific model of effectiveness reveals that the African court system is struggling.

Section I briefly reviews the competing methodologies on assessing the effectiveness of international courts. Section II describes the structure and operation of the African court system and presents data on its caseload, usage, state compliance rate, and funding. Section III evaluates the results of Section II and considers potential critiques, alternative hypotheses, confounding variables, and measurement issues. Section IV discusses normative proposals to improve the African court system and provides some concluding thoughts.

23. *See generally African Human Rights Case Law Analyser*, INST. FOR HUMAN RIGHTS & DEV. IN AFR., <http://caselaw.ihrda.org/> (last visited Feb. 18, 2016).

24. *See generally* INT’L HUMAN RIGHTS DEV. IN AFR., <http://www.ihrda.org/> (last visited Feb. 18, 2016).

25. *See infra* notes 113–118.

26. *Id.*

27. *Id.*

28. *See infra* Section II(D).

I. THEORIES OF EFFECTIVE INTERNATIONAL COURTS

The literature on the effectiveness of international courts is vast and includes both qualitative and quantitative approaches. Yet there is no dominant understanding of the best methodology to measure the impact of international courts on the parties, states, and other actors subject to the courts' authority. The key issue for all of these approaches is the difficulty in demonstrating a causal relationship between the court's activities — the court's presence, catalytic potential, programming, formal judgments, legal reasoning, advisory opinions — and human rights outcomes. Before evaluating the data on the African court system, the discussion below outlines the competing approaches to assessing the effectiveness of international courts.

As Laurence Helfer details in a recent article,²⁹ the range of methodological approaches to measuring the effectiveness of international courts ("ICs") can be divided into four categories: (1) case-specific effectiveness; (2) *erga omnes* effectiveness; (3) embeddedness effectiveness; (4) and norm-development effectiveness.³⁰ He carefully describes their strengths and weaknesses and outlines the type of research questions common to each methodology.³¹ The merits of the four methodologies are worth exploring to determine their relevance for assessing the African court system.

Case-specific effectiveness focuses on "whether a state found in breach of international law changed its behavior following an IC judgment."³² It is perhaps the simplest, most intuitive approach to measuring effectiveness: an IC that works well is one that, through domestic actors at the state level, compels the relevant parties to comply with its judgments. As discussed below, Helfer and Anne-Marie Slaughter are proponents of this approach.³³

Erga omnes effectiveness examines "whether ICs are effective in influencing the behavior of all actors subject to their authority."³⁴ Scholars working from this perspective are concerned not only with the ex post behavior of the parties in a given case but also with the behavior of all states subject to the jurisdiction and authority of the IC.³⁵ There are two prominent strands of *erga omnes* effectiveness: One employs "quantitative empirical methods to analyze the behavior of governments, both as policymakers and

29. Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464 (Karen J. Alter, Cesare Romano & Yuval Shany eds., 2014).

30. *Id.* at 466.

31. *Id.* at 466–81.

32. *Id.* at 466.

33. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

34. Helfer, *supra* note 29, at 472.

35. *Id.*

as prospective litigants,”³⁶ with the goal of measuring the effect of the IC on a broad range of relevant constituencies.³⁷ The second moves from the positive to the normative, offering proposals regarding the institutional design of ICs and the adoption of particular procedures to broaden an IC’s *erga omnes* effectiveness.³⁸ In the end, the *erga omnes* methodology assesses effectiveness in part by evaluating the *ex post* behavior of all parties, particularly states, after an adverse judgment from an IC.

Embeddedness effectiveness explores “whether ICs enhance the ability of domestic actors to prevent or remedy violations of international rules ‘at home,’ thus avoiding the need for international litigation.”³⁹ Scholars working in this vein look to the mechanisms through which ICs can incentivize domestic actors, largely through “institutional design features, most notably jurisdiction and access rules.”⁴⁰ Much like *erga omnes* effectiveness, this approach has both positive and normative components but is much less focused on specific case outcomes or implementation.

Finally, norm-development effectiveness focuses on “how IC decisions contribute to building a body of international jurisprudence.”⁴¹ Here, an IC’s effectiveness is a function of the quality of its legal reasoning when interpreting and applying international law. When judges at an IC display their legal acumen by issuing innovative judgments or developing a strong reputation, the IC increases its capacity to “promote the underlying objectives of the legal obligations that the court supervises.”⁴² This approach is case-driven, as it requires close attention to the development of an IC’s jurisprudence in both specialized ICs — such as human rights courts — and ICs with general jurisdiction.

Each methodology has its merits, and this Article does not attempt to resolve the debate about the best approach to analyzing the effectiveness of international human rights courts. In fact, multiple studies from different perspectives only improve our knowledge of the mechanisms through which courts affect outcomes on the ground. What is clear, however, is that three of the four approaches view cases as key tools to motivate domestic actors and incentivize states to change their behavior. Moreover, in light of the availability of data on caseloads, adverse judgments, and implementation, the case-specific approach to assessing IC effectiveness is the most straightforward of the dominant methodologies. The approach is not perfect,

36. *Id.* at 473.

37. *Id.*

38. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1, 16–19 (2012).

39. Helfer, *supra* note 29, at 474.

40. *Id.*

41. *Id.* at 466.

42. *Id.* at 478.

but it provides a useful set of variables to evaluate the effectiveness of the African court system.

A. Case-Specific Effectiveness

Measures for Effectiveness: Helfer and Slaughter offer a well-developed theory of case-specific effectiveness. For them, the definition of effectiveness is a “court’s basic ability to compel or cajole compliance with its judgments.”⁴³ They begin by comparing and contrasting domestic and international courts. In domestic courts, effectiveness is the power to compel a defendant to become a party to a dispute and to “comply with the resulting judgment.”⁴⁴ Domestic courts are also effective when their ability to compel a litigant to comply post-trial encourages similarly situated parties to comply in the face of future litigation.⁴⁵

For ICs and international adjudicators, effectiveness is not a binary determination; rather, it “requires locating courts along a continuum of effectiveness.”⁴⁶ Since ICs lack the coercive capacity to make parties to a suit comply with their judgments — or even to appear before them — ICs are substantially less effective than is the typical, well-functioning domestic court.⁴⁷ Given the weakness of ICs, their effectiveness turns on state interests in complying with the IC’s judgments, the legitimacy of the IC and its jurisprudence, and the salience of the underlying legal rule at issue.⁴⁸ Yet, despite the differences between domestic courts and ICs, Helfer and Slaughter employ the same definition of effectiveness for both types of courts, namely the ability of each “to compel compliance with its judgments by convincing domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf.”⁴⁹

B. Effectiveness and Compliance

Other scholars also consider cases and state compliance in assessing the effectiveness of ICs. Although they differ from Helfer and Slaughter in their general approach to ICs, Eric Posner and John Yoo agree that “[a] tribunal is effective if states comply with its judgments.”⁵⁰ They outline three potential

43. Helfer & Slaughter, *supra* note 33, at 278.

44. *Id.* at 283.

45. *Id.*

46. *Id.* at 285.

47. *Id.*

48. *Id.*

49. *Id.* at 290.

50. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 28 (2005).

measures for effectiveness including (1) the level of state compliance with IC judgments; (2) the caseload or usage of the IC; and (3) the overall efficacy of the treaty regime that created the IC.⁵¹ The most straightforward measure is state compliance. Consistent with the case-specific approach, they contend, ICs “can be effective only if the state that loses is (usually) willing to comply with the judgment.”⁵² The easiest way to assess state compliance is through determining the IC’s compliance rate, namely “the number of complied-with judgments divided by the total number of judgments.”⁵³

Even if defining compliance appears relatively easy, Posner and Yoo acknowledge that measuring compliance is more complicated. For example, state compliance is often difficult to observe or interpret, meaning that it could be total, partial, or mixed for any given judgment.⁵⁴ Compliance also has a temporal component — is it true compliance if a state finally complies with a judgment many years after it has been handed down?⁵⁵ Evaluating state implementation is also susceptible to selection effects, where the nature of the disputes that individuals or states choose to submit to ICs might distort the compliance rate.⁵⁶

Posner and Yoo’s second measure of effectiveness is usage or volume of cases. They argue that “[i]f a tribunal is ineffective, states will stop using it.”⁵⁷ Accordingly, a more effective court will likely see a greater caseload. Metrics for measuring usage include the number of states using the IC, the number of cases, the number of cases per year, and the number of cases per state per year.⁵⁸ But, like measurements of compliance, selection effects present problems since a variety of disputes might be justiciable in multiple ICs.⁵⁹ If so, states and other litigants might choose the most relevant court rather than the most effective one. Finally, one could also assess IC effectiveness by examining whether the underlying situation improves, worsens, or stagnates in the relevant states or region within a specific IC’s jurisdiction, or in the area of international law that an IC is meant to address.⁶⁰ Such an *ex post facto* analysis, however, is only reliable when all else is equal, making it extremely difficult to isolate the independent effect of the IC from competing explanatory variables.⁶¹

51. *Id.* at 27–29.

52. *Id.* at 20.

53. *Id.* at 28.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 29.

61. *Id.*

It is well beyond the scope of this Article (and the available data) to assess the effectiveness of the African court system using each of the four approaches outlined here. Like other quantitative and qualitative methodologies, each has strengths and weaknesses. This Article does not attempt to resolve the debate on the proper measures for assessing the effectiveness of an IC. However, to make some progress in understanding the effectiveness of the African court system and exploit the available data on African court system data, I adopt some of the key variables common to the case-specific approaches outlined in this section, and I apply them to the data described below.⁶² In the following section, I examine the institutional structure, usage, compliance rate, and independence (measured through funding) of the African court system. Although consideration of these factors will not capture every possible way in which an IC might be effective, doing so will provide greater context on the operation and effectiveness of the African court system and will help in evaluating normative proposals to improve the system's functioning.

II. HUMAN RIGHTS IN AFRICAN REGIONAL AND SUB-REGIONAL COURTS

A. Background on African Regional and Sub-Regional Courts

Any assessment of human rights litigation and its effectiveness in Africa starts with an examination of the African regional and sub-regional courts that have specific jurisdiction to hear human rights claims. This study thus focuses on the operation of the five African regional and sub-regional courts (the "African court system") that have such jurisdiction: the African Commission on Human and Peoples' Rights ("ACommHPR"),⁶³ the African Court on Human and Peoples' Rights ("ACourtHPR"),⁶⁴ the Court of Justice of the Economic Community of West African States ("ECOWAS Court"),⁶⁵ the

62. *Infra* Section II(B)(1).

63. The ACommHPR is a quasi-judicial body founded in 1987 and located in Banjul, Gambia. It has eleven commissioners serving for six-year terms, and they are eligible for reelection by the assembly of the African Union. The ACommHPR meets twice per year and has jurisdiction over fifty-three of the member states of the AU, with only South Sudan not yet under its mandate. *See generally* Banjul Charter, *supra* note 6; Claude E. Welch, Jr., *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43 (1992).

64. The ACourtHPR was founded in 2004 and is located in Arusha, Tanzania. It consists of a tribunal of eleven judges serving for four or six-year terms and eligible for reelection by the assembly of the African Union. It has jurisdiction over twenty-seven of the member states of the African Union, with a large portion of AU states not having ratified the ACourtHPR Protocol. *See generally* Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000); *Protocol on the Statute of the African Court of Justice and Human Rights*, July 1, 2008, 48 I.L.M. 337.

65. The ECOWAS Court was founded in 1991 and is located in Abuja, Nigeria. It consists of a tribunal of seven judges, appointed by the Heads of State and Government of ECOWAS members, for

Southern African Development Community Tribunal (“SADCT”),⁶⁶ and the East African Court of Justice (“EACJ”).⁶⁷ These five adjudicatory bodies — one quasi-judicial regional commission, one regional court, and three sub-regional courts — do not represent the entirety of courts in Africa. However, most importantly, each has jurisdiction to adjudicate human rights claims.⁶⁸

Of course, there are many other African sub-regional courts that may be granted or might assume jurisdiction over human rights claims in the future. The Court of Justice of the Central African Economic and Monetary Community, the Instance Judiciaire of the Arab Maghreb Union, and the Common Market for Eastern and Southern Africa Court of Justice hear cases within their respective jurisdictions, but they do not exercise jurisdiction over human rights claims and are not included in my dataset.⁶⁹ Since some ICs with jurisdiction over claims of human rights violations that occur in Africa are not actually part of the African court system, I have also excluded these from my dataset. These ICs include the International Criminal Court (“ICC”), the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the new Extraordinary African Chambers for the Trial of Hissen Habre.⁷⁰ Finally, national courts that exercise universal jurisdiction or hear human rights claims under domestic law are also excluded for the same reason. By narrowly focusing on the African regional and sub-regional courts with jurisdiction over human rights claims, this study can draw more accurate

five-year terms. Judges are eligible for reappointment once, and the ECOWAS Court has jurisdiction over all fifteen members of ECOWAS. *See generally Economic Community of West African States Community Court of Justice (ECOWAS) Revised Treaty*, July 24, 1993, 35 I.L.M. 660 [hereinafter *ECOWAS*]; Alter et al., *supra* note 5.

66. The SADCT was founded in 1992 and was located in Windhoek, Namibia. It consisted of a tribunal of ten members and met approximately five times per year. It had jurisdiction over all fifteen members of the South African Development Community (“SADC”). The SADCT was effectively suspended in 2012 and reorganized, with jurisdiction limited to “disputes between member states” rather than adjudicating claims from individuals. *See generally* Werner Scholtz, *Review of the Role, Functions and Terms of Reference of the SADC Tribunal*, 1 S. AFR. DEV. COMMUNITY L.J. 197 (2011).

67. The EACJ was founded in 1999 and is based in Arusha, Tanzania. It consists of a tribunal of ten judges, divided between a first instance and an appellate division, each serving a single seven-year term. It has jurisdiction over all five members of the EAC. *See generally* Gathii, *supra* note 7; E. AFR. CT. J., <http://eacj.org/> (last visited Feb. 10, 2017).

68. Of course, each adjudicatory body employs different procedures, and the underlying law that is applied sometimes varies between courts. *See, e.g.,* Banjul Charter, *supra* note 6; E. AFR. CT. J., *supra* note 67; *ECOWAS*, *supra* note 65; *Protocol on the Statute of the African Court*, *supra* note 64. To better understand the overall performance of the African court system, the cases from each court are combined into one dataset with the hope that it provides a broader perspective on the utility of human rights law in the region as a whole.

69. *Common Market for Eastern and Southern Africa Court of Justice*, INT’L JUSTICE RES. CTR., <http://www.ijrcenter.org/regional-communities/common-market-for-eastern-and-southern-africa-court-of-justice/> (last visited Feb. 10, 2017).

70. *See generally* Laurence R. Helfer, *Sub-Regional Courts in Africa: Litigating the Hybrid Right to Freedom of Movement* (Danish Nat’l Research Found.’s Centre of Excellence for Int’l Cts., Working Paper No. 32, 2015), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6208&context=faculty_scholarship.

conclusions about the relationship between adjudicated cases and human rights outcomes.

1. *The History of the African Court System*

A full understanding of the history, political environment, and institutional setting in which each regional and sub-regional court operates would provide helpful context for this study. Yet, of course, such a comprehensive examination is beyond the scope of this Article. This section offers a very brief summary of the key institutional actors involved in creating five regional and sub-regional courts that comprise the African court system.

In 1986, the Organization of African Unity (“OAU”), the predecessor of the AU, approved the African Charter on Human and Peoples’ Rights (the “Charter”) and created the ACommHPR, which formally came into existence in 1987.⁷¹ Reporting directly to the Assembly of the AU since 2000, the ACommHPR has the largest caseload and broadest membership, and it had the most expansive human rights jurisdiction during the relevant time period. The OAU created the Charter and the ACommHPR to embody the “values, traditions, and development of Africa.”⁷² Indeed, the OAU wanted to create a “conception of human rights” and “pattern [of] the African philosophy of law [that met] the needs of Africa.”⁷³ The Charter was a significant milestone for Africa because human rights had not been a priority of the OAU or its member states in the years prior to 1986.⁷⁴

In fact, at the time of its founding in 1963, the OAU’s primary mission was promoting “political and economic independence, non-discrimination and the liberation of Africa eradication of colonialism on the continent.” However, the OAU did not focus on protecting civil liberties.⁷⁵ For example, the OAU did not have an adjudicatory mechanism to hear individual rights claims between individuals and states. While the OAU did not make civil, political or economic rights a priority, it did initiate preliminary discussions that over time developed into a program to recognize human rights.⁷⁶ As early as 1971, at the Economic Commission for Africa Conference, OAU members

71. *From the Organisation of African Unity (OAU) to the African Union (AU): The 50-Year Path Towards African Unity*, AFR.-EU P’SHP (May 28, 2013), <http://www.africa-eu-partnership.org/en/newsroom/all-news/organisation-african-unity-oau-african-union-au-50-year-path-towards-african-unity>.

72. LUIS GABRIEL FRANCESCHI, *THE AFRICAN HUMAN RIGHTS JUDICIAL SYSTEM: STREAMLINING STRUCTURES AND DOMESTICATION MECHANISMS VIEWED FROM THE FOREIGN AFFAIRS POWER PERSPECTIVE* 107 (2014).

73. *Id.* at 106 (citing Draft African Charter Prepared for the Meeting of Experts in Dakar, Senegal, from 28 November to 8 December 1979, CAB/LEG/67/3/Rev.1 (reprinted in CHRISTOF HEYNS, *HUMAN RIGHTS LAW IN AFRICA* 81 (2002))).

74. *Id.* at 142.

75. ACommHPR, Information Sheet No. 1: Establishment, Org. Afr. Unity (on file with The Virginia Journal of International Law).

76. AFR.-EU P’SHP, *supra* note 71.

endorsed the creation of a human rights commission, but they suggested that the “promotion rather than [the] interpretation of human rights” was the goal.⁷⁷ By 1979, the OAU adopted a resolution to draft a formal human rights convention for Africa. The OAU assembly eventually formalized and unanimously approved the Charter by 1981. The Charter came into force in 1986.

The AU is the successor to the OAU and serves as the regional or continental association of African states. The Constitutive Act of 2000 initially divided the AU into nine organs: the Assembly of Heads of State and Government (“Assembly”); the Executive Council of Ministers (“Executive Council”); the Pan-African Parliament, the African Court of Justice and Human Rights (“ACJHR”); the Secretariat of the Union (“Commission”); the Permanent Representatives Committee; the Specialized Technical Committees; the Economics, Social, and Cultural Council; and the Financial Institutions.⁷⁸ In 2001, the AU added a tenth organ: the Peace and Security Council (“PSC”).⁷⁹ Subsequently, in 2004, the AU created the ACourtHPR to work in conjunction with the existing ACommHPR⁸⁰ while the AU reviewed the structure, operation, and jurisdiction of the ACJHR. Despite ACourtHPR’s creation, the ACommHPR remains the oldest and most important human rights body in Africa to date.⁸¹

In addition to the ACommHPR and the ACourtHPR at the regional level, three sub-regional courts also hear human rights claims. The ECOWAS Court, EACJ, and SADCT are the most prominent African sub-regional courts, roughly representing West, East, and South Africa, respectively. These courts were originally established as sub-regional trade tribunals but now exercise jurisdiction over human rights cases as part of their general jurisdiction. For example, fifteen West African states founded ECOWAS in 1975⁸² to promote economic integration and trade liberalization. At the time, ECOWAS envisaged a tribunal to handle interstate disputes between members, but ECOWAS never created one.⁸³ In 1993, however, ECOWAS

77. Timothy F. Yerima, *Over Two Decades of African Commission on Human and Peoples’ Rights: Flying or Fledgling*, 12 GLOBAL J. HUM. SOC. SCI. ARTS & HUMAN. 12, 56 (2012).

78. Constitutive Act of the African Union, July 11, 2000, 2158 U.N.T.S. 37733.

79. AFR. UNION [AU], *AU in a Nutshell*, <https://www.au.int/web/en/au-nutshell> (last visited Feb. 18, 2016).

80. *See infra* Section IV (explaining the relationship between these two adjudicatory bodies).

81. *Kenya Commits \$1mn to ‘Unstoppable’ African Court of Justice*, PRESIDENTIAL STRATEGIC COMMUN. UNIT (Jan. 31, 2015), <http://www.capitalfm.co.ke/news/2015/01/kenya-commits-1mn-to-unstoppable-african-court-of-justice/> (calling the ACourtHPR “unstoppable”).

82. Although the membership has changed slightly over time, the founders were Benin, Burkina Faso, Cote d’Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Nigeria, Senegal, Sierra Leone, and Togo. *See supra* note 65.

83. *ECOWAS CCJ: Court of Justice of the Economic Community of West African States*, AFR. INT’L CTS. & TRIBS., http://www.aict-ctia.org/courts_subreg/ecowas/ecowas_home.html (last visited Jan. 2, 2017).

revised its treaty to replace the non-existent tribunal with today's ECOWAS Court.⁸⁴

The ECOWAS Court's early history does not suggest that the Court was designed to promote individual liberties or human rights. After all, the ECOWAS Court's limited jurisdiction only covered disputes between member states and did not provide access to private litigants.⁸⁵ ECOWAS did not appoint judges to the ECOWAS Court until 2001. Also, as late as 2004, the ECOWAS Court interpreted its founding protocol to limit its jurisdiction to cases brought by member states.⁸⁶ Yet, in 2005, ECOWAS adopted a Supplementary Protocol that gave the ECOWAS Court the immediate authority to hear human rights cases.⁸⁷

Similarly, the EAC founded the EACJ in 2001, but EAC member states did not view the EACJ as a key component of EAC, and so they did not fund or recognize it as an independent judicial organ.⁸⁸ Unsurprisingly, the EAC member states also did not formally grant the EACJ jurisdiction to hear human rights cases.⁸⁹ Instead, the EACJ, in a series of cases in the late 2000s, began to construe its authority broadly to entertain human rights cases, often against the wishes of the EAC member states.⁹⁰

Finally, the SADCT has a similar past to the EACJ, but with a much different ending. SADC formed the SADCT in 1992,⁹¹ but the SADCT did not become operational until late 2005.⁹² In 2008, after the SADCT found Zimbabwe liable for illegally removing white farmers from their own property as part of a state-run land redistribution program,⁹³ Zimbabwe lobbied the other SADC member states to suspend the SADCT's authority to hear complaints brought by individuals against states. In 2012, SADC acceded to Zimbabwe's wishes and limited the SADCT's jurisdiction to complaints between member states. Since only individuals had petitioned the SADCT to that point, it was essentially disbanded.⁹⁴ In 2014, SADC formally reinstated

84. *Id.*

85. Alter et al., *supra* note 5, at 746.

86. *Id.* at 751.

87. *ECOWAS CCJ*, *supra* note 83. For an in-depth discussion of this process, see Alter, et al., *supra* note 5.

88. See Gathii, *supra* note 7, at 249–50.

89. *Id.* at 262.

90. *Id.* at 251.

91. Treaty of the Southern African Development Community, Aug. 17, 1992, available at http://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf.

92. Free Zenda, *The SADC Tribunal and the Judicial Settlement of International Disputes* (Sept. 2010) (unpublished LL.D. thesis, University of South Africa), <http://www.peacepalacelibrary.nl/ebooks/files/38258094X.pdf>.

93. *Mike Campbell Ltd. v. Rep. of Zim.*, S. Afr. Dev. Cmty. Trib., Case No. 2/2007 [2008] SADCT 2 (Nov. 28, 2008).

94. Zvamaida Murwira, *Southern Africa: Regional Leaders Permanently Disband SADC Tribunal*, *HERALD* (Aug. 21, 2012), <http://allafrica.com/stories/201208210893.html>.

the SADCT with limited jurisdiction to hear disputes between member states,⁹⁵ ending the tribunal as a venue to vindicate individual human rights claims.⁹⁶

Since the ECOWAS Court, EACJ, and SADCT were each created by state parties to founding sub-regional treaties, these courts do not have a formal relationship with the ACommHPR and the ACourtHPR. Although, in theory, individuals could bring human rights claims to both a sub-regional and a regional adjudicatory body. For purposes of this Article, the non-human rights component of the ECOWAS Court, EACJ, and SADCT caseloads — trade cases — is not included in the dataset.

2. *Formal Authority and Basic Procedures*

The regional and sub-regional courts that comprise the African court system can hear claims based on the Charter; the International Covenant on Civil and Political Rights (“ICCPR”);⁹⁷ the International Covenant on Economic, Social and Cultural Rights (“ICESCR”);⁹⁸ and the Convention Against Torture (“CAT”).⁹⁹ These regional and international treaties provide the underlying substantive law for human rights claims in the dataset. The ACourtHPR,¹⁰⁰ ECOWAS Court,¹⁰¹ EACJ,¹⁰² and SADCT’s¹⁰³ judgments are formally binding on individuals and state parties. The status of the ACommHPR’s judgments, however, is contested and is discussed at greater

95. *Id.*

96. Tileni Mongudhi, *SADC Tribunal to Pay N\$10m in Retrenchment Packages*, NAMIBIAN (Oct. 10, 2013), <http://www.namibian.com.na/index.php?id=115090&page=archive-read>.

97. *See generally* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (2000).

98. *See generally* ICCPR, *supra* note 97; Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties’ Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987).

99. *See generally* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* (2008).

100. *African Court on Human and Peoples’ Rights*, AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS [ACOMMHPR], <http://www.achpr.org/about/afchpr/> (last visited Nov. 13, 2016).

101. *Economic Community of West African States Court of Justice*, INT’L JUSTICE RES. CTR., <http://www.ijrcenter.org/regional-communities/economic-community-of-west-african-states-court-of-justice/> (last visited Nov. 13, 2006) (“The Court’s decisions on human rights matters interpret the African Charter on Human and Peoples’ Rights, considered by Article 1(h) of Protocol A/SP1/12/01 to contain ‘constitutional principles shared by all Member States’ as legally binding on ECOWAS Member States. Corporations and individuals can submit complaints alleging human rights violations by the Community or Member State actors.”) (citing Office of the U.N. High Comm’r for Human Rights, Protocol on Democracy and Good Governance, Dec. 21, 2001, A/SP1/12/01, http://www2.ohchr.org/english/law/compilation_democracy/ecowasprot.htm).

102. James Thuo Gathii, *Variation in the Use of Subregional Integration Courts Between Business and Human Rights Actors: The Case of the East African Court of Justice*, 79 L. & CONTEMP. PROBS. 37, 37 (2016).

103. Treaty of the Southern African Development Community, *supra* note 91, art. 16(5).

length in Section III. Given the prominence of ACommHPR cases in the dataset, below is a more detailed description of its procedures and formal authority.

To bring a claim, a complainant presents a “communication” or complaint with the relevant allegations and supporting information to the ACommHPR.¹⁰⁴ The ACommHPR then informs the relevant state of the communication through a “note verbale” and provides the case documentation.¹⁰⁵ After the ACommHPR considers the communication and conducts an investigation, it issues a judgment.¹⁰⁶ The ACommHPR’s judgment provides the facts and the procedural posture of the case. If it determines that a state is in violation, the judgment usually concludes with a statement of violations and remedies.¹⁰⁷ Despite the use of the term “judgment,” as a formal matter the ACommHPR’s decisions are not legally binding on the states.¹⁰⁸ However, the ACommHPR submits an annual “Activity Report” to the AU Assembly for formal adoption and publication.¹⁰⁹ If adopted, it has been argued that the recommendations then become legally binding on the states.¹¹⁰ For ease of exposition, I will describe the various decisions, orders, recommendations, and findings of the African court system as “judgments.”

B. Data on Human Rights Cases

In this section, I present data on every human rights claim brought between 1988 and 2015 in the African court system: the ACommHPR, the ACourtHPR, the ECOWAS Court, the SADCT, and the EACJ. As I noted above, the cases are drawn from the African Human Rights Case Law Analyser (“AHRCLA”).¹¹¹ All of the decisions are in English, and the database appears complete and regularly updated.¹¹²

104. Banjul Charter, *supra* note 6, arts. 48–49, 55.

105. Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010 R. 86, ACommHPR, May 12–26, 2010, <http://www.achpr.org/instruments/rules-of-procedure-2010/> [hereinafter ACommHPR Rules of Procedure].

106. *See* Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and People’s Rights: 1994–2004*, 101 AM. J. INT’L L. 1, 2 (2007) [hereinafter Viljoen & Louw, *State Compliance*].

107. *Id.*

108. Banjul Charter, *supra* note 6.

109. ACommHPR Rules of Procedure, *supra* note 105.

110. Frans Viljoen & Lirette Louw, *The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation*, 48 J. AFR. L. 1, 19 (“A decision of the Assembly therefore confirms the legally binding nature of the [judgment,] or ‘converts’ a quasi-legal [judgment] into a legally binding decision . . .”).

111. *See generally African Human Rights Case Law Analyser*, *supra* note 23.

112. Ideally, I would be able to crosscheck every case in the AHRCLA against the individual caseloads from each of the courts in the African court system to ensure that the database includes every

For each human rights claim, I have collected information regarding the case name, the status of the complainant (individual or organization), the legal basis of the claim, the relevant regional or international treaty, the state party allegedly in violation, the year the claim was adjudicated, and the final disposition of the case.

1. *General Results*

Number of Cases by Year. Over the twenty-seven-year period since the creation of the first regional human rights body in Africa — the ACommHPR in 1987 — the data shows that 337 human rights cases were adjudicated across the five regional and sub-regional bodies charged with hearing human rights claims based on alleged violations of the Charter and other international human rights treaties.¹¹³ Figure 1 on the next page provides data on the number of human cases adjudicated annually.

Data by Court. The ACommHPR adjudicated the vast majority of the 337 cases — some 250 — with the remaining distributed among the four other regional and sub-regional courts. Figure 2 on the next page illustrates the prominence of the ACommHPR as the main human rights adjudicator in Africa.

single case over the relevant period. As of this writing, unfortunately, the courts do not regularly update their websites or publish readily available summaries of filed, pending, and adjudicated cases. The AHRCLA is a reliable source commonly used in the literature on African courts, perhaps most prominently in Karen Alter's excellent book on international courts. *See generally* ALTER, *supra* note 1.

113. The ACommHPR has a significant backlog of cases. Although its exact size is unknown, one can estimate the backlog at over one hundred cases. The ACommHPR states that each communication is numbered to reflect the total number of communications received and the year each was received. The highest numbered document available on the ACommHPR's website as of February 2016 was 464/12. *Communications*, ACOMMHPR, <http://www.achpr.org/communications/> (last visited Feb. 18, 2016). Assuming that the numbering system is accurate and the website is regularly updated, case 144/12 is the 464th communication received by the ACommHPR. In addition, this particular communication was filed in 2012. Since the ACommHPR has adjudicated 337 cases, and the latest case adjudicated is number 464, one would expect that over 100 cases are still pending.

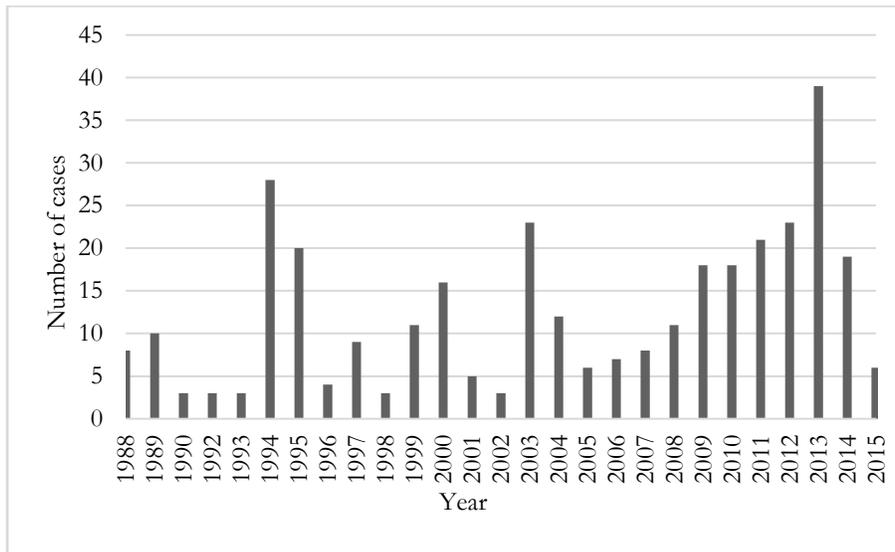


Figure 1: Cases Adjudicated by Year

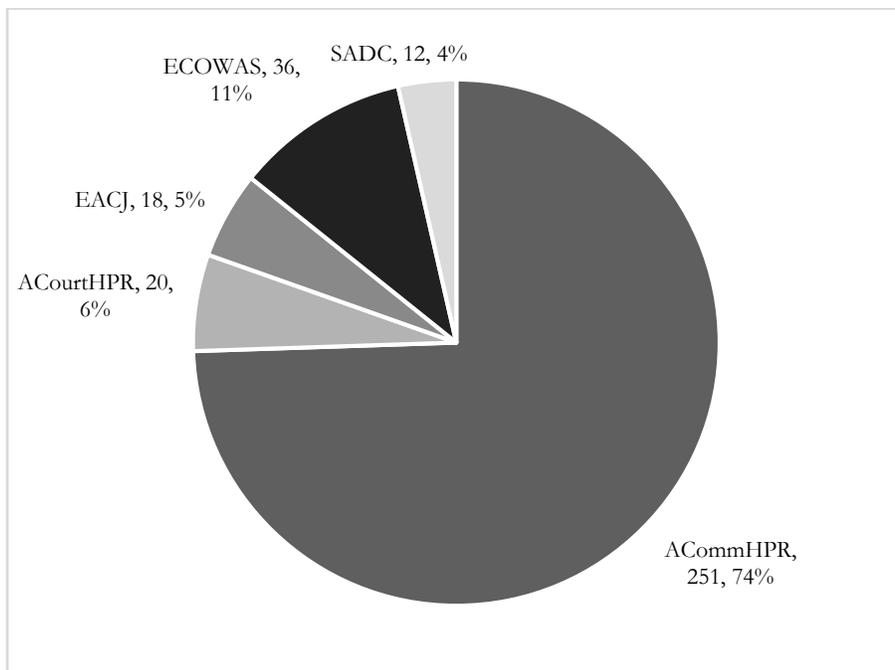


Figure 2: Cases by Court

Disposition of Cases. Of the 337 cases in the dataset, the majority — 184 cases, 54.3% of the total — never reach a decision on the merits at any of

the five African regional or sub-regional courts.¹¹⁴ For these cases, the most common reason for dismissal is the failure to exhaust local remedies (forty-nine cases), with the remainder including insufficient efforts by the complainant; complaints where the alleged offender was not a party to the treaty; and time-barred complaints.¹¹⁵ Overall, over 14% of the 337 claims were dismissed on exhaustion grounds.¹¹⁶ Of the remaining 152 cases adjudicated on the merits, 113 resulted in a judgment of a violation, with all but one of the remaining cases resulting in no violation.¹¹⁷ Given this result, of the 337 claims before the five courts in the African court system over a twenty-seven-year period, approximately 34% resulted in a finding that there was a violation of the ACHPR, ICCPR, ICESCR, or CAT.

2. *Case Characteristics*

Most Common Claims. The Charter serves as the legal basis for the vast majority of the claims (over 310 cases; 92% of the total), with a few cases referring to the other international human rights treaties mentioned above or involving internal employment disputes between court employees the courts themselves. A large number of the cases involve human rights claims relating to arbitrary detention or the right to a fair trial (147 cases; 44% of the total). To be clear, the complainants in each case alleged that the relevant state party violated several articles of the Charter, meaning that every case had multiple claims. I reviewed each case to determine the “primary” or “dominant” claim alleged by complainant or complainants.¹¹⁸ Figure 3 below shows the percentage and raw number of the six most frequent human rights claims in the dataset.

114. Daniel Abebe, *Compilation of African court cases* (on file with The Virginia Journal of International Law).

115. Beyond the failure to exhaust local remedies, common reasons for dismissal include insufficient efforts by the complainant, complaints where the alleged offender was not a party to the treaty, and time-barred complaints. *Id.*

116. *Id.*

117. *Id.* One SADC case, *United Republic of Tanzania v. Cimexpan (Mauritius) Ltd. and Others*, SADC (I) Case No. 01/2009, Southern Africa Development Community Tribunal [SADC] (June 11, 2010), <http://dev.ihrda.org/doc/01.09/view/>, was decided on the merits against one party and dismissed against the other for failure to exhaust local remedies.

118. This is certainly imprecise. At the very least, the information on claims provides a rough background on the type of claims that were most prominent among the 337 cases.

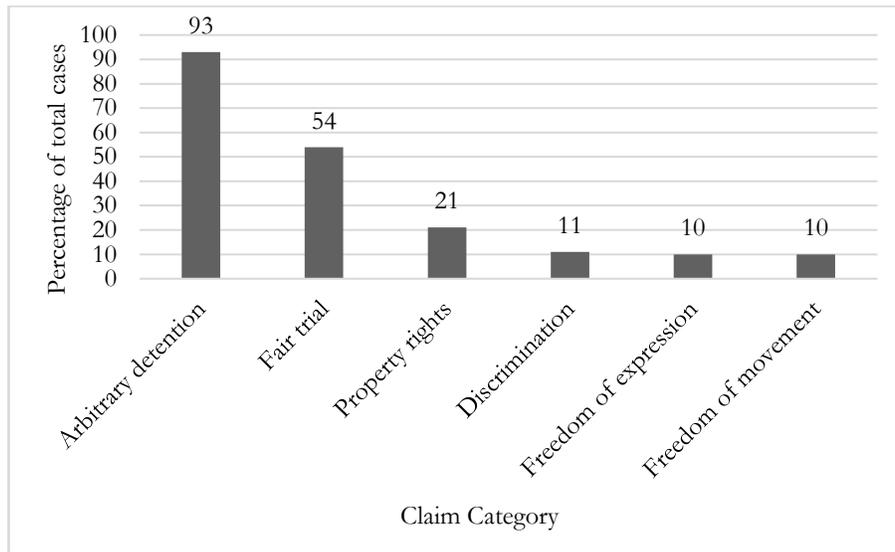


Figure 3: Most Frequent Claims (n=199)

Type of Complainants. The data also show that claims brought by individuals against states comprise 165 cases or 48% of the total number of cases. International human rights organizations brought most of the remaining cases. The number and trends in the type of complainant is below in Figure 4.

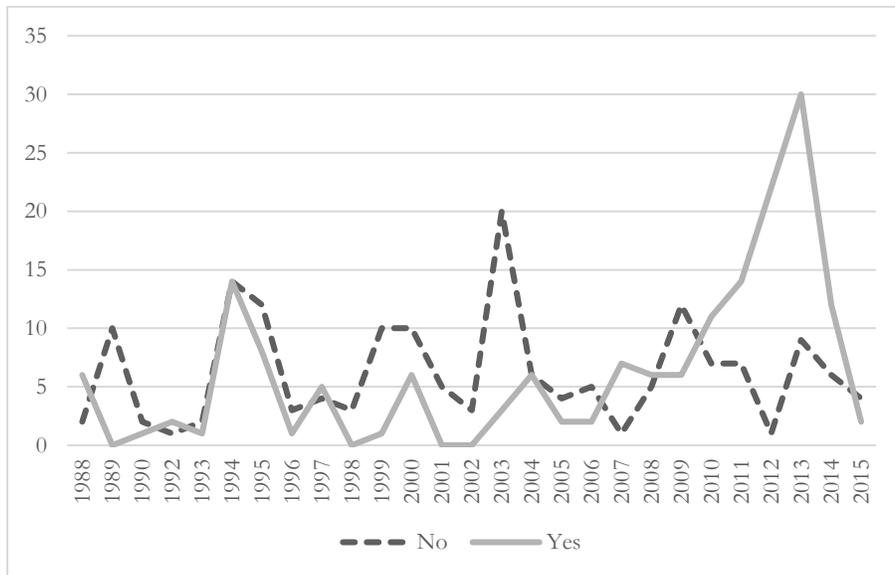


Figure 4: Individual (“Yes”) vs. Non-Individual Cases (“No”) by Year (n=337)

The distinction between cases brought by an individual and those brought by human rights organizations or other non-governmental organizations (“NGOs”) might not seem relevant, since it is common in human rights litigation for individual claimants to receive legal advice and financial support from organizations. Although specific information on litigation funding is extremely difficult to acquire, Section II(D) addresses issues of funding and the operation of the African court system in general.¹¹⁹

Cases per State. Nearly half of the 337 cases — 153 cases — involved claims brought against eight states: Nigeria (41), Zimbabwe (25), the Democratic Republic of Congo (“DRC”) (17), Cameroon (17), Gambia (15), Kenya (14), Sudan (13), and Ethiopia (11). The list is perhaps unsurprising since Nigeria and Ethiopia are Africa’s largest countries by population, and Zimbabwe, Kenya, Sudan, and the DRC have had high levels of internal strife over the period covered by the dataset, including ethnic violence, civil war, and claims of genocide. Figure 5 below shows the total number of cases (163) brought against these states and, for correlational purposes, their average Freedom House (“FH”) scores during the relevant period. By way of background, an FH score of one denotes “most free,” while an FH score of seven denotes “least free.”¹²⁰

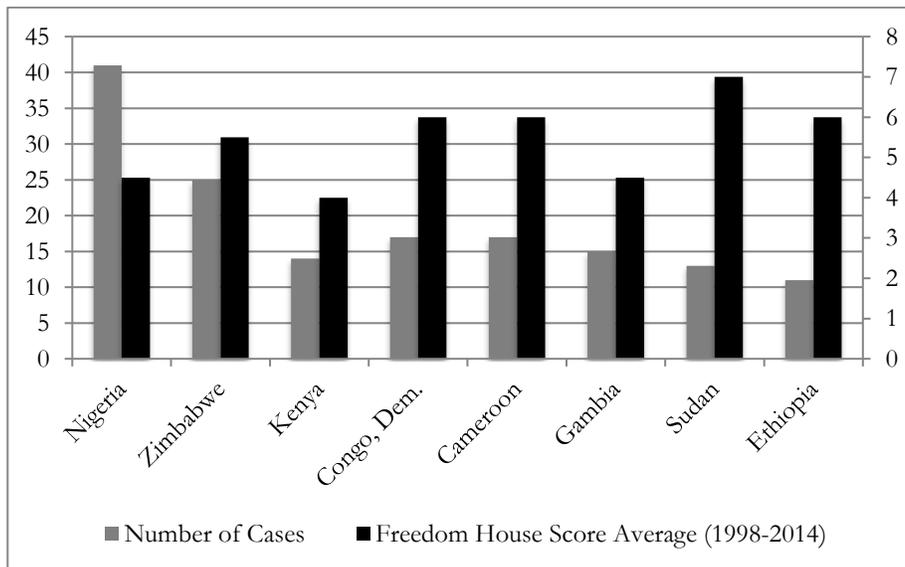


Figure 5: Cases and Freedom House Scores

119. See *infra* Section IV.

120. *Freedom in the World 2016*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2016> (last visited Feb. 10, 2017).

C. Implementation of African Court System Judgments

As noted above, only 113 of the 337 cases in the dataset resulted in a finding of a violation of the Charter or an international human rights treaty. The AHRCLA database, however, does not have data on the final resolution of these cases, namely whether the state party in violation actually enforced judgments. This is important since a key measure of the effectiveness of an international court is the state implementation and compliance rate. The following section provides more information on implementation. Determining state compliance rates is extremely complicated, and the data below are a combination of in-depth studies, anecdotal evidence, and general observations about the operation of the African court system and the national executives, judiciaries, and legislatures charged with implementing adverse legal judgments.

1. The ACommHPR and ACourtHPR

Over the period covered in the dataset, the ACommHPR and the ACourtHPR adjudicated 271 cases, of which eighty-three resulted in a violation. What is unclear, however, is what number of those judgments the offending state party has enforced. Gathering compliance data is exceedingly difficult due to questions about the binding nature of ACommHPR decisions, lack of clarity in its judgments, and the problem of precisely defining state implementation. Still, some studies have attempted to address this very important question.

In 2007, Frans Viljoen and Lirette Louw published the first comprehensive study of state implementation of ACommHPR judgments (they use the term “recommendations”), evaluating a nearly ten-year period between 1994 and mid-2003.¹²¹ Since the ACommHPR lacks “any follow-up mechanism or policy in place to monitor state compliance with its recommendations,”¹²² Viljoen and Louw assessed compliance by those states that the ACommHPR found in violation of the Charter.¹²³ During the relevant period, they found forty-four ACommHPR judgments that a state party was in violation of the Charter and categorized them along a spectrum of implementation including: (1) full compliance; (2) non-compliance; (3) partial compliance; (4) sui generis compliance; (5) and unclear cases.¹²⁴

To ensure the accuracy of my data, I compared the Viljoen and Louw findings with my coding of the human rights cases in the AHRCLA dataset.

121. See generally Viljoen & Louw, *State Compliance*, *supra* note 106.

122. See *id.* at 3.

123. *Id.* at 4.

124. *Id.* at 5.

Over the same period, I found fifty-two ACommHPR judgments of state violations, a result generally consistent with Viljoen and Louw's study, but I do not have data on state compliance. For their study, Viljoen and Louw spent three years collecting information and interviewing a range of key parties to gather data on state implementation of ACommHPR judgments.¹²⁵ They found six cases of full compliance, thirteen cases of noncompliance, fourteen cases of partial compliance, seven cases of *sui generis* compliance (in these cases, the noncompliant regime collapsed), and four cases of unclear compliance.¹²⁶ Using this coding system, Viljoen and Louw identified twenty-one cases of either full or partial compliance with ACommHPR judgments, representing approximately 45% of the forty-four state violations during the almost ten-year period in their study.¹²⁷

However, as Section I suggests, defining and measuring compliance is methodologically challenging. Despite the rigor and exhaustiveness of the Viljoen and Louw study, a few definitional issues complicate their findings. For example, Viljoen and Louw treat a state as fully compliant if "it has implemented [all of the ACommHPR's recommendations] or has unequivocally expressed the political will to comply with their substance and has already taken steps in this process."¹²⁸ Yet, as Viljoen and Louw also carefully acknowledge, deciphering political will is complicated. Use of this measure might very well over-represent the state compliance rate because it relies on assessments of government statements and political "will" instead of looking directly at legal outcomes for human rights victims.¹²⁹ Since Viljoen and Louw only find six cases of full compliance with this more expansive definition, the result suggests that state implementation of ACommHPR judgments is poor.

Similarly, "partial compliance" is even more fraught as a category because it necessarily expands the concept of compliance, potentially converting instances of functional noncompliance into partial compliance. Implementation of an ACommHPR judgment could be "ongoing,"¹³⁰ but the partial steps toward compliance might not transform into full compliance. Viljoen and Louw also perceptively note that state compliance falling within the *sui generis* category has basically nothing to do with implementing the ACommHPR's judgment. Rather, such compliance generally reflects "a transition from an undemocratic and repressive to a more stable and

125. *Id.* at 4.

126. *Id.* at 5–7.

127. *Id.* at 6.

128. *Id.* at 5.

129. *Id.*

130. *Id.* at 6.

democratic system of government.”¹³¹ Despite these concerns, the Viljoen and Louw study provides the best information available for assessing state compliance with ACommHPR judgments, and the record is mixed at best.

More recently, in 2015, Rachel Murray and Debra Long published the results of a four-year investigation into the implementation of ACommHPR’s judgments, provisional measures, and mission reports, with a specific focus on the myriad factors that impact (and impair) state compliance.¹³² Rather than assessing state implementation and expanding on the Viljoen and Louw study, Murray and Long focus on the institutional and procedural impediments at both the regional and state level that limit the ACommHPR’s capacity to ensure that its judgments are respected.¹³³ They evaluate the many obstacles to state implementation (described below), and then they offer a series of normative proposals to improve the operation of the ACommHPR.¹³⁴

Their study does not include data on state compliance rates, but it provides helpful background on the ACommHPR’s structural limitations. Since the ACommHPR’s organizational issues affect the implementation of its judgments, some of the problems are worth exploring here. For example, Murray and Long highlight the ongoing debate about the binding nature of the ACommHPR’s judgments.¹³⁵ As discussed above,¹³⁶ some argue that whatever the formal language of the Charter, the adoption of the ACommHPR’s annual Activity Reports by the AU gives binding authority to ACommHPR’s judgments.¹³⁷ The ACommHPR itself has taken the same view and declared that its judgments are binding as “authoritative interpretation of the Charter.”¹³⁸ But the ACommHPR has also “noted the quasi-judicial nature of its mandate.”¹³⁹ The need to issue legally binding judgments and support the ACommHPR’s mission is what motivated ACommHPR’s creation, in significant part.¹⁴⁰ Whatever the merits of the competing positions, some African states refuse to enforce the ACommHPR’s judgments because of their allegedly non-binding nature.

Moreover, the inconsistent form and lack of clarity in the ACommHPR’s judgments present obstacles to state implementation. Judgments sometimes only include a series of findings, rather than orders or specified remedies,

131. *Id.*

132. MURRAY & LONG, *supra* note 12, at 42–43.

133. *See generally id.*

134. The proposals are discussed in greater depth in Section IV.

135. MURRAY & LONG, *supra* note 12, at 53–55.

136. *Supra* Section II(B)(2).

137. *Id.*

138. FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 339 (2d. ed. 2012).

139. MURRAY & LONG, *supra* note 12, at 53.

140. *Id.*

making it much easier for states to ignore or refuse to implement them.¹⁴¹ ACommHPR judgments also vary widely in length, quality of reasoning, and clarity of specific remedies,¹⁴² and there are substantial delays — often measured in years — before judgments are published and disseminated.¹⁴³ Finally, the ACommHPR does not have clear mechanisms for notifying the states, complainants, or human rights groups who are parties to the underlying complaint of its final disposition.¹⁴⁴ Perhaps this should not be surprising: as recently as 2008, the ACommHPR had “a severe shortage of staff, particularly in the legal section of the Secretariat, and yet the bulk of the activities carried out by the African Commission are supposed to be done with support and assistance of the legal officers.”¹⁴⁵

Numerous institutional issues at the state level compound the problems at the ACommHPR.¹⁴⁶ As described in Section I, although nearly all African states are parties to the Charter (with the exception of South Sudan),¹⁴⁷ many of them have not taken steps to implement the Charter domestically,¹⁴⁸ meaning that it might not be enforceable against domestic actors. Few African states permit domestic courts to enforce the judgments of international or regional courts, let alone quasi-legal bodies such as the ACommHPR.¹⁴⁹ Even if they did, knowledge of ACommHPR decisions and international law among national judiciaries is very low,¹⁵⁰ limiting the kind of judicial cross-fertilization and dialogue that could assist in the development of domestic human rights law. In fact, according to Murray and Long, “our research and that of others shows still, twenty-seven years after the African Commission was established, the lack of visibility of the ACHPR and the findings of the African Commission at the domestic level.”¹⁵¹ Since the ACommHPR does not inform national legislatures of its judgments, these legislatures lack awareness of the ACommHPRs’ activities¹⁵² and consequently seldom discuss ACommHPR judgments as legislative matters.¹⁵³ Further, when the ACommHPR notifies states of adverse judgments — generally through the ministry of foreign affairs or external relations — the judgments are not

141. *Id.* at 113.

142. *Id.*

143. *Id.* at 56.

144. *Id.* at 143, 232.

145. MALCOLM EVANS & RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS 340 (2011).

146. See *infra* Section III (describing the issues in greater depth).

147. Banjul Charter, *supra* note 6.

148. Viljoen & Louw, *State Compliance*, *supra* note 106, at 4.

149. MURRAY & LONG, *supra* note 12, at 95.

150. *Id.* at 74.

151. *Id.* at 97.

152. *Id.* at 102–04.

153. *Id.* at 104.

consistently forwarded to the relevant department, unit, agency, or bureau within the state charged with enforcement and implementation.¹⁵⁴

Murray and Long helpfully describe the general institutional and structural challenges in securing compliance. To add more detail, I have summarized below four human rights cases in which the ACommHPR has concluded that a state is in violation of the Charter. The cases are clearly illustrative — not necessarily representative of all ACommHPR judgments — but they provide context on the relationship between the ACommHPR and some state violators of the Charter. The cases also reflect the difficulties in defining partial and full state compliance.

For example, in *John K. Modise v. Botswana* (2000), the ACommHPR determined that the government of Botswana had violated John K. Modise's right to citizenship under the ACHPR by denying him citizenship in Botswana and deporting him to South Africa.¹⁵⁵ In providing relief for Mr. Modise, the ACommHPR recommended that Botswana grant him citizenship and provide him adequate compensation for his damages.¹⁵⁶ As of 2010, Botswana maintained the position that the ACommHPR's recommendations were not legally binding on state parties.¹⁵⁷ Nonetheless, Botswana offered Mr. Modise compensation for the violation of his rights under the ACHPR, but he rejected the offer as inadequate. It appears that the government of Botswana has not taken any additional steps to comply with the ACommHPR's recommendation.¹⁵⁸

Similarly, in *Liesbeth Zegveld and Mussie Ephrem v. Eritrea* (2003), the ACommHPR concluded that the government of Eritrea violated the ACHPR by illegally detaining fifteen persons, mainly former government officials, based on their political affiliations.¹⁵⁹ The ACommHPR recommended that the detainees be released and compensated.¹⁶⁰ As of 2013, the government of Eritrea had not implemented the ACommHPR's recommendation,¹⁶¹ and some detainees have since died in jail or disappeared (or their whereabouts are unknown).¹⁶² A similar pattern is evident in *Article 19 v. Eritrea* (2007), as

154. *Id.* at 100–01.

155. John K. Modise v. Botswana, Communication 97/1993, ACommHPR, at 12 (2000), http://www.achpr.org/files/sessions/28th/comunications/97.93_14ar/achpr28_97_93_14ar_eng.pdf.

156. *Id.*

157. *African Commission on Human and Peoples' Rights*, 1 HUM. RTS. MONITOR Q. 44, 45 n.2 (2013).

158. See *Botswana Urged to Implement Decision on John Modise*, REFUGEES DAILY, <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=4b4c219b5> (last visited Oct. 2, 2014).

159. Liesbeth Zegveld and Mussie Ephrem v. Eritrea, Communication 250/2002, ACommHPR, at 7 (2003), http://www.achpr.org/files/sessions/34th/comunications/250.02/achpr34_250_02_eng.pdf.

160. *Id.*

161. See *Eritrea: ARTICLE 19's Submission to the UN Universal Periodic Review*, ARTICLE 19 (June 24, 2013), <http://www.article19.org/resources.php/resource/37120/en/eritrea:-article-19's-submission-to-the-un-universal-periodic-review>.

162. *Id.*

the ACommHPR determined that the government of Eritrea violated the ACHPR by arbitrarily detaining eighteen journalists.¹⁶³ The ACommHPR recommended that Eritrea release the detained journalists, provide them with a fair trial, pay them adequate compensation, and lift its ban on the press.¹⁶⁴ As of 2015, the government of Eritrea still had not implemented the ACommHPR's recommendation.¹⁶⁵

Finally, in *Abdel Hadi, Ali Radi & Others v. Republic of Sudan* (2013), the ACommHPR found that the government of Sudan violated the Charter by arbitrarily arresting and mistreating individuals at several refugee camps.¹⁶⁶ It recommended that Sudan conduct an investigation regarding the treatment of refugees, then compensate the victims and reform its security procedures. As of June 2014, Sudan had yet to take measures to implement the ACommHPR's recommendations.¹⁶⁷ To fully understand the complicated relationship between the ACommHPR and AU member states, a deeper qualitative inquiry is likely necessary. While such an inquiry is beyond the scope of this Article, these cases shed light on some of the obstacles that the ACommHPR must overcome to ensure that its judgments are respected.

2. *African Sub-Regional Courts*

African sub-regional courts have similar problems with state compliance, although the number of human rights cases and judgments of violation is much smaller than that of the ACommHPR. Still, for all the courts, state compliance rates are very difficult to determine due to a lack of reliable data. By way of background, the EACJ has formally adjudicated eighteen human rights cases, with six resulting in a judgment of violation. Note, however, that information is not readily available on whether the nations found in violation of human rights treaties have taken steps to comply with the EACJ's judgments. The ECOWAS Court has adjudicated twenty-five human rights cases, with nine resulting in a judgment of violation. Similarly, as of this writing, I cannot confirm if states have complied with these judgments. Finally, the SADCT adjudicated twelve cases, ten of which resulted in an adverse judgment for the state party. Zimbabwe was the state violator in eight

163. Article 19 v. Eritrea, Communication 275/03, ACommHPR, at 13 (2007), http://www.achpr.org/files/sessions/41st/communications/275.03/achpr41_275_03_eng.pdf at 13.

164. *Id.*

165. Abraham T. Zere, *If We Don't Give Them a Voice, No One Will: Eritrea's Forgotten Journalists, Still Jailed After 14 Years*, GUARDIAN (Aug. 19, 2015), <http://www.theguardian.com/world/2015/aug/19/eritrea-forgotten-journalists-jailed-pen-international-press-freedom>.

166. *Abdel Hadi, Ali Radi & Others v. Republic of Sudan*, Communication 368/2009, ACommHPR (2013), http://www.achpr.org/files/sessions/54th/communications/368.09/achpr54_decis_368_09_sudan_2013_eng.pdf.

167. *See Sudan's Human Rights Crisis: High Time to Take Article 2 of the Covenant Seriously*, REDRESS (June 2014), <http://www.refworld.org/docid/53a2a4584.html>.

of the cases. Tanzania and the Democratic Republic of the Congo were the state offenders in the other cases. Overall, the ECOWAS Court, EACJ, and SADCT have adjudicated fifty-six human rights cases, resulting in twenty-five adverse judgments against state parties (44%), a higher rate than for the ACommHPR and the ACourtHPR (31%), although drawn from a smaller sample.

In contrast to the much-contested status of ACommHPR judgments, EACJ, ECOWAS, and SADCT judgments are legally binding on state parties. Does the binding nature of such judgments suggest that compliance rates for these sub-regional courts is or will be higher? While concrete data on implementation of human rights judgments for the EACJ, ECOWAS Court, and SADCT are unavailable, some anecdotal evidence and case studies might be useful.

As a threshold issue, Murray and Long reject the idea that African states are more likely to enforce legally binding human rights judgments (hard law) than non-binding decisions (soft law).¹⁶⁸ The “presumption . . . is not borne out in practice before other regional courts, and neither is it borne out by the, albeit limited, practice of the African Court.¹⁶⁹ In fact, after the SADCT’s legally binding adverse judgments against Zimbabwe in 2009 and 2010 from suits by individuals, the SADC simply limited the jurisdiction of the SADCT to “disputes between member states,” making it impossible for individuals to bring human rights claims.¹⁷⁰ Human Rights Watch noted that SADC members “ordered a review of the tribunal’s role, functions, and terms of reference.”¹⁷¹ It also “instructed the tribunal not to take on any new cases, and it blocked the re-appointment of eligible judges.”¹⁷² The SADCT example notwithstanding, some argue that the other sub-regional courts (the EACJ and the ECOWAS Court) might be better placed to have states implement their human rights judgments.

For example, James Gathii carefully describes the EACJ’s decision in the mid-2000s to begin adjudicating human rights claims¹⁷³ — in the absence of

168. See MURRAY & LONG, *supra* note 12, at 10–26.

169. *Id.* at 142.

170. SADC: *Q&A on the Tribunal*, HUMAN RIGHTS WATCH (Aug. 11, 2011, 4:18 PM) <https://www.hrw.org/news/2011/08/11/sadc-qa-tribunal>.

171. SADC: *Q&A on the Tribunal*, *supra* note 170; S. Afr. Dev. Cmty., *Final Communiqué of the 32nd Summit of SADC Heads of State and Government* (Aug. 18, 2012), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Communique_32nd_Summit_of_Heads_of_States.pdf.

172. *Id.*

173. Gathii, *supra* note 7, at 252 (The EACJ’s determination to expand its authority to human rights cases is part of “building and forging judicial autonomy that derives from the entrepreneurship, resourcefulness, and creativity of the judges on the court and of the court’s long-standing registrar”).

a specific grant of jurisdiction from the EAC member states¹⁷⁴ — as exemplifying a “new trend in African regional human rights enforcement.”¹⁷⁵ Despite the EACJ’s initial design as a “tribunal to resolve trade disputes,” it has evolved into a sub-regional court that “seeks to hold member governments accountable for violations of human rights and to promote good governance and the rule of law.”¹⁷⁶ Gathii discusses the EACJ’s recent human rights caseload, noting that it has adjudicated cases against Uganda and Rwanda for arbitrary detention and against Kenya for failing to pursue investigations concerning serious allegations of murder, torture, and cruelty by Kenyan security forces.¹⁷⁷ In short, the EACJ has set itself apart from domestic courts in the region, as “East Africa has no history of judicial activism, and national judiciaries in general have been very passive.”¹⁷⁸ The EACJ’s human rights caseload is a “remarkable achievement, rather than a general pattern of courts in the region.”¹⁷⁹

Still, it is unclear whether these developments will result in higher state compliance rates. Perhaps revealingly, Gathii characterizes the expansion of the EACJ’s human rights jurisdiction as a tool to overcome its substantial institutional and structural deficiencies, including “the ad hoc basis on which most of its judges serve and the failure to settle their terms of service, the lack of a permanent location and building, insufficient staff, and an inadequate budget to pay for its operations.”¹⁸⁰ Again, the expansion of the EACJ’s jurisdiction to human rights is recent, and any assessment of state compliance at this stage is tentative at best.

In 2005, ECOWAS member states formally expanded the jurisdiction of the ECOWAS Court to hear human rights cases.¹⁸¹ Karen Alter, Laurence Helfer, and Jacqueline McAllister describe the ECOWAS Court as “an increasingly active and bold adjudicator of human rights,”¹⁸² with an enhanced human rights jurisdiction and a caseload including “judgments against Niger for condoning modern forms of slavery and against Nigeria for

174. *Id.* at 251 (noting that EACJ “[has] construed [its] powers broadly to allow [it] to decide human rights cases even though [its] constitutive treaties . . . do not include a specific grant of jurisdiction to entertain human rights cases”).

175. *Id.* at 250.

176. *Id.*

177. *Id.* at 251.

178. *Id.* at 293.

179. *Id.*

180. *Id.* at 259.

181. Supplementary Protocol Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol (A/P.1/7/91) Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol, Jan. 19, 2005, A/SP1/01/05, http://www.courtceowas.org/site2012/pdf_files/supplementary_protocol.pdf.

182. Alter et al., *supra* note 5, at 737.

impeding the right to free basic education for all children.”¹⁸³ In their study of the ECOWAS Court and its evolution, Alter, Helfer, and McAllister interviewed key domestic, regional, and international players, ranging from judges to human rights organizations, and found that ECOWAS states “gave the ECOWAS Court a broad human rights jurisdiction, and they have eschewed opportunities to narrow the Court’s authority.”¹⁸⁴ Since the expansion of its jurisdiction, the ECOWAS Court has issued several consequential human rights judgments that “grab headlines, and they significantly enhance the Court’s salience and visibility across West Africa.”¹⁸⁵

With respect to implementation, however, Alter, Helfer, and McAllister concede that “the Court faces an ongoing challenge of securing compliance with its judgments” and that at such an early stage of its development, the ECOWAS Court’s future is not clear.¹⁸⁶ They do note, however, that the ECOWAS Court is actually not dissimilar to “the European Court of Human Rights and the Inter-American Court of Human Rights,” both of which “took decades to establish their authority, whereas sub-regional tribunals in Africa are still in their infancy.”¹⁸⁷ In short, the ECOWAS Court has significant challenges but also perhaps the most promise of the African sub-regional courts.

It is hard to draw broad conclusions about the African court system’s effectiveness from a single study. For example, because of the difficulties in securing accurate state compliance data, it is complicated to assess the implementation of judgments. Further, the relative immaturity of the African court system cautions against condemning the courts before they have had sufficient time to establish authority. Based on the evidence collected here, including the Viljoen and Louw implementation study, the Murray and Long assessment of the ACommHPR’s operation, and the data provided in this Article, the record of state compliance with ACommHPR judgments appears mixed. For the sub-regional courts, the effective dissolution of SADCT as a venue for human rights claims is a step backwards, but the recent developments at the EACJ and the ECOWAS Court seem promising. In sum, there does not seem to be strong evidence that state compliance with the African court system’s judgments is likely to improve significantly, at least in the short- to medium-term.

183. *Id.*

184. *Id.* at 738.

185. *Id.* at 765.

186. *Id.* at 739, 768.

187. *Id.* at 777.

D. Funding of the African Court System

One way to measure the effectiveness of the African court system to hear cases, review evidence, and issue judgments is to assess its overall funding. If the African court system suffers from resource constraints that result in shortages of judges and staff, for example, it is unlikely to maintain a large enough caseload to impact human rights outcomes or encourage states to comply with its decisions. Funding creates the judicial capacity to render more judgments, and more judgments of violations against states should, in theory, create an increasing number of opportunities to pressure states to comply with African court system judgments.

The funding structure of the African court system naturally implicates perceptions of its independence, neutrality, and autonomy and, by extension, its effectiveness. If African states fully fund and operate the African court system, its judgments, *ceteris paribus*, will likely have greater legitimacy and expressive power than would judgments of an African court system funded and operated by non-African states. In such a world, the African court system would have a level of independence, neutrality, and autonomy far exceeding a system dependent on foreign funding, and so it would likely enjoy greater compliance with its decisions. The source of funding, in other words, has concrete implications for the African court system's effectiveness.

The Section below assesses the African court system's funding structure. The budget data presented below is incomplete and relies on the publicly available information at the time of this writing. Unfortunately, the budget data does not perfectly match the years covered in the database of human rights cases drawn from the five courts in the African court system. Data for the early years of the OAU, AU, and ACommHPR do not appear to be publicly available, but, in light of the data presented in this Section, it is unlikely that the funding structure has changed dramatically over the twenty-seven years of this study. The data described below covers the periods between 2009–11 and 2013–15,¹⁸⁸ and it is drawn from AU activity reports and declarations; SADC, EAC, and ECOWAS itemized organizational budgets; newspaper articles; press releases from the various courts within the African court system; and academic studies. Some of the organizational budgets do not break down numbers for the individual courts, and I have noted that where appropriate. While the data is not complete, it is sufficient to show the fragility of some of the courts within the African court system and their dependence on foreign donors to function. This conclusion — and some of the anecdotal evidence offered below — suggests that the African court system might have challenges in showing that it is an independent, neutral, and autonomous court under the current funding structure.

188. I have been unable to locate the AU budget for 2012 at the time of this writing.

1. *The ACommHPR and ACourtHPR*

The AU and its member states nominally fund the ACommHPR. According to the Charter, “Provision shall be made for the emoluments and allowances of the members of the Commission in the Regularly Budget of the Organization of African Unity.”¹⁸⁹ As discussed in Section II, the AU eventually replaced the now-defunct OAU. The ACommHPR now relies on funding from the AU, the successor to the OAU.

Since the ACommHPR receives its budget from the AU, it is important to analyze the AU’s funding model. Figure 6 below shows the overall AU budget and the sources of funding.

Period	AU General Budget (in USD)	Contribution from Member States (in USD)	Contribution from Partners (in USD)	% from Partners
2009	\$164,256,817 ¹⁹⁰	\$93,804,243	\$57,412,574	34.95%
2010	\$250,453,697 ¹⁹¹	\$111,763,676	\$133,690,021	53.38%
2011	\$256,754,447 ¹⁹²	\$122,602,045	\$134,152,402	52.24%
2013	\$278,226,622 ¹⁹³	\$122,866,637	\$155,359,986	55.84%
2014	\$308,048,376 ¹⁹⁴	\$126,050,898	\$170,098,545	55.22%
2015	\$522,121,602 ¹⁹⁵	\$131,471,086	\$374,802,995	71.78%

Figure 6: *AU Annual General Budget*

The bulk of the AU budget “is paid for by non-African donors, while the rest is almost entirely paid for by just five of the member states,”¹⁹⁶ specifically “Algeria, Egypt, Libya, Nigeria and South Africa.”¹⁹⁷ The largest overall donors are the European Union, United States, World Bank, China, and

189. Banjul Charter, *supra* note 6.

190. AU Assembly Dec. 208 (XII), 12th Ordinary Sess., ¶ 1 (Feb. 1–3, 2009), https://www.au.int/web/sites/default/files/decisions/9559assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf.

191. AU Assembly Dec. 287 (XIV), 14th Ordinary Sess., ¶ 1 (Jan. 31–Feb. 2, 2010), https://www.au.int/web/sites/default/files/decisions/9561-assembly_en_31_january_2_february_2010_bcp_assembly_of_the_african_union_fourteenth_ordinary_session.pdf.

192. AU Assembly Dec. 600 (XVIII), 26th Ordinary Sess., ¶ 1 (Jan. 24–28, 2011), https://www.au.int/web/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf.

193. AU Assembly Dec. 438 (XIX), 19th Ordinary Sess., ¶ 2 (July 15–16, 2012), https://www.au.int/web/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf.

194. AU Assembly Exec. Council Dec. 767 (XXIII), 23rd Ordinary Sess., ¶ 3 (May 19–23, 2013), https://www.au.int/web/sites/default/files/decisions/9658-ex_cl_dec_767-782_xxiii_e_1.pdf.

195. AU Assembly Dec. 544 (XXIII), ¶¶ 1–3 (June 26–27, 2014), [http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20544%20\(XXIII\)%20_E.pdf](http://archive.au.int/collect/auassemb/import/English/Assembly%20AU%20Dec%20544%20(XXIII)%20_E.pdf).

196. *The African Union: Half a Century On*, ECONOMIST (May 29, 2013, 11:53 AM), <http://www.economist.com/blogs/baobab/2013/05/african-union-0>.

197. Gabe Joselow, *AU Budget for 2013 Relies Heavily on Foreign Partners*, VOICE OF AMERICA (July 16, 2012, 9:44 AM), http://www.voanews.com/content/au-budget_for_2013_relies_heavily_on_foreign_parties/1405363.html.

Turkey.¹⁹⁸ The AU also has a number of donor partners, including seventy-two non-African states as well as regional integration and international organizations accredited to the AU.¹⁹⁹ The trend for the AU is a greater dependence on foreign states, international organizations, and other outside donors.

Figure 7 below shows the specific ACommHPR budget, divided into operational and program components, over the same time period. The program component refers to ACommHPR-led workshops, education campaigns, and other marketing strategies to improve awareness of the ACommHPR's mission.

Period	Total ACommHPR Budget (in USD)	Operational Budget (funded by AU Member States) (in USD)	Program Budget (funded by AU partners) (in USD)
2009	\$3,671,766 ²⁰⁰	\$2,376,639	\$1,295,127
2010	\$4,929,852 ²⁰¹	\$2,968,874	\$1,960,978
2011	\$7,942,889 ²⁰²	\$3,624,600	\$4,318,289
2013	\$8,488,716 ²⁰³	\$3,881,947	\$4,606,770
2014	\$5,645,467 ²⁰⁴	\$4,076,044	\$1,569,423
2015	\$5,922,595 ²⁰⁵	\$4,970,825	\$951,770

Figure 7: Annual ACommHPR Budget

What is not clear from the data is that the ACommHPR also relies on its own private “extra-budgetary” sources — distinct from the program budget — mainly contributions from “Western” donors.²⁰⁶ As long as the ACommHPR informs the AU, it is permitted to negotiate financial agreements with donors, accept funds, and invite donors to attend its hearings.²⁰⁷ The amount of extra-budgetary funding that the ACommHPR receives annually and the list of donors is not readily available. The ACommHPR likely relies on such funding to meet staffing shortages, although there is not data directly supporting this contention. For example,

198. Agence France-Presse [AFP], *No Strings Attached: African Union Seeks Financial Independence*, DAILY MAIL (Feb. 1, 2015, 6:42 AM), <http://www.dailymail.co.uk/wires/afp/article-2935107/No-strings-attached-African-Union-seeks-financial-independence.html>.

199. *Non-Africa States & Regional Integration & International Organizations Accredited to the AU*, AU (last updated Jan. 21, 2011), <http://au.int/en/partnerships/others>.

200. AU Assembly Dec. 208 (XII), *supra* note 190, ¶ 2.

201. AU Assembly Dec. 287 (XIV), *supra* note 191, ¶ 2.

202. AU Assembly Dec. 600 (XVIII), *supra* note 192, ¶ 2.

203. AU Assembly Dec. 438 (XIX), *supra* note 193, ¶ 3.

204. AU Assembly Exec. Council Dec. 783 (XXIV), 24th Ordinary Sess., ¶ 4 (Jan. 21 – 28, 2014), https://www.wmo.int/amcomet/sites/default/files/field/doc/events/ex_cl_dec_783-812_xxiv_e.pdf.

205. AU Assembly Dec. 544 (XXIII), *supra* note 195, ¶ 2.

206. VIIJOEN, *supra* note 138, at 294.

207. MURRAY & LONG, *supra* note 12, at 241.

anecdotally there were only two legal officers at the ACommHPR for more than fifteen years prior to 2006, but I could not find data on the number of legal officers on staff in 2015.²⁰⁸ Overall, the trend appears to reflect a reduction in funding from AU partners, but it is not clear if or how the reduction has impacted the ACommHPR's operations.

In contrast, the ACourtHPR is not as reliant on foreign donors as the ACommHPR. As Figure 8 shows, the ACourtHPR receives a smaller percentage of its funding from outside donors — “AU partners” — not including extra-budgetary aid (which is not regularly listed in budget documents and is unavailable). While it is not clear why the ACourtHPR is less dependent on outside funding than is the ACommHPR, it is important to note that the AU's overall budget and specific contributions to both adjudicatory bodies are heavily subsidized by foreign donors, meaning that the majority of the funding comes from non-African sources.

Period	Total ACourtHPR Budget (in USD)	Operational Budget (funded by AU Member States) (in USD)	Program Budget (funded by AU partners) (in USD)	% from Partners
2009	\$7,642,269 ²⁰⁹	\$6,892,269	\$750,000	10%
2010	\$7,939,375 ²¹⁰	\$6,169,591	\$1,769,784	22%
2011	\$9,389,615 ²¹¹	\$6,478,071	\$2,911,544	31%
2013	\$8,969,947 ²¹²	\$6,607,632	\$2,362,315	26%
2014	\$8,619,585 ²¹³	\$6,938,014	\$1,681,571	20%
2015	\$9,857,665 ²¹⁴	\$8,176,154	\$1,681,511	17%

Figure 8: Annual ACourtHPR Budget

2. The SADCT, the EACJ, and the ECOWAS Court

Unlike the ACommHPR and the ACourtHPR, budget data for the SADCT and the EACJ were not available at the time of this writing. To work around this problem, I examined the budget data for the SADC and the EAC — the regional organizations that created the courts — to determine the sources of their funding. If these regional organizations depend on outside donors, it is likely that their courts rely on outside donors as well. For example, the SADC is reliant on outside sources for funding: between 2005 and 2012,

208. See generally *Activity Reports*, ACOMMHPR, <http://www.achpr.org/activity-reports/> (last visited Feb. 18, 2016).

209. AU Assembly Dec. 208 (XII), *supra* note 190, ¶ 2.

210. AU Assembly Dec. 287 (XIV), *supra* note 191, ¶ 2.

211. AU Assembly Dec. 600 (XVIII), *supra* note 192, ¶ 2.

212. AU Assembly Dec. 438 (XIX), *supra* note 193, ¶ 3.

213. AU Assembly Exec. Council Dec. 783 (XXIV), *supra* note 204, ¶ 4.

214. AU Assembly Exec. Council Dec. 767 (XXIII), *supra* note 194, ¶ 2.

over 55% of its budget came from foreign donors, an amount totaling approximately \$217 million.²¹⁵ The United Kingdom, Sweden, Norway, Denmark, Finland, Belgium, Canada, France, Germany, Japan, and the United States are major bilateral donors, while the European Commission, the World Bank, the African Development Bank, the UNDP, and other UN agencies also provide support and financial assistance.²¹⁶ Since the SADCT is funded by the SADC, it likely also relies on foreign donors to operate.

The EAC is perhaps the most reliant on outside donors of the African sub-regional organizations. Figure 9 provides data on the EAC budget from 2012 through 2015, the years for which data is available. As Figure 9 shows, foreign donors account for 65% of funding.

Year	Donor Contributions (in USD)	EAC General Budget (in USD)	% from Partners
2012–2013	\$97,079,329 ²¹⁷	\$138,316,455	70.17%
2013–2014	\$85,676,850 ²¹⁸	\$130,429,394	65.69%
2014–2015	\$75,121,126 ²¹⁹	\$124,069,625 ²²⁰	60.55%

Figure 9: Annual EAC Budget with Donor Aid

According to the EAC, outside donors include the World Bank, European Union, European Investment Bank, African Development Bank, United Nations Economic Commission for Africa, and the German, Danish, Norwegian, Austrian, Swedish, and British domestic development agencies. The EAC has also entered into memoranda of understanding with France, India, Finland, and Canada, among others, for additional financial assistance.²²¹

215. Anna van der Vleuten & Merran Hulse, *Governance Transfer by the Southern African Development Community (SADC)* (The Collaborative Research Ctr. 700, SFB-Governance Working Paper Series No. 48, 2013), http://www.sfb-governance.de/publikationen/working_papers/wp48/SFB-Governance-Working-Paper-48.pdf.

216. AU Assembly Exec. Council Dec. 767 (XXIII), *supra* note 194, ¶ 2.

217. Christabel Ligami, *Which State Will Call the Tune in EAC? The Funding Question*, E. AFR. (Oct. 6, 2012, 6:14 PM), <http://www.theeastafrican.co.ke/news/Which-state-will-call-the-tune-in-EAC-The-funding-question-/-/2558/1526738/-/gkudz/-/index.html>.

218. Press Release, E. Afr. Legislative Assembly, EALA Approves EAC Budget (June 6, 2013), <http://www.eala.org/new/index.php/media-centre/press-releases/535-eala-approves-eac-budget>.

219. *East Africa: Donors to Fund Bulk of EAC Budget*, E. AFR. BUS. WEEK (May 17, 2015), <http://allafrica.com/stories/201505182665.html>.

220. *Id.*

221. *EAC Partnerships*, E. AFR. CMTY. (last updated Sept. 8, 2015), http://www.eac.int/index.php?option=com_content&view=article&id=45&Itemid=55.

Finally, ECOWAS is the sub-regional organization least reliant on foreign funding, although the data is spotty and inconsistent.²²² For example, in 2011, approximately 84.4% of the ECOWAS budget was financed through the organization's own resources, including a community levy and arrears of contributions, with a wide range of external development partners providing the remaining 15.6%.²²³ Similarly, in 2015, the ECOWAS general budget was approximately \$235 million, of which \$13.5 million was specifically allocated to the ECOWAS Court. Some \$10.2 million of the ECOWAS Court allocation — around 76% — came from the ECOWAS community levy on member states and another \$2.7 million (21%) came from the ECOWAS reserve fund, meaning that approximately 96% of the ECOWAS Court budget comes from ECOWAS member states.²²⁴ Based on the funding model alone, the ECOWAS Court is the most independent of the adjudicatory bodies in the African court system.

In light of its funding model, the African court system faces unique challenges in establishing its independence and neutrality. African regional and sub-regional courts were created by African states but in most cases rely on outside (mainly European) donors for their continued operation. In effect, the African court system is an agent of two principals: foreign donors and African founders, and the interests of the principals are not always aligned. Moreover, the legitimacy of the African court system may very well be undermined if those subject to its authority perceive the courts as European instead of African. There is anecdotal evidence that this is a concern for some judges in the African court system (discussed in Section IV). The structure of the funding is not likely to change soon, and the African court system will continue to struggle in establishing legitimacy and increasing its effectiveness.

* * *

The regional and sub-regional courts that comprise the African court system have jurisdiction over fifty-three African states with a population of approximately 1.1 billion people. They also have formal authority to adjudicate human rights claims under the Charter and other international

222. See LUDGER KUHNHARDT, REGION BUILDING: THE GLOBAL PROLIFERATION OF REGIONAL INTEGRATION 267 (2011) (“The overall budget structure of ECOWAS remains something of a mystery, as in many other regional groupings . . .”).

223. Economic Community of West African States Commission [ECOWAS Comm’n], *2011 Annual Performance Evaluation Report of the ECOWAS Commission*, ¶ 40 (Mar. 2012), <http://events.ecowas.int/wp-content/uploads/2013/03/rapport-de-performance-2011-EN.pdf>. International organizations include the European Union, African Development Bank, and the World Bank, while state donors include Canada, Spain, France, Britain, Germany, Sweden, Denmark, Finland, Venezuela, Cuba, Israel, China, India, and Japan. *Id.*

224. ECOWAS Comm’n, *Seventy Third Ordinary Session of the Council of Ministers*, at 6 (Dec. 2014), <http://www.ecowas.int/wp-content/uploads/2015/01/10-Work-Programme-2015-Institutions-Special-Programmes-etc.pdf>.

human treaties. Since Africa has a regional Freedom House score of 4.7, meaning 12% free (out of a possible 100% free),²²⁵ and individual African states have a poor history of upholding human rights and civil liberties, it is quite safe to assume that, annually, both the number of human rights violations and potential complainants is very high. Yet, between 1987 and 2015, a total of only 337 human rights cases were adjudicated in the African court system. These cases resulted in 113 judgments finding state violations of the Charter. The existing data on state implementation of African court system judgments, mostly focused on the ACommHPR, suggest that compliance rates are poor. Moreover, studies outline numerous institutional obstacles to compliance, both for the ACommHPR and at the state level. Finally, the African court system is dependent on foreign donors for its operation, and this funding model likely undermines the African court system's independence, legitimacy, and effectiveness.

III. THE FAILURE (OR SUCCESS) OF AFRICAN REGIONAL AND SUB-REGIONAL COURTS

Is the African court system effective? Section II provides data on the structure, caseload, state compliance rates, and funding of the African court system.²²⁶ These data, combined with the Viljoen and Louw findings and the Murray and Long study, show that the state compliance rate with adverse court judgments from the African court system is low, as states have fully or partially implemented few of these judgments.²²⁷ Similarly, the African court system's caseload is arguably very low in light of Africa's population, overall level of state-driven violence, and poor human rights record.²²⁸ With the exception of the ECOWAS Court, the African court system is dependent on bilateral, multilateral, and private financing from international, European, and American donors, potentially undermining its legitimacy.²²⁹ In light of the metrics of effectiveness outlined in Section I and the data on the African court system presented in Section II, it appears that the African court system is struggling to be effective.

225. *Sub-Saharan Africa*, FREEDOM HOUSE, <https://freedomhouse.org/regions/sub-saharan-africa> (last visited Feb. 10, 2017).

226. See *supra* Section II.

227. The Viljoen and Louw study was the most promising for state compliance rates, but as the authors specifically recognized, its methodology was problematic in several places. Viljoen & Louw, *supra* note 106.

228. *Sub-Saharan Africa*, *supra* note 225.

229. See *supra* Section II(D).

A. Questioning the Data and Evaluating Effectiveness

Along the dimension of case-specific effectiveness, the African court system is facing significant challenges. However, as I noted in Section I, a single study of the African court system focusing on only one form of effectiveness cannot rule out the possibility that the African court system performs better under a different measure. For example, one can argue that other methodological approaches are more appropriate for evaluating effectiveness, that practical constraints limit the African court system's capacity, and that it is simply too early to assess a relatively new judicial system. Below, I address the central critiques to the method applied in this Article. While these critiques do not undermine the contention that the African court system is struggling, they do illustrate the difficulties in demonstrating if and how the African court system affects or contributes to the state of human rights practices in Africa.

1. Methodology

The most straightforward critique is that the case-specific approach is the wrong methodology to evaluate the effectiveness of the African court system, or that it is the methodology least likely to produce a favorable assessment. Since the case-specific approach is, by definition, heavily focused on cases, one could argue that it misses the alternative mechanisms through which an IC's judgment, even if not always or regularly implemented, shapes respect for human rights within states.

One could argue that effectiveness is better conceptualized as "observable, desired changes in behavior" among those actors subject to the IC's authority, not necessarily compliance by the salient parties on a case-by-case level.²³⁰ More concretely, a state might comply with the underlying legal rationale of an IC's decision, even if the state does not formally comply with a specific adverse judgment. Maybe "the real effectiveness test . . . is not compliance but the counterfactual of what the outcome would have been absent the IC."²³¹ If the IC's judgment — or perhaps even the IC's very existence — generates a change in state behavior that deviates from the status quo *ex ante*, then the IC could be viewed as effective.

Similarly, competing methodologies including *erga omnes* effectiveness, which centers on the capacity of an IC to affect those subject to its authority,²³² and embeddedness effectiveness, which focuses on the capacity

230. Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 394 (2000).

231. Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT'L REL. 33, 52 (2008).

232. Helfer, *supra* note 29, at 472.

of an IC to assist state actors to address human rights violations domestically,²³³ might capture an IC's influence on states in ways that measuring case implementation at the national level cannot. In other words, the case-specific approach and supporting data cannot formally disprove the hypothesis that the African court system can influence states, improve state human rights practices, and improve human rights outcomes on the ground.

It is certainly fair to argue that competing methodologies might produce a different assessment of the African court system. There are many potential avenues through which an IC could be effective, and no single study could prove or disprove all the potential hypotheses about the effectiveness of the African court system. The methodological strategy and data in this Article cannot show that the African court system does not, at any point, have a positive effect on human rights outcomes in Africa. Rather, this study discusses examples of the few cases in which states have actually implemented the ACommHPR's human rights judgments, and it points out the existing obstacles to greater compliance. However, it is important to recognize that neither the possibility of an effect nor the existence of a specific effect makes the African court system generally effective overall. The key takeaway is that a straightforward measure of IC effectiveness common to the international law literature suggests that the African court system is underperforming along several dimensions.

2. *Baseline Issues*

Some might argue that counting cases, measuring implementation, and drawing conclusions about the effectiveness of the African court system is futile without a baseline against which to compare the court system's performance. Since Africa has many states with serious human rights problems, low Freedom House Scores, weak rule of law traditions, and high levels of poverty, it would be unreasonable to expect the African court system to have a large human rights caseload and a high compliance rate for its judgments. The fact that the African court system has adjudicated 337 cases and found 113 violations of the Charter is compelling for any court operating under such constraints.

Questions about the appropriate baseline to evaluate legal rules, institutional competencies, and judicial performance are endemic in law. In this particular case, the baselines issue cuts both ways. On the one hand, one could argue that it is unreasonable to expect the African court system in a few short years to operate as a well-functioning regional and sub-regional judiciary, adjudicating cases efficiently and enjoying high levels of compliance. The poor governance, weak institutions, deep poverty, and ethnic strife common to many African states are unlikely to be a solid foundation upon

233. *Id.* at 474.

which a regional or sub-regional human rights system could flourish. Perfect compliance is not possible in the world's most advanced legal systems, and it should not be the measure of effectiveness in Africa.

On the other hand, it is also unreasonable for the baseline to be zero, or something approaching it. For the African court system, there have been 113 judgments of violation over a twenty-seven-year period. Compliance rates are difficult to ascertain, but the Viljoen and Louw study estimates that states have partially or fully implemented 45% of ACommHPR's judgments. Even under the assumption that this compliance rate is generalizable — and there are good reasons to question that assumption — only forty-nine of the 133 judgments have been partially or fully implemented between 1988 and 2015. While I agree that a fair baseline should not be 200 African court system judgments partially or fully implemented annually, the current average is less than two per year. It is hard to see how the African court system with this record could be considered effective under the case-specific approach. One might argue that it is effective given the challenges it faces, but one wonders if the African court system is a useful tool to improve human rights outcomes on the ground. Perhaps the underlying conditions necessary for the African court system to be effective are absent or are still at a very early stage of development. Whatever the baseline, two cases enforced annually seems inadequate to show that the African court system is effective.

Another way of thinking about the appropriate baseline for assessing state implementation is through the lens of the African court system's funding. Rather than focusing on the obstacles to effectiveness in Africa, one might argue that the African court system's dependence on foreign donors for its operation, the role of international organizations in funding human rights litigation, and the presence of African and international human rights groups pushing for state compliance all suggest that the baseline should be higher than two cases per year. After all, European, American, and African donors have spent and continue to spend tens of millions of dollars to make the African court system effective; like all of us, they want to see human rights violators punished. Despite the millions of dollars of funding, caseloads are small and judgments are infrequently enforced.

3. Incentivizing Domestic Courts

One could argue that the existence and operation of the African court system has incentivized local actors to address human rights claims. Even if its caseload is small, the very existence of the African court system catalyzes domestic actors to pursue human rights claims that otherwise would not have been brought. The African court system's low usage rate might be a sign that state domestic courts have been more assertive in exercising jurisdiction over human rights cases, with decisions enforced by local authorities. The African

court system does not need an expansive caseload or a high compliance rate to influence human rights practices in states.

It is conceivable that there has been an increase in human rights cases adjudicated by domestic courts in Africa and that the increase, all else equal, is causally related to the creation and operation of the African court system. Similarly, it is possible that the number of human rights cases in the African court system and domestic courts is low because African states are enforcing national human rights laws. Of course, the data presented here cannot disprove these hypotheses, and an evaluation of the domestic courts of fifty-four African states is well beyond the scope of this Article. Yet, in light of the evidence that we do have — a poor Freedom House score for Africa, few cases, and even fewer decisions enforced — it is unlikely that domestic courts have been adjudicating the “missing” human rights cases that we would expect to see in Africa.

As a threshold matter, national judiciaries in African states rarely cite to international agreements, including the Charter. They also have very little knowledge of the operation and judgments of the ACommHPR.²³⁴ This fact by itself undermines the claim that the ACommHPR’s judgments might catalyze domestic courts to hear more human rights cases, when those courts do not even know about the ACommHPR’s activities. For example, “There have been no reported cases of reliance on the findings of the African Commission or human rights treaty bodies in the case law of African Francophone countries.”²³⁵ To further the point, below is a brief description of the domestic legal status of international human rights law in a few African national courts.

Like other regions of the world, African states have different constitutional procedures governing the application and enforcement of international human rights treaties within their domestic legal systems. Some states are monist in that they permit international law and treaties to serve as a basis for a claim without requiring any domestic implementing legislation.²³⁶ Some are dualist and require, but do not often pass, the legislation necessary to permit human rights claims by individuals. Others permit the citation of international law in their constitutional jurisprudence, but only as persuasive rather than binding authority.²³⁷ Finally, some states simply ignore international human rights commitments in treaties that they have signed and to which they are parties.²³⁸

234. MURRAY & LONG, *supra* note 12, at 94.

235. INTERNATIONAL LAW AND DOMESTIC RIGHTS LITIGATION IN AFRICA 8 (Magnus Killander ed. 2010).

236. VIJJOEN, *supra* note 138, at 548.

237. *Id.* at 522.

238. *Id.* at 109.

Moving to specific African countries, Benin appears to open its domestic courts to human rights claims based on violations of the ACHPR,²³⁹ although the Benin Constitutional Court generally understands international treaties to enhance rights that are already protected in Benin's constitution.²⁴⁰ Similarly, the Botswana Court of Appeal does not rely on international human rights law for its decisions, but it has occasionally referred to human rights treaties as persuasive authority in cases in which the underlying human rights law was consistent with Botswana's domestic law.²⁴¹ The Democratic Republic of the Congo considers international human rights provisions in treaties to be informative, but such provisions are treated neither as persuasive nor binding.²⁴² Ghana has sometimes permitted constitutional claims based on or influenced by provisions of the Charter, while in other cases national courts have ignored international human rights treaties.²⁴³

The Lesotho Court of Appeal has permitted individual human rights claims based on obligations enshrined in UN-sponsored international human rights treaties, and it has treated regional human rights agreements as legally binding.²⁴⁴ However, Lesotho does not treat such agreements — international or regional — as automatically self-executing within its domestic legal system.²⁴⁵ Malawi is somewhat similar in that it treats the Universal Declaration of Human Rights (“UDHR”) as binding law and permits human rights claims in domestic courts.²⁴⁶ Interestingly, in Malawi, regional agreements like the Charter only constitute persuasive authority in domestic cases.²⁴⁷

Namibia, Nigeria, Senegal, and South Africa are among the African states with the most permissive regimes for international human rights claims in their respective domestic courts. Namibia ratified and adopted as binding domestic law the Charter, the UDHR, and the ICCPR. The national courts of Namibia permit individuals to bring claims based on violations of the UDHR and the two international agreements.²⁴⁸ Nigeria generally treats the Charter

239. *Id.*

240. See Anna Rotman, *Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights*, 17 HARV. HUM. RTS. J. 281 (2004).

241. VILJOEN, *supra* note 138.

242. FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 546 (1st ed. 2007) [hereinafter VILJOEN (1st ed. 2007)].

243. VILJOEN, *supra* note 138, at 531.

244. *Id.* at 532.

245. *Id.*

246. CONST. OF THE REPUBLIC OF MALAWI 1994, MALAWI GAZETTE supp. 1994-05-16, No. 3C, art. 15.

247. VILJOEN (1st ed. 2007), *supra* note 242, at 548.

248. VILJOEN, *supra* note 138, at 532.

provisions as binding law in its national courts, although it is unclear whether Nigeria considers international treaties binding in national courts as well.²⁴⁹

Senegal and South Africa are less clear about the legal status of international human rights treaties in national courts and whether such treaties serve as a basis for a private right of action. Senegal appears to consider the Charter and other international treaties directly applicable in Senegalese courts without implementing legislation, but, in practice, Senegalese courts treat them as persuasive authority rather than as an independent basis for remediable claim.²⁵⁰ South Africa also treats the ACHPR and other international human rights treaties as persuasive legal authority,²⁵¹ although it is not clear if they serve as a basis for a claim.²⁵² The South African Constitutional Court has held that they should be directly applicable in South African courts without domestic implementing legislation, but the record is unclear.²⁵³

In Tanzania²⁵⁴ and Uganda,²⁵⁵ it appears that international human rights treaties do not have persuasive authority — let alone binding authority — and do not serve as a basis of a claim or legal remedy in their respective national courts. For example, Gathii notes that “[t]he place of human rights, the rule of law, and democracy within [Burundi, Kenya, Rwanda, Tanzania, and Uganda] is still in its formative stage.”²⁵⁶ Unsurprisingly, Zimbabwean national courts have issued decisions that squarely conflict with human rights obligations in international human rights treaties that Zimbabwe has formally ratified.²⁵⁷

It is not clear from the varied constitutional procedures and practices outlined above that there is reason to believe that African national courts are adjudicating the “missing” denominator of potential human rights claims. Whether the African court system could catalyze improved human rights enforcement by domestic courts is an open question, but the lack of knowledge about the ACommHPR and its operations by domestic courts, for example, is not promising evidence.

249. *Id.* at 533.

250. *Id.* at 537.

251. *Id.* at 539.

252. *Id.* at 540.

253. *Id.* at 538.

254. Killander, *supra* note 235, at 57.

255. *Id.* at 83.

256. Gathii, *supra* note 7, at 261.

257. *See generally* VIJJOEN, *supra* note 138.

4. *Practical Constraints*

The meager caseload of African court system might be explained by the severe resource constraints — lack of information, access, and time — that the victims of human rights violations face in pursuing a claim. The literacy rate in Sub-Saharan Africa is approximately 60% for adults,²⁵⁸ and the average person might not be aware of the existence and operation of the African court system. Or, perhaps more importantly, the average victim of a human rights violation might not envisage litigation as the preferred vehicle to vindicate her rights. The average victim is unlikely to have the financial resources to pursue litigation in domestic courts, let alone a distant African regional or sub-regional court, on a continent with an annual GNI per capita hovering around \$1,600.²⁵⁹ For example, ACommHPR's requirements to exhaust local remedies only increase the financial and temporal costs of bringing a claim.²⁶⁰

Similarly, some of the courts in the African court system are geographically difficult for potential litigants to access. The ACommHPR — the quasi-judicial body whose cases comprise the vast majority of the dataset — is based in Banjul, Gambia, which is far removed from population centers in Nigeria, Ethiopia, and Egypt. The ACommHPR does not hear cases on a regularized basis and generally meets only twice a year,²⁶¹ limiting opportunities for victims to get their day in court. From a temporal perspective, it could take years between the date of the alleged human rights violation and the opportunity to present one's case before the ACommHPR. Once local remedies are exhausted, a process that often runs into indefinite delays in corrupt legal systems, many of the courts within the African court system take years to issue decisions. Even if a complainant is successful with her claim before a court, implementation is unlikely.²⁶²

There is no question that the practical constraints outlined above hugely affect the ability of litigants to pursue human rights claims and, as a consequence, reduce the caseload of the African court system. Potential litigants already carry the scars of the human rights violations they have suffered, and it is perhaps unreasonable to expect many to overcome the numerous practical obstacles to vindicating their claims. Perhaps paradoxically, the severity of the resource constraints described actually suggests that the African court system has enormous impediments to overcome before it can become a serious option for the typical human rights victim of abuse, let alone an effective mechanism to address human rights

258. UIS FACT SHEET 3, UNESCO INST. FOR STAT., ADULT & YOUTH LITERACY (2015), <http://www.uis.unesco.org/literacy/Documents/fs32-2015-literacy.pdf>.

259. *Sub-Saharan Africa*, WBG (2016), <http://data.worldbank.org/region/SSA>.

260. 2 ACOMMHPR, INFORMATION SHEET 8, ORG. OF AFR. UNITY, http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf.

261. *African Commission on Human and Peoples' Rights*, INT'L SERV. FOR HUM. RTS. (July 8, 2008), <http://www.ishr.ch/news/african-commission-human-and-peoples-rights-article>.

262. *See supra* Section II(C)(1), at 21–27.

violations. Deep poverty and its attendant consequences on health and educational outcomes for many Africans are unlikely to be addressed soon, meaning that the practical constraints that have limited the African court system's effectiveness for the past twenty-seven years will continue.

B. Judicial Maturity

Another explanation concerns the relative maturity of the African court system. One might contend that twenty-seven years is simply not enough time for the African court system to establish its legal authority. The ACommHPR has been operational since 1987,²⁶³ but the EACJ and ECOWAS Court, for example, have only been adjudicating human rights claims for a little over ten years.²⁶⁴ Maybe it is too early to assess the African court system because it does not have a developed history of adjudicating human rights claims, and African states have not created the domestic enforcement infrastructure to implement judgments. If this is accurate, perhaps we should expect to see low numbers of adjudicated claims in the early years of the African court system, with an increasing caseload over time.

The data presented in Section II do indicate an uptick in adjudicated cases by the African court system over the second half of its existence.²⁶⁵ It is certainly possible that over another twenty-seven-year period, the African court system will mature in conjunction with national judiciaries, resulting in higher levels of state compliance and, hopefully, lower levels of human rights violations. The data from the last thirteen years is supportive of this potential outcome, although there are also countervailing factors, such as poverty.

One comparative data point is the caseload of the Inter-American Court of Human Rights ("IACHR")²⁶⁶ and the European Court of Human Rights ("ECtHR")²⁶⁷ during their first ten years of existence. A direct comparison of the ACommHPR's current caseload with that of the IACHR and ECtHR would be almost entirely useless, as the IACHR and the ECtHR are twenty-eight and forty-eight years older respectively, meaning that the latter two

263. *About ACHPR*, ACommHPR, <http://www.achpr.org/about/> (last visited Feb. 10, 2017).

264. Alter et al., *supra* note 5, at 737; Dr. John Eudes Ruhangisa, EACJ Registrar, A Paper for Presentation During the Sensitisation Workshop on the Role of the EACJ in the EAC Integration: The East African Court of Justice: Ten Years of Operation (Achievements and Challenges), (Nov. 1–2, 2011), <http://eacj.org/wp-content/uploads/2013/09/EACJ-Ten-Years-of-Operation.pdf>.

265. *See supra* Figure 4.

266. The IACHR was founded in 1979 and is based in San Jose, Costa Rica. It consists of a tribunal of seven members and meets regularly. It has jurisdiction over all twenty-nine member states of the Organization of American States. *See generally* Thomas Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231 (1982).

267. The ECtHR was founded in 1959 and is based in Strasbourg, France. It consists of a tribunal of forty-seven members and meets regularly. It has jurisdiction over all forty-seven member states of the Council of Europe. *See generally* Alona E. Evans, *European Court of Human Rights*, 61 AM. J. INT'L L. 1075 (1967); EUR. CT. HUM. RTS., <http://www.echr.coe.int/Pages/home.aspx?p=home> (last visited Feb. 18, 2016).

regional courts have had many more years to mature, adjudicate claims, and develop a human rights jurisprudence. Moreover, any comparison cannot account for the sheer number of confounding variables at the regional level, including FH scores, population and GDP, rule of law tradition, availability of national courts for human rights claims, and frequency of war. That said, the ECtHR and the IACHR are the only regional human rights courts against which we can compare the ACommHPR.

Notwithstanding these limitations, the ACommHPR caseload is somewhat comparable to the ECtHR over the first ten years — ninety-one for the ACommHPR to 122 for the ECtHR — but is well behind the IACHR's 201 cases. Although this evidence seems promising, it is important to note that the comparison is between the ACommHPR and two regional courts, rather than one between the ACourtHPR and the ECtHR and IACHR. This is the most favorable comparison for the judicial maturity argument, since ACourtHPR's twenty cases adjudicated over its first ten years is a much smaller number than the ACommHPR's ninety-one cases. Whether these data support or undermine the judicial maturity argument, however, is unclear. To prove such a claim would require a much more exhaustive investigation. The trend seems positive, but the sample size is small, and, given the difficulties in obtaining data on implementation, the effect on state compliance is unknown.

As is clear by now, this study employs the case-specific method to assess the effectiveness of the African court system. Using the criteria common to this approach, it appears that the African court system is struggling to be effective, although there is variation in the effectiveness and future potential of the regional and sub-regional courts within it. This section engages several conceptual, methodical, and practical critiques. These critiques certainly cannot disprove the possibility that a different quantitative or qualitative methodology might indicate that the African court system is effective. Still, the evidence adduced here suggests that over the short- to medium-term, the African court system faces significant challenges to establishing its authority and functioning as an effective adjudicator of human rights claims.

IV. THE FUTURE OF THE AFRICAN COURT SYSTEM AND HUMAN RIGHTS CLAIMS

The comprehensive studies of the structure and operation of the ACommHPR and the sub-regional courts that comprise the African court system show that there are significant institutional, procedural, and operational challenges that limit the effectiveness of the African court system. Moreover, at the state level, the lack of knowledge about the ACommHPR, the non-binding treatment of ACommHPR judgments and international law in national judiciaries of African states, and the weight of the available state

compliance data suggest that African states are not regularly enforcing African court system judgments. Finally, the enormity of the practical constraints obstructing the ability of victims of human rights violations to access the African court system serve to reduce the African court system's already small caseload and restrict its capacity to influence human rights outcomes on the ground. Issues at every level — the regional and sub-regional courts, national courts, and individual victims of human rights violations — limit the African court system's capacity to act as an effective adjudicator of human rights claims.

These significant challenges do not mean, however, that efforts should not be made to improve the African court system. If meaningful proposals for reform exist and will likely lead to better human rights outcomes in Africa, they should be funded and implemented. Below, I briefly summarize some of the more prominent proposals to improve the operation of the African court system. What is clear from the proposals is that little will change unless the AU demonstrates that it has the political will to address the African court system's problems. To begin assessing political will, this section concludes by discussing recent developments in the position of the AU and individual African states toward the African court system, the ICC, and human rights claims in general.

A. Normative Proposals to Improve the African Court System

In their study of the ACommHPR, Murray and Long outline a series of normative proposals to improve the ACommHPR's operation, provide human rights organizations and other concerned NGOs with greater access to ACommHPR hearings, and ensure that states implement the ACommHPR's decisions.²⁶⁸ For example, Murray and Long suggest that the ACommHPR judges improve the quality of the legal reasoning in their judgments, including specifying clearly their recommendations and remedies for states in violation of the Charter.²⁶⁹ This, in turn, would theoretically make it harder for states to ignore or otherwise circumvent the ACommHPR's authority.

Murray and Long strongly endorse a more vigorous ACommHPR follow-up procedure to verify that states are complying with its decisions. This includes engaging in promotional missions and expanding the role of Special Rapporteurs²⁷⁰ to pressure states to comply with ACommHPR judgments.²⁷¹ While strengthening national judiciaries and legislatures is important, Murray

268. MURRAY & LONG, *supra* note 12, ch. 6.

269. *Id.* at 112–14.

270. *Id.* at 127–128.

271. *Id.* ch. 6.

and Long also encourage national human rights institutions (“NHRIs”) “to facilitate the process of implementation,”²⁷² civil society activists to “apply pressure on States to implement [judgments],”²⁷³ and the UNDP to assist in making sure that “the African Commission’s findings can be disseminated among national actors.”²⁷⁴

Since the ACourtHPR can issue legally binding decisions, Murray and Long propose that the ACommHPR transfer cases of state non-compliance to the ACourtHPR for review. However, Murray and Long are skeptical that this would improve compliance, and they lament the absence of AU guidance on how the two bodies should coordinate.²⁷⁵ Murray and Long argue that the AU’s political organs must take steps to ensure state compliance by making the ACommHPR’s judgments legally binding,²⁷⁶ imposing sanctions in serious cases,²⁷⁷ and engaging more directly in debates about implementation with the ACommHPR itself.²⁷⁸ Finally, they call for greater funding — always a concern, as Section II illustrates — of the ACommHPR and the ACourtHPR. Doing so will remedy operational and programmatic deficits, increase the number of full-time staff, and expand the human rights caseload.²⁷⁹

All of these normative proposals address important institutional, procedural, and structural problems at the ACommHPR and the ACourtHPR, and, if fully implemented, are likely to improve these courts’ general effectiveness. However, Murray and Long acknowledge that the core issue is whether the political will exists among the AU’s member states to take meaningful steps to ensure that the ACommHPR’s judgments are implemented.²⁸⁰ In light of the enormous practical challenges facing the African court system outlined in Sections III, changes in the institutional design of the ACommHPR and the ACourtHRP — without the political will of states to enforce judgments — are unlikely to improve their effectiveness.

B. The AU’s History with Regional and International Courts

Whatever the extant structural, institutional, and economic shortcomings of the African court system, its future turns on the political will of the AU member states. To provide just one example, an improvement in their collective willingness to comply with judgments could elevate the importance

272. *Id.* at 105.

273. *Id.* at 109.

274. *Id.* at 111.

275. *Id.* at 160.

276. *Id.* at 174.

277. *Id.* at 175.

278. *Id.* at 176.

279. *Id.* at 131–32.

280. *Id.* at 139.

of the African court system and signal to domestic and international constituencies that human rights matter. Assessing the political will of the entire AU is extremely complicated and well beyond the scope of this Article. One way to make progress on this important question, however, is to explore the history and politics behind the AU's creation of the ACourtHPR and the ACJHR and to examine the AU's relationship with the ICC. Since these three courts have the authority to exercise jurisdiction over human rights claims in Africa, their interaction with the AU will provide some insight on the AU's political will to enforce human rights claims.

1. *African Court of Justice and Human Rights and the ICC*

Although the ACommHPR has been in existence since 1988, the ACourtHPR was established by a Protocol to the Charter that was adopted on June 10, 1998, and entered into force on January 25, 2004.²⁸¹ During the same period, the Protocol of the Court of Justice of the African Union ("CJAU") created the Court of Justice of the African Union, which was adopted on July 11, 2003, but did not enter into force until February 11, 2009.²⁸² The AU apparently contemplated two functioning courts: the ACourtHPR with specialized jurisdiction over human rights claims and the CJAU with general jurisdiction over AU matters. As the data show, the ACommHPR continued to investigate claims of human rights violations and issued judgments throughout this period.

However, on July 1, 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights ("Protocol"), which merged the ACourtHPR with the not yet operational CJAU to create the African Court of Justice and Human Rights ("ACJHR").²⁸³ Per the Protocol, the ACJHR will have two sections: a General Affairs section and a Human Rights section, each composed of eight judges.²⁸⁴ The actual merger has not occurred because the Protocol has not yet entered into force. Further, as of March 2, 2014 (at this writing, the most recent date that the AU website has updated the ratification list), only five states (Benin, Burkina Faso, Congo, Libya, and Mali) had ratified the Protocol.²⁸⁵

281. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III), <http://www.achpr.org/instruments/court-establishment/>. The Draft Protocol, which was adopted unmodified, is *reprinted in* 9 AFR. J. INT'L & COMP. L. 953.

282. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court, *supra* note 281; Protocol of the Court of Justice of the African Union, July 11, 2003, *reprinted in* 113 AFR. J. INT'L & COMP. L. 115 (2005) (entered into force Feb. 11, 2009).

283. *Id.*

284. *Id.*

285. *Id.*

On the one hand, this story of competing courts, overlapping jurisdictions, and a merger-in-progress might suggest that the AU is struggling to design and operationalize what will eventually be Africa's main regional court. In perhaps the best example of operational difficulties, the AU formally merged the CJAU with the ACourtHPR in 2008, before the protocol creating the CJAU even entered into force in 2009.²⁸⁶ Since the product of the merger — the ACJHR — is not yet operational, the AU has two courts that were formally dissolved on paper but still function in practice. Meanwhile, the ACommHPR continues to hear human rights claims, but its formal relationship with the new ACJHR is, to date, unclear.

On the other hand, one could argue that the AU is trying to determine the appropriate institutional design to address human rights claims. Centralizing judicial authority in one court, the ACJHR, rather than having two courts with jurisdiction over a range of claims, might optimize limited judicial resources. Also, the AU has continued to support the ACommHPR and its human rights mandate during the broader reorganization. In short, while the AU might be moving slowly to design an effective African regional court with the capacity to address violations of the Charter, the political will is there, even if progress is incremental.

In fact, the AU's June 27, 2014, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("The Malabo Protocol"), seems to support this contention.²⁸⁷ The Malabo Protocol makes a number of important changes to the jurisdiction and structure of the still nascent ACJHR. First, it provides the ACJHR with criminal jurisdiction over fourteen international crimes,²⁸⁸ well beyond the four crimes — genocide, crimes against humanity, war crimes, and the crime of aggression — within the ICC's jurisdiction under the Rome Statute.²⁸⁹ As part of the expansion of the ACJHR's jurisdiction, the Malabo Protocol creates a third

286. AU Assembly Dec. 196 (XI), 11th Ordinary Sess., at 13 (June 30–July 1, 2008), <https://www.au.int/web/en/decisions/assembly-african-union-eleventh-ordinary-session>.

287. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, June 27, 2014, https://au.int/web/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf [hereinafter Malabo Protocol].

288. In addition to the four crimes that are also part of the ICC's jurisdiction, the ACJHR has jurisdiction over the following ten crimes: unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and the illicit exploitation of natural resources. See Amnesty Int'l, *Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court*, AFR 01/3063/2016, at 5 (Jan. 22, 2016), available at <http://www.refworld.org/docid/56a9ddcf4.html>.

289. Rome Statute of the International Criminal Court, arts. 5–8, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

section for international crimes apart from the human rights and general affairs sections already envisaged.²⁹⁰

Second, the Malabo Protocol provides for corporate criminal liability for serious crimes, an expansion of criminal liability absent in other international human rights treaties.²⁹¹ Third, it creates a “Defence Office,” akin to an Office of Public Defender, as an independent organ of the ACJHR.²⁹² Through the Malabo Protocol, the AU has vested the ACJHR with formal authority to issue legally binding judgments and has granted the ACJHR the most expansive human rights and international criminal jurisdiction of any existing court, including the ICC. Despite the fitful beginning, the Malabo Protocol perhaps suggests that the AU is finally serious about addressing human rights violations. Viewed in this light, one could argue that the AU is beginning to show the political will to address human rights violations.

The story, however, is not as simple as it seems. A deeper examination of the politics surrounding the Malabo Protocol suggests that the AU began to conceptualize an “African Court” to address human rights violations in response to the ICC’s apparent targeting of Africans for international criminal prosecution since the ICC came into existence in 2002.²⁹³ The AU and several member states have repeatedly condemned the ICC as “racist” and “anti-African,”²⁹⁴ arguing that the ICC is only interested in applying “Western justice.”²⁹⁵ Others have simply called it “biased.”²⁹⁶ For many, the ICC’s selective caseload proves the point: “Despite having received almost 9,000 formal complaints about alleged war crimes in at least 139 countries, the ICC has focused exclusively on Africa, choosing to indict thirty-six black Africans

290. Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 16, 2014, http://www.iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf.

291. Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amicus Curiae in Support of the Respondents at 17–18, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2012) (No. 10-1491), 2012 WL 405480, at *17–*18; COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Otto Triffterer ed. 2008); Albin Eser, *Individual Criminal Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 767, 778–79 (A. Cassese et al. eds., 2002).

292. Amended ACJHR Statute, art. 22C(1)–(2).

293. Max du Plessis, Tiyanjana Maluwa & Annie O’Reilly, *Africa and the International Criminal Court*, CHATAM HOUSE INT’L L. 2 (2013), https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf (claiming that all ICC investigations involve alleged violations in Africa).

294. Barry Malone, *Africans Push UN to Call Off “Racist” Court*, ALJAZEERA (Nov. 15, 2013, 16:00 GMT), <http://www.aljazeera.com/indepth/features/2013/11/africans-push-un-call-off-racist-court-2013111451110131757.html>.

295. See generally AFP, *Gbagbo Trial Rekindles Controversy in Africa Over Western Justice*, DAILY MAIL (Jan. 28, 2016, 7:40 AM), <http://www.dailymail.co.uk/wires/afp/article-3420356/Gbagbo-trial-rekindles-controversy-Africa-western-justice.html>; Obianuju Okafor, *ICC Trial of Laurent Gbagbo Rekindles Western Justice Argument*, ANSWERS AFR., <http://answersafrica.com/icc-trial-of-laurent-gbagbo-rekindles-western-justice-argument.html>.

296. Malone, *supra* note 294.

in eight African countries.”²⁹⁷ After the ICC indicted Kenyan President Uhuru Kenyatta in 2012, the AU began to consider withdrawing, en masse, from the ICC, and, in 2013, the AU formally announced “that no serving AU Head of State or Government or anybody acting or entitled to act in such capacity, shall be required to appear before any international court or tribunal during his term of office.”²⁹⁸

To that end, for African leaders and senior officials accused of human rights violations from prosecution by the ACJHR, the Malabo Protocol specifically immunizes them while they are in office — an immunity that the ICC does not recognize.²⁹⁹ One might argue that this form of head of state immunity might encourage greater cooperation with the ACJHR on the theory that sitting African leaders would not have to worry about prosecution. However, such immunity also creates the perverse incentive for African leaders accused of human rights violations to stay in office and try to preserve their immunity for life. Despite the ACJHR’s broad human rights mandate and expansive international criminal jurisdiction, the AU may very well have strategically extended the AJCHR’s authority to ensure that any human rights violations allegedly committed by an African leader will fall under the AJCHR’s jurisdiction, conceivably making it harder for the ICC to exercise concurrent jurisdiction over the accused.³⁰⁰ Although the ICC would not be formally prohibited from pursuing an international criminal prosecution of an African leader, the political costs of indicting an African head of state already subject to the authority of an African court might be too high, especially in light of the ICC’s already fractured relationship with the AU.

Notably, the ACJHR’s broad jurisdiction over fourteen international crimes will likely generate a large caseload in light of Africa’s poor human rights record. Supporting the ACJHR’s potential caseload would require more judges, staff, and trials, not to mention the provision of public defenders for the accused. Given the chronic underfunding of the African court system and

297. David Hoile, *The International Criminal Court is Unfit for Purpose*, MIDDLE E. MONITOR (July 29, 2015, 11:26 AM), <https://www.middleeastmonitor.com/articles/africa/20089-the-international-criminal-court-is-unfit-for-purpose/>.

298. Tom Maliti, *AU Asks Kenyatta Not to Attend Trial Until Deferral Request is Acted On*, INT’L JUST. MONITOR, <https://www.ijmonitor.org/2013/10/au-asks-kenyatta-not-to-attend-trial-until-deferral-request-is-acted-on/>.

299. Malabo Protocol, *supra* note 287, art. 46A; Rome Statute, *supra* note 289, art. 27.

300. See Rome Statute, *supra* note 289, art. 98(2) (prohibiting the ICC from requesting surrender or assistance that would require a member to act inconsistently with obligations under international agreements); Max du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes*, INST. FOR SEC. STUDIES (2012), <https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf>. Some have described this as a negative complementarity. See Max du Plessis, *A Case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes*, EJIL: TALK! (Aug. 27, 2012), <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.

the AU's reliance on European donors, it is not clear how the AU will fund the ACJHR's new, expansive mandate.³⁰¹ A comparison of the ICC's and the ACourtHPR's budgets is instructive:

In 2011 the AU's budget for the 2011 financial year amounted to US \$256,754,447. Included in that amount was a total allocation for the African Court on Human and Peoples Rights of US \$9,389,615. Compare that with the ICC. In the same year the ICC had a budget of US \$134 million, \$26 million short of what it says it needed for 2012. The point is that the ICC budget — currently for investigating just three crimes, and not the raft of offences the African Court is expected to tackle — is more than 14 times that of the African Court without a criminal component; and is just about double the entire budget of the AU.³⁰²

If the AU wants the ACJHR to operate effectively, the AU will have to fund it at unprecedented levels, well beyond the existing capacity of member states.³⁰³

From the discussion above, it is difficult to conclude that the AU has shown the political will to adjudicate and prosecute human rights claims against member states. On paper, the AU has granted the ACJHR the most extensive jurisdiction to hear human rights claims and issue legally binding judgments of any other regional court. The ACJHR even surpasses the ICC in its authority to prosecute international crimes. At the same time, the AU provides immunity to heads of state and other senior officials accused of human rights violations — creating perverse incentives for leaders in power — and the ACJHR has the potential to complicate the ICC's capacity to prosecute African leaders.³⁰⁴ Based on the AU's current funding model, it is not clear that the ACJHR would ever get the necessary funding to adjudicate what would likely be an increased volume of human rights cases. In short, the AU still has not demonstrated the requisite political will to make its commitment to human rights a reality on the ground.

2. *African (or European) Courts for Africans?*

One important justification for the creation of the AJCHR was the AU's desire to have Africans — not the ICC or other foreigners — solve African human rights problems. The AJCHR would lead to African judges applying an African Charter in African courts to cases involving African parties and enforced by African states. For many in the AU, the ICC's targeting of Africans eroded its legitimacy and contributed to the view that the ICC is a

301. See *supra* Section IV(B)(2).

302. Plessis, *A Case of Negative Regional Complementarity?*, *supra* note 300.

303. *Id.*

304. Malabo Protocol, *supra* note 287.

tool of Europeans rather than an impartial international tribunal. Whatever its merits — and the good intentions of many involved with it — the ICC has been damaged by the perception of foreign meddling in African affairs.

A similar perception of foreign involvement applies to the African court system. As the funding data show, nearly all of the courts (with the exception of the ECOWAS Court) rely on outside donors. Foreign states, aid agencies, and human rights organizations play a significant role in financing the litigation. Although the African court system's judges are African, many of the key staff — including legal officers — are foreign as well.³⁰⁵ According to Max du Plessis, who served as an intern at the ACommHPR, and Lee Stone:

The African Commission has become synonymous with young European, American and Canadian interns who undertake a perfunctory six-month stint in The Gambia, to “help Africa.” As altruistic and as valuable as this is, it serves to confirm how deprived the Commission is of African graduates who might similarly enhance their professional careers through an internship at the Commission and whose own home-grown experience might benefit the Commission's work on African soil.³⁰⁶

While there are good reasons to admire foreign states and aid agencies for their commitment to fighting human rights violations in Africa, the African court system's dependence on foreign donors might compromise its legitimacy. There is anecdotal evidence suggesting that this is a growing problem. For example, in 2008, the AU increased the budgetary allocation to the ACommHPR by over 400% to \$6,003,857.³⁰⁷ According to the twenty-third AU Activity Report, this large increase was designed “to facilitate the Commission's effective implementation of its mandate; to remove the Commission's reliance on donor funding; and to ensure that the Commission is seen as being independent.”³⁰⁸ In 2014, the SADC Executive Secretary encouraged member states to reduce donor reliance: “As long as donor contributions are the major source of our funding, it will be hard for us to independently realise our objectives — without pandering to the whims of others. This disturbing situation requires immediate attention.”³⁰⁹ Although these perspectives are simply illustrative, they highlight the tension between the desire of African judges and government officials to address human rights violations in Africa

305. Max du Plessis & Lee Stone, *A Court Not Found?*, 7 AFR. HUM. RTS. L.J. 522, 533 (2007).

306. *Id.* at 533–34.

307. AU Assembly EX.CL/446(XIII), Activity Report of the African Commission on Human and Peoples' Rights, Submitted in Conformity with Article 54 of the African Charter on Human and Peoples' Rights, at 7 (June 28, 2008), http://www.achpr.org/files/activity-reports/23/achpr4243eo4_actrep23_20072008_eng.pdf.

308. *Id.* (emphasis added).

309. “Reduce Dependence on Donor Funding”—SADC Urged, S. AFR. DEV. CMTY. (July 24, 2014), <http://www.sadc.int/news-events/news/reduce-dependence-donor-funding-sadc-urged/>.

and the realization that doing so might require reliance on foreign donors who at times may hold different conceptions on how to reach similar goals.

* * *

International human rights law and the African court system are logical tools to fight human rights violations and vindicate civil liberties. Although the African court system is struggling to be effective at this stage of its development, this Article does not argue that the African court system is completely ineffective, nor does it exclude the possibility that the other approaches to measuring effectiveness discussed in Section I might generate different results. Case-specific effectiveness is important, but there may also be good normative, discursive, or symbolic reasons to have courts adjudicate claims involving gross human rights atrocities, even if decisions are not regularly enforced against the state perpetrators. Finally, this Article neither claims that all aid for courts is unhelpful, nor that development aid is better. Rather, it argues that in light of the performance of the African court system so far, scholars, advocates, and donor states should reconsider how to allocate limited resources to ensure that human rights outcomes improve, whether through courts or other mechanisms.

CONCLUSION

The African court system — consisting of the ACommHPR, the ACourtHPR, the ECOWAS Court, the SADCT, and the EACJ — has adjudicated 337 human rights cases over the past twenty-seven years, resulting in 113 judgments of violation. Since 2009, the ACommHPR and the ACourtHPR have spent \$104 million to adjudicate human rights claims and have heard eighty-eight cases, with twenty-four resulting in judgments of violation, for an average cost of \$1.2 million per case, or \$4.3 million per violation. Based on the best available data and academic studies, state compliance has been poor, and few judgments have been enforced. Over the last eight years, the AU has created the ACJHR — the successor to the ACourtHPR and the CJAU — with a broad mandate to hear international crimes and human rights violations. However, the ACJHR controversially provides head of state immunity and might complicate the work of the ICC, for better or worse. Finally, the African court system's reliance on outside donors impacts perceptions of its independence, and so funding will be a significant challenge to the ACJHR's eventual operation.

Simply because the African court system faces challenges today does not mean that it cannot be effective in the future. One might argue that the relative cost of the African court system is low, that it will likely strengthen over time, and that retaining and improving a struggling court system is much

better than the adverse signal that eliminating it would send. On its face, this argument is completely plausible: maybe, over time, the ACJHR will adjudicate an increasing number of cases, funding will similarly improve, and African states will eventually implement adverse legal judgments and respect human rights law. That is certainly a much-desired goal, one that almost all would embrace. The real question is whether the available evidence supports such optimism in light of the time, money, and opportunity cost of investing hundreds of millions of dollars in a system that hears few cases, generates even fewer violations, and sees a low percentage of its judgments implemented. One worries that the African court system might actually hinder human rights goals because it confirms the fragility of human rights law in Africa, rather than promote the belief that pursuing human rights claims in courts is a meaningful way to remedy violations. On the basis of this study on one dimension of effectiveness, the African court system is struggling to be effective in adjudicating cases and improving human rights outcomes in Africa.

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