
Note

Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights

*Kristen Rau**

Atrocities of an international scale are nothing new.¹ From Carthage and Armenia to Rwanda and Iraq, the history of humankind features innumerable instances of horrific bloodshed.² Internationally-led individual criminal accountability for human rights abuses, by contrast, is a modern development. The Nuremberg trials marked the earliest manifestation of international criminal proceedings, which have continued to evolve with the establishment of the International Criminal Court (ICC).³ Despite this changing face of international justice, the controversy surrounding its utility—and whether it promotes or compromises peace—is ongoing.

Given that Africa has a long history of human rights violations and that all seven of the ICC's current active investiga-

* Juris Doctor candidate at the University of Minnesota Law School and Master of Public Policy candidate at the University of Minnesota Hubert H. Humphrey School of Public Affairs. The author would like to extend thanks to Stephen Lamony of the Coalition for the International Criminal Court; Elise Keppler of Human Rights Watch; Professor Duane Krohnke; Foreign, Comparative & International Law Librarian Mary Rumsey; Professor Kathryn Sikkink; and Professor David Weissbrodt for their insightful comments and edits. In addition, the author expresses thanks to Robert and Susan Rau for their support. All errors herein are the author's own. Copyright © 2012 by Kristen Rau.

1. *See generally* BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* 1–40 (2007) (providing an introductory survey of human rights abuses throughout history).

2. *Id.*

3. Hon. Philippe Kirsch, President, Int'l Criminal Court, Keynote Address at the Judgment at Nuremberg Conference: Applying the Principles of Nuremberg in the ICC (Sept. 30, 2006), *available at* http://www.icc-cpi.int/NR/rdonlyres/ED2F5177-9F9B-4D66-9386-5C5BF45D052C/146323/PK_20060930_English.pdf.

tions are situated on that continent,⁴ it is unsurprising that African actors are vocal on international justice issues. It is equally unsurprising that an African institution and its proposed expansion demonstrate the legal and political tradeoffs of international justice efforts. The African Court of Justice and Human Rights (ACJHR), a regional tribunal proposed by member states of the African Union (AU), is particularly controversial due to the uncertainty of its potential interaction with the ICC.⁵ The ACJHR, as initially planned, merges two previous regional courts into a single institution, combining judicial functions related to state-level human rights violations and treaty interpretation law.⁶

Expansion of the court beyond that initial grant concerns observers for several reasons. First, the proposed expansion of the court would create the world's first combined state-level and individual-level criminal accountability mechanism for human rights violations on an international scale.⁷ International criminal law and human rights law have long coexisted in a bifurcated system of accountability, and observers fear that their conflation is undesirable.⁸ Second, and perhaps more problematically, expansion of the ACJHR would produce an area of overlapping jurisdiction between the court and the ICC not contemplated by either court's foundational document and not definitively addressed in treaty interpretation law.⁹

This Note investigates the ways in which modern developments in international criminal law interact with both longstanding and novel accountability institutions—specifically, how proposed expansion of the ACJHR would relate to existing systems of state- and individual-level accountability for human rights abuses. Part I offers an overview of global judicial hu-

4. Karen L. Corrie, *International Criminal Law*, 46 INT'L LAW. 145, 151 (2012).

5. See *Observations and Recommendations on the International Criminal Court and the African Union*, HUM. RTS. WATCH (June 27, 2011), <http://www.hrw.org/node/99945>.

6. African Union, Protocol on the Statute of the African Court of Justice and Human Rights, art. 1 (July 1, 2008) [hereinafter ACJHR Protocol], available at <http://www.africa-union.org/root/au/documents/treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf>.

7. See Kathryn Sikkink, *From State Responsibility to Individual Criminal Accountability: A New Regulatory Model for Core Human Rights Violations*, in THE POLITICS OF GLOBAL REGULATION 121, 121–26 (Walter Mattli & Ngaire Woods eds., 2009).

8. See *infra* Part II.A.2.

9. See *infra* Part II.B.1.

man rights mechanisms, including the ICC and the ACJHR, and discusses efforts to expand the latter's jurisdiction. Part II examines legal issues related to expanding the ACJHR's jurisdiction, considers policy barriers to effectively prosecuting human rights abusers within the expanded jurisdictional scope, and considers these challenges in light of potential benefits to expansion. Part III suggests approaches through which stakeholders could address various procedural and practical difficulties should the AU pursue expansion. Ultimately, this Note predicts that the ACJHR may well expand as the result of jurisprudential evolution and political will, suggesting that stakeholders should recognize the potential benefits to expansion and develop benchmarks to ensure the court's integrity and effectiveness.

I. ALPHABET SOUP: AN OVERVIEW OF INTERNATIONAL COURTS AND KEY PRINCIPLES

A. A BRIEF HISTORY OF GLOBAL HUMAN RIGHTS COURTS AND THE EMERGENCE OF BIFURCATION

Modern human rights courts exist in a bifurcated judicial system.¹⁰ That is, international courts and the nature of the cases they hear vary widely depending upon a particular tribunal's mandate to consider state- or individual-level human rights claims.¹¹ A brief history of these courts helps to contextualize the ACJHR and its proposed jurisdictional expansion.

In 1945, the field of human rights was basically unregulated; by 2000, states had ratified a panoply of human rights treaties and conventions, laying the groundwork for international courts.¹² In early regional human rights courts in Europe and the Americas, the legal regulatory model focused only on states'

10. See generally KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 13–24 (2011).

11. See Sikkink, *supra* note 7, at 121–37 (examining the emergence of state and individual accountability systems).

12. See *id.* Europe's Convention for the Protection of Human Rights and Fundamental Freedoms was adopted in November 1950, the American Convention on Human Rights was adopted in November 1969, and Africa's Banjul Charter on Human and Peoples' Rights was adopted in June 1981. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter Inter-American Convention]; African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217.

legal accountability for human rights violations.¹³ On the one hand, then, the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR) hold accountable states whose action or inaction violates their residents' human rights in contravention of states' treaty obligations; these courts rule on the basis of human rights law promulgated in the European Convention of Human Rights and the American Convention on Human Rights, respectively.¹⁴ Similarly, the European Court of Justice (ECJ) decides questions of state-level violations under European Union (EU) law.¹⁵ The United Nations' primary judicial organ, the International Court of Justice (ICJ), also considers state-level human rights claims.¹⁶ While the respective spheres of authority of these courts relative to the others are not always clear, it is plain that these courts consider only claims regarding state-level accountability, rather than individual criminal accountability.¹⁷

On the other hand, more recently formed ad hoc international criminal justice bodies like the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the permanent ICC seek to hold individuals responsible, leaving state accountability outside their legal competence.¹⁸ The ICC is perhaps the most significant of these individual-level courts given its permanent status.¹⁹ The ICC has a mandate to hold accountable perpetrators of the most serious crimes of concern to the international community.²⁰ As an independent international organization (i.e., it does not operate as a direct part of the United

13. Sikkink, *supra* note 7, at 121.

14. Inter-American Convention, *supra* note 12, at arts. 61, 62; European Convention, *supra* note 12, at art. 32.

15. See generally *Court of Justice of the European Union*, EUROPA, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (last visited Nov. 5, 2012).

16. See generally Rosalyn Higgins, *Human Rights in the International Court of Justice*, 20 LEIDEN J. INT'L L. 745, 745-75 (2007).

17. See generally YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003).

18. See Sikkink, *supra* note 7, at 134 for a discussion of key legal developments facilitating the evolution of an individual criminal accountability model alongside state-level proceedings.

19. *About the Court*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Nov. 5, 2012).

20. *Id.* The ICC's jurisdiction is limited to genocide, war crimes, and crimes against humanity, referred to in this Note as "serious international crimes." This Note does not discuss the crime of aggression.

Nations' system), the ICC's expenses are primarily funded by members of its Assembly of States Parties (ASP).²¹ Since its underlying Rome Statute entered into force on July 17, 1998,²² the ICC has been at the center of robust debate about the utility and effectiveness of international justice mechanisms.²³ The Court concluded its first criminal trial of Thomas Lubanga in August 2011.²⁴ From its seat in The Hague, the ICC found the former Congolese warlord guilty of using child soldiers in his rebel army in 2002 and 2003, and sentenced him to fourteen years in prison.²⁵ The ICC reflects the increasingly prominent individual criminal accountability paradigm, separate from that aimed at state-level accountability. Indeed, observers consider the ICC's underlying Rome Statute as "the clearest statement of the new doctrine of individual criminal accountability."²⁶

These courts—the ICTY, the ICTR, and the ICC—are the product of work by human rights organizations, legal scholars, and governments to facilitate the development of the individual criminal accountability model through treaty language explicitly referring to individual offenders.²⁷ While the newer individual accountability model does reflect "an important convergence [of several branches] of international law (human rights, humanitarian, and international criminal law) and domestic criminal law,"²⁸ it operates strictly independent of the state-level

21. See Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34 *FORDHAM INT'L L.J.* 1584, 1593 (2011) (observing that the ICC is independent from the UN).

22. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

23. For a discussion of the United States' concerns about the ICC, see William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 *EUR. J. INT'L LAW* 701, 701 (2004).

24. Aaron Gray-Block, *ICC's Landmark Debut Trial Concludes After Two Years*, *REUTERS* (Aug. 24, 2011), <http://www.reuters.com/article/2011/08/24/us-warcrimes-lubanga-idUSTRE77N32N20110824>.

25. Marlise Simons, *Congolese Warlord Draws First Sentence From International Criminal Court*, *N.Y. TIMES*, Jul. 11, 2012, at A4.

26. Sikkink, *supra* note 7, at 136.

27. *Id.* at 134 ("The drafters of various treaties, especially the Genocide Convention of 1948 and the Convention against Torture (CAT) negotiated in the late 1970s and early 1980s, managed to insert clear references to individual criminal accountability. These treaties did not create a new legal framework all at once, but rather contributed gradually and in an understated way to the development of the new norms.")

28. *Id.* at 137.

model. Indeed, mechanisms for state-level violations and individual criminal accountability evolved during different periods and emerged for different historical reasons.²⁹ The state accountability model emerged alongside key treaties such as the International Covenant on Civil and Political Rights (ICCPR), as well as a proliferation of non-governmental organizations (NGOs) and regional and international institutions overseeing compliance with those treaties.³⁰ These treaties and organizations emphasized states' responsibility to protect human rights and to investigate abuses of those rights.³¹ By contrast, the individual model ascended in the context of the Balkan conflict and the Rwandan genocide, vivid illustrations that the dominant state-regulatory model had failed.³² The individual model "may have emerged as a way to provide additional enforcement mechanisms for the human rights regime in the wake of the perception that the current enforcement mechanisms were inadequate and new tools were needed."³³

B. EVOLVING JURISDICTIONAL PARADIGMS: CONCURRENCE TO COMPLEMENTARITY

Along with navigating the complexities of bifurcation outlined above, one of the thorniest challenges for promoting long-term peace in conflict states through judicial mechanisms is the institutional relationship between international and domestic

29. Juan Méndez, *Background Paper for Panel on Regional Organs of Protection*, CONSULTATIVE CONF. ON INT'L CRIM. JUST., 2 (Sept. 9–11, 2009), <http://www.internationalcriminaljustice.net/experience/papers/session5.pdf>.

30. Sikkink, *supra* note 7, at 123. The ICCPR, which entered into force in 1976, was the first U.N. multilateral treaty obligating states parties to respect various enumerated rights of their citizens. International Covenant on Civil and Political Rights, *adopted by the General Assembly Dec. 19, 1966*, 999 U.N.T.S. 171 [hereinafter ICCPR].

31. See Rhonda Copelon, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 AM. U.J. GENDER SOC. POL'Y & L. 865, 872 (2003) ("The ICCPR identifies two concepts of state responsibility: the duty to respect (negative) or do no harm and the duty to ensure (positive) the protection of these rights as against private interference as well as the means to exercise basic rights.").

32. Sikkink, *supra* note 7, at 124.

33. *Id.* But see BEATRICE I. BONAFÈ, *THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES* 35 (2009) ("In the less recent scholarship, the two regimes of international responsibility were viewed as closely connected to each other. However, a gradual process of separation took place until the rapid development of international criminal law in the 1990s brought to the surface various practical issues concerning their relationship.").

courts. The earliest ad hoc courts, such as the ICTY and the ICTR, operated according to a principle of *concurrent* jurisdiction.³⁴ Effectively, this principle bestowed on international courts the primary responsibility for investigating and prosecuting human rights abuses.³⁵ According to their underlying statutes, “[a]t any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.”³⁶ These international courts operated with precedence over the national courts; that is, these international courts were able to proceed with investigations and prosecutions without determining that a domestic court had failed to investigate or prosecute human rights violations.³⁷ Cognizant of the decimation of judicial systems of the former Yugoslavia and Rwanda, drafters established primacy of the international courts in order to deal with hotly contested issues in a more neutral and developed judicial environment.³⁸

Unlike the ICTY and ICTR, which enjoyed jurisdiction in effect superior to national courts, the ICC operates according to a principle of *complementarity*.³⁹ In a complementary relationship, as between the ICC and a domestic court, the former may only step in where the latter is “unwilling or unable genuinely

34. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 348–51 (2003).

35. *Id.* In fact, the international tribunals could assert primacy in three circumstances: when a national prosecutor investigated an international crime, or a national court held criminal proceedings relating to that crime, as an ‘ordinary’ and not an international crime; when a domestic court acted unreliably by showing partiality or dependence; or when the case was “closely related to” other cases under consideration by the international tribunal. *Id.* at 349–50; see also ICTY, Rules of Procedure and Evidence, R. 8-9, U.N. Doc. IT/32/Rev. 46 (Oct. 20, 2011); ICTR, Rules of Procedure and Evidence, R. 8-9, U.N. Doc. ITR/3/Rev. 1 (June 29, 1995); John T. Holmes, *Complementarity: National Courts versus the ICC*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 667 (Antonio Cassese et al., eds., 2002).

36. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 9, U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute]; see also Statute of the International Tribunal for Rwanda, art. 8, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

37. WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 52 (2010).

38. See CASSESE, *supra* note 34, at 349 (exploring the ways in which the post-conflict context of Yugoslavia and Rwanda produced “the need . . . to affirm the overriding authority of the international Tribunal”).

39. CASSESE, *supra* note 34, at 351.

to carry out the investigation or prosecution.”⁴⁰ The historical context in which the ICC emerged is significant: the International Law Commission’s preparation of the ICC draft statute took place during its 1993 and 1994 sessions, after creation of the ICTY and while the Security Council was concerned with the Rwandan genocide.⁴¹ Drafters recognized both the need for a permanent criminal court and states parties’ potential reluctance to sacrifice a role for their domestic courts in the investigation or prosecution of suspected human rights crimes.⁴² The Rome Statute’s inclusion of a complementarity approach, rather than a concurrency or primacy principle, recognized state sovereignty and sought to manage scarce ICC resources.⁴³ Moreover, it signified an important and delicately negotiated balance of state authority and international intolerance for impunity.⁴⁴

While these examples reflect a notable difference between earlier tribunals and the ICC, the underlying statutes of all of these courts feature a striking similarity: in determining the ways in which they would interact with other courts (i.e., the operationalization of their concurrent or complementary jurisdictional grant) all three courts contemplated only *domestic* courts.⁴⁵ The drafters of these courts did not consider *regional* courts, such as the ACJHR, that might assert a shared jurisdictional interest.⁴⁶ The absence of relevant statutory language is significant, as it leaves current international tribunals with little guidance on how they might interact with regional courts.

The novelty of the problem presented by potential ACJHR expansion is revealed by a brief hypothetical comparison to the ICTY. Although this situation has not presented itself, the ICTY and the ICC conceivably could have overlapped jurisdictionally with regard to human rights abuses committed after 2002—a time still within the ICTY’s open-ended temporal jurisdiction, yet after the Rome Statute’s entry into force.⁴⁷ The

40. Rome Statute, *supra* note 22, at art. 17. An integral component of the complementarity requirement concerns the point at which domestic proceedings are considered “unwilling or unable genuinely” to conduct an investigation or trial.

41. Holmes, *supra* note 35, at 670.

42. See CASSESE, *supra* note 34, at 351–52.

43. *Id.* at 351.

44. See *id.* at 351–53.

45. See *infra* Part II.B.1.

46. See *infra* Part II.B.1.

47. Michael Bohlander, *Possible Conflicts of Jurisdiction with the Ad Hoc*

ICTY emerged pursuant to Chapter VII of the U.N. Charter,⁴⁸ meaning that all U.N. members are bound to their obligations to the tribunal above all other treaties and conventions, including the Rome Statute.⁴⁹ By contrast, the Rome Statute developed independently from U.N. membership, and its signatories did not assume any obligations paramount to the United Nations or its ad hoc courts.⁵⁰ Because of its rooting in the U.N. Charter, the ICTY's authority would inherently have overruled that of the ICC.⁵¹ The superior-subordinate relationship between the ICTY and ICC, though complicated and never presented, is a clear one.⁵²

By contrast, states parties to the Rome Statute would not necessarily have a dominant obligation to the ICC over a regional court. This fact highlights the novelty of the issue posed by potential jurisdictional expansion of the ACJHR in the context of the ICC: while the nature of past international tribunals (e.g., the ICTY) inherently vested them with superior authority to the ICC, such is not the case with the ACJHR and its proposed expansion. Identifying those portions of a shared legal territory that would attach to the ICC and those that would attach to a jurisdictionally expanded ACJHR would not be straightforward.⁵³ Indeed, the absence of statutory guidance that would resolve conflicts relating to overlapping jurisdiction may lead to real legal conflict given the political and regional interests existing at the intersection of international justice and human rights.

C. A TIMELINE OF PAN-AFRICAN COURTS

The ACJHR constitutes a significant reorganization of uniquely African justice mechanisms, a brief history of which is

International Tribunals, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, *supra* note 35, at 687–89.

48. ICTY Statute, *supra* note 36, at chapeau (“Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations . . . [the ICTY] shall function in accordance with the provisions of the present Statute.”).

49. Bohlander, *supra* note 47, at 688.

50. Rome Statute, *supra* note 22, at art. 2 (noting that the ICC did not emerge pursuant to U.N. authority and that any relationship with the United Nations would exist by agreement only).

51. *See id.*

52. *See* Bohlander, *supra* note 47, at 688 (explaining that the ICTY's jurisdiction would prevail over the ICC's).

53. *See infra* Part II.B.1.

useful.⁵⁴ The African Court on Human and Peoples' Rights (ACHPR) was established in 1998 with jurisdiction over all members of the Organization of African Unity (OAU), precursor to the AU.⁵⁵ Drafters vested the ACHPR with authority over "all cases and disputes . . . concerning the interpretation and application of the [OAU] Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."⁵⁶ In 2003, the AU adopted a protocol establishing the organization's principal judicial organ, the African Court of Justice (ACJ), a second court with jurisdiction over all disputes related to treaty interpretation and international law.⁵⁷ These two original courts, the ACHPR and the ACJ, featured non-overlapping jurisdiction. While the former considered state-level human rights issues, the latter was to address disputes relating to general questions of international law, the validity of AU treaties and subsidiary legal instruments, and acts, regulations, and directives of AU organs.⁵⁸

AU leaders proposed the ACJHR in 2008, seeking to consolidate the two previous courts and merge their respective functions into a single institution.⁵⁹ As initially proposed, the ACJHR would act as a dual-chamber court comprised of a General Affairs and a Human Rights Section.⁶⁰ The ACJHR will have sixteen judges, each appointed by a different state, with three to four judges allotted to each region.⁶¹ As initially pro-

54. This Note focuses primarily on Pan-African courts (i.e., continent-wide structures) rather than on regional or sub-regional courts.

55. 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).

56. Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 3, CAB/LEG/665 (June 9, 1998), available at http://www.achpr.org/files/instruments/courtestablishment/achpr_instr_proto_court_eng.pdf (entered into force Jan. 1, 2004).

57. Compare *id.* at art. 3, with African Union, Protocol of the Court of Justice of the African Union, arts. 2(2), 19(1) (July 11, 2003) [hereinafter ACJ Protocol], available at http://www.au.int/en/sites/default/files/PROTOCOL_COURT_OF_JUSTICE_OF_THE_AFRICAN_UNION.pdf (entered into force Feb. 11, 2009).

58. ACJ Protocol, *supra* note 57, at art. 19(1).

59. ACJHR Protocol, *supra* note 6, at art. 2.

60. African Union, Statute of the African Court of Justice and Human Rights, arts. 1, 16 (July 1, 2008) [hereinafter ACJHR Statute], available at <http://www.africa-union.org/root/au/documents/treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf>.

61. *Id.* at art. 3.

posed, the ACJHR would be capable of hearing only two types of cases: state-level accountability cases “relating to human and/or [peoples’] rights” and cases related to the Constitutive Act of the AU and other international or treaty law issues.⁶² Notably, the ACJHR jurisdictional grant as initially proposed, even without expansion, is far broader than that of the ECHR or the IACHR. Because Article 28(c) gives the ACJHR jurisdiction over cases relating to “the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned,” the ACJHR is the only court in the world that would be able to enforce violations of treaties like the ICCPR.⁶³ Even under its original jurisdictional grant, experts worry that the court would suffer from an overextension of responsibilities.⁶⁴

D. PROPOSED JURISDICTIONAL EXPANSION OF THE ACJHR

Recent proposals have pushed for the jurisdictional expansion of the ACJHR, a move that would challenge the bifurcated international justice paradigm outlined above that separates state- from individual-level accountability efforts. Proponents argue that in addition to the dual-chamber jurisdictional grant suggested in the ACJHR’s original underlying documents, the ACJHR should also include a third chamber to consider individual-level criminal accountability for serious international crimes.⁶⁵

62. ACJHR Statute, *supra* note 60, at arts. 17, 28.

63. ACJHR Statute, *supra* note 60, at art. 28(c) (emphasis added); *see also* Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19 MICH. ST. J. INT’L L. 299, 381 n.305 (2010) (“The new [ACJHR’s] jurisdiction is set by Article 29 of the Statute in . . . incomparably broader terms, at least with regard to the Court’s sister regional human rights courts in Europe and the Americas.”).

64. *See* Carlin Moore et al., *International Legal Updates*, 16 NO. 1 HUM. RTS. BRIEF 33, 37 (2008) (noting ACHPR Judge Fatsah Ouguerouz’s concerns that the merged court is ill-equipped to deal with its “impossibly broad” mission under the initial jurisdictional grant).

65. The merged court may be known as the African Court of Justice and Human and Peoples’ Rights, but for the purposes of this article, I refer to it as an expanded version of the African Court of Justice and Human Rights (ACJHR). *See* Don Deya, *Africa: Is the African Court Worth the Wait*, OPEN SOC’Y INITIATIVE FOR S. AFR. (Mar. 22, 2012), <http://allafrica.com/stories/201203221081.html>.

In February 2009, the AU Assembly issued a decision requesting the AU Commission and the African Commission on Human and Peoples' Rights to "examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes" and to report to the Assembly in 2010.⁶⁶ In July 2010, the AU Assembly issued a second decision requesting the AU Commission to finalize its work on the implications of the jurisdictional expansion.⁶⁷ More recently, the AU Heads of State and Government meeting at the 17th AU Summit adopted a decision encouraging "implementation of the Assembly's Decisions on the [ACJHR] so that it is empowered to try serious international crimes committed on African soil."⁶⁸ As a result of these efforts, the AU released an amended draft ACJHR protocol in May 2011 including proposed amendments, expressing formal support for the addition of an individual-level criminal chamber, and articulating a plethora of crimes—including but not limited to war crimes, crimes against humanity, and genocide—of which the chamber would be seized.⁶⁹ In May 2012, African justice ministers and attorneys general approved the draft protocol for the extension of ACJHR jurisdiction to international criminal jurisdiction.⁷⁰ At the 19th AU Summit—hosted by

66. African Union, Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, at 1, Assembly/AU/Dec.213(XII) (Feb. 1–3, 2009), *available at* http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_FEBRUARY_2009_AUC_TWELFTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION.pdf. Shortly thereafter, the AU Assembly issued a second decision pushing for "early implementation" of the February 2009 position. African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), at 1, Assembly/AU/Dec.245(XIII) Rev. 1 (July 1–3, 2009) [hereinafter African Union Decision 245], *available at* http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf.

67. African Union, Decision on the Abuse of the Principle of Universal Jurisdiction, at 1, Assembly/AU/Dec.292(XV) (July 25–27, 2010), *available at* http://www.au.int/en/sites/default/files/ASSEMBLY_EN_25_27_July_2010_BCP_ASSEMBLY_OF_THE_AFRICAN_UNION_Fifteenth_Ordinary_Session.pdf.

68. African Union, Decisions Adopted During the 17th African Union Summit (July 1, 2011), *available at* http://www.au.int/en/summit/sites/default/files/17th%20SUMMIT_-_DECISIONS_DECLARATIONS_and_RESOLUTIONS_-_eng%20FINAL.pdf.

69. African Union, Legal/ACJHR-PAP/4(II)Rev.5, art. 14 (Nov. 13, 2011) [hereinafter First Draft Amended ACJHR Protocol] (on file with author).

70. African Union, Draft Protocol on Amendments to the Protocol on the

Ethiopia after initially planned host Malawi vowed to arrest Sudan President Omar Hassan al-Bashir pursuant to an ICC warrant if he attended the Summit⁷¹—the Assembly and the Executive Council requested further information on the financial and structural implications of expansion for consideration at the next summit in January 2013.⁷² Support for an expanded court may be growing, and aspects of its proposed operations are increasingly detailed.

Such a merged court—including chambers for treaty law, state-level international human rights violations, and individual-level criminal international human rights violations—would radically restructure judicial human rights accountability efforts in light of the bifurcated structure of current courts.⁷³ Moreover, expanded ACJHR jurisdiction would overlap with that of the ICC to include serious international crimes, a move that could complicate already controversial international justice efforts.⁷⁴

The history and evolution of international human rights courts reflect diligent efforts to increase accountability for human rights violations around the globe.⁷⁵ Jurisdictional expansion could further these goals, constituting a natural (if revolutionary) innovation in international law.⁷⁶ Alternatively, expansion could undermine hard-won gains in the struggle against impunity for a variety of reasons rooted in law and policy.⁷⁷

Statute of the African Court of Justice and Human Rights, art. 3, Exp/Min/IV/Rev.7 (May 15, 2011) [hereinafter Second Draft Amended ACJHR Protocol] (on file with author); Letter from African Civil Society and International Organizations to Foreign Ministers on the 19th African Union Summit (July 5, 2012), available at <http://www.hrw.org/node/108800>.

71. *Malawi: Summit Meeting Declined*, N.Y. TIMES, June 9, 2012, at A5.

72. African Union, Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, at 1, Assembly/AU/Dec.427(XIX) (July 15–16, 2012), available at http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20%28XIX%29%20_E_Final.pdf.

73. See *infra* Part II.A.2.

74. See *infra* Part II.B.

75. See generally SIKKINK, *supra* note 10, at 1–28 (noting the emergence of justice norms after decades of efforts to increase accountability for human rights violations, especially following World War II); Sikkink, *supra* note 7, at 121–22 (explaining that there has been a dramatic increase in international regulation through the ratification of human rights treaties).

76. See *infra* Part II.A.1.

77. See *infra* Part II.B.

II. THE JURISDICTIONAL EXPANSION DEBATE

ACJHR jurisdictional expansion, though not yet realized, is nonetheless a contentious issue.⁷⁸ Such a development would potentially present benefits and drawbacks. In order to assess the desirability of expansion, critics must engage with both sides of the debate.

A. POTENTIALLY ATTRACTIVE ASPECTS OF EXPANSION

Expansion presents various theoretical advantages. First, expansion may reflect the latest innovation in international human rights law.⁷⁹ A brief historical analysis supports arguments that such a development could continue an ongoing universal trend and, as such, novel legal advances in Africa should be both expected and welcomed.⁸⁰ Second, the proposed expansion would make the ACJHR the first and only international court to combine state- and individual-level proceedings for human rights abuses, a development that some observers believe would be both effective and efficient.⁸¹ Critics must consider these points as well as possible practical challenges in order to determine whether potential advantages would produce actual benefits.

1. Jurisprudential Innovation

Jurisdictional expansion seems in many ways to reflect a natural development in international law. Historically, geographic and sociopolitical forces combine to shape human rights law in different ways at different times. Reference to the two most visible regional legal systems for human rights investigations and court proceedings, Europe and Latin America, is par-

78. Compare Coal. for an Effective African Court on Human and Peoples' Rights [CEAC], et al., *Implications of the African Court of Human and Peoples' Rights Being Empowered to Try International Crimes Such as Genocide, Crimes Against Humanity, and War Crimes: An Opinion*, AFR. CT. COAL. 3 (June 2009) [hereinafter *Implications*], http://www.africancourtcoalition.org/images/docs/submissions/opinion_african_court_extension_jurisdiction.pdf (describing the "insurmountable legal and practical obstacles" of expanding ACJHR jurisdiction), with Jacob Lilly, *Peace with Justice: Options for Bringing to Trial Human Rights Violators in Africa and a Proposed Solution to Cover the Gap in Enforcement Mechanisms Between International Criminal Law and Human Rights Violations*, 6 GONZ. J. INT'L L. 1, 30 (2002-03) (arguing that expansion would be "the most effective and efficient solution to dealing with human rights violators").

79. See *infra* notes 82-94 and accompanying text.

80. See *infra* notes 82-94 and accompanying text.

81. Lilly, *supra* note 78, at 30-31.

ticularly instructive. Europe, rocked by the unimaginable scale of the Holocaust's atrocities, effectively became a legal laboratory after the end of World War II.⁸² In addition to serving as the seat of the Nuremberg trials in 1945 and 1946, European states were among the strongest supporters of the 1948 Universal Declaration of Human Rights.⁸³ Moreover, European states collaborated on the development of the European Convention of Human Rights and its corresponding court in 1959.⁸⁴ Similarly, support for Latin America's human rights commission and court in the 1970s and 1980s was a reaction to both large-scale human rights abuses and increased democratization across the region.⁸⁵ Given this historical pattern in which legal metamorphosis follows a period of large-scale human rights abuse and/or the evolution of government, it may be natural to expect that Africa will serve as the next laboratory for judicial innovation unique to its own context. Indeed, this would not be the first example of African jurisprudential innovation related to human rights. The African Charter adopted in 1981, for example, for the first time combined the three so-called "generations" of human rights law—civil and political rights; social, economic, and cultural rights; and a broad spectrum of self-determination, collective, environmental, and communication rights—into a single binding instrument.⁸⁶ Similarly, the 1977 African Unity Convention on the Elimination of Mercenarism in Africa predated the U.N. Mercenary Convention by twelve years.⁸⁷

Looking to other areas of international human rights law supports a position that the field of human rights is complex and perpetually changing. For example, contemporary scholars increasingly engage with the restorative aspects of human

82. Interview with Kathryn Sikkink, Professor of Political Science, University of Minnesota, in Minneapolis, Minn. (Dec. 14, 2011).

83. See GENE M. LYONS & JAMES MAYALL, *INTERNATIONAL HUMAN RIGHTS IN THE 21ST CENTURY: PROTECTING THE RIGHTS OF GROUPS* 8 (2003) (noting that the specter of the Holocaust played a part in shaping the Universal Declaration of Human Rights).

84. See *supra* note 14 and accompanying text.

85. See Klaas Dykmann, *Impunity and the Right to Truth in the Inter-American System of Human Rights*, 7 *IBEROAMERICANA* 45, 45 (2007) ("Latin America witnessed a practically institutionalised violation of human rights on a large scale. However, from the early 1980s, the beginning of democratic transition in the region led to an intense debate on impunity . . .").

86. Deya, *supra* note 65.

87. Deya, *supra* note 65.

rights court proceedings,⁸⁸ the growing influence of the “new international judiciary,”⁸⁹ or mainstreaming gender-sensitive approaches in post-conflict rule of law initiatives.⁹⁰ It is noteworthy that the jurisdiction of the ACJHR criminal section would include more crimes than are within the mandate of the Rome Statute.⁹¹ The expanded ACJHR could presumably prosecute individuals for crimes outside the purview of the ICC, such as corruption, trafficking, the illicit exploitation of natural resources, money laundering and offenses committed by corporations; this fact suggests that the ACJHR could be seen as a bold judicial response to a growing body of international norms.⁹² Failing to acknowledge the dynamism of international human rights jurisprudence ignores its status as a living, evolving body of law.

In addition, it should be remembered that efforts to promote domestic (rather than ICC) authority over a particular case are not per se undesirable. Facilitating the development of domestic rule of law so that state-level courts are able to conduct investigations and prosecutions of crimes in the Rome Statute’s scope is a goal of many civil society organizations⁹³ (though not the ICC itself, given its judicial mandate).⁹⁴ Critics

88. See generally Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT’L L. 279 (2011) (asserting that international courts are making progress towards restorative justice and that a victim-centered model is attainable).

89. Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT’L L. 73, 90 (2009).

90. See generally Eve M. Grina, Note, *Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings*, 17 WM. & MARY J. WOMEN & L. 435, 437 (2011) (arguing that cultural and religious gender issues are a significant inhibitor to the success of international human rights laws and asserting that “mainstreaming a gender approach in rule of law initiatives is crucial to long-term success”).

91. Second Draft Amended ACJHR Protocol, *supra* note 70, at arts. 28A, 46C.

92. *Id.*; see also *supra* note 72 and accompanying text; Escorihuela, *supra* note 63.

93. For a definition of “civil society organization,” see Charles R. Ostertag, Comment, *We’re Starting to Share Well with Others: Cross-Border Giving Lessons from the Court of Justice of the European Union*, 20 TUL. J. INT’L & COMP. L. 255, 255 n.1 (2011) (“‘Civil society organization’ is an umbrella term that includes nonprofit organizations, public charities, private foundations, and nongovernment organizations, among others.”).

94. Marieke Wierda, *Stocktaking: Complementarity*, ICTJ BRIEFING: THE ROME STATUTE REVIEW CONFERENCE 4 (2010), available at <http://ictj.org/sites/default/files/ICTJ-RSRC-Global-Complementarity-Briefing-2010-English.pdf>;

cannot discount jurisdictional expansion of the ACJHR merely because it would produce a result different from the current regime. International jurisprudence is both fluid and dynamic, meaning that novel developments in jurisdictional structure are not necessarily flaws. Rather, observers must closely analyze expansion in principle and practice to determine whether it would provide access to justice that is compliant with modern international standards.

2. Revisiting the Bifurcated Human Rights Regime: Conceptual Advantages to Institutional Unification of State- and Individual-Level Proceedings and Practical Barriers

Expanding ACJHR jurisdiction would overturn the longstanding bifurcation of state and individual accountability for human rights abuses detailed above.⁹⁵ At present, the structural separation of state and individual mechanisms is a key element of accountability efforts for human rights abuses.⁹⁶ There is, however, significant conceptual overlap between the regimes.⁹⁷

No court currently considers claims of human rights violations against both states and individuals.⁹⁸ This dual-prong system is indispensable to comprehensively addressing grave human rights violations.⁹⁹ Either regime alone is insufficient to address the legal and social complexities produced by human rights violations.¹⁰⁰ If retaining both state- and individual-level

Christine Bjork & Juanita Goebertus, Note from the Field, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 *YALE HUM. RTS. & DEV. L.J.* 205, 213 (“The reality is that the ICC does not have an explicit objective to actively participate in rule of law strengthening; not only does the Court lack an express mandate to carry out the functions of a development agency, but the States Parties are unlikely to finance such direct interventions . . . [The ICC] should primarily defer to domestic public and private actors to tailor their own rule of law strengthening programs.”).

95. See *supra* Part I.A.

96. See *supra* Part I.A.

97. BONAFÈ, *supra* note 33, at 23–25.

98. See *id.* at 193 (“[O]ne of the clearest signs of the separation between state and individual responsibility for international crimes is that there are different and independent bodies charged with enforcing obligations of states and obligations of individuals under international law.”).

99. See Sikkink, *supra* note 7, at 125 (“[T]he addition of individual criminal accountability alongside of the existing state accountability model means that there is now significantly more enforcement of human rights norms than existed previously.”).

100. See BONAFÈ, *supra* note 33, at 23 (“[I]t is undeniable that the commis-

accountability in the human rights law system is important, however, maintaining the institutional distinction between these mechanisms may not be equally so.¹⁰¹

Some commentators suggest that the current bifurcated system is outdated and fails to adequately account for its conceptual overlap. For example, commission of a war crime could produce responsibility at both an individual-level and a state-level.¹⁰² The current bifurcated system, then, produces uncertainty about the interaction of regimes where such dual responsibility for a serious international crime is at issue. Critics further note that strict bifurcation cannot address the nuances of serious international crimes, such as those committed by collective groups, rather than by individuals or the state.¹⁰³

In all likelihood, however, the institutional separation between state- and individual-level proceedings remains important. In part, the distinction is significant because the fundamental goals of state and individual accountability will not always be complementary; indeed, at times they may work at cross-purposes.¹⁰⁴ Legal scholar Beatrice Bonafè notes the potentially irreconcilable goals of the two mechanisms: state-level accountability is rooted in the doctrine of international legal order, while individual-level accountability stems from a tradition of imposing legal obligations upon persons.¹⁰⁵ State-level accountability efforts can “fill the gaps that assignment of individual blame may leave in the processes of truth-telling and accountability and thus may serve to further reconciliation and

sion of international crimes entails a dual responsibility (of states and individuals).”).

101. *Cf. id.* at 194 (noting doubts about the “absolute separation between state and individual responsibility for international crimes as far as enforcement mechanisms are concerned”).

102. *Id.* at 28 (“[A] dual responsibility for war crimes was, and still is, well-established under international law . . .”).

103. *Id.* at 67 (observing that the current bifurcated structure fails to deal adequately with collective crimes, i.e., those that are committed neither individually, nor at the state level); *cf. Jelena Subotic, Expanding the Scope of Post-Conflict Justice: Individual, State and Societal Responsibility for Mass Atrocity*, 48 J. PEACE RES. 157, 159 (2011), available at <http://jpr.sagepub.com/content/48/2/157.full.pdf+html> (discussing the insufficiency of both individual- and state-level accountability for mass crimes and calling for recognition of another level of accountability: societal responsibility).

104. See Jocelyn Courtney, Note, *Enforced Disappearances in Colombia: A Plea for Synergy Between the Courts*, 10 INT’L CRIM. L. REV. 679, 680 (2010) (noting that the ICC, an individual accountability court, and the IACHR, a state accountability court, “fulfill different fundamental purposes”).

105. BONAFÈ, *supra* note 33, at 7.

peace, the ultimate goals of transitional justice.”¹⁰⁶ Conversely, individual accountability personalizes the prosecution, conviction, and sentences for human rights violations, lifting the “corporate veil’ of state responsibility.”¹⁰⁷ The two approaches “are difficult to reconcile, and they lead to diverging solutions when applied to practical problems that arise from the relationship between state and individual responsibility.”¹⁰⁸

Post-apartheid South Africa serves as an example in which post-conflict peace may not have been well-served by a dual-purpose court. The African National Congress (ANC) came to power in South Africa in 1994 following the first election in which all citizens of South Africa, including blacks, were free to vote.¹⁰⁹ The formerly dominant and white-minority National Party (NP) had not been militarily defeated, nor had it been exiled from South Africa. As a result, the ANC was not positioned to unilaterally structure the transfer of power or to pursue accountability of the former government at a state level.¹¹⁰ Rather, a negotiated transfer from the white NP to the ANC included the creation of a Truth and Reconciliation Commission, which established a framework that prioritized reconciliation and reconstruction by allowing for amnesties in limited situations.¹¹¹ The limited amnesty system meant that individual

106. Saira Mohamed, *A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice*, 80 U. COLO. L. REV. 327, 331 (2009).

107. Jutta Bertram-Nothnagel, Permanent Representative to the United Nations, Union Internationale des Avocats, Remarks at the Annual Meeting of the American Society of International Law (Mar. 25–28, 2009), in 103 AM. SOC’Y INT’L L. PROC. 441 (2009).

108. BONAFÈ, *supra* note 33, at 7.

109. See generally LEONARD THOMPSON, *A HISTORY OF SOUTH AFRICA* 241–77 (rev. ed. 1995) (describing the end of apartheid).

110. Paul Lansing & Julie C. King, *South Africa’s Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 ARIZ. J. INT’L & COMP. L. 753, 758–61 (1998). Moreover, a state-level trial was not available in South Africa in 1994 because no African regional court with the jurisdiction to conduct such proceedings was available.

111. *Id.* Successful constitutional negotiations depended on making a deal with the previous National Party regime, and Nuremberg-type individual trials were not an option if the ANC sought to promote stability and reconciliation. Paul Lansing & Julie King Perry, *Should Former Government Leaders be Subject to Prosecution After Their Term in Office? A Case of South African President P.W. Botha*, 30 CAL. W. INT’L L.J. 91, 98 (1999). Some observers argue that the use of limited amnesties and the consequent absence of widespread individual criminal trials in South Africa promoted stability and reconstruction. See John Dugard, *Dealing with Crimes of a Past Regime: Is*

criminal trials proceeded only where human rights abusers failed to apply for or obtain amnesty from designated amnesty committees.¹¹² Had a dual-purpose court existed in South Africa in 1994, however, the determination to pursue this limited number of individual criminal trials in place of a more comprehensive (and more controversial) state-level proceeding could have sparked divisive political polemics, generated unrest, and fatally undermined reconciliation efforts. The case of South Africa illustrates that the failure to maintain two unique systems risks confounding international justice efforts. If state- and individual-level prosecutions were unified in a single institution, decisions on the “track” that a particular case should follow would be affected by political considerations, dramatically affecting the type and quality of relief available to victims. Ultimately, the structural distinction between state- and individual-level accountability preserves the integrity of the each system’s goals.¹¹³ An institutional separation facilitates continuing efforts to serve the different and potentially inconsistent goals pursued by each mechanism.¹¹⁴

The current bifurcated system of accountability for human rights abuses undoubtedly reflects various flaws, but the proposed ACJHR expansion is a remedy ill-suited to the problem. As the international legal community increasingly recognizes the overlap between the individual- and state-level regimes, it

Still An Option?, 12 LEIDEN J. INT’L L. 1001, 1010–11 (1999) (“Amnesty was one of the most difficult issues that faced negotiators after the abandonment of apartheid. Prosecution *à la* Nuremberg that had been threatened by the [ANC] while engaged in the armed struggle was clearly impossible in a situation in which there was no victor. On the other hand, absolute, unconditional amnesty, of the kind favoured by the retiring apartheid regime, was unacceptable to the ANC. The compromise was conditional amnesty . . .”); *id.* at 1015 (“The present state of international law on the issue of amnesty is, to put it mildly, unsettled . . . This uncertainty has a major advantage: it allows prosecutions to proceed where they will not impede peace, but at the same time permits societies to ‘trade’ amnesty for peace where there is no alternative.”).

112. Dugard, *supra* note 111, at 1012.

113. BONAFÈ, *supra* note 33, at 216–17 (“When no separation exists between the body charged to deal with state responsibility and that exercising criminal jurisdiction over the individuals responsible for international crimes, there is the risk that the basic principles of international criminal law may be frustrated . . .”).

114. See Méndez, *supra* note 29, at 6 (“International criminal tribunals should never overstep their boundaries and condemn States for the abuses committed by individuals; likewise, organs whose jurisdiction is limited to State responsibility should not engage in determinations of liability of individuals.”).

will have to conceptually revisit this bifurcation and collectively address the best means for imbuing the ICC with flexibility to adapt to changing opinions of the legal community and the evolving face of human rights violations. By merely patching together state and individual accountability into a single institution, however, the ACJHR's proposed expansion would produce a jurisprudential hodgepodge, rather than streamlined justice. While individual- and state-level systems undoubtedly and necessarily interrelate, and while the current structure fails to recognize this interaction adequately, the goal should be to coordinate them rather than to merge them into a single institution.¹¹⁵

B. A CRITIQUE OF EXPANDED ACJHR JURISDICTION ROOTED IN LAW AND POLICY

A comprehensive appreciation of the implications of expanded jurisdiction requires consideration of legal hurdles and policy-based obstacles. First, the absence of statutory guidance in the Rome Statute or the ACJHR's underlying documents means that interaction of overlapping courts would be difficult to articulate. Second, ACJHR expansion may frustrate the goals of complementarity painstakingly laid out in the Rome Statute: to promote state-level rule of law and to ensure that court decisions are not politicized. Finally, an expanded court might face myriad practical challenges to operating in compliance with globally accepted legal standards.

1. Treaty Interpretation and the Lack of Statutory Basis in the Rome Statute and the Protocol on the Statute of the ACJHR

The most obvious challenge to facilitating interaction of the ICC and the jurisdictionally expanded ACJHR stems from the complete absence of statutory consideration of the courts' potential jurisdictional overlap. Given the absence of any binding text on the subject, the 1969 Vienna Convention on the Law of Treaties provides a helpful starting point to determine the ways in which the ICC and an expanded ACJHR might interact (or fail to do so effectively).¹¹⁶

115. Courtney, *supra* note 104, at 703 (noting that the goals of individual and state-level accountability mechanisms are both important, and that these institutions should develop "synergetic" relationships).

116. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

Article 31 of the Vienna Convention states that a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”¹¹⁷ The statutory language, then, provides a starting point. Unfortunately, the ACJHR’s underlying documents offer little clarity on the issue of complementarity. Indeed, the initial ACJHR protocol asserted that the court “shall have jurisdiction over all cases and all legal disputes submitted to it” falling within several categories, declining to detail how concurrent or overlapping jurisdiction would affect the court’s authority to pursue investigations or cases also pending before the ICC.¹¹⁸ Recent developments further suggest that ACJHR supporters have expressly avoided confronting the issue of overlapping jurisdiction with the ICC. The 2011 draft protocol incorporating proposed amendments would expressly limit ACJHR admissibility determinations, which relate to whether a case may be heard by the court at all, to only those situations where a “state” has commenced investigation.¹¹⁹ Moreover, the document specifies that “[the ACJHR], the Courts of African Regional Economic Communities as appropriate, and the national Courts of States Parties shall have concurrent jurisdiction over the crimes identified by this Protocol and Statute,” conspicuously omitting reference to the ICC.¹²⁰ The 2012 proposed amendments to the ACJHR Statute again noticeably failed to address the relationship between an expanded ACJHR and the ICC by omitting reference to the latter in Article 46H on Complementary Jurisdiction, resulting in an ongoing absence of clarity on the subject.¹²¹

Similarly, the ICC’s Rome Statute offers little clarity on whether or how the court’s complementarity principle would operate with a regional-level court.¹²² Both the preamble to the

117. *Id.*

118. ACJHR Protocol, *supra* note 6, at art. 28. Article 27 of the same protocol reminds the ACJHR to “bear in mind the complementarity it maintains with the African Commission and the African Committee of Experts,” but omits reference to the ICC. *Id.* at art. 27.

119. First Draft Amended ACJHR Protocol, *supra* note 69, at art. 46H(2).

120. *Id.*, at art. 46H(1).

121. Second Draft Amended ACJHR Protocol, *supra* note 70, at art. 46(H) (“The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.”).

122. Article 7 of the Genocide Convention provides that any person charged with genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal

Statute and Article 1 mention the court's complementarity principle relative only to "national criminal jurisdictions."¹²³ Moreover, the court's admissibility criteria relating to complementarity limit eligible cases to situations where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute¹²⁴

Had drafters of the Rome Statute contemplated its interaction with an overlapping regional court, it is likely that the instrument would have expressed its jurisdictional scope with reference to regional as well as domestic mechanisms. There is little question that the Rome Statute intended the principle of complementarity to apply to domestic, rather than regional, courts.¹²⁵ In order to remedy that omission, states parties to the Rome Statute would likely have to initiate the cumbersome process of approving a statutory amendment that would expand the ICC's complementarity principle to competent regional bodies with individual criminal justice chambers.¹²⁶ Of course, even in the absence of an actual amendment, the ICC Office of the Prosecutor could independently determine under Article 53 of the Rome Statute if the existence of a regional prosecution means that there is no "reasonable basis to proceed" with ICC prosecution.¹²⁷ Quite clearly, however, informal action on the

as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Convention on the Prevention and Punishment of the Crime of Genocide, art. 6, Dec. 9, 1948, 78 U.N.T.S. 277. An expanded ACJHR, though a regional court, could be interpreted as one such "international penal tribunal" only by stretching the definition of that term far beyond its original intended scope. For a counterargument, see Chacha Bhoke Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, 9 J. INT'L CRIM. JUST. 1067, 1081 (2011).

123. Rome Statute, *supra* note 22, at pmbl., art. 1.

124. Rome Statute, *supra* note 22, at art. 17.

125. See generally Wierda, *supra* note 94 (highlighting that the Rome Statute did not anticipate a role for regional courts to exercise criminal jurisdiction over crimes that could be tried at the ICC or at the domestic level and clarifying that the Rome Statute assigns that responsibility to domestic legal systems).

126. Rome Statute, *supra* note 22, at art. 121(4) ("[A]n amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.").

127. Rome Statute, *supra* note 22, at arts. 17, 53. That is, the OTP could

part of the OTP could invite suspicion of bias, and statutory texts of the ICC and the ACJHR are the most authoritative sources for recognition and discussion of overlapping criminal jurisdiction.

That said, the absence of explicit engagement in the courts' underlying statutes and protocols prompts consideration of unofficial, yet instructive, sources of guidance. Rome Statute drafters at no time considered that the complementarity regime they designed would apply to regional human rights courts considering cases of individual criminal accountability.¹²⁸ Indeed, International Law Commission (ILC) commentary on a 1994 draft of the Rome Statute reflects that the complementarity principle was intentionally limited in scope to national courts.¹²⁹

Opponents of expansion worry that perpetrators of alleged human rights abuses in Africa could use this confusion to assert jurisdiction over issues pending before the ICC, hoping to resituate investigations and cases in a nascent and underfunded institution to avoid accountability.¹³⁰ For example, Article 30 of the Vienna Convention suggests that where two successive treaties relate to the same subject matter (as would be the case should the ACJHR's underlying protocol and statute be properly amended to include a criminal chamber for serious international crimes), states parties to both treaties would be bound to their Rome Statute obligations "only to the extent that its provisions are compatible with those of the later treaty."¹³¹ Efforts to strip the ICC of jurisdiction via this mechanism would likely prove ineffective; however under Article 127 of the

exercise its authority under Article 53 to apply the criteria of Article 17 to an evaluation of proceedings in a regional institution. Lutz Oette, *The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond*, 8 J. INT'L CRIM. JUST. 345, 363 (2010).

128. Sharon A. Williams & William A. Schabas, *Article 17: Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 605, 613 (Otto Triffterer ed., 2d ed. 2008).

129. *Report of the International Law Commission on the Work of Its Forty-sixth Session* U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), reprinted in [1997] Y.B. Int'l L. Comm'n 27, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) ("The emphasis [in the Rome Statute] is thus on the court as a body which will complement existing national jurisdictions . . .").

130. See, e.g., *AU Hostility Threatens International Justice*, KENYAN SECTION INT'L COMMISSION OF JURISTS (May 31, 2011), <http://icj-kenya.org/index.php/media-centre/commentary/362-au-hostility-threatens-international-justice> [hereinafter *AU Hostility*].

131. Vienna Convention, *supra* note 116, at art. 30.

Rome Statute, a state party could not avoid its obligations related to cases or investigations commenced prior to the date of effective withdrawal from the Statute.¹³² Moreover, because the Security Council is empowered to refer situations to the ICC under Article 13(b), U.N. member states would be obligated to assist in the investigation of cases and the prosecution or transfer of suspects, regardless of the states' status as signatories or non-signatories to the Rome Statute.¹³³ That is, African states that are U.N. members would be obligated to assist with ICC proceedings to some extent, irrespective of the responsibilities they assume by virtue of a new relationship with the ACJHR. Despite the ICC's ability to retain investigations and cases currently underway, expansion opponents rightly note that the lack of statutory language creates ambiguity that could be opportunistically exploited to undermine ICC efforts and political support for the court. Moreover, confusion persists regarding the interaction of the courts with potentially overlapping jurisdiction in future, rather than ongoing, cases.

2. Frustration of the Purpose of Complementarity: Diverting Attention from Domestic Rule of Law Development and Risking Politicized Judgments

Complementarity relates closely to the integrity of domestic legal systems. Drafters of the Rome Statute considered it preferable to leave the majority of cases concerning international crimes to national courts, which would likely have greater capacity to collect evidence and apprehend the accused.¹³⁴ Early Rome Statute supporters also saw rule of law promotion as a desirable (if secondary) effect of including the principle of complementarity.¹³⁵

132. Rome Statute, *supra* note 22, at art. 127(1)–(2). Effective withdrawal requires a State Party to notify the Secretary-General of the United Nations in writing of its intended withdrawal, after which time withdrawal takes effect one year after the date of receipt of the notification unless the notification specifies a later date.

133. Rome Statute, *supra* note 22, at art. 13(b); *see also* Stephane Bourgon, *Jurisdiction Ratione Loci*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, *supra* note 35, at 559, 565 (“[W]hether or not the State on whose territory the crime was committed or the State of nationality are Parties to the Statute has no bearing on the powers of the Security Council under this provision.”).

134. CASSESE, *supra* note 34, at 351; Williams & Schabas, *supra* note 128, at 609.

135. *Cf.* Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106

Domestic rule of law carries independent significance for a variety of reasons. Scholarly research reveals that rule of law is “strongly correlated” with life expectancy.¹³⁶ Moreover, government agencies have recognized the relationship between rule of law and economic growth.¹³⁷ The ICC is not itself responsible—and should not be—for actively developing the legal systems of states in which its investigations are ongoing.¹³⁸ This responsibility falls largely to civil society organizations and states themselves.¹³⁹ The strong conceptual connection, however, remains between the promotion of state-level rule of law and the ICC. If complementarity in part aims to promote the growth of *national* rule of law, diverting cases and resources to a *regional* court would serve different purposes. Development of regional rule of law at the expense of state rule of law may not produce positive effects in health and investment measures, because any effect would exist in a continent still governmentally divided into states. There is little support for the position that improved *regional* rule of law would translate into better and more effective *state* policies, which is at least an ancillary goal of Rome Statute complementarity.¹⁴⁰ Moreover, shifting the onus for rule of law from states to institutional bodies abdicates a responsibility fundamental to the international system, as “the exercise of national criminal jurisdiction is not only a right but also a duty of States.”¹⁴¹ Mere substitution of a regional

COLUM. L. REV. 182, 183–84 (2006) (“Tracing developments from the Yugoslavia and Rwanda tribunals, purely international in character, to the introduction of principles of complementarity in the ICC [on onwards] . . . an obvious trend emerges. Ultimately, the international community recognizes that there can be no substitute for serious efforts to strengthen the rule of law domestically.”).

136. Peter Boettke & J. Robert Subrick, *Rule of Law, Development, and Human Capabilities*, 10 SUP. CT. ECON. REV. 109, 117 (2003).

137. See, e.g., *Safety Security and Accessible Justice: Putting Policy into Practice*, DEPARTMENT FOR INT’L DEV. 14 (2002), <http://www.gsdrc.org/docs/open/SSAJ23.pdf>.

138. See Wierda, *supra* note 94, at 4.

139. See *id.* For an interesting analysis of the paradox presented by the involvement of civil society in promoting domestic judicial capacity as they advocate for ICC involvement, see Bjork & Goebertus, *supra* note 94, at 205–29.

140. Bjork & Goebertus, *supra* note 94, at 212 (“The ICC Chief Prosecutor has stated that one of the objectives of his office is to encourage and facilitate states in investigating and prosecuting crimes domestically . . .”).

141. Williams & Schabas, *supra* note 128, at 607 (quoting Office of the Prosecutor, International Criminal Court, *Paper on Some Policy Issues Before the Office of the Prosecutor*, INT’L CRIM. CT., 5 (Sept. 2003), <http://www.iccpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Paper+on+some+policy+issues+before+the+Office+of+the+Prosec>

court for a domestic court in the Rome Statute's complementarity scheme is not a solution to the problem discussed herein because it fails to account for the unique benefits of promoting domestic rule of law.

Further, critics note that effective individual human rights prosecutions require a court to remain impartial, but they also demand that the court "understand the reality within which [it] work[s] to be relevant and effective."¹⁴² Domestic tribunals are naturally exposed to this relevant contextual information. An expanded ACJHR, geographically and operationally distinct from the *situs* of the crimes it would consider, could result in remoteness undermining its effectiveness.

Similarly, complementarity in practice is essential to avoiding politicized judgments and compromised judicial credibility. Unlike the ECHR, which evolved alongside political organs and entities in Europe, the expanded ACJHR is a "late-comer to a scene with highly developed political organs."¹⁴³ Because the ACJHR's expansion would require a political decision by the AU, it takes little imagination to recognize that subjecting a court to State determinations regarding its jurisdiction "will have a very negative effect over its real or perceived independence and impartiality as a court of law."¹⁴⁴

In addition, given the lack of clarity regarding potential jurisdictional overlap should the ACJHR expand, conflict could easily erupt over which court—the ICC or the ACJHR—would have jurisdictional precedence in an investigation or case. Such a conflict has the potential to compromise the legitimacy of both courts by risking light sentences, weak enforcement, unwarranted acquittals, or politicized benches.¹⁴⁵ Even if the Rome Statute contemplated regional-level complementarity, exercises of overlapping jurisdiction could create conflict between institutions and produce proceedings that are actually

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142. James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 770 (2008).

143. Thompson Bobby Ugiagbe, *The African Court of Justice and Human Rights: Future Political and Jurisdictional Realities and Challenges*, PEACE & CONFLICT MONITOR (May 3, 2010), http://www.monitor.upeace.org/archive.cfm?id_article=714.

144. Méndez, *supra* note 29, at 6.

145. Kate Gibson, *An Uneasy Co-existence: The Relationship Between Internationalised Criminal Courts and Their Domestic Counterparts*, 9 INT'L CRIM. L. REV. 275, 277 (2009).

politicized or perceived as such. Moreover, overlapping jurisdiction can produce uncertainty for victims, defendants, and prosecutors of international crimes¹⁴⁶ or result in forum-shopping by the accused.¹⁴⁷ A lack of clarity about institutional interplay could thus seriously compromise the ACJHR's ability to fulfill its expanded mandate (or its existing one).¹⁴⁸

3. Practical Difficulties of Concurrently Operationalizing a Tri-Chamber Court

While some argue that a court with jurisdiction over both states and individual actors could deliver a more comprehensive package of justice,¹⁴⁹ in reality the ACJHR likely lacks the fundamentals to execute an expansion and still deliver due process because of inadequate capacity and political will.¹⁵⁰ First,

146. There is some evidence that parallel judicial structures can result in double jeopardy prosecutions in violation of the *ne bis in idem* principle. ORG. FOR SEC. & CO-OPERATION IN EUR., *Report 9—On the Administration of Justice*, 7–8 (Mar. 2002) [hereinafter *Report 9*], available at <http://www.osce.org/kosovo/12561>. For a discussion of *ne bis in idem* in international criminal law, see Ildikó Erdei, *Cumulative Convictions in International Criminal Law: Reconsideration of a Seemingly Settled Issue*, 34 SUFFOLK TRANSNAT'L L. REV. 317, 319–20 (2011) (“The principle of *ne bis in idem* is referred to in common law jurisdictions as the prohibition on double jeopardy. Double jeopardy is thought of as applying to repeated trials within the same jurisdiction, whereas *ne bis in idem* is broader, protecting ‘the person from repeated prosecution or punishment for the same conduct, irrespective of the prosecuting system.’” (quoting Arrila Bogdan, *Cumulative Charges, Convictions and Sentencing at the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda*, 3 MELB. J. INT'L L. 1, 4 n.17 (2002))).

147. Gibson, *supra* note 145, at 276–77.

148. See *supra* notes 63–64 and accompanying text.

149. Lilly, *supra* note 78, at 30–31. Supporters of expansion also assert that proceedings relating to African violations should be investigated and prosecuted on the African continent. Harvard University Hauser Center, *Domestic and Regional Complementarity*, YOUTUBE (Apr. 15, 2010), <http://www.youtube.com/watch?v=ifgXxa2Q1FI>. This purely geographic argument is not convincing in the context of the ACJHR, however, because the ICC expressly provides for *in situ* proceedings (though these have yet to occur). Rome Statute, *supra* note 22, at art. 3(3).

150. See *Implications*, *supra* note 78, at 3 (noting that the proposal to expand ACJHR jurisdiction “confronts insurmountable legal and practical obstacles”); see also Ibrahim Kane & Ahmed C. Motala, *The Creation of a New African Court of Justice and Human Rights*, in THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986–2006, at 428 (Malcolm Evans & Rachel Murray eds., 2d ed. 2008) (“It would be a serious mistake for the Assembly to confer on the Court of Justice and Human Rights jurisdiction to conduct criminal trials, since the structure, composition and resources . . . would not permit it to conduct such trials. Furthermore, given that the International Criminal Court (ICC) has been established and many AU Member

critics doubt the AU's ability to design and implement an expanded jurisdictional grant to the ACJHR, particularly because of its likely high cost and the limited resources already allotted to the court.¹⁵¹ Courts will require extensive training in the rights of victims, witness protection arrangements, compliance with court decisions, outreach efforts, evidence collection and preservation, and defendants' rights.¹⁵² According to a coalition of NGOs and human rights advocates, the financial implications of these requirements will be "exponentially onerous and [will] call into question the desirability and effectiveness of the process."¹⁵³ African states themselves have noted the chilling effect that inadequate financial resources can have on justice efforts.¹⁵⁴ Within the context of an expanded ACJHR, such a chilling effect is likely given the estimated average multi-million dollar cost for a single trial of an international crime in an international tribunal.¹⁵⁵ Ultimately, funding limitations could seriously compromise the mandate of the ACJHR in its work relating to treaty interpretation and state-level human rights claims, not only that connected to individual criminal accountability.

The effects of restricted funding may be amplified by capacity limitations. Jurisdictional expansion would require both administrative and structural changes to the ACJHR. With an expanded court must come detention facilities, a criminal appeals chamber, and accommodations for inter-state actions re-

States have ratified the Rome Statute establishing this Court, all attempts should be made to strengthen the ICC, instead of having a proliferation of criminal trials in different parts of the world." (footnote omitted)).

151. *Implications*, *supra* note 78, at 16–17; *see also AU Hostility*, *supra* note 130 (describing a meeting of African and European civil society questioning the ACJHR's technical and financial capacity to run a separate criminal jurisdiction outside of the ICC).

152. *Implications*, *supra* note 78, at 14–16.

153. *Id.* at 15.

154. *See Lubuto v. Zambia*, No. 390/1990, ¶ 5.2, U.N. Doc. CCPR/C/55/D/390/1990 /Rev.1 (1995) (asserting that country in a "bad economic situation," such as Zambia, lacked the financial resources to adequately adjudicate cases).

155. *See David Wippman, The Costs of International Justice*, 100 AM. J. INT'L L. 861, 862 n.11 (2006) (observing that, as of 2006, dividing the ICTY budget by the number of trials concluded indicates that \$18 million dollars were spent per trial, though this figure failed to take into account the costs of proceedings against indicted but ultimately untried individuals or the costs of cases then in progress); M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* 190 (2011) (reflecting official website content from the ICTY and the ICTR that the average per case costs are \$10–\$11 million and \$11 million, respectively).

lated to the apprehension and transfer of suspects.¹⁵⁶ In addition, the ACJHR's judicial bench would be entirely new if the sitting bench of the ACHPR is dismissed prior to ACJHR empaneling as planned; whether in its initially proposed or an expanded form, the court risks losing valuable institutional memory that will need to be rebuilt.¹⁵⁷ The capacity of AU states to meet these challenges is open to question given many members' ongoing failure to ensure that independence and due process are guaranteed by their domestic courts.¹⁵⁸ Indeed, ACHPR Judge Fasah Ougouergouz has noted the critical absence of respect for judicial culture at both the municipal and continental levels in Africa.¹⁵⁹ The financial resources and capacity of AU member states cast doubt on the likelihood of timely and lasting effectiveness from an expanded ACJHR; these doubts are further amplified given states' willingness (or lack thereof) to consistently commit to efforts that protect human rights.

Examples abound of insufficient political willingness in the AU and the consequent compromised effectiveness of AU human rights institutions.¹⁶⁰ The byzantine judicial maze of African judicial accountability systems outlined above is complicated by delays related to the establishment and operationalization of the ACJ, the ACHPR, and the ACJHR. The ACHPR, for example, did not deliver its first judgment from its seat in the Tanzanian city of Arusha until December 2009,¹⁶¹ and the ACJ has yet to hear any case. The ACJHR does

156. See *Implications*, *supra* note 78, at 18 (noting that an expanded ACJHR would have to rely on cooperation from states to enforce its orders and assist in investigations).

157. See *Advocacy Before Regional Human Rights Bodies: A Cross-Regional Agenda*, 59 AM. U. L. REV. 163, 244–45 (2009) [hereinafter *Advocacy Conference*] (noting comment of ACHPR Judge Fatsah Ougouergouz that “the judges of the current [ACHPR], the bench of the current Court, including myself, will be ‘resigned’—or, in other words, will be dismissed. So there will be a totally new court which is going to be established, creating some very important and crucial issues of judicial legacy”).

158. See, e.g., Abdoulaye Massalatchi, *Niger Leader Dissolves Constitutional Court*, REUTERS (June 29, 2009, 9:50 PM GMT), <http://af.reuters.com/article/nigerNews/idAFLT50531820090629>.

159. *Advocacy Conference*, *supra* note 157, at 255 (“But what is missing [in Africa] is a ‘judicial’ culture, both at the continental level and at the grassroots, municipal level. There is no respect for judges at the national level. Most of the African states do not really consider the decisions or the rulings of the judges.”).

160. Kane & Motala, *supra* note 150, at 438–39.

161. *Michelot Yogogombaye v. The Republic of Senegal*, Application No.

not yet even functionally exist; as of September 2012, only five states have ratified its underlying protocol, notably short of the fifteen it requires to enter into force.¹⁶² Commentators have further noted that the precipitate subsuming of the ACHPR within the ACJHR “does not seem to bode well for the project of establishing a strong African human rights court.”¹⁶³

Other examples of inadequate political will result from more explicit structural choices. For example, not all entities and individuals have access to the remedies that the ACJHR in its initial or its expanded form would offer. The most recent proposed amendments to the ACJHR, which would facilitate its jurisdictional expansion, reflect a notable limitation on those persons and entities eligible to submit cases to the Court. According to those changes,

African individuals or African Non-Governmental Organizations with Observer Status with the African Union or its organs or institutions [are eligible to submit cases to the Court], but only with regard to a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. . . .¹⁶⁴

The significance of this language is that it severely limits the ability of individuals and many NGOs to submit complaints directly to the Court, because states that become ACJHR members need not automatically subject themselves to individuals’ standing before the Court. By contrast, an important feature of jurisdiction in the ECHR, a predecessor and peer of the ACJHR, is the eligibility of individuals to submit complaints directly to the court for investigation.¹⁶⁵ Drafters of the ACJHR’s underlying documents, though presented with “an opportunity for remedying a critical failure,” declined to expand the limited grounds for standing before the court to include individuals.¹⁶⁶ One critic observes, “the limited standing [ob-

001/2008, African Court of Human Rights (2009).

162. *List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights*, AFRICAN UNION, <http://www.africa-union.org/root/au/documents/treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf> (last visited Nov. 5, 2012).

163. See RUTH MACKENZIE ET AL., *THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* 408 (2d ed. 2009).

164. Second Draft Amended ACJHR Protocol, *supra* note 70, at art. 16.

165. Symposium, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 *BROOK. J. INT’L L.* 911, 916 (2011).

166. Simon M. Weldehaimanot, *Unlocking the African Court of Justice and Human Rights*, 2 *J. AFR. & INT’L L.* 167, 177 (2009); see also African Union, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, art. 16(f), Exp/Min/IV/Rev.7 (2012) (on file with author). A full

structing individuals' access to the court] was not an oversight on the part of African States but a calculated decision; and that it was repeated when an opportunity for revision appeared at tests to unwillingness of states."¹⁶⁷ African civil society organizations have expressed concern that supporters advanced jurisdictional expansion with a political agenda, rather than a genuine impetus to promote accountability.¹⁶⁸ Indeed, it would seem that if AU leaders' true goal is to promote accountability, efforts should be directed to strengthening the ICC, which has yet to issue its first judgment, and avoiding diversion of resources to an unformed institution.

That said, perhaps the most troubling reflection of inadequate political will for international accountability efforts is the discouraging record of African states' compliance with already existing regional decisions at the state level.¹⁶⁹ While Africa is indeed a supporter of international justice—exemplified by the fact that African states constitute the largest regional block of ICC states parties¹⁷⁰—African states have repeatedly failed to comply with regional human rights-related decisions. Indeed, observers estimate that the rate of states' full compliance with AU Commission decisions is only fourteen percent.¹⁷¹

Examples of non-compliance with other regional and sub-regional courts abound. In September 2009, Zimbabwe withdrew from the regional Southern African Development Community tribunal, in an apparent attempt to halt the effect of a

discussion of this aspect is beyond the scope of this paper.

167. Weldehaimanot, *supra* note 166, at 178.

168. Valentina Torricelli, *The Contribution African States Can Make to the ICC Review Conference*, in OXFORD TRANSITIONAL JUSTICE RESEARCH: DEBATING INTERNATIONAL JUSTICE IN AFRICA 30 (2010), available at http://www.fljs.org/uploads/documents/Justice_in_Africa.pdf.

169. *Cf.* Cavallaro & Brewer, *supra* note 142, at 770 (“[I]n states where respect for human rights is not entrenched, supranational tribunals are unlikely to enjoy the automatic implementation of their decisions, particularly when these decisions call for a significant political or financial commitment . . .”). For a study explaining the difficulty of determining the exact rate of compliance with African institutions, see Frans Viljoen & Lurette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004*, 101 AM. J. INT'L L. 1, 32 (2007) (“[T]he attempt to chart compliance empirically and analytically is fraught with methodological difficulties. The most important of these is the [African] Commission's failure to enunciate clear and specific remedies, leaving an unreliable yardstick for measuring compliance.”).

170. *The States Parties to the Rome Statute*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Nov. 5, 2012).

171. Viljoen & Louw, *supra* note 169, at 1, 5.

court judgment.¹⁷² The Gambia has delayed compliance with the regional Economic Community of West African States Court of Justice ruling to investigate the disappearance of a journalist in 2006.¹⁷³ According to a coalition of civil society organizations, Kenya and Uganda failed to comply with regional East African Community Court of Justice rulings in 2006 and 2007.¹⁷⁴ Several examples even reflect efforts to avoid accountability at the ICC. For example, after the ICC Office of the Prosecutor announced an investigation in 2005 into abuses in Sudan, the Sudanese government established the Special Criminal Court for Events in Darfur (SCCD).¹⁷⁵ The move was seen as “window dressing” and critics found that the court held “little promise of bringing justice to victims of serious abuses.”¹⁷⁶ In effect, expansion of the ACJHR’s jurisdiction could continue to facilitate inaction by excluding key international actors from ensuring compliance with individual criminal accountability efforts.

The issue of jurisdictional expansion is marked by serious concerns relating to the ACJHR’s ability or the willingness of its members to pursue investigations, conduct trials, and enforce judgments. Indeed, several aspects of an expanded court are compelling, and supporters’ arguments communicate legitimate points about the trajectory of international justice. Ultimately, however, expanding the ACJHR’s jurisdiction as proposed threatens to hamper both its effectiveness and that of the ICC. Determining a way forward requires critics to consider the potential legitimacy of expansion while ensuring that such a development would satisfy fair trial requirements.

172. Paidamoyo Muzulu, *SADC Mulling Measures to Take Against Zimbabwe*, ZIM. INDEP. (May 13, 2011), <http://allafrica.com/stories/201105140080.html>. The case at issue was *Mike Campbell (Pvt) Ltd & Anor v. Republic of Zimbabwe*, Case No. SADCT: 2/07; see also *Implications*, *supra* note 78, at 19.

173. *IFJ Calls on ECOWAS and Gambia to Enforce Court Ruling on Disappearance of Journalist 3 Years On*, INT’L FED’N JOURNALISTS (Apr. 9, 2009), <http://africa.ifj.org/en/articles/ifj-calls-on-ecowas-and-gambia-to-enforce-court-ruling-on-disappearance-of-journalist-3-years-on>; see also *Implications*, *supra* note 78, at 19.

174. See *Implications*, *supra* note 78, at 19.

175. Joanne Mariner, *Bringing Justice to Darfur*, CNN (June 24, 2005), http://articles.cnn.com/2005-06-24/justice/mariner.darfur_1_janjaweed-darfur-sudanese-government/3?_s=PM:LAW.

176. *Sudan: Khartoum War Crimes Investigations Are Mere ‘Window Dressing,’ HUM. RTS. WATCH* (Oct. 20, 2008), <http://www.hrw.org/news/2008/10/20/sudan-khartoum-war-crimes-investigations-are-mere-window-dressing>.

III. MOVING FORWARD: PROPOSED STEPS IF THE AU PURSUES ACJHR EXPANSION

Despite the legal and policy-based concerns outlined above, resisting expansion of the ACJHR may be politically unpalatable (if not impossible), and doing so potentially risks ignoring the legitimate purposes of such a development. Stakeholders should engage with proposals to expand the court at an early stage to ensure some level of input and guarantee that the ultimate result satisfies fair trial requirements.

A. RESISTING EXPANSION MAY PROVE IMPOSSIBLE OR UNDESIRABLE

Jurisdictional expansion of the ACJHR as proposed is likely inadvisable due to the myriad legal and policy obstacles previously outlined. To now direct resources and expertise to a new institution would be to withhold crucial support for a blossoming and increasingly robust ICC. In addition, the ACJHR as initially proposed will likely have its hands full given the already unprecedented breadth of its jurisdictional scope.¹⁷⁷

That said, resisting expansion might well prove impossible. While commentators have argued that AU opposition to the ICC should not be overstated,¹⁷⁸ it appears that African hostility to the ICC may be growing (or is at least more visible than in the past).¹⁷⁹ Indeed, AU leaders have already shown interest in expanding the ACJHR's jurisdiction, and political will may continue to further this agenda.¹⁸⁰ Moreover, expansion may be desirable at a theoretical level and because of what it reflects about the reality of developments in international law.¹⁸¹ The historical trajectory of international legal jurisprudence suggests that the current bifurcated system distinguishing state-level from individual-level proceedings may well evolve.

Although reasons exist to resist expansion, attempts by rights groups and ICC proponents to resist expansion of the ACJHR may prove unsuccessful. To ensure that complementa-

177. See *supra* notes 63–64, 69, 92 and accompanying text.

178. See, e.g., Elise Keppler, *Managing Setbacks for the International Criminal Court in Africa*, 56 J. AFR. L. 1, 1–8 (2012).

179. See, e.g., African Union Decision 245, *supra* note 66 (asserting that AU member states need not “cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan”).

180. See *supra* notes 68–70 and accompanying text.

181. See *supra* Part II.A.1.

rity endures, stakeholders should help develop key benchmarks against which the credibility and effectiveness of a new regional criminal-level court could be tested.

B. RECOMMENDED BENCHMARKS FOR AN EXPANDED REGIONAL CRIMINAL COURT IN AFRICA

Calls to expand the ACJHR do not reflect the first or only efforts to develop extra-ICC judicial mechanisms for crimes within the mandate of the Rome Statute. Reference to past experiences and analysis of stakeholders' recommendations relating to fair trial requirements elsewhere is instructive. As elsewhere, developing and applying key benchmarks can address potential challenges posed by the expansion of ACJHR jurisdiction. Ultimately, many of these recommendations would apply, not only to proceedings of an expanded ACJHR, but to any trial of a person charged with a serious criminal offense.

ACJHR criminal prosecutions would have to be generally credible in accordance with international standards.¹⁸² Indeed, prosecutions for serious crimes are not only mandated under international law, but are also meaningful for peace-building and stability in post-conflict states.¹⁸³ U.N. principles for the protection and promotion of human rights state that a right to justice means both "prompt, thorough, independent and impartial investigations" and "appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."¹⁸⁴ The Rome Statute expressly asserts that non-ICC prosecutions must reflect a state's ability and willingness to meaningfully prosecute a defendant for ICC jurists to consider them acceptable domestic alternative proceedings.¹⁸⁵

Quite reasonably, the ICC would likely place a similar

182. *Benchmarks for Assessing Possible National Alternatives to International Criminal Court Cases Against LRA Leaders* (May 2007), in *BENCHMARKS FOR JUSTICE FOR SERIOUS CRIMES IN NORTHERN UGANDA: HUMAN RIGHTS WATCH MEMORANDA ON JUSTICE STANDARDS AND THE JUBA PEACE TALKS 3* (2008) [hereinafter *Benchmarks*], available at http://www.hrw.org/legacy/pub/2008/ij/uganda_memos_cover.pdf.

183. *Id.* at 6.

184. *Id.* (quoting U.N. Econ. & Soc. Council, Human Rights Comm'n, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, princ. 19, U.N. Doc. E/CN.4/2005/102/Add.1, 61st Sess. (Feb. 8, 2005) [hereinafter *Impunity Principles*]).

185. *Id.*; see generally Rome Statute, *supra* note 22, at art. 17.

onus on a regional court. The thresholds of willingness and ability entail both substantive and procedural requirements.¹⁸⁶ Procedurally, investigations and prosecutions must be both independent and impartial. Proceedings must not shield the accused from criminal responsibility and must be consistent with intent to bring a person to justice.¹⁸⁷ Substantively, drafters should incorporate Rome Statute crime definitions and legal theories, such as command responsibility, into the law of the expanded court.¹⁸⁸ Indeed, if an expanded ACJHR emerges with the flexibility to create its own rules and procedures—an origin far different from a more conventional situation of rule-of-law building in which existing domestic judicial systems are shaped to comply with international standards¹⁸⁹—there is little basis to argue that its jurisdictional definitions should differ from those embedded in the Rome Statute. A failure to incorporate and apply Rome Statute definitions could result in a single defendant's simultaneous trials before the ICC and the expanded ACJHR with very similar (though not identical) charges, implicating the principle of *ne bis in idem*.¹⁹⁰ Similarly, the expanded ACJHR should expressly guarantee that the complementarity regime with the ICC would be fully respected.¹⁹¹ Such a move would assure opponents of expansion that the ACJHR was created for a purpose greater than avoiding ICC accountability.

186. *Benchmarks*, *supra* note 182, at 6.

187. Rome Statute, *supra* note 22, at art. 17; *Benchmarks*, *supra* note 182, at 6.

188. See African Union, Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters 6 (May 14–15, 2012) (on file with author); *cf.* *Benchmarks*, *supra* note 182, at 6 (noting, in discussion of a potential alternative to ICC prosecution in the domestic Ugandan legal system, that the Rome Statute requires the substantive incorporation of crimes within its mandate into states parties' internal law).

189. The principle of complementarity does not depend, however, on the incorporation of Rome Statute definitions into domestic law. For a case to be considered inadmissible before the ICC, a national prosecution must proceed against the same defendant for the same conduct, though the label applied to that crime may differ. See Nidal Nabil Jurdi, *Some Lessons on Complementarity for the International Criminal Court Review Conference*, 34 S. AFR. Y.B. INT'L L. 28, 35–37 (2009), available at <http://ssrn.com/abstract=1651851>.

190. For a definition of this principle, see Erdei, *supra* note 146, at 319–20. See also Report 9, *supra* note 146, at 7–8 (discussing a situation where the existence of parallel legal structures resulted in a Kosovar Serb being twice indicted and tried for an alleged murder).

191. *Recommendations of the African and European Civil Society Seminar on Accountability and Justice, 11–12 April 2011—Pretoria, South Africa*, INT'L FED. HUM. RTS., http://fidh.org/IMG/pdf/EU_Seminar_recommendations_Summary_English_2.pdf (last visited Nov. 5, 2012).

Ultimately, the issue of credibility is particularly salient in the context of Africa, where a proliferation of judicial institutions has been accompanied by the continuation of egregious human rights violations. Supporters of an expanded court should acknowledge doubts over African leaders' commitment to justice for serious international crimes and directly address such concerns.

The observation of internationally recognized fair trial standards is closely related to the issue of credibility. The expanded ACJHR should rigorously observe internationally recognized fair trial standards in principle and in practice. These standards are reflected in the ICCPR and include, but are not limited to, the right to freedom from torture and cruel, inhuman, or degrading treatment;¹⁹² the right to a presumption of innocence; the right to adequate time and facilities for preparation of a defense; the right to a trial without undue delay; the right to legal assistance; the right to an interpreter; and the right to refrain from self-incrimination.¹⁹³ Particular attention should be paid to ensure the proper scope and adequacy of disclosure of material to the defense.¹⁹⁴ The ACJHR should also provide for adequate investigative and prosecutorial capacity, implement witness protection and support procedures, develop a plan for victims' participation and reparations, guarantee the security of court personnel and participants, and execute outreach programs across the continent.¹⁹⁵ These elements are particularly important to ensure adequate involvement of the defense, the prosecution, the judiciary, and the public—all vital parties in efforts to counter impunity. A failure to adequately assess and develop any component could jeopardize the integrity of the whole.

Perhaps most importantly, the expanded ACJHR should take steps to ensure that its judiciary is properly qualified. All too often, governments appoint judges to international tribunals paying little attention to nominees' criminal law credentials.¹⁹⁶ Indeed, achieving the goal of a truly qualified judiciary

192. ICCPR, *supra* note 30, at art. 7; *Benchmarks*, *supra* note 182, at 8.

193. ICCPR, *supra* note 30, at art. 14; *Benchmarks*, *supra* note 182, at 8.

194. *Benchmarks*, *supra* note 182, at 8.

195. *Particular Challenges for Uganda in Conducting National Trials for Serious Crimes* (Sept. 2007), in *BENCHMARKS FOR JUSTICE FOR SERIOUS CRIMES IN NORTHERN UGANDA: HUMAN RIGHTS WATCH MEMORANDA ON JUSTICE STANDARDS AND THE JUBA PEACE TALKS*, *supra* note 182, at 30–33 (2008) [hereinafter *Particular Challenges*].

196. See RUTH MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES:*

may be best served by maintaining the institutional bifurcation outlined above in detail. That is, the AU could proceed with the creation of a separate regional court concerned solely with individual crimes, thus benefiting from the specialization in function and training such a court would attract, while maintaining the current dual-prong structure of the current and unexpanded ACJHR. Meeting fair trial standards generally will demand the commitment of the judiciary and the broader public, alike. As noted above, the absence of a generalized respect for the judiciary has already hampered accountability efforts across the continent.¹⁹⁷ Undertaking broad efforts to raise the profile of respect for judicial decisions in Africa will be crucial to operationalize fair trial standards. Ultimately, however, fair trials will require not only a legal system of high quality, but also that system's independence from outside political forces.¹⁹⁸ This challenge may prove particularly onerous given the politically charged atmosphere in which the suggestion of jurisdictional expansion emerged.

In addition, penalties applied through an expanded ACJHR should reflect the gravity of the serious international crimes in its mandate.¹⁹⁹ International law requires that states not only prosecute, but also punish, perpetrators of serious human rights abuses.²⁰⁰ The Convention Against Torture, for example, states that the crimes it concerns should be "punishable by appropriate penalties which take into account their grave nature."²⁰¹ U.N. principles on fighting impunity note that states should ensure that convicted perpetrators of serious crimes are "duly punished."²⁰² Truth commissions and traditional justice mechanisms may well play an important role in post-conflict justice processes for some offenses, but an expand-

PRINCIPLE, PROCESS, AND POLITICS 173–74 (2010) ("It is apparent that efforts to insulate ICC elections from politicized electoral practices have largely failed, so that selection to both the ICJ and ICC is seen as being part of a broader landscape of political elections, often with very limited regard for the judicial nature of the posts.").

197. See *supra* note 159 and accompanying text.

198. *Particular Challenges*, *supra* note 195, at 29–30.

199. *Benchmarks*, *supra* note 182, at 9–10.

200. See Brad Emmons, Note, *Tortured Language: "Individuals," Corporate Liability, and the Torture Victim Protection Act*, 96 MINN. L. REV. 675, 683 (2011).

201. *Benchmarks*, *supra* note 182, at 16 (quoting Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at art. 4, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984)).

202. Impunity Principles, *supra* note 184, at princ. 1.

ed ACJHR should adhere to global standards and resist pressures to implement these mechanisms exclusively. As in other international and hybrid international-national criminal courts, an expanded ACJHR should impose imprisonment as its principal penalty.²⁰³ International and hybrid international-national institutions do not permit the death penalty as a sentence for serious international crimes²⁰⁴ and, to meet international fair trial standards, the expanded ACJHR should do the same. In addition, imposed and served periods of imprisonment should reflect the seriousness of crimes. International tribunals have consistently applied terms reflecting the gravity of the atrocities of which they are seized. A 2002 study concluded, for example, that the mean ICTY sentence was for 16 years' imprisonment, while the majority of ICTR sentences were for life imprisonment.²⁰⁵

Finally, the expanded ACJHR should explicitly recognize that judicial determinations of ICC admissibility rest, under Article 19 of the Rome Statute, exclusively with ICC judges.²⁰⁶ That is, the ACJHR's underlying documents should explicitly recognize that a determination of admissibility under the Rome Statute is not subject to attack on the grounds of competing ACJHR jurisdiction. Perhaps the best way to ensure the courts' compatibility is to help guide an expanded ACJHR to work with—not against—ICC proceedings. For example, the AU could ensure that an expanded ACJHR adds value (rather than creates redundancy) by deploying it to execute proceedings against mid- and lower-level defendants where the ICC has commenced investigation and prosecutions against their superior counterparts.²⁰⁷ That said, regardless of the way in which it is safeguarded, true complementarity must remain a pivotal element of the ICC.

CONCLUSION

Somewhat compelling in theory, jurisdictional expansion of the ACJHR faces myriad legal and practical obstacles. Propo-

203. *Benchmarks*, *supra* note 182, at 9.

204. *Benchmarks*, *supra* note 182, at 9.

205. Mark A. Drumbl & Kenneth S. Gallant, *Sentencing Policies and Practices in the International Criminal Tribunals*, 15 *FED. SENT'G REP.* 140, 142 (2002).

206. *See* Rome Statute, *supra* note 22, at art. 19.

207. *See* Williams & Schabas, *supra* note 128, at 620 (noting that drafters intended the ICC to have a primary "emphasis" on senior leaders in any given situation under investigation).

nents of expansion should revisit the reasons asserted in support of including serious international crimes within the ambit of the ACJHR and recognize that such goals are better served by upholding the already-established ICC. Obfuscating jurisdictional boundaries between institutions risks compromising the ICC's substantial accomplishments and the ACJHR's potential to contribute to Africa's international jurisprudential landscape. Ultimately, however, expansion of the ACJHR and its overlap with the ICC may be seen as both politically palatable and the result of organically evolving international law. Should demands to expand jurisdiction become more insistent, stakeholders must develop benchmarks to preserve the integrity of the ICC and ensure the legitimacy of the expanded ACJHR. Failing to do so would compromise the effectiveness and the credibility of both institutions, compromising hard-won advances in international human rights law.