The Transnational Human Rights Review

Volume 7 Article 1

5-19-2020

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Simon Zschirnt
Texas A&M International University, simon.zschirnt@tamiu.edu

OPENING THE DOORS TO JUSTICE IN AFRICA: ANALYZING STATE ACCEPTANCE OF THE RIGHT OF INDIVIDUAL APPLICATION TO THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

SIMON ZSCHIRNT*

Abstract: The African Court on Human and Peoples' Rights took its place as the youngest of the three regional human rights courts with its establishment in 2006. However, the Court's jurisdiction remains a work in progress. Thirty of the African Union's fifty-five member states have ratified the protocol allowing the African Commission on Human and Peoples' Rights to refer cases to the Court but only ten have made the optional declaration allowing individuals direct access. Previous research has indicated that transitional states desirous of "locking in" new commitments to democracy and human rights have been particularly likely to ratify the protocol but there has been little analysis of optional declarations, which have been the primary means by which cases have reached the Court. This article fills this gap by analyzing the circumstances underlying optional declarations. It finds that most have been associated with consolidations of prior democratic transitions.

Keywords: African Union; African human rights system; African Court on Human and Peoples' Rights; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; optional declaration

1 Introduction

Great expectations greeted the establishment of the African Court on Human and Peoples' Rights (ACtHPR) with the swearing in of its eleven judges on 2 July 2006. With the establishment of the ACtHPR, the African human rights system joined the European and Inter-American human rights systems as the third regional human rights system with a specialized human rights court empowered to enforce regional human rights treaties by adjudicating claims against states. The successes of the ACtHPR's European and Inter-American counterparts led to the establishment of the ACtHPR being declared a "watershed moment" and "the beginning of true human rights enforcement" on a troubled continent that despite having "led the way in the promulgation of human rights treaties" had recently experienced genocides in Rwanda and Darfur and mass

* Associate Professor of Political Science, Texas A&M International University, 5201 University Boulevard, Laredo, TX 78041, USA, Email: simon.zschirnt@tamiu.edu.

atrocities on a scale unseen since the Second World War in the Congo War.[1]

However, the subsequent history of the ACtHPR has somewhat tempered this enthusiasm. On the one hand, the ACtHPR has become an innovator in certain areas of international law and has delivered a number of landmark decisions that have attracted global attention. These have recently included, for example, its condemnation of Mali's failure to set a minimum age of marriage for women and ensure women's consent to marriage and its condemnation of Kenya's denial of an indigenous community its communal right to its ancestral lands.[2] By affirming in the latter case that rights to culture are collective rights and that *any* development projects must obtain consent from impacted indigenous communities, the ACtHPR went beyond existing international law.[3] This has led some to praise the ACtHPR as a court that has quickly become a "formidable judicial institution that can boldly articulate and apply the law."[4] However, on the other hand, others have critiqued the ACtHPR as an institution that has not lived up to its promise due to "structural deficiencies, meager caseloads, low compliance rates, and persistent budgetary issues."[5]

Caseload has been a particular concern because access to the ACtHPR is more limited than its European counterpart, which allows individuals and NGOs to bring claims directly against any contracting state. Individuals and NGOs may bring claims directly to the ACtHPR only if the state involved has not only ratified the ACtHPR Protocol but also made an additional optional declaration, which only ten states have done (Benin, Burkina Faso, Côte d'Ivoire, the Gambia,

[1] Scott Lyons, "The African Court on Human and Peoples' Rights" (2006) 10:24 ASIL Insights, online: <https://www.asil.org/insights/volume/10/issue/24/african-court-human-and-peoples-rights>.
[2] *Association pour les Progrès et la Défense des Droits des Femmes Maliennes and the Institute for Human Rights and Development in Africa v. Republic of Mali*, Judgment, Afr Ct Hum Peoples' Rts (11 May 2018); *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment, Afr Ct Hum Peoples' Rts (26 May 2017).
[3] See Chelsea Purvis, "Africa as a Generator of Human Rights Law" (2013) 107 ASIL Proc 480 at 481-82.
[4] Vincent O. Nmehielle, "Seven Years in Business: Evaluating Developments at the African Court on Human and Peoples' Rights" (2013) 17:1 Law Democracy Dev 317 at 327.
[5] Daniel Abebe, "Does International Human Rights Law in African Courts Make a Difference?" (2016) 56:3 Va J Intl Law 527 at 527.

Ghana, Malawi, Mali, Rwanda, Tanzania, and Tunisia), one of which (Rwanda) subsequently withdrew its declaration.[6] Cases involving state parties that have not made the declaration must be referred by the African Commission on Human and Peoples' Rights (ACHPR), a quasi-judicial body that is the decision-maker of first instance in the African system. A lack of referrals due to the ACHPR's reluctance to exercise its discretion (there have only been three referrals in the history of the ACtHPR) has meant that the vast majority of the cases that the ACtHPR has adjudicated have come before it via petitions filed directly against the relatively few states that have made the declaration.

Increasing the number of optional declaration states is thus the key to increasing the effectiveness of the ACtHPR and is the subject of this article. Building upon previous research analyzing ratifications of the ACtHPR Protocol, it analyzes the factors that may have inclined some state parties to take the additional step of making the optional declaration. The article proceeds as follows: the following two sections provide a brief overview of the African human rights system and survey the literature on state accession to international human rights regimes, the fourth section examines the extent to which optional declarations have fit the patterns identified by the literature, and the final section discusses the implications for the future of the ACtHPR.

2 The African Human Rights System and the ACtHPR in Brief

The African human rights system was established in 1981 with the adoption of the African Charter on Human and Peoples' Rights by what was then known as the Organization of African Unity (OAU).[7] The content of the Charter is generally similar to the American Convention on Human

[6] See International Commission of Jurists, "Gambia: Declaration Allowing Access to African Court a Major Advance for Access to Justice" (25 November 2018), online: <https://www.icj.org/gambia-declaration-allowing-access-to-african-court-a-major-advance-for-access-to-justice/>.
[7] African Charter on Human and Peoples' Rights (1982) 21 I.L.M. 59 (adopted 27 June 1981, entered into force 21 October 1986) (1982).

Rights and the European Convention on Human Rights insofar as it protects core civil and political rights (i.e. rights to freedom of speech and religion, to freedom from discrimination, to property, to due process of law, etc.) as well as a host of economic, social, and cultural rights. The Charter took effect upon obtaining the requisite number of ratifications in 1986 and has since been ratified by fifty-four AU member states. The entry into force of the Charter also brought into being the ACHPR, which is charged with enforcement of the Charter. Comprised of eleven commissioners elected to six-year terms by the AU Assembly to "promote human and peoples' rights and ensure their protection in Africa," the ACHPR is vested with protective power under which individuals and NGOs may bring claims against states for violations of the Charter.[8]

However, the ACHPR's use of this protective power has been the subject of a number of criticisms. In particular, the ACHPR has been criticized for producing decisions that are "formulaic" and "attract little, if any, attention from governments and the human rights community."[9] The ability of the ACHPR to compel change in the behavior of states has also been limited by the fact that decisions finding violations of the Charter are merely non-binding recommendations. Consequently, full compliance has been estimated at a mere 14%.[10] In addition to its protective power, the ACHPR is also responsible for overseeing biannual reporting by states on their human rights records, which is required under Article 62 of the Charter. However, this process has been plagued by sporadic and incomplete reporting and by the ACHPR's observations and recommendations having little impact.[11] Thus, the judgment of many observers has been that

[8] *Ibid*, Art. 30.
[9] Makau W. Mutua, "The African Human Rights Court: A Two-Legged Stool?" (1999) 21:2 Hum Rts Q 342 at 348.
[10] Frans Viljoen & Lirette Louw, "State Compliance With the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004" (2007) 101:1 Am J Intl Law 1 at 5.
[11] See e.g. Felice D. Gaer, "First Fruits: Reporting by States Under the African Charter on Human and Peoples' Rights" (1992) 10:1 Neth Q Hum Rights 29; Frans Viljoen, "State Reporting Under the African Charter on Human and Peoples' Rights: A Boost from the South" (2000) 44:1 J Afr Law 110; Takele S. Bulto, "Beyond the Promises: Resuscitating the State Reporting Procedure Under the African Charter on Human and Peoples' Rights" (2006) 12:1 Buffalo Hum Rights Law Rev 57.

"the African Commission has been a disappointment."[12]

This disillusionment with the ACHPR led to the idea of an African human rights court being formally endorsed by the OAU Assembly of Heads of State and Government in 1994 in the face of the Rwandan Genocide and increasing pressure from NGOs and other regional stakeholders dissatisfied with the state of the African human rights system.[13] This set into motion a reform process that led to the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights by the 1998 Assembly of Heads of State and Government meeting in Ouagadougou, Burkina Faso. Once it obtained the requisite fifteen ratifications in 2004, the Protocol entered into force and there are currently thirty state parties (see Table 1).

The ACtHPR established by the Protocol has contentious jurisdiction in cases brought by the ACHPR (when a state party has failed to comply with its recommendations or is accused of "serious or massive" human rights violations), by state parties (when they have been petitioners or respondents in ACHPR cases or when their nationals have been the victims of human rights violations), and by intergovernmental organizations.[14] Claims may be filed directly with the ACtHPR by individuals and NGOs only in cases involving states that, in addition to being state parties, have made the optional declaration accepting ACtHPR jurisdiction in such cases.[15]

Table 1: State Accession to the African Court on Human and Peoples' Rights

State	Ratified Protocol	Made Optional Declaration
Algeria	2003	—
Angola	—	—

[12] Mutua, *supra* note 9 at 345.
[13] See Gina Bekker, "The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States" (2007) 51:1 J Afr Law 151 at 159-69.
[14] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (entered into force 25 January 2004) reprinted in OAU/LRG/AFCHPR/PROT (III).
[15] *Ibid*, Art. 34.

Benin	2014	2014
Botswana	—	—
Burkina Faso	1998	1998
Burundi	2003	—
Cabo Verde	—	—
Cameroon	2014	—
Central African Republic	—	—
Chad	2016	—
Comoros	2003	—
Congo	2010	—
Côte d'Ivoire	2003	2013
Democratic Republic of the Congo	—	—
Djibouti	—	—
Egypt	—	—
Equatorial Guinea	—	—
Eritrea	—	—
Eswatini	—	—
Ethiopia	—	—
Gabon	2000	—
The Gambia	1999	2018
Ghana	2004	2011
Guinea	—	—
Guinea-Bissau	—	—
Kenya	2004	—
Lesotho	2003	—
Liberia	—	—
Libya	2003	—
Madagascar	—	—
Malawi	2008	2008
Mali	2000	2010
Mauritania	2005	—
Mauritius	2003	—
Morocco	—	—
Mozambique	2004	—
Namibia	—	—
Niger	2004	—
Nigeria	2004	—
Rwanda	2003	2013[†]
Sahrawi Arab Democratic Republic	2013	—
São Tomé & Principe	—	—
Senegal	1998	—
Seychelles	—	—

Sierra Leone	—	—
Somalia	—	—
South Africa	2002	—
South Sudan	—	—
Sudan	—	—
Tanzania	2006	2010
Togo	2003	—
Tunisia	2007	2017
Uganda	2001	—
Zambia	—	—
Zimbabwe	—	—

† Withdrawn in 2016

Table 2: ACtHPR Decisions Involving Optional Declaration States

	Responsible on all counts	**Responsible on some counts, not responsible on others**	**Not responsible on all counts**	**Dismissed on procedural grounds**	**TOTAL**
State	*No. of Cases (%)*	*No. of Cases (%)*	*No. of Cases (%)*	*No. of Cases (%)*	*No. of Cases*
Benin	—	1 (100.0)	—	—	1
Burkina Faso	—	2 (100.0)	—	—	2
Côte d'Ivoire†	1 (50.0)	—	—	1 (50.0)	2
The Gambia	—	—	—	—	—
Ghana	—	—	—	1 (100.0)	1
Malawi	—	—	—	2 (100.0)	2
Mali	1 (20.0)	—	—	4 (80.0)	5
Rwanda	—	1 (20.0)	—	4 (80.0)	5
Tanzania	4 (16.0)	16 (64.0)	3 (12.0)	2 (8.0)	25
Tunisia†	—	—	—	—	—
TOTAL	6 (13.95)	20 (46.51)	3 (6.98)	14 (32.56)	43

† Excludes cases dismissed for lack of jurisdiction prior to optional declaration

Table 3: ACtHPR Decisions Involving Other States

	Responsible on all counts	**Responsible on some counts, not responsible on others**	**Not responsible on all counts**	**Dismissed on procedural grounds**	**TOTAL**
State	*No. of Cases (%)*	*No. of Cases (%)*	*No. of Cases (%)*	*No. of Cases (%)*	*No. of Cases*
Algeria	—	—	—	1 (100.0)	1
Cameroon	—	—	—	1 (100.0)[1]	1
Côte d'Ivoire	—	—	—	1 (100.0)	1
Gabon	—	—	—	1 (100.0)	1
Libya	1 (50.0)[1]	—	—	1 (50.0)[2]	2
Kenya	—	1 (100.0)[2]	—	—	1
Morocco	—	—	—	1 (100.0)	1
Mozambique	—	—	—	1 (100.0)	1
Nigeria	—	—	—	1 (100.0)[1]	1
Senegal	—	—	—	1 (100.0)	1
South Africa	—	—	—	2 (100.0)	2
Sudan	—	—	—	1 (100.0)	1
Tunisia	—	—	—	1 (100.0)	1
TOTAL	1 (7.14)	1 (7.14)	—	12 (85.71)	14

[1] Petition filed jointly against Cameroon and Nigeria
[2] Referred by the ACHPR

Despite the Protocol entering into force in 2004, the ACtHPR was not constituted until 2006, did not begin receiving cases until 2008, and did not issue its first judgment until 2009, declaring a petition against Senegal, which has not made the optional declaration allowing individuals and NGOs direct access, inadmissible.[16] As of the summer of 2019, fifty-seven final judgments have been delivered in contentious cases. However, twenty-six of these judgments have been dismissals for lack of jurisdiction. Most of these dismissals have been due either to the failure of the respondent state to make the declaration or the failure of the petitioner to exhaust local remedies.

[16] *Michelot Yogogombaye v. Republic of Senegal*, Judgment, Afr Ct Hum Peoples' Rts (15 December 2009).

The large number of dismissals reflects the limited access to the ACtHPR granted individuals and NGOs and the ACHPR's reluctance to refer cases to the ACtHPR (there have only been three referrals in the history of the ACtHPR). Thus, in only thirty-one cases has the ACtHPR reached the merits of the case. The ACtHPR has also issued precautionary measures in twenty-six cases as well as six advisory opinions.

In sum, despite the large number of state parties, the ACtHPR's record thus far illustrates that direct applications pursuant to optional declarations are the primary means of bringing cases before the court. Indeed, all but two of the thirty-one cases in which final judgments on the merits have been rendered came before the ACtHPR as a result of direct applications by individuals and/or NGOs (see Tables 2 and 3). Thus, being held accountable for human rights violations by the ACtHPR still remains more theory than reality for most of the twenty states that have ratified the Protocol but declined to make the declaration.

However, the AU's responses to two 2011 crises, the violent suppression of political dissent first in Côte d'Ivoire and then in Libya and the destructive internal conflicts that followed, did appear to have "unfrozen the [Commission's] concern about referring cases" to the ACtHPR for some time.[17] By immediately suspending Côte d'Ivoire's membership and by calling for Moammar Gaddafi to step aside and permit a transition to democracy, the AU sent a powerful message that state sovereignty was no longer paramount and that the AU would play a more active role in promoting democratization and human rights than did its predecessor the OAU.[18] This was followed by the ACHPR referring three cases in succession to the ACtHPR. The first of these

[17] Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton: Princeton University Press, 2014) at 152.
[18] See "African Union Suspends Ivory Coast over Disputed Poll" (9 December 2010), online: *BBC* <https://www.bbc.com/news/world-africa-11963694>; Kareem Fahim, "Truce Plan for Libya is Rejected by Rebels" (12 April 2011), online: *New York Times* <https://www.nytimes.com/2011/04/12/world/africa/12libya.html>.

(and the ACHPR's first ever referral) came later in 2011 in response to the events in Libya and resulted in a swift order for provisional measures.[19] This was followed by the 2012 referral of a dispute between Kenya and an indigenous community displaced from its ancestral lands and the 2013 referral of the case of Saif Gaddafi, both of which resulted in judgments against the states concerned.[20]

Yet despite this turn, the supply of cases from the ACHPR has since dried up once again. There are a number of reasons why this has been the case. One is the fact that the ACHPR is an institution that has historically been rather deferential to states and "subservient to the political machinery of the OAU/AU."[21] Another is the fact that most cases of non-compliance with ACHPR recommendations during this period have involved states that have not ratified the ACtHPR Protocol. Since the ACtHPR opened for business, Angola, Botswana, the Democratic Republic of the Congo, Eritrea, Ethiopia, Sudan, and Zimbabwe have all flouted ACHPR recommendations but as non-state parties their cases could not be referred.[22] Furthermore, the fact that "[t]here is…a certain competition" between the two institutions due to their overlapping functions may have made the ACHPR reluctant to refer cases of non-compliance that do involve state parties.[23] This has been compounded by the lack of formal guidance provided by the AU to the ACHPR and ACtHPR regarding their relationship and how they should coordinate.[24] The ACHPR's reluctance to refer cases may also be driven by fear of having its findings reversed by the ACtHPR, whose

[19] *African Commission on Human and Peoples' Rights v. Great Socialist Peoples' Libyan Arab Jamahiriya*, Order for Provisional Measures, Afr Ct Hum Peoples' Rts (25 March 2011).
[20] *African Commission on Human and Peoples' Rights v. Republic of Kenya*, *supra* note 2; *African Commission on Human and Peoples' Rights v. Libya*, Judgment, Afr Ct Hum Peoples' Rts (3 June 2016).
[21] Bekker, *supra* note 13 at 171.
[22] See Manisuli Ssenyonjo, "Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)" (2018) 7:1 Int Hum Rights Law Rev 1 at 38.
[23] Katrin N. Metcalf & Ioannis F. Papageorgiou, "Regional Courts as Judicial Brakes?" (2017) 10:2 Balt J Law Polit 154 at 166.
[24] See Rachel Murray & Debra Long, *The Implementation of the Findings of the African Commission on Humanand Peoples' Rights* (Cambridge: Cambridge University Press, 2015) at 140-61.

review of cases is de novo.[25]

3 Understanding State Accession to International Human Rights Regimes

Given the ACtHPR's reliance upon optional declarations for most of its caseload, what can the creation of other international human rights regimes tell us about the states most likely to provide further declarations? One of the most influential paradigms for understanding why some states accept the sovereignty costs associated with international human rights regimes while others do not is the "lock in" thesis. Most prominently articulated by Andrew Moravcsik in a case study of the creation of the European human rights system, the "lock in" thesis asserts that the strongest support for international human rights regimes will come not from established democracies but rather from transitional states seeking to use membership in such regimes as a way of "locking in" new (and potentially vulnerable) domestic commitments to democracy and human rights.

The 1950 negotiation of the European human rights system provides support for this notion given that newly reestablished democracies with recent experience with fascism (such as Austria, West Germany, and Italy) were the strongest proponents of allowing individuals to bring claims directly against states in a system of mandatory and binding jurisdiction (while established democracies were generally more skeptical).[26] This is explained by the fact that for new democracies the sovereignty costs of a more powerful system were outweighed by the benefits of protecting unstable institutions against internal subversion while for established democracies there was less incentive to accept these costs given that democratic stability was already high.[27]

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[25] See Ssenyonjo, *supra* note 22.
[26] Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 54:2 Int Organ 217.
[27] *Ibid.* See also Laurence R. Helfer & Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93:3 Calif Law Rev 899; Beth A. Simmons & Allison Danner, "Credible Commitments and the International Criminal Court" (2010) 64:2 Int Organ 225; Simon Zschirnt & Mark Menaldo, "International Insurance? Democratic Consolidation and Support for International Human Rights Regimes" (2014) 8:3 Int J Transit Just 452.

Realist scholars also emphasize the role of self-interest in the rise of international human rights regimes. However, they differ insofar as they maintain that the strongest proponents of these regimes will not be transitional states but rather global superpowers, which use these regimes to project power over other states. That is, realists maintain that just as international law serves as a means by which strong states impose their norms and values on weak states and protect their own interests, the same is also true of international human rights regimes.[28] For example, Donnelly's analysis of the creation of the Inter-American human rights system attributes it largely to "power, particularly the dominant power of the United States."[29] Having "for whatever reasons…decided that a regional regime with relatively strong monitoring powers was desirable" (perhaps as a means of promoting regional stability), the United States "exercised its hegemonic power to ensure its creation and support its operation." [30] The result has been a system in which the United States enjoys a uniquely privileged position of having permanent representation on both the Inter-American court and commission despite having neither accepted the jurisdiction of the court nor ratified the American Convention on Human Rights.

Other scholars have maintained that the rise of international human rights regimes primarily demonstrates the power of international norms. This has often been conceptualized as a "norm cascade" in which the embrace of a norm by a critical mass of states makes the remaining states see compliance as an inherent part of membership in good standing in the international community.[31] This may be achieved through diplomatic, economic, and/or military pressure or

[28] See e.g. Kenneth N. Waltz, *Theory of International Politics* (New York: McGraw-Hill, 1979); Jack Donnelly, "International Human Rights: A Regime Analysis" (1986) 40:3 Int Organ 599; Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).
[29] Donnelly, *supra* note 28 at 625.
[30] *Ibid.*
[31] Ellen L. Lutz & Kathryn Sikkink, "International Human Rights Law and Practice in Latin America" (2000) 54:3 Int Organ 633 at 638; See also Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 Intl Organ 887.

through internalization of the norm via processes of globalization.[32] One notable example of this is state accession to the Convention Against Torture, as Jay Goodliffe and Darren Hawkins' analysis finds that states became more likely to sign/ratify the Convention as the percentage of other states in their geographic region that had signed/ratified increased.[33]

However, the ability of norms to drive the expansion of international human rights regimes is undoubtedly affected by the strength of states' domestic rights protections. States with stronger protections have unsurprisingly been the most willing to accede to international human rights regimes because of their lower compliance costs, which previous scholarship has shown strongly affect (except in cases where enforcement mechanisms are weak) the likelihood of accession.[34] These more liberal states can reap the reputational and other benefits of accession while making few, if any, policy changes. States' assessments of compliance costs may also be affected by the extent to which the procedures of the courts created by international human rights regimes are similar to those of their own domestic courts. For example, states with civil law legal systems have been significantly more likely than states with common law legal systems to submit to the jurisdiction of the International Court of Justice, whose procedures largely mirror those of a civil law court.[35]

Scholars taking an ideational perspective maintain, however, that this is not the entire story

[32] See e.g. Harold H. Koh, "Why Do Nations Obey International Law?" (1997) 106:8 Yale Law J 2599; Thomas Risse & Kathryn Sikkink, "Socialization of International Human Rights Norms Into Domestic Practices" in Thomas Risse, Stephen C. Ropp & Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) at 1-38; Brian Greenhill, "The Company You Keep: International Socialization and the Diffusion of Human Rights Norms" (2010) 54:1 Int Stud Quart 127.
[33] Jay Goodliffe & Darren G. Hawkins, "Explaining Commitment: States and the Convention Against Torture" (2006) 68:2 J Polit 358 at 366.
[34] See Oona A. Hathaway, "The Cost of Commitment" (2003) 55:5 Stanford Law Rev 1821; "Why Do States Commit to Human Rights Treaties?" (2007) 51:4 J Conflict Resolut 588.
[35] Emilia J. Powell & Sara M. Mitchell, "The International Court of Justice and the World's Three Legal Systems" (2007) 69:2 J Polit 397; *Domestic Law Goes Global: Legal Traditions and International Court* (Cambridge: Cambridge University Press, 2011) at 129-63.

and that the greater willingness of these states to commit also reflects principled commitment to safeguarding and exporting their liberal values. Indeed, some scholars have provided evidence of such commitments transcending states' own material interests, such as, for example, the surprising number of states with close economic, military, and political ties to the United States that refused to sign bilateral agreements not to surrender Americans to the International Criminal Court (ICC).[36] Further evidence that ideational factors have been critical to the rise of international human rights regimes can be found in the significant differences in the postures of states governed by leftist versus rightist parties. For example, during the negotiation of the Rome Statute, states governed by leftist parties were significantly more likely to take positions that would have established a more powerful and independent ICC.[37]

Analysis of the effects of these various factors upon the likelihood of ratification of the ACtHPR Protocol has provided substantial support for the "lock in" thesis as well as some support for other theories of the origins of international human rights regimes. Most notably, the relationship between democratization and the likelihood of ratification has not been a positive linear relationship but rather a curvilinear relationship. That is, it has not been the most democratic AU member states but rather those at intermediate levels of democratization (most of which have relatively recently transitioned to more democratic modes of governance) that have been the most likely to ratify.[38] Indeed, a surprising number of the continent's strongest and most stable democracies, including states such as Botswana and Namibia (two of only three African states that have been continuously democratic since independence), have yet to ratify. This is underscored

[36] Judith Kelley, "Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Surrender Agreements" (2007) 101:3 Am Polit Sci Rev 573.
[37] Jay Goodliffe & Darren G Hawkins, "A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations" (2009) 71:3 J Polit 977 at 991; Zschirnt & Menaldo, *supra* note 27 at 467.
[38] Simon Zschirnt, "Locking in Human Rights in Africa: Analyzing State Accession to the African Court on Human and Peoples' Rights" (2018) 19:1 Hum Rights Rev 97 at 112.

by the fact that recent transitions to full democracy and out of autocracy have both been significant positive predictors of ratifications, as has been past experience of genocide or politicide.[39] There is also evidence that compliance costs have mattered as states scoring higher on human rights indices and states with fewer armed internal conflicts have been more likely to ratify.[40] Furthermore, as would be expected given the similarities between the ACtHPR's procedures and those of a common law court, states with common law legal systems have also been significantly more likely to ratify.[41] There is also evidence of the influence of ideational factors as states governed by leftist parties have also been more likely to ratify.[42] Finally, there was no evidence of the type of power dynamics postulated by realists as there was no difference in the willingness of large and small states to ratify.[43]

However, given the lack of direct access conferred by the ACtHPR Protocol and the ACHPR's reluctance to refer cases to the ACtHPR, there is reason to believe that the dynamics of optional declarations may differ significantly from the dynamics of ratifications of the Protocol. Whereas ratifying the Protocol has proven to be a largely cost-free, symbolic commitment, taking the further step of making the optional declaration represents a far more significant and potentially costly commitment. Thus, the following section analyzes the circumstances surrounding the ten declarations and the conclusions that can be drawn from them.

4 Analyzing Optional Declarations

Comparing as groups states that made the optional declaration and states that ratified the ACtHPR Protocol but did not make the declaration reveals a few potentially significant differences. First,

[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid.*
[42] *Ibid.*
[43] *Ibid.*

some of the same factors that have distinguished states that have ratified the Protocol from states that have not ratified have also distinguished states that have made the declaration from states that have ratified the Protocol but not made the declaration. Most noteworthy are compliance costs. States making the declaration scored slightly higher on average on democratization and human rights indices than states ratifying the Protocol but not simultaneously making the declaration. In particular, optional declaration states scored higher on average on both the Polity democratization index and the Cingranelli-Richards (CIRI) Empowerment Rights Index (which measures the incidence of violations of rights to electoral self-determination and freedom of assembly, association, movement, religion, and speech). The respective average scores of optional declaration states at the time of their declarations were 3 and 9 while the respective average scores of ratification only states at the time of their ratifications were 1 and 7. [44]

[44] There was, however, no difference in the two groups of states' average scores on the CIRI Physical Integrity Rights Index (which measures the incidence of human rights violations such as disappearance, extrajudicial killing, and torture). The average score of both groups was a 4. This was not unexpected given that Physical Integrity Rights Index scores have also not been a significant predictor of ratifications of the Protocol.

Table 4: Characteristics of Optional Declaration States

State (Year)	Polity Score[1]	Physical Integrity Rights Score[2]	Empowerment Rights Score[3]	Armed Internal Conflicts	New Democracy	Recent Autocracy	Forcible Regime Changes	Genocides / Politicides	Executive Party Ideology	Legal System	Region
Benin (2014)	7	N/A[4]	N/A[4]	—	No	No	5	—	N/A[5]	Civil Law	West Africa
Burkina Faso (1998)	—4	4	10	—	No	Yes	5	—	Right	Civil Law	West Africa
Côte d'Ivoire (2013)	4	N/A[4]	N/A[4]	2	No	No	1	—	N/A[5]	Civil Law	West Africa
The Gambia (2018)	4	N/A[4]	N/A[4]	—	No	No	1	—	Left	Common Law	West Africa
Ghana (2011)	8	4	11	—	No	No	5	—	Left	Common Law	West Africa
Malawi (2008)	6	4	8	—	Yes	No	—	—	Right	Common Law	Southern Africa
Mali (2010)	7	5	11	1	No	No	1	—	N/A[5]	Civil Law	West Africa
Rwanda (2013)	—3	N/A[4]	N/A[4]	2	No	No	1	2	N/A[5]	Civil Law	East Africa
Tanzania (2010)	—1	5	7	—	No	No	—	—	Left	Common Law	East Africa
Tunisia (2017)	7	N/A[4]	N/A[4]	—	Yes	No	1	—	Left	Civil Law	North Africa

[1] Possible scores range from —10 to 10
[2] Possible scores range from 0 to 8
[3] Possible scores range from 0 to 14
[4] Scores only available through 2011
[5] Centrist party or independent executive

Thus, states making the declaration have been a self-selected group of somewhat more democratic and liberal states for whom greater exposure to mandatory and binding human rights litigation before the ACtHPR poses fewer difficulties. On the other hand, the "lock in" factor appears, at least at first glance, to have been less of a driving force behind declarations than ratifications. For example, there have been relatively fewer new democracies (defined as fully democratic states [i.e. states with a Polity score of 6 or higher in a given country-year] that had transitioned to democracy within the past ten years) and/or recent autocracies (defined as non-autocratic states [i.e. states with a Polity score of —5 or higher in a given country-year] that had transitioned out of autocracy within the past ten years) among the states making the declaration. Of the ten declarations, only two (20%) were made by states that were new democracies at the time (Malawi and Tunisia) and only one (10%) was made by a state that was a recent autocracy at the time (Burkina Faso). In contrast, of the twenty-seven cases of states ratifying the Protocol but not simultaneously making the declaration, seven (25%) involved new democracies and eleven (41%) involved recent autocracies. This reflects the fact that in most cases declarations were not made until several years after states took the initial step of ratifying the Protocol. While three states (Benin, Burkina Faso, and Malawi) made the declaration immediately upon ratifying the Protocol, the other seven optional declaration states waited an average of ten years to do so.

However, in most cases it was not subsequent positive change in those states' human rights situations that led them to take the further step of making the declaration but rather consolidation and stabilization. Only in the Gambia and Tunisia was there dramatic improvement in the human rights situation in the years between ratification and declaration. In the Gambia, military intervention by the Economic Community of West African States (ECOWAS) forced the end of the authoritarian regime of Yahya Jammeh in 2017 after his refusal to concede defeat in the

presidential election, eighteen years after the Gambia's 1999 ratification of the Protocol. In Tunisia, the "Arab Spring" swept out the authoritarian regime of Zine El Abidine Ben Ali in 2011, four years after Tunisia's 2007 ratification of the Protocol. In contrast, there was little, if any, change in the human rights situations of Ghana, Côte d'Ivoire, Mali, Rwanda, and Tanzania in the years between their ratifications and their declarations (although Côte d'Ivoire's declaration was made shortly after the 2010-11 Ivorian crisis, a civil war that saw massive human rights violations).

The Ivorian crisis notwithstanding, optional declaration states have also, in a similar vein, been generally less likely to have experienced significant civil strife. In particular, they have experienced more than a third fewer armed internal conflicts on average. Specifically, whereas the twenty-seven states that ratified the Protocol but did not simultaneously make the declaration had experienced an average of 0.88 armed internal conflicts at the time of their ratifications, the ten declarations were made by states that had experienced an average of only 0.50 such conflicts at the time of their declarations (see Table 4). Given that recurrences of civil conflict threaten state parties with significant compliance costs, this is not surprising.

Optional declaration states have also been somewhat less likely to have experienced genocides or politicides. Rwanda, which in 2016 became the only state to withdraw its declaration, is the only one of the ten states with such experience. In contrast, past experience of genocide or politicide has been a significant positive predictor of ratifications. Around 20% of the states that ratified the Protocol but did not simultaneously make the declaration had experienced at least one genocide or politicide at the time of their ratification.[45]

[45] There was, however, no difference between the two groups of states on other measures of political instability, such as the number of forcible regime changes (i.e. coups d'etat, executive auto-coups, etc.) experienced. Just as the twenty-seven states that ratified the Protocol but did not simultaneously make the declaration had experienced an average of 2 forcible regime changes at the time of their ratifications, the ten declarations were made by states that had experienced an average of 2 such regime changes at the time of their declarations. This was also not unexpected given that forcible regime changes have not been a significant predictor of ratifications of the Protocol.

Finally, with regard to other factors that have also been significant drivers of ratifications, there has been little or no difference between optional declaration states and states that have ratified the Protocol but not made the declaration. In particular, optional declaration states have not been significantly more or less likely to be governed by leftist parties. 35% of the states that ratified the Protocol but did not simultaneously make the declaration were governed by leftist parties at the time of their ratifications whereas four of the ten states making the declaration (40%) did so under leftist governments.

Similarly, differences in domestic legal systems also appear not to have been a major factor. 40% of the ten optional declaration states and 30% of the twenty states that have ratified the Protocol but not made the declaration are states with common law legal systems. However, given the relatively small number of optional declaration states, there are limits to the inferences that can be drawn from such comparisons. What follows therefore are more in depth analyses of the situations in each of the ten optional declaration states at the time of their declarations.

4.1 Benin

Benin's 2014 declaration (which occurred the same year as its ratification of the Protocol) happened well into a lengthy period of democratic stability and liberalisation. Since the ratification of its 1990 constitution, which jettisoned Marxism-Leninism as the official state ideology and provides for a multi-party democracy, Benin has been among Africa's most democratic and politically stable countries. It has held six consecutive national elections that have been considered free and fair and enjoys an independent judiciary, a free and diverse media, and a flourishing civil society.[46] Consequently, it has consistently scored highly on various governance indices, ranking

[46] See Bruce A. Magnusson, "Democratization and Domestic Insecurity: Navigating the Transition in Benin" (2001) 33:2 Comp Polit 211; Thomas Bierschenk, "Democratization without Development: Benin 1989-2009" (2009) 22:3 Int J Polit Cult Soc 337.

in the top ten in the categories of rule of law and participation/human rights in the most recent Ibrahim Index of African Governance.[47] With no political prisoners and without the large-scale ethnic violence that has plagued other African states, it perhaps is not surprising that the ACtHPR did not adjudicate the merits of a case brought against Benin until 2019. Benin's initial disinterest in the ACtHPR (waiting until 2014 to ratify the 1998 ACtHPR Protocol) is thus consistent with the disinterest shown by many of the continent's other relatively established democracies. However, it is noteworthy in light of the "lock in" thesis that the stable liberal democracy that the country has enjoyed for the past twenty-nine years followed thirty years of extreme instability and repression that earned it the moniker "*enfant malade de l'Afrique*."[48] Following its 1960 independence from France, Benin experienced five coups d'etat in less than twelve years, the last of which ushered in eighteen years of autocratic rule by Mathieu Kérékou, who established a one-party Marxist regime and placed all economic activity under state control.[49]

It is also noteworthy that Benin was the fifth ECOWAS member state to make the declaration (following its neighbors Burkina Faso, Côte d'Ivoire, Ghana, and Mali), and that the six ECOWAS member states that have now made the declaration (the aforementioned five plus the Gambia) now comprise a majority of the states that have done so (and more than a third of ECOWAS's total membership). The particular willingness of ECOWAS member states to submit themselves to the ACtHPR's jurisdiction likely reflects the increasing activism of the ECOWAS Court of Justice, especially in the area of human rights. Established in 1991 to adjudicate disputes arising from

[47] Mo Ibrahim Foundation, "2018 Ibrahim Index of African Governance Index Report" (17 October 2018), online (pdf): <https://mo.ibrahim.foundation/u/2018/10/28183452/2018-Index-Report.pdf?_ga=2.61673836.1958465812.1541020228-40382193.1541020228>.
[48] Bierschenk, *supra* note 46 at 348.
[49] See e.g. Chris Allen, "'Goodbye to All That:' The Short and Sad Story of Socialism in Benin" (1992) 8:2 J Communist Stud 63; "Reconstructing an Authoritarian State: 'Democratic Renewal' in Benin" (1992) 54:1 Rev Afr Polit Econ 42; Patrick Claffey, "Kérékou the Chameleon, Master of Myth" in Julia C. Strauss and Donal C. O'Brien, *Staging Politics: Power and Performance in Asia and Africa* (New York: I.B. Taurus & Co., 2007) at 91-110.

ECOWAS treaties and regional integration programs, the ECOWAS Court of Justice was not formally constituted until 2001 and had a relatively minimal caseload until a supplemental protocol expanded its jurisdiction to include human rights in 2005.[50] This human rights jurisdiction is noteworthy for its breadth insofar as not only does it grant direct access to the Court to individuals, this access is not contingent upon the exhaustion of domestic remedies and claims may be based upon any human rights instrument that the state concerned has ratified.[51] Consequently, human rights claims now comprise the vast majority of the Court's caseload.[52] It is therefore not surprising that states that already have even broader exposure to international human rights litigation as ECOWAS members would be more likely to allow direct access to the ACtHPR. Furthermore, the disproportionate number of ECOWAS member states among the states allowing direct access to the ACtHPR appears likely to increase rather than decrease as Liberia and Sierra Leone have both recently indicated their willingness to ratify the Protocol and simultaneously make the optional declaration.[53]

That the ECOWAS Court of Justice has been allowed to develop in this way has been attributed to a number of factors, most notably the strengthening of ECOWAS and its institutional credibility following military interventions under ECOWAS auspices that ended civil wars in Côte d'Ivoire, Guinea-Bissau, Liberia, and Sierra Leone.[54] Thus, whereas regional dynamics have obstructed

[50] Supplementary Protocol A/SP1/01/05 Amending the Preamble and Articles 1, 2, 9, 22, and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol (adopted 19 January 2005).
[51] *Ibid*, Art 3.
[52] See e.g. Solomon T. Ebobrah, "Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice"(2010) 54:1 J Afr Law 1; Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013) 107:4 Am J Int Law 737; Karen J. Alter, James T. Gathii & Laurence R. Helfer, "Backlash Against International Courts in West, East, and Southern Africa: Causes and Consequences" (2016) 27:2 Eur J Int Law 293.
[53] African Court on Human and Peoples' Rights, "Sierra Leone and Liberia Express Willingness to Ratify the African Court Protocol Soonest" (9 August 2018), online: <http://en.african-court.org/index.php/news/press-releases/item/248-sierra-leone-and-liberia-express-willingness-to-ratify-the-african-court-protocol-soonest>.
[54] Alter, Helfer & McAllister, *supra* note 52 at 744-45.

ratifications of the ACtHPR Protocol in some regions, they have facilitated them in others. For example, other factors being equal, Southern African states have been significantly less likely to ratify, reflecting the backlash against the regional Southern African Development Community Tribunal's decision favoring expropriated white Zimbabwean farmers that caused it to be disbanded in 2012.[55] However, regional dynamics appear to have facilitated optional declarations in West Africa. Indeed, there is some indication of the sort of "cascade" effect seen in other contexts since Mali, Ghana, Côte d'Ivoire, and Benin's declarations all occurred within a period of four years.

4.2 Burkina Faso

Burkina Faso's 1998 declaration was the first by any state, occurring only a month after Burkina Faso successfully hosted the OAU summit at which the ACtHPR Protocol was adopted. Indeed, for the next ten years Burkina Faso remained the only state that had made the declaration (although this was something of a moot point given that the ACtHPR did not begin receiving cases until 2008). However, despite its early accession, Burkina Faso was one of the more atypical of the states making the optional declaration as its declaration occurred near the midpoint of a lengthy spell of non-democratic governance. In 1998, the country was in only the eleventh year of Blaise Compaoré's twenty-seven year presidency. Having organized a bloody 1987 coup d'etat in which President Thomas Sankara was murdered, Compaoré shared power as part of a triumvirate for two years before executing the other two triumvirate members following an alleged 1989 coup attempt. Although Compaoré subsequently won presidential elections in 1991 and 1998, these were boycotted by the major opposition parties in protest of the means by which Compaoré had seized

[55] See Alter, Gathii & Helfer, *supra* note 52 at 306-14; Shane Meckler, "A Human Rights 'Monster' That Devoured No One: The Far-Reaching Impact of Dismantling the SADC Tribunal" (2016) 48:3 NYU J Int Law Pol 1007; Zschirnt, *supra* note 38.

power. Compaoré's 2005 and 2010 victories over a divided opposition were also accompanied by allegations of massive fraud.[56]

Notably however, the 1998 declaration did occur amidst significant liberalisation of the regime. Although elections remained one-sided and marred by low turnout, the repression of civil society began to wane in the 1990s as the regime evolved from a military dictatorship into a "competitive authoritarian regime."[57] For example, between 1987 and 1997 Burkina Faso's score on the Empowerment Rights Index rose from a 5 (a score identical to recent scores received by authoritarian states such as, for example, Kuwait, Rwanda, and Tajikistan) to a 12 (a score identical to recent scores received by established democracies such as, for example, Canada, Japan, and Sweden). Ironically, this liberalisation would ultimately pave the way for Compaoré's ouster in 2014. NGOs and opposition parties spearheaded the nationwide protests that forced his resignation after he attempted to amend the country's constitution to allow him to run for reelection to a fifth term.[58]

Nonetheless, despite being the first state to make the optional declaration, it was not until the decision of two cases in 2014 that this resulted in the condemnation of Burkinabé human rights violations by the ACtHPR, underscoring the ACtHPR's relatively small docket and its slow pace of adjudication. In its decision in *Abdoulaye Nikiema et al. v. Burkina Faso*, the ACtHPR condemned the Burkinabé government's failure to adequately investigate the murder of an

[56] See e.g. Carlos Santiso & Augustin Loada, "Explaining the Unexpected: Electoral Reform and Democratic Governance in Burkina Faso" (2003) 41:3 J Mod Afr Stud 395; Christophe Châtelot, "Burkina Faso's President Is in a League of his Own" (30 November 2010), online: *The Guardian* <https://www.theguardian.com/world/2010/nov/30/burkina-faso>; Simon Gongo & Nicky Smith, "Burkina Faso Votes as Compaoré Seeks his Fourth Term" (21 November 2010), online: *Bloomberg* <https://www.bloomberg.com/news/articles/2010-11-21/burkina-faso-votes-as-compaore-seeks-fourth-term-update1->.

[57] Santiso & Loada, *supra* note 56 at 399. See also Ernest Harsch, "Burkina Faso in the Winds of Liberalisation" (1998) 25:4 Rev Afr Polit Econ 625.

[58] See Thomas Fessy, "How Burkina Faso's Blaise Compaoré Sparked His Own Downfall" (31 October 2014), online: *BBC News* < https://www.bbc.com/news/world-africa-29858965>.

investigative journalist while in its decision in *Lohé Issa Konaté v. Burkina Faso*, the ACtHPR declared that Burkinabé law criminalizing the defamation of government officials violates the right to freedom of expression.[59]

4.3 Côte d'Ivoire

Côte d'Ivoire's 2013 declaration was one that is consistent with the "lock in" thesis since it was closely linked to a new political beginning. In particular, it occurred less than two years after the end of the 2010-11 Ivorian crisis. Following the refusal of President Laurent Gbagbo to concede defeat in the country's disputed 2010 presidential election, violent clashes broke out between government security forces and supporters of opposition candidate Alassane Ouattara. This triggered an immediate international response, with the AU suspending Côte d'Ivoire's membership, ECOWAS threatening military intervention, and the United Nations Security Council adopting a resolution condemning the violence and recognizing Ouattara as the country's legitimate president. It also precipitated the collapse of a tenuous peace agreement that had ended five years of ethnically and religiously charged civil war in 2007 and to the rebel forces now allied with Ouattara renewing armed hostilities and marching south on the country's capital from their northern strongholds.

The resulting four month conflict killed more than 3,000 Ivorians and ended with a rebel victory (aided by French and United Nations intervention), the capture of President Gbagbo, and Gbagbo's extradition to face charges filed by the International Criminal Court.[60] Charged with

[59] *Abdoulaye Nikiema et al. v. Burkina Faso*, Judgment, Afr Ct Hum Peoples' Rts (28 March 2014); *Lohé Issa Konaté v. Burkina Faso*, Judgment, Afr Ct Hum Peoples' Rts (5 December 2014).
[60] See e.g. Thomas J. Bassett & Scott Straus, "Defending Democracy in Côte d'Ivoire: Africa Takes a Stand" (2011) 90:4 Foreign Aff 130; David Zounmenou, "Côte d'Ivoire's Post-Electoral Conflict: What Is at Stake?"(2011) 20:1 Afr Security Rev 48; Mohamed A. El Khawas & Julius N. Anyu, "Côte d'Ivoire: Ethnic Turmoil and Foreign Intervention" (2014) 61:2 Afr Today 41.

crimes against humanity in connection with murders, rapes, and other atrocities allegedly committed by government security forces following the election, Gbagbo was the first head of state to be tried by the ICC.[61] He was ultimately acquitted in 2019.

The optional declaration allowing Ivorians direct access to the ACtHPR was but one of several human rights initiatives that were subsequently undertaken early in Ouattara's presidency to signal a clear break with the abuses of the Gbagbo regime. These also included further cooperation with the ICC, extraditing not only Gbagbo but also pro-Gbagbo militia leader Charles Blé Goudé following his capture in 2013. They also included the 2011 establishment of a special commission of inquiry to investigate and document human rights violations committed by both sides during the Ivorian crisis and of a special taskforce of judges and prosecutors, the Special Investigative and Examination Cell, charged with prosecuting crimes committed in the conflict.[62]

Making the declaration was thus clearly part of a broader effort to enhance the credibility of a new regime accused of having committed its own widespread human rights violations against pro-Gbagbo forces both during and after the crisis.[63] It also opened the door to one of the ACtHPR's most significant decisions applying human rights instruments other than the Charter. In its 2016 decision in *Actions pour la Protection des Droits de l'Homme v. Republic of Côte d'Ivoire*, its only merits decision involving Côte d'Ivoire thus far, the ACtHPR concluded that Côte d'Ivoire's national electoral commission violated its obligation under the African Charter on Democracy, Elections, and Governance and the ECOWAS Protocol on Democracy and Good Governance to establish an independent and impartial election authority (due to the fact that the

[61] See International Justice Monitor, "Laurent Koudou Gbagbo and Charles Blé Goudé at the International Criminal Court," online: < https://www.ijmonitor.org/category/laurent-koudou-gbagbo-charles-ble-goude/>
[62] See Human Rights Watch, "'They Killed Them Like It Was Nothing:' The Need for Justice for Côte d'Ivoire's Post-Election Crimes" (5 October 2011), online: < https://www.hrw.org/report/2011/10/05/they-killed-them-it-was-nothing/need-justice-cote-divoires-post-election-crimes>.
[63] See Robbie Corey-Boulet, "Ivory Coast: Victor's Justice" (2012) 29:3 World Policy J 68.

commission was staffed largely by functionaries of the governing party).[64]

4.4 The Gambia

The Gambia's 2018 declaration is the most recent and one that, like Côte d'Ivoire's, provides support for the "lock in" thesis as it was closely linked to a new political beginning. In this case, the declaration was made less than two years after the 2017 removal from power of President Yahya Jammeh via an ECOWAS military intervention. Following the country's 2016 presidential election, Jammeh, who had ruled the Gambia for twenty-two years, first as the leader of a military junta and then as a four-term elected president, initially conceded defeat to Adama Barrow. However, a week later, following the release of revised results that showed a narrower margin of defeat (and calls by some opposition leaders for him to be prosecuted for human rights violations once he left office), Jammeh retracted his concession, called for a new election to be held, and declared a state of emergency extending his term. These actions plunged the Gambia into a constitutional crisis and were internationally condemned by ECOWAS, the AU, and the United Nations Security Council. Once a January 19, 2017 deadline set by ECOWAS for Jammeh to step down expired, a multinational ECOWAS force marched into the Gambia largely unopposed (after the leadership of the Gambian military had declared its support for Barrow) and Jammeh resigned and went into exile.[65] Although the intervention resulted in only a handful of deaths in isolated clashes, it also triggered an exodus of more than forty thousand Gambians fleeing the unstable

[64] *Actions pour la Protection des Droits de l'Homme v. Republic of Côte d'Ivoire*, Jugement, Afr Ct Hum Peoples' Rts (18 November 2016).

[65] See e.g. Christof Hartman, "ECOWAS and the Restoration of Democracy in The Gambia" (2017) 52:1 Afr Spectr 85; Claus Kress and Benjamin Nussberger, "Pro-Democratic Intervention in Current International Law: The Case of The Gambia in January 2017" (2017) 4:2 J Use Force Intl Law 239; Josh Zakharov, "Lessons in Democracy Promotion from The Gambia's Constitutional Crisis" (27 February 2017), online: <http://uchicagogate.com/articles/2017/2/27/lessons-in-democracy-promotion-from-the-gambias-constitutional-crisis/>.

political situation for other countries.[66]

It was in this context that President Barrow attempted to signal the dawn of a new era by quickly reversing a number of controversial decisions taken by Jammeh. Not only did Barrow return the Gambia to the Commonwealth of Nations, which Jammeh had withdrawn the country from in 2013, he also returned the Gambia to the International Criminal Court, which Jammeh had withdrawn the country from in 2016.[67] Rejoining the ICC was but part of a broader human rights agenda pursued by Barrow that also included releasing all political prisoners detained without trial by Jammeh, establishing a truth and reconciliation commission, compensating victims of human rights abuses, and abolishing the death penalty.[68]

This agenda was framed as a "return from twenty-two years of exile" inflicted by the 1994 military coup that brought Jammeh to power.[69] Prior to the coup, the Gambia had since independence been one of Africa's most democratic and politically stable states. Although elections resumed in 1996 following the adoption of a new constitution, these were marred by significant restrictions on freedom of the press and the widespread use of intimidation, harassment, and violence against political opponents.[70] Making the declaration thus fit in nicely with this

[66] United Nations High Commissioner for Refugees, "Senegal: Around 45,000 Have Fled Political Uncertainty in The Gambia" (20 January 2017), online: <https://www.unhcr.org/news/briefing/2017/1/5881deb74/senegal-around-45000-fled-political-uncertainty-gambia.html>.
[67] See "Gambia Rejoins the Commonwealth After Democratic Election" (8 February 2018), online: <https://www.telegraph.co.uk/news/2018/02/08/gambia-rejoins-commonwealth-democratic-election/>.
[68] See e.g. "President Adama Barrow Orders Release of 171 Prisoners" (20 February 2017), online: <https://www.aljazeera.com/news/2017/02/president-adama-barrow-orders-release-171-prisoners-170220063108170.html>; "Gambia to Set Up Truth and Reconciliation Commission" (23 March 2017), online: <https://www.reuters.com/article/us-gambia-politics-idUSKBN16U2ZD>; "Gambia: President Barrow Signs Abolition of Death Penalty Treaty" (21 September 2017), online: <https://www.jollofnews.com/2017/09/21/gambia-president-barrow-signs-abolition-of-death-penalty-treaty/>.
[69] "The Gambia: UK 'Very Pleased' About Commonwealth Return" (14 February 2017), online: *BBC* <https://www.bbc.com/news/world-africa-38968336>.
[70] See e.g. Carlene J. Edie, "Democracy in The Gambia: Past, Present, and Prospects for the Future" (2000) 25: 3/4 Afr Dev 161; Abdoulaye S. Saine, "The Gambia's 2006 Presidential Election: Change or Continuity?" (2008) 51:1 Afr Stud Rev 59; *The Paradox of Third Wave Democratization in Africa: The Gambia Under AFPRC-APRC Rule, 1994-2008* (Lanham, MD: Lexington Books, 2009).

project of signaling a break with the abuses of the Jammeh regime and restoring the liberal democracy that the country once enjoyed.

4.5 Ghana

Ghana's 2011 declaration fits the same pattern as Benin's: a declaration occurring after significant democratic consolidation in a state previously marked by significant instability and repression. Since the military gave way to a civilian government following the ratification of the country's current constitution in 1992, Ghana has developed into one of Africa's most democratic and politically stable states.[71] It had the highest Polity score of any of the ten optional declaration states at the time of their declarations and was tied with Mali for the highest Empowerment Rights Index score. It has also performed extremely well on governance indices like the Ibrahim Index, ranking in the top ten overall and in the top five in the categories of rule of law and participation/human rights.[72] Thus, Ghana, like Benin, Mali, and Malawi (full democracies with relatively high scores on CIRI and other human rights indices), faced relatively fewer compliance costs in making the declaration. Indeed, the ACtHPR has yet to adjudicate the merits of any cases brought against Ghana. The only finalized case involving Ghana resulted in a declaration of inadmissibility.

Like nearby Benin, however, Ghana's current stability belies the unusual instability it suffered during its first decades of independence. Between 1960 and 1992, the country oscillated wildly between democracy and dictatorship as five governments were forcibly removed via coups. Two of these coups (those of 1972 and 1981) ended short-lived experiments in democracy and the

[71] See e.g. Mike Oquaye, "Human Rights and the Transition to Democracy under the PNDC in Ghana" (1995) 17:3 Hum Rts Q 556; Kwame A. Ninsin (ed), *Ghana: Transition to Democracy* (Dakar: Codesria, 2002); Wilson K. Yayoh, "Resurgence of Multi-Party Rule in Ghana, 1990-2004: A Historical Review" (2007) 10:1 Trans Hist Soc Ghana 125.
[72] Mo Ibrahim Foundation, *supra* note 47.

country was governed largely by a succession of military regimes.[73] Indeed, the five coups that Ghana experienced marked its early history as unstable even by post-colonial African standards. Only Nigeria and Sierra Leone have experienced more forcible regime changes and only four other states, including fellow optional declaration states Benin and Burkina Faso, have experienced as many. Thus, just like in Benin, historical memory may have been a key driver of Ghana's willingness to commit.

4.6 Malawi

Malawi's 2008 declaration (which occurred the same year as its ratification of the Protocol) represents yet another example of a declaration made by a state that was a full democracy but one with a significant history of instability and/or repression. However, Malawi's case differs somewhat from the cases of Benin, Ghana, and Mali because its declaration occurred during efforts to correct backsliding that threatened Malawi's young democracy. In particular, it occurred as President Bingu wa Mutharika tried to restore confidence following significant backsliding in the latter years of his predecessor Bakili Muluzi's tenure.

Having already been elected president twice, Muluzi, Malawi's first democratically elected president, precipitated a political crisis in 2002 by proposing a constitutional amendment that would have permitted him to run for reelection indefinitely. This proved particularly controversial in a country that had only in 1994 emerged from thirty years of totalitarian rule by "president for life" Hastings Banda and led to widespread public demonstrations and formal statements of

[73] See e.g. Naomi Chazan, "Planning Democracy in Africa: A Comparative Perspective on Nigeria and Ghana" (1989) 22:3/4 Policy Sci 325; Jeff Haynes, "Sustainable Democracy in Ghana? Problems and Prospects" (1993) 14:3 Third World Q 451; Minion K.C. Morrison, "Political Parties in Ghana through Four Republics: A Path to Democratic Consolidation" (2004) 36:4 Comp Polit 421.

opposition from the legislative and judicial branches.[74] After standing down, Muluzi was succeeded in 2004 by his handpicked successor Mutharika. The latter, in addition to bringing Malawi into the ACtHPR, pursued legal reforms intended to entrench human rights protections and the separation of powers. He was also credited with reducing endemic corruption in his first term (although his second term was widely criticized for undermining the country's democratic institutions).[75]

Despite the fact that Malawi was only the second state to make the declaration and its declaration has been in force for virtually the entire period that the ACtHPR has been receiving cases, the ACtHPR has yet to adjudicate the merits of a case brought against Malawi. The two cases involving Malawi that reached the ACtHPR were dismissed on procedural grounds and there is only one such case currently pending on the ACtHPR's docket. This underscores the relative lack of compliance costs faced thus far by the four more liberal and democratic optional declaration states.

4.7 Mali

Mali's 2010 declaration occurred toward the end of a twenty-one year period in which it was one of Africa's most democratic and politically stable countries. Following the nationwide demonstrations and strikes that toppled Moussa Traorè's twenty-three-year military dictatorship

[74] See e.g. Jan K. Van Donge, "Kamuzu's Legacy: The Democratization of Malawi: Or Searching for the Rules of the Game in African Politics" (1995) 94:2 Afr Affairs 227; Stephen Brown, "'Born-Again Politicians Hijacked Our Revolution:' Reassessing Malawi's Transition to Democracy" (2004) 38:3 Can J Afr Stud 705; Kenneth R. Ross, "Worrisome Trends: The Voice of the Churches in Malawi's Third Term Debate" (2004) 103:1 Afr Affairs 91.
[75] See e.g. "Bingu wa Mutharika" (10 April 2012), online: <https://www.telegraph.co.uk/news/obituaries/politics-obituaries/9196446/Bingu-wa-Mutharika.html>; Stephen Chan, "Bingu wa Mutharika Obituary: President of Malawi Who Went from Reformer to Despot" (7 April 2012), online: *The Guardian* <https://www.theguardian.com/world/2012/apr/07/bingu-wa-mutharika-obituary-malawi>; Mwangi S. Kimenyi, "The Erosion of Democracy in Malawi: President Bingu wa Mutharika's Unholy Conversion" (9 March 2012), online: <https://www.brookings.edu/opinions/the-erosion-of-democracy-in-malawi-president-bingu-wa-mutharikas-unholy-conversion/>.

in 1991, Mali quickly transformed into a model democracy on par with its fellow ECOWAS members Benin and Ghana. Four consecutive free and fair national elections followed, alongside the first peaceful transition of power in the country's history.[76] It was against this backdrop, late in the second term of President Amadou Toumani Touré, the country's second democratically elected president, that Mali became only the third state to make the declaration.

However, two years later the fragility of this democracy would be revealed when Touré was ousted in a coup d'etat and replaced by a military junta. The coup was triggered by dissatisfaction among military leaders with Touré's handling of the secessionist Tuareg Rebellion in northern Mali, which had ousted government forces from several major cities with the assistance of fighters from Al Qaeda and other Islamist groups. Although pressure from the AU and ECOWAS (both of which suspended Mali's membership), the United Nations Security Council (which adopted a resolution calling for the military to stand down), and most of the international community quickly led to a negotiated settlement that restored democracy, the episode illustrated the vulnerability of even relatively consolidated African democracies to backsliding.[77]

4.8 Rwanda

The 1994 Rwandan Genocide, which cost the lives of nearly one million Rwandans, clearly loomed large in Rwanda's 2013 declaration. Since toppling the military junta that perpetrated the genocide, the Rwandan Patriotic Front government has used memory of the genocide to legitimate

[76] See e.g. J. Tyler Dickovick, "Legacies of Leftism: Ideology, Ethnicity, and Democracy in Benin, Ghana, and Mali" (2008) 29:6 Third World Q 1119; Richard Vengroff, "Governance and the Transition to Democracy: Political Parties and the Party System in Mali" (1993) 31:4 J Mod Afr Stud 541; Robert Pringle, "Mali's Unlikely Democracy" (2006) 30:2 Wilson Q 31.

[77] See e.g. Sten Hagberg & Gabriella Körling, "Socio-Political Turmoil in Mali: The Public Debate Following the Coup d'Etat on 22 March 2012" (2012) 47:2/3 Afr Spectr 111; Simeon H.O. Alozieuwa, "The March 22, 2012 Coup in Mali: Lessons and Implications for Democracy in the West Africa Subregion in the Wave of Transnational Terrorism" (2013) 9:4 Democracy Secur 383; Morten Bøås & Liv E. Torheim, "The Trouble in Mali Corruption, Collusion, Resistance" (2013) 34:7 Third World Q 1279.

its increasingly authoritarian rule.[78] It has also strategically attempted to cultivate the support of the international donors needed to rebuild the devastated country through numerous progressive initiatives, such as the use of gender quotas to achieve the highest representation of women of any national legislature, the abolition of the death penalty, and support for LGBT rights.[79] Supporting the nascent ACtHPR by becoming only the sixth state to make the declaration thus fits into this pattern.

However, the fact that Rwanda remains effectively a one-party state in which political opposition is tightly controlled quickly became a source of tension. By far the least democratic of the states that have made the declaration and the one with the poorest performance on human rights indices, compliance costs quickly became unacceptable to Rwanda's government. Only three years later and before the ACtHPR had adjudicated even a single case brought against it, Rwanda became the first (and thus far only) state to withdraw its declaration (although it has not denounced its ratification of the Protocol). The apparent cause of the withdrawal was the impending adjudication of a petition filed by Victoire Ingabire Umuhoza, an opposition politician arrested after giving a speech at the country's Genocide Memorial Centre that was deemed genocide denial by the Rwandan government.[80] This occurred against the backdrop of increasing international criticism of the Rwandan government's use of laws against ethnic "divisionism" and "genocide

[78] See e.g. Filip Reyntjens, "Rwanda, Ten Years On: From Genocide to Dictatorship" (2004) 103:411 Afr Affairs 177; Scott Straus & Lars Waldorf (eds), *Remaking Rwanda: State Building and Human Rights After Mass Violence* (Madison: University of Wisconsin Press, 2011); Susan Thomson, "Whispering Truth to Power: The Everyday Resistance of Rwandan Peasants to Post-Genocide Reconciliation" (2011) 110:440 Afr Affairs 439.
[79] See e.g. Jeffrey Gettleman, "The Global Elite's Favorite Strongman" (8 September 2013), online: *New York Times* <https://www.nytimes.com/2013/09/08/magazine/paul-kagame-rwanda.html>; Anjan Sundaram, "Rwanda: The Darling Tyrant" (March/April 2014), online: <https://www.politico.com/magazine/story/2014/02/rwanda-paul-kagame-americas-darling-tyrant-103963>; Tara John, "Rwanda's Paul Kagame Set for Third Term as Both Despot and Do-Gooder" (4 August 2017), online: <http://time.com/4887274/rwanda-election-paul-kagame/>.
[80] See International Justice Resource Center, "Rwanda Withdraws Access to African Court for Individuals and NGOs" (14 March 2016), online at: < https://ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african- court-for-individuals-and-ngos/>.

ideology" to suppress political dissent.[81]

The official reason provided by the Rwandan government was a different (and ultimately dismissed) petition that had been filed by a fugitive former senator convicted of genocide that sought provisional measures enjoining the 2015 referendum on amending the country's constitution to allow President Paul Kagame to run for a third term.[82] The Rwandan Ministry of Justice's statement on the withdrawal of Rwanda's declaration declared that it would not stand for the right of individual application being "exploited by genocide fugitives" who were using it as a "platform for reinvention and sanitization" of the genocide.[83] Although this had no effect upon claims lodged before the withdrawal (one of which resulted in a finding of responsibility for human rights violations and several of which are still pending before the ACtHPR), it has severely limited the ACtHPR's ability to play any further role in the protection of human rights in Rwanda.

4.9 Tanzania

Tanzania's 2010 declaration appears to have been driven more by its 2007 selection as the seat of the ACtHPR than by the political factors that have driven other states' declarations. Once the AU made the decision to conserve scarce funding by accepting Tanzania's offer to house the ACtHPR in the existing facilities of the International Criminal Tribunal for Rwanda, it would have been untenable for Tanzania to remain outside of the ACtHPR for very long. Thus, whereas declarations have otherwise tended to be made in contexts of consolidated or consolidating democracies, Tanzania has been an exception. It remains a one-party dominant state in which the Chama Cha

[81] See Kenneth Roth, "The Power of Horror in Rwanda" (11 April 2009), online: <https://www.hrw.org/news/2009/04/11/power-horror-rwanda>

[82] *Kayumba Nyamwasa et al. v. Republic of Rwanda*, Order on the Request for Provisional Measures, Afr Ct Hum Peoples' Rts (24 March 2017).

[83] Institute for Security Studies, "Justice, but Not in My Backyard" (10 March 2016), online: <https://issafrica.org/iss-today/justice-but-not-in-my-backyard>.

Mapinduzi (Party of the Revolution) has held power continuously since 1977 and is the longest reigning ruling party in Africa. While multi-party elections have been held since 1992, the party has never received less than 58% of the vote in a presidential election and has consistently enjoyed legislative supermajorities.[84] This grip on power can be attributed at least in part to significant restrictions on freedom of association and expression, including widespread intimidation of independent media outlets and suppression of political dissent.[85] This is reflected in the country's relatively low Polity (−1) and Empowerment Rights Index (7) scores at the time of its declaration, scores reflecting a situation that has not changed fundamentally in the intervening years.

Given that human rights have thus been somewhat more precarious in Tanzania than in most of the other states that have made the declaration, it is perhaps not surprising that Tanzania has become by far the ACtHPR's most frequent "customer," with twenty-three of the ACtHPR thirty-one merits decisions coming in cases involving Tanzania. This has also been driven by geographic proximity since the ACtHPR's location in Arusha means that there are fewer barriers to Tanzanians filing claims than there are to residents of other optional declaration states filing claims, not to mention the greater awareness of the ACtHPR and its work that exists in Tanzania.[86] Most importantly, Tanzania's unique exposure to ACtHPR litigation has the potential to force change in its political system as some of the ACtHPR's decisions involving Tanzania have condemned laws used to perpetuate one-party dominance, such as its decision condemning

[84] See e.g. Kevin Croke, "Tools of Single Party Hegemony in Tanzania: Evidence from Surveys and Survey Experiments" (2017) 24:2 Democratization 189; Yonatan L. Morse, "Party Matters: The Institutional Origins of Competitive Hegemony in Tanzania" (2014) 21:4 Democratization 655; Melanie O'Gorman, "Why the CCM Won't Lose: The Roots of Single Party Dominance in Tanzania" (2012) 30:2 J Contemp Afr Stud 313.
[85] See United Nations Human Rights Council, "Universal Periodic Review – United Republic of Tanzania" (13 December 2011), online: <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/TZ/UNCT-eng.pdf>.
[86] See Frans Viljoen, "Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights" (2018) 67:1 Int Comp Law Q 63 at 69-70.

Tanzania's ban on independent electoral candidacies.[87] The ACtHPR ordering provisional measures staying the executions of several Tanzanian prisoners facing death sentences has also roiled Tanzanian politics.[88] Moreover, a look at the cases pending on the ACtHPR's docket reveals that this will continue to be the case in the future. A whopping 101 of the 138 cases currently listed as pending on the ACtHPR's docket are cases involving Tanzania.

4.10 Tunisia

Tunisia's 2017 declaration is the first by a North African state. This declaration parallels those in Côte d'Ivoire and the Gambia as it represents a declaration clearly linked to a new political beginning. This new beginning was the 2011 revolution that toppled President Zine El Abidine Ben Ali after twenty-three years in power, triggered the "Arab Spring," and led to the ratification of a new constitution in 2014.[89] Indeed, Tunisia's subsequent decision to make the declaration was spurred directly by domestic concerns as it represented an attempt to mitigate problems associated with the failure thus far to constitute the constitutional court established by the new constitution. In particular, the declaration was made shortly after the interim judicial body responsible for constitutional review declared the legislation establishing Tunisia's Superior Judicial Council, which is responsible for selecting four of the Tunisian Constitutional Court's twelve members, unconstitutional. This delay has proven problematic because the interim body,

[87] *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, Judgment, Afr Ct Hum Peoples' Rts (14 June 2013).
[88] See e.g. *Armand Guehi v. United Republic of Tanzania*, Order for Provisional Measures, Afr Ct Hum Peoples' Rts (18 March 2016); *John Lazaro v. United Republic of Tanzania*, Judgment, Afr Ct Hum Peoples' Rts (18 March 2016); *Ally Rajabu et al. v. United Republic of Tanzania*, Order for Provisional Measures, Afr Ct Hum Peoples' Rts (18 March 2016).
[89] See e.g. Jason Brownlee, Tarek Masoud & Andrew Reynolds, *The Arab Spring: Pathways of Repression and Reform* (Oxford: Oxford University Press, 2015); Jack A. Goldstone, "Understanding the Revolutions of 2011: Weakness and Resilience in Middle Eastern Autocracies" (2011) 90:3 Foreign Aff 8; Adam Roberts, Michael J. Willis, Rory McCarthy & Timothy Garton Ash (eds), *Civil Resistance in the Arab Spring: Triumphs and Disasters* (Oxford: Oxford University Press, 2016).

the Instance Provisoire de la Justice Judiciaire, is limited by its enabling act to reviewing the constitutionality of legislation enacted pursuant to the 2014 constitution.[90]

Tunisia's declaration also parallels Côte d'Ivoire's in that it may also have been made to shore up the credibility of a new regime accused of its own human rights violations. In particular, it occurred in the context of increasing domestic and international criticism of alleged human rights violations committed in the context of an extended state of emergency in effect since a 2015 spate of terrorist attacks. This criticism has focused upon prosecutions of civilians in military counts, the imposition of travel restrictions, and allegations of arbitrary arrest and torture.[91] Thus, although Tunisia's recent declaration has yet to result in any cases adjudicated by the ACtHPR, current issues make it likely that Tunisia will face more significant compliance costs than many of its fellow optional declaration states.

5 Conclusions

The record of optional declarations thus far reveals patterns indicative of the future direction of the ACtHPR. The most common scenario, represented by Benin, Ghana, Malawi, and Mali, has been commitment by a fairly consolidated full democracy that would face relatively few compliance costs but which is potentially vulnerable to internal subversion due to a significant history (even if rather remote) of political instability and/or repression. Thus, whereas states that had recently transitioned to more democratic modes of governance (states that were often not fully

[90] See Tania Abbiate, "One More Step Towards Human Rights Protection: Tunisia Allows Direct Access to the African Court on Human and Peoples' Rights" (25 May 2017), online: <http://ohrh.law.ox.ac.uk/one-more-step-towards-human-rights-protection-tunisia-allows-direct-access-to-the-african-court-on-human-and-peoples-rights/>.
[91] See Amnesty International, "Tunisia: Abuses in the Name of Security Threatening Reforms" (10 February 2017), online: < https://www.amnesty.org/en/latest/news/2017/02/tunisia-abuses-in-the-name-of-security-threatening-reforms/>; United Nations Human Rights Council, "UN Expert Urges Tunisia to Further Ground in Human Rights Its Fight Against Extremism and Terrorism" (9 February 2017), online: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21159&LangID=E>.

democratized) were the ones most likely to ratify the ACtHPR Protocol, the dynamics of optional declarations have been somewhat different. This reflects the fact that while ratifying the Protocol is a relatively cost-free way for a new regime to make a symbolic commitment to democracy and human rights, taking the additional step of making the declaration can entail significant costs. While the dynamics of transitional situations may on occasion lead non-consolidated democracies like Côte d'Ivoire, the Gambia, and Tunisia to commit in spite of these costs (particularly when the new regime needs to enhance its credibility on human rights issues), this has been and likely will continue to be slightly less common than the first scenario.

Given that West African states have been particularly likely to make the declaration since they are already subject to the jurisdiction of the ECOWAS Court of Justice, the states that are therefore the most likely candidates to provide additional declarations are states such as Liberia and Sierra Leone, West African states that combine high current levels of democratization and human rights protection with troubled histories of political instability and repression. That both of these states have recently indicated a willingness to do so is consistent with the pattern of optional declarations thus far and with the "lock in" thesis.

On the other hand, less likely candidates would be transitional partial democracies as well as full democracies with little or no history of political instability and/or repression. Thus, for example, despite being members of ECOWAS, partial democracies such as Guinea and Niger are less likely candidates to make the declaration, as are states such as Senegal, a full democracy which has since independence been one of Africa's most politically stable states. However, although the number of states subject to the ACtHPR's full jurisdiction is relatively small and will likely continue to be for the immediate future, it is important to note the progress that has been made in a relatively short period of time. For example, despite often being compared negatively to the

European Court of Human Rights and the Inter-American Court of Human Rights, the ACtHPR has actually delivered more merits decisions in its first decade than either of those courts did in their first decades.[92] This makes its future development something that should be of the utmost interest to the international human rights community.

[92] Viljoen, *supra* note 86 at 96.