

American Journal of International Law
October, 2010

International Decision

Edited by David J. Bederman

African Court on Human and Peoples' Rights--Jurisdiction--Individual Human Rights Com-
plaints Procedure--Forum Prorogatum as a Basis for Jurisdiction-- Costs

***620** MICHELOT YOGOGOMBAYE v. REPUBLIC OF SENEGAL. APP. NO. 001/2008.
JUDGMENT. AT HT-
TP://WWW.AFRICAN-COURT.ORG/EN/CASES/LATEST-JUDGMENTS/. AFRICAN
COURT ON HUMAN AND PEOPLES' RIGHTS, DECEMBER 15, 2009

Charles Chernor Jalloh

University of Pittsburgh School of Law

Copyright © 2010 by The American Society of International Law; Charles Chernor Jalloh

On December 15, 2009, the African Court on Human and Peoples' Rights, based in Arusha, Tanzania, rendered its historic first judgment. [FN1] In a short ruling accompanied by a separate opinion by Judge Fatsah Ouguergouz, the Court unanimously [FN2] dismissed the case for lack of jurisdiction (paras. 37, 46; sep. op. Ouguergouz, J., para. 1).

The applicant, Michelot Yogogombaye, is a Chadian living in Switzerland (*Yogogombaye*, para. 1). On August 11, 2008, he initiated proceedings against Senegal, seeking an order to prevent Senegalese authorities from prosecuting former President Hissein Habré [FN3] (*id.*). Habré, who ruled Chad for eight years, sought asylum in Senegal, a neighboring West African country, after he was deposed in December 1990 (para. 18). He is allegedly responsible for ordering the torture and deaths of up to forty thousand Chadians during his eight years in office. [FN4]

Yogogombaye sought to establish the Court's jurisdiction over the case. He claimed that Senegal, as a member of the African Union [FN5] (AU) and as party to the Protocol on the Establishment of an African Court on Human and Peoples' Rights [FN6] (Protocol), had filed a declaration pursuant to Article 34(6) of the Protocol allowing the Court to hear human rights petitions initiated by individuals (para. 17).

***621** In his application, Yogogombaye made two substantive allegations. First, he asserted that Chadian victims had filed complaints with Senegalese authorities in 2000, alleging Habré's complicity in crimes against humanity, war crimes, and torture during his presidency (para. 18). Six years later, in July 2006, the AU mandated that Senegal either take steps to re-

solve the matter or find an “African option” to the “problem” posed by the prosecution of Habré (para. 19). Thereafter, on July 23, 2008, the Senegalese parliament adopted a constitutional amendment authorizing the retroactive application of its relevant law, solely to enable this trial (para. 20). In Yogogombaye's view, Senegal's action violated the “sacrosanct” rule against retroactive application of the criminal law and was therefore inconsistent with both its Constitution and Article 7(2) of the African Charter on Human and Peoples' Rights [FN7] (para. 21). Second, he alleged that Senegal wrongly opted for a “judicial” instead of an “African” solution inspired by African tradition (para. 22). For example, it could have used traditional African conflict resolution mechanisms like *ubuntu*, which promotes reconciliation through dialogue and reparations. Consequently, Senegal's actions had amply demonstrated its intention to abuse, for *political* and *financial* gain, the mandate entrusted to it by the AU (*id.*). [FN8]

Yogogombaye advanced various subsidiary legal and political arguments. He claimed, *inter alia*, that Senegal had violated other African human rights instruments and abused the universal jurisdiction principle, which could have a “destabilizing effect” on the political, economic, social, and cultural development of Chad and other countries in the continent (para. 23(3), (4), (8)). Similarly, he asked not only for orders directing Chadian and Senegalese authorities to jointly establish a South African--style truth commission to address, in an “African manner,” the crimes committed in Chad between 1962 and 2008, but also for a declaration that the charges against Habré had been “abusively used” by Senegal, France, and Human Rights Watch--as evidenced by the “media hype into which they turned ... the said allegations” (para. 23(7), (10), (11)). Ultimately, among his various requests for relief, he asked that the Court suspend or terminate the AU's July 2006 mandate that Senegal prosecute Habré (para. 23(2), (9)).

In response, Senegal, after initially requesting an extension of time that the Court granted, contested the admissibility of the complaint (paras. 9-12). [FN9] It argued that, contrary to the applicant's claims, it had not filed the Article 34(6) declaration accepting the Court's jurisdiction over cases directly initiated by individuals (para. 25). Alternatively, on the merits, Senegal *622 averred that the Habré case concerned only itself and Habré's alleged victims, in light of obligations owed under the Convention Against Torture [FN10] (para. 26); Yogogombaye therefore lacked a “legitimate interest” to initiate proceedings (*id.*). Furthermore, Senegal denied the purported violations of the nonretroactivity principle and the AU mandate to prosecute Habré (para. 27). Accordingly, it requested that the Court declare the case inadmissible because the applicant lacked standing to institute a complaint and, on the substance, dismiss the complaint because the evidence he had adduced was “baseless and incompetent” (para. 28).

Given the simple facts of the case, the judges deemed a public hearing unnecessary. They therefore moved to deliberations (para. 16). In its judgment, the Court analyzed the relevant statutory provisions and rules. [FN11] It explained that, to hear a case initiated directly by an individual against a state party, the requirements of Articles 5(3) and 34(6) of the Protocol must be met (para. 31). Article 5(3) provides that the “Court *may* entitle relevant Non-Governmental Organizations (NGOs) with observer status before the [African] Commission [on Human and Peoples' Rights] and *individuals* to institute cases *directly* before it, in accord-

ance with Article 34(6) of this Protocol” (para. 32, emphasis added). In turn, Article 34(6) states:

At the time of ratification of this Protocol or *any time thereafter*, the State *shall* make a declaration accepting the competence of the Court to *receive* cases under Article 5 (3) of this Protocol. The Court *shall not receive* any petition under Article 5 (3) involving a State Party which has not made such a declaration. (Para. 33, emphasis added)

These two provisions, read together, confirm that direct individual access to the Court is subject to a precondition: the respondent state must have deposited an Article 34(6) declaration vesting the Court with jurisdiction to hear such cases (para. 34).

In this case, the simple--but contentious-- question was whether Senegal, as a party to the Protocol, had entered such a declaration (para. 35). To resolve the issue, the Court had requested the chair of the AU Commission, the depository of the treaty, to provide the list of African states parties that had accepted the Court's competence over direct individual complaints (para. 36). That list confirmed Senegal's stance that it had not submitted an Article 34(6) declaration. Consequently, the Court ruled that it lacked jurisdiction to hear Yogogombaye's application (para. 37). Given this conclusion, it was unnecessary to consider the secondary question of inadmissibility, which, though Senegal had framed it that way, was a preliminary objection pertaining to lack of jurisdiction (para. 38).

Finally, the Court addressed costs. Yogogombaye, who represented himself, requested “the benefit of free proceedings” (paras. 23(12), 42). Senegal was represented by five lawyers. It therefore asked for the applicant to bear its expenses (paras. 28, 43). The judges noted their default rule requiring each party to absorb its costs (para. 44). [FN12] The circumstances of this case did not warrant any exception (para. 45).

* * * *

***623** The dream for a robust regional human rights court in Africa dates back to the early 1960s. [FN13] However, it took almost forty years, a wave of democratization in the early 1990s, the end of the Cold War, and the establishment of new judicial institutions at the international level to shame continental leaders into attempting to fix the glaring deficiencies of the largely ineffectual African Commission on Human and Peoples' Rights (Commission) based in Banjul, Gambia. [FN14] While the Commission could adjudicate human rights complaints brought by individuals and NGOs against African states, it was severely constrained by its slow institutional start, confidential procedures, lack of power to issue binding decisions, and dearth of requisite resources to do its work. [FN15]

Unlike the well-regarded European and Inter-American systems, the African human rights system has been consigned to the “least developed or effective” [FN16] category. According to a leading commentator, by the mid-1990s, the African system was such a “disappointment, if not embarrassment for the continent,” [FN17] that leaders approved the processes culminating in the adoption of the Protocol, which established the Court in June 1998. That development rekindled hope of a new dawn for traditional enforcement of individual human rights in Africa. But, perhaps portending what was to come, it took almost six years to achieve the fif-

teen ratifications required for the Protocol's entry into force on January 25, 2004. [FN18] It took another two years (until 2006) for the judges to be elected, and still another two years (in 2008) for the Court to finally find a home in Tanzania. [FN19]

Against this backdrop, this first judgment is a noteworthy step for the Court. In a continent rife with human rights violations, the judgment marks the beginning of an era in which African states, individuals, and NGOs may have disagreements about important human rights matters adjudicated by this regional court.

The years of delay [FN20] leading up to this first judgment highlight the fundamental flaw in the Court's jurisdiction over contentious matters. States parties and certain African inter-governmental bodies may all channel cases to the Court. However, individuals and NGOs may only bring *direct* complaints against African governments after apparently crossing two major hurdles: (1) convincing the Court to exercise its discretion to hear the case; and (2) showing that *624 the relevant state had filed a declaration accepting such jurisdiction. [FN21] Only Burkina Faso, Malawi, Mali, and Tanzania have filed such declarations. [FN22] Otherwise, individuals may bring cases only *indirectly*: through their home states or the Commission. [FN23] Both these mechanisms have so far languished in desuetude because neither African states nor the Commission has proved willing to refer cases to the Court.

Though imperfect, one way to overcome the limited direct individual and NGO access to the Court is through creative judicial interpretation. In their first ruling, the judges did not shy away from that monumental challenge, as seen in their interpretation of the relevant legal provisions as well as their liberal treatment of Yogogombaye's application.

The judgment begins by highlighting that Article 3 specifies that, in the event of a dispute between parties over jurisdiction, "the Court shall decide" (para. 30). The purpose of citing that provision, which reaffirms the established *compétence de la compétence* doctrine, is arguably to underscore judicial primacy in resolving questions of jurisdiction in cases of doubt as to its existence.

The majority also noted the second sentence of Article 34(6) of the Protocol, which provides that the Court "shall not *receive* any petition under Article 5(3) involving a State Party which has not made such a declaration" (para. 39). However, the judges underscored that "receive" is not to be understood in a *literal* (physical) or *technical* (admissibility) sense, but rather, as denoting "the conditions under which the Court could *hear* such cases" (*id.*, emphasis added). In other words, while the letter and spirit of Article 34(6), read as a whole, indicate that the concerned state must consent to direct individual and NGO complaints, nothing prevents the Court from physically receiving such petitions. This interpretation implies that African individuals and NGOs may still attempt to initiate complaints directly. If the respondent state challenges the Court's jurisdiction, the Court will decide whether it may hear the matter in light of Articles 5(3) and 34(6), as well as the specific positions taken by the parties.

This reading of the judgment is confirmed by the separate opinion of Judge Ouguergouz, who helpfully placed the facts of the case in a new light and emphasized their significance. As he explained, the majority reached the inevitable conclusion that the Court lacked jurisdiction

to hear Yogogombaye's application against Senegal. However, he noted *625 that the majority reasoning is oversimplified because it referred, without detailed analysis, to Articles 5(3) and 34(6) of the Protocol. Though fundamentally important to personal jurisdiction, those two provisions must be read in their context. Doing so required that a distinction be drawn between concerns about *access to the Court* (Article 5) and its overall *jurisdiction* (Article 3) (sep. op. Ouguergouz, J., paras. 10-11). Ultimately, that distinction explains (1) why the Court did not reject the application through a simple letter given its “manifest lack of jurisdiction”; and (2) why, instead, it ruled on the application by way of “a very solemn Judgment” (*id.*, para. 12).

Indeed, according to Judge Ouguergouz, the majority's discussion of jurisdiction did not “faithfully reflect the Court's liberal approach to the treatment of the application” (sep. op. Ouguergouz, J., para. 9). Senegalese officials had corresponded twice with the Court registry (*id.*, paras. 18-19; *Yogogombaye*, paras. 5, 8-9). Instead of unequivocally challenging jurisdiction, Senegal, through notification of the names of its lawyers and subsequent request for extension of time to prepare a reply, “left open the possibility, however slim, that it might accept the jurisdiction of the Court to deal with the application” (sep. op. Ouguergouz, J., para. 20). This prospect raised doubts for the judges as to whether the country would appear to (1) contest jurisdiction; (2) challenge the admissibility of the application; or (3) defend itself on the merits (*id.*, para. 18).

Furthermore, the separate opinion implicitly criticized the reasoning of the majority. It explained the principles underlying jurisdiction--namely consent and sovereignty--to show the legal basis of the Court leaving that door open for Senegal's potential endorsement of jurisdiction. Judge Ouguergouz closely analyzed Article 34(6), which is ambiguous in critical respects (sep. op. Ouguergouz, J., paras. 24-26). As he noted, the provision uses “shall” which suggests that states parties are *required* to submit a declaration accepting direct individual and NGO complaints (para. 25). Despite such language, however, a state's decision to confer such jurisdiction on the Court is optional because no deadline was imposed for filing such a declaration (*id.*, para. 26). In addition, the second sentence of Article 34(6), read together with Article 5(3), barred the Court from hearing a case involving a state party that has not entered such a declaration. This conclusion was corroborated by the Protocol's *travaux préparatoires* (*id.*, paras. 25-26).

Judge Ouguergouz correctly observed that Article 34(6) raises another important question that should have also been answered by the majority opinion: whether filing the optional declaration is the *only* way for a state to recognize the Court's jurisdiction over complaints brought by individuals (sep. op. Ouguergouz, J., para. 27). Here, the plain language of the provision shows that a declaration may be made “at the time of ratification or *any time thereafter*” (*id.*, emphasis added). Furthermore, nothing in the Protocol prevents a state from granting such consent “in a manner other than through the optional declaration” (*id.*, para. 29). As Senegal had not entered such a declaration upon ratification, it could consent afterwards, upon receipt of Yogogombaye's application for example, and in whatever form it chose, including by letter to the Court (*id.*, para. 28).

The judgment ought to have comprehensively developed this reasoning (sep. op. Ouguergouz, J., para. 37; *Yogogombaye*, para. 37). This is particularly so considering the pos-

sibility that, besides filing an Article 34(6) declaration and other formal ways of indicating consent, Senegal's acceptance of jurisdiction might have reflected *forum prorogatum*--"the acceptance of the jurisdiction of an international Court by a State after the seizure of this Court by another State or an individual, and this either, expressly or tacitly, *626 through decisive acts or an unequivocal behavior" (sep. op. Ouguergouz, J., para. 32). Judge Ouguergouz explained that, under this doctrine, effective participation in proceedings by addressing the merits of a case, for example, could be taken to imply a tacit endorsement of jurisdiction (*id.*, para. 31).

In this case, until April 9, 2009, when Senegal finally filed its "statement of defence," the possibility remained that it would step through the Court door and accept jurisdiction (sep. op. Ouguergouz, J., paras. 32-34, 37-38; *Yogogombaye*, para. 12). Senegal's correspondence, failure to immediately and unequivocally contest jurisdiction, and general attitude were suggestive of this outcome (sep. op. Ouguergouz, J., paras. 18-20, 38). However, once it filed preliminary objections to *Yogogombaye*'s application and showed that jurisdictional consent was not forthcoming, the judges had to comply with Rule 52(7), which requires the Court to give reasons for ruling on preliminary objections (*id.*, para. 36). But for Senegal's filing, a simple order or letter issued by the Court registry would have sufficed to dispose of the application (*id.*, para. 38).

By importing the doctrine of *forum prorogatum*, which is well established in the jurisprudence of the International Court of Justice (ICJ), [FN24] Judge Ouguergouz revealed how the judges' disposition might have opened the jurisdictional door slightly wider. Essentially, based on the Court's liberal handling of its first case, he implied that even where a particular African country has not filed a prior declaration accepting the Court's competence to automatically hear human rights applications, an individual (and presumably qualified NGOs) may still initiate a case against a state party. Such a case would be rendered admissible if the respondent state submits to the Court's jurisdiction--whether explicitly or implicitly-- by, for example, appearing to contest the merits.

The question that then arises is how to treat future applications, especially in the face of widespread uncertainty as to which African states have lodged the optional declaration. According to Judge Ouguergouz, the Court must verify that it has jurisdiction over a particular case before listing it (sep. op. Ouguergouz, J., para. 40). Drawing on the ICJ practice before July 1978, he suggested a new administrative procedure. If an initial review reveals that the Court has jurisdiction, a complaint would be placed on the general list; however, if it appears that the respondent state has not entered the Article 34(6) declaration, the application would be rejected through a simple letter issued by the Court registry. In his view, the application "could eventually be communicated to the State Party concerned" (*id.*, emphasis added). It is only if and when such a state party accepts the Court's jurisdiction that the case would then be listed and notified to all other states parties and relevant AU organs--as required by the Protocol and pertinent rules (*id.*).

This hypothetical discussion might be academically satisfying. But it is probably confusing for prospective applicants. The separate opinion made an important contribution by elaborating the Court's liberal approach to jurisdiction in this maiden case. However, with the pro-

posal of this new limitation based on ICJ practice, Judge Ouguergouz followed a line of reasoning with more detail and hypothesis than is probably tied to the conclusion of the judgment. *627 He rationalized that the limitation would “avoid giving untimely or undue publicity” to individual applications over which the Court manifestly lacks jurisdiction (sep. op. Ouguergouz, J., para. 40).

This approach appears problematic for at least two reasons. First, as far as human rights cases are concerned, unlike state-to-state disputes, such as those before the ICJ, it is precisely such timely publicity that could shame a state into accepting judicial competence to hear a complaint. Second, the very essence of *forum prorogatum* is to afford the applicant a chance—otherwise unavailable—to confront the respondent state. Thus, for this jurisdictional trigger to even be remotely plausible in the context of a human rights court, the complaint must necessarily be transmitted to the concerned state.

The object and purpose of the Protocol suggest that other African states and AU organs should also be notified of such applications. At that stage, from the Court's perspective, no further action need be taken on the complaint. This process makes sense, particularly for judicial efficiency. Depending on the facts of the case, notifying AU organs or other states parties could give them the impetus to bring relevant pressures to bear for the state party to accede to jurisdiction. The impugned state would then be free to respond in whatever way it chooses: to accept the Court's competence over individual/NGO complaints *generally* by filing a declaration with the depository of the treaty; by submitting a letter endorsing jurisdiction with respect to the specific case before the Court; by formally contesting the merits of the complaint (thereby seizing the Court of jurisdiction through *forum prorogatum*); or perhaps more likely, by filing a brief raising preliminary objections to jurisdiction.

On a much broader level, this first judgment is significant because of the underlying issue that it addresses: Senegal's delay in trying Habré for his *alleged* crimes. While Yogogombaye's characterization of the facts is misleading, [FN25] the underlying issues reached the ICJ in February 2009, when Belgium initiated a case against Senegal, alleging that it had violated its obligations to prosecute or extradite the former Chadian president under the Convention Against Torture. [FN26] It also requested an order for provisional measures, which has since been denied. [FN27] This judgment is therefore not the last we will hear of Habré's alleged actions. Interestingly, perhaps because of that ongoing litigation, Senegal rejected the African Court's jurisdiction over Yogogombaye's application. Strategically, in view of the slowness of ICJ proceedings and the *628 reality that the AU asked Senegal to prosecute Habré on behalf of Africa, one must wonder whether it might not have served the country better to secure a ruling from this regional court. [FN28]

Finally, this first judgment is a major disappointment to advocates of the Court who have waited for years to gain a glimpse into the added value that it will bring to human rights protection in Africa. The judges did not engage substantive human rights at all; rather, they got bogged down in discussions of *locus standi* and internal procedures. It is to be hoped that the next few cases will present the Court an opportunity to adjudicate substantive allegations of human rights violations by an African state. That is the only way it will establish its credibility, and help to move the African human rights system into the developed and effective cat-

egory.

[FN1]. *Yogogombaye v. Republic of Senegal*, App. No. 001/2008, Judgment (Afr. Ct. Hum. & Peoples' Rts. Dec. 15, 2009), available at <http://www.african-court.org/en/cases/latest-judgments/>. It should be noted that the Court calls rulings on preliminary matters concerning jurisdiction “Judgments,” rather than “Decisions,” the term used by most international courts.

[FN2]. The following nine judges signed the opinion: Jean Mutsinzi, Sophia A. B. Akuffo, Justina K. Mafoso-Guni, Bernard M. Ngoepe, Hamdi Faraj Fannoush, Modibo Tounty Guindo, Gérard Niyungeko, Fatsah Ouguerouz, and Joseph N. Mulenga. As required by Court rules, the Senegalese judge El Hadj Guissé recused himself. *See Yogogombaye*, para. 2.

[FN3]. The first name of the former Chadian President is variously spelled Hissein, Hissen, Hissane, Hissene, and Hissène. His last name is spelled Habre or Habré. This case note uses the Court's spelling: Hissein Habré.

[FN4]. A Chadian inquiry concluded that, in addition to those allegedly killed, up to 80,000 orphans, 30,000 widows, and 200,000 people were victimized by Habré. *See* Stephen P. Marks, *The Hissène Habré Case: The Law and Politics of Universal Jurisdiction*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 131, 135 (Stephen Macedo ed., 2004).

[FN5]. Constitutive Act of the African Union, July 11, 2000, 2158 UNTS 3. This and other African Union documents are available online at <http://www.africa-union.org>.

[FN6]. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998, Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force Jan. 25, 2004) [hereinafter Protocol].

[FN7]. Article 7(2) provides:

No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

African Charter on Human and Peoples' Rights, Art. 7(2), June 27, 1981, OAU Doc. CAB/LEG.67/3 rev. 5, 21 ILM 58 (1982).

[FN8]. *Yogogombaye* claimed that, by choosing to prosecute Habré and by asking for the AU's financial support to do so, Senegal's “pecuniary motivation” would be lucrative at 40 billion CFA francs (approximately \$38 million) (para. 23(6)). This incentive would, in his view, set a bad precedent for other African states where former heads of states may seek refuge.

[FN9]. Senegal wrote the Court on February 17, 2009, requesting time to prepare a reply. That request was granted, by an order dated March 6, 2009, providing Senegal with a deadline of April 14, 2009 (paras. 9-10). The Judgment noted that Senegal filed its “statement of defence

within the time limit,” but the date was not specified (para. 12). No indication was given that the order issued by the Court was confidential. Concerns therefore arise about the lack of transparency in the proceedings because, so far, the order has not been published.

[FN10]. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 85 [hereinafter Convention Against Torture].

[FN11]. The Court cited Article 3(2) of the Protocol and Rules 26(2), 39(1), and 52(7) of the Interim Rules of the Court (paras. 29-30). See Interim Rules of the African Court of Human and Peoples' Rights, June 20, 2008, available at http://www.africancourtcoalition.org/content_files/files/Interim_Rules_of_Court_ENG.pdf.

[FN12]. See *id.*

[FN13]. See FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 420-22 (2007); Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN ST. L. REV. 679, 681-85 (2004).

[FN14]. See VILJOEN, *supra* note 13, at 420-22; Makau Mutua, *The African Human Rights Court: A Two-Legged Stool?* 21 HUMAN RTS. Q. 342, 351 (1999). Information about the Commission is available on its Web site, http://www.achpr.org/english/_info/mandate_en.html.

[FN15]. For an analysis of the various problems, see Mutua, *supra* note 14, at 343-44; Chidi Anselm Odinkalu, *The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 359, 365 (1998); Richard Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 VA. J. INT'L L. 667 (1982); Cees Flinterman & Evelyn Ankumah, *The African Charter on Human and Peoples' Rights*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 159 (Hurst Hannum ed., 2d ed. 1992).

[FN16]. INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 920 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000).

[FN17]. Mutua, *supra* note 14, at 352.

[FN18]. VILJOEN, *supra* note 13, at 422-23.

[FN19]. *Id.* at 431-36.

[FN20]. GEORGE MUKUNDI WACHIRA, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: TEN YEARS ON AND STILL NO JUSTICE 2 (2008), available at <http://www.unhcr.org/refworld/pdfid/48e4763c2.pdf> (lamenting the Court's failure to hear a single case a decade after its formal creation).

[FN21]. Article 5(3) of the Protocol provides that the Court “may entitle” NGOs with observer status before the Commission to initiate cases, as well as individuals to do so directly

(consistent with Article 34(6)). Viljoen has argued the phrase *may entitle* is a drafting anomaly. It was not intended to confer discretion for the Court to reject a case. Otherwise, it places an “unduly heavy burden on individuals.” This author agrees with Viljoen that formalistic interpretations of this provision should be avoided to enhance *individual* and NGO access to the Court. See VILJOEN, *supra* note 13, at 443.

[FN22]. As Judge Ouguergouz notes in his separate opinion, the chair of the AU Commission, depository of the treaty, only lists on the AU Commission's Web site the states parties to the Protocol; reference to states that have lodged the Article 34(6) declaration accepting automatic individual and NGO complaints has been omitted. In addition, unlike similar international judicial institutions, the Protocol does not require the list to be transmitted to the Court (sep. op. Ouguergouz, J., paras. 41-42). A simple remedy would be for the depository to regularly provide an updated list to the Court which, in turn, could post it online to inform prospective complainants. Regrettably, as of writing, this process has not yet been put in place. Recently, however, the Court identified these four countries as recognizing its authority to hear petitions filed by individuals and NGOs. See Press Release, African Court on Human and Peoples' Rights, Opening Ceremony of the 18th Ordinary Session (Sept. 20, 2010), at http://www.africa-union.org/root/au/Conferences/2010/september/pr/Presse%20Release%20Opening%2018%20Ordinary%20session%20of%20the%20African%20Court_20%20Sep._Eng.pdf.

[FN23]. Article 5 of the Protocol establishes the various ways to access the Court. In addition to jurisdiction over contentious matters, the Court has wide advisory jurisdiction.

[FN24]. Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), paras. 60-63 (Int'l Ct. Justice June 4, 2008). Materials for this and other cases are available on the ICJ's Web site, <http://www.icj-cij.org>. Given the ICJ's experience, where only a limited set of cases have successfully based jurisdiction on this doctrine, it seems unlikely that the African Court will receive a flood of cases anytime soon. Any such use of the doctrine will have to address the underlying state consent issue that inevitably arises.

[FN25]. See, e.g., Decision on the Hissène Habré Case and the African Union, Doc. Assembly/AU/3 (VII), para. 5 (July 1-2, 2006) (mandating Senegal to ensure Habré was tried, on behalf of Africa, by a competent court with guarantees of a fair trial); AU Report of the Committee of Eminent African Jurist on the Case of Hissene Habré (2006), at http://www.hrw.org/justice/habre/CEJA_Repor0506.pdf; see also Mandiaye Niang, *The Senegalese Legal Framework for the Prosecution of International Crimes*, 7 J. INT'L CRIM. JUST. 1047, 1048 (2009) (noting that the Habré case has been both a “catalyst and litmus test” for Senegal, and arguing that the failure to prosecute arose at least partially from the lacunae in the domestic legal framework criminalizing international crimes). For a discussion of AU policy on universal jurisdiction and the related African government critique of the International Criminal Court, see Charles C. Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction*, 21 CRIM. L.F. 1 (2010); and Charles C. Jalloh, *Regionalizing International Criminal Law?* 9 INT'L CRIM. L. REV. 445 (2009).

[FN26]. Application Instituting Proceedings (Belg. v. Sen.) (Int'l Ct. Justice Feb. 19, 2009); *see also* Convention Against Torture, *supra* note 10, Arts. 7(1), 30 (imposing an obligation on states parties to prosecute or extradite, and a duty for disputing parties to refer disputes over alleged noncompliance to the ICJ).

[FN27]. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Provisional Measures (Int'l Ct. Justice May 28, 2009).

[FN28]. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Order (Int'l Ct. Justice July 9, 2009) (setting timeline for written pleadings and deadline for Senegal's counter-memorial as July 11, 2011).
104 Am. J. Int'l L. 620

END OF DOCUMENT