

## NOTE

### TOWARD A BETTER UNION: ADDRESSING CHILD MARRIAGE THROUGH INDIVIDUAL AND NGO PETITIONS IN THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

KARYAN SAN MARTANO\*

#### INTRODUCTION

“We are girls, not brides. We know our rights, we speak them out.”<sup>1</sup> These simple, yet meaningful, phrases are lyrics to a song put together by a group of girls in Lusaka, Zambia at an after-school club.<sup>2</sup> The song serves as a supportive reminder to these young girls of their rights to consensual marriages and to continue their education.<sup>3</sup> As of 2015, Zambia had the fifteenth highest rate of child marriage in the world;<sup>4</sup> and Zambia does not stand alone on the continent of Africa, which is currently home to fifteen of the twenty countries with the highest rates of child marriage.<sup>5</sup>

Child marriage includes formal marriages and informal unions before one or both of the spouses are eighteen years old.<sup>6</sup> Girls are disproportionately affected by the practice.<sup>7</sup> The international human rights community has recognized that the minimum age of

---

\* J.D., 2018, The George Washington University Law School; B.A. in History and Business Administration 2014, The University of Florida.

1. See Maryam Mohsin, *Ending Child Marriage with a Song!*, GIRLS NOT BRIDES (June 17, 2016), <http://www.girlsnotbrides.org/ending-child-marriage-with-a-song/> [https://perma.cc/5KXN-LSWX].

2. *Id.*

3. *Id.*

4. UNITED NATIONS CHILDREN'S FUND [UNICEF], *THE STATE OF THE WORLD'S CHILDREN 2015: EXECUTIVE SUMMARY* tbl.9 (2014).

5. *African Union Launches Its First-Ever Campaign to End Child Marriage*, GIRLS NOT BRIDES (May 29, 2014), <http://www.girlsnotbrides.org/african-union-launches-first-ever-campaign-end-child-marriage/> [https://perma.cc/2NNH-94AH].

6. *Child Protection from Violence, Exploitation, and Abuse*, UNICEF (Aug. 29, 2016), [https://www.unicef.org/protection/57929\\_58008.html](https://www.unicef.org/protection/57929_58008.html) [https://perma.cc/GX7W-CKFE].

7. *Id.*

marriage should be eighteen years old.<sup>8</sup> Significantly, child marriage without the free and full consent of both parties is prohibited as a human rights violation by several international treaties, including the Universal Declaration of Human Rights (UDHR),<sup>9</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>10</sup> and the African Charter on the Rights and the Welfare of the Child (Children's Charter).<sup>11</sup> In addition to its designation as a human rights violation, child marriage perpetuates a cycle of poverty, a denial of education, and a multitude of physical and psychological health issues.<sup>12</sup>

Defining child marriage as a human rights violation has “help[ed] to raise it as a grave public concern rather than a private matter between families.”<sup>13</sup> In 2014, the African Union made a commitment to end child marriage within its member states with its first Campaign to End Child Marriage.<sup>14</sup> This commitment undeniably requires efforts from all levels of government—regionally, through the African Union where a standard of human rights can be established; nationally, within the member states where marriage laws and registration systems can be mandated; and locally, where ground-level enforcement can be monitored. This Note focuses on the regional establishment of human rights, particularly through the African Union's main enforcement forum: the African Court on Human and Peoples' Rights (African Court).

As currently established, the African Court does not accept petitions directly from individuals or non-governmental organizations (NGOs). This severely inhibits access to protection from human rights violations for those most vulnerable and in need of the Court's protection—young girls—and for those in a good position to help these populations—NGOs. In contrast, the European Court of Human Rights has recently restructured to open its doors

---

8. Brent Stirton, *Q&A: Child Marriage and Violations of Girls' Rights*, HUM. RTS. WATCH (June 14, 2013, 2:19 PM), <https://www.hrw.org/news/2013/06/14/q-child-marriage-and-violations-girls-rights> [<https://perma.cc/7XHQJW4L>].

9. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 16(1)–(2) (Dec. 10, 1948) [hereinafter UDHR].

10. Convention on the Elimination of All Forms of Discrimination against Women art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

11. African Charter on the Rights and Welfare of the Child art. 21, OAU Doc. CAB/LEG/24.9/49 (Nov. 29, 1999) [hereinafter Children's Charter].

12. See *infra* Part I.

13. Rangita de Silva-de-Alwis, *Child Marriage and the Law*, at i (UNICEF Legislative Reform Initiative Paper Series, Working Paper, 2008), [https://www.unicef.org/policyanalysis/files/Child\\_Marriage\\_and\\_the\\_Law\(1\).pdf](https://www.unicef.org/policyanalysis/files/Child_Marriage_and_the_Law(1).pdf) [<https://perma.cc/6326-TBWZ>].

14. *African Union Launches Its First-Ever Campaign to End Child Marriage*, *supra* note 5.

to individuals and NGOs.<sup>15</sup> This shift by the European Court provides an example for the African Court and validates the proposal that the right of individual petitions in regional human rights systems is a step forward in securing human rights. Therefore, Articles 5(3) and 34(6) in the controlling African Protocol of the Court should be amended to reflect a right for individual and NGO petitions. Modifying the African Court Protocol would give access to two groups: women and young girls suffering from human rights violations, and NGOs, who are in a good position to speak on behalf of these individuals.

Part I of this Note describes the depth of the problem of child marriage in Sub-Saharan Africa and its impact on the development of the countries affected and the girls that live in them. Part II juxtaposes the African human rights system under the African Commission and the African Court with that of the European human rights system and its shift to a single court system. Part III analyzes the modifications that the African Court can adopt from the European Court to allow individual and NGO petitions. Further, this Part demonstrates how this modified system would better protect Africa's most vulnerable populations—its women and children.

## I. BACKGROUND

The United Nations Children's Fund (UNICEF), an organization established by the United Nations to address the needs of children,<sup>16</sup> has assessed that Sub-Saharan Africa "presents the most extreme scenario" regarding child marriage.<sup>17</sup> Countries in Sub-Saharan Africa have rates as high as seventy-seven percent in Niger, seventy percent in Mali, and sixty-two percent in Burkina Faso of girls entering marriages prior to the age of eighteen.<sup>18</sup> UNICEF has projected that by 2050, Sub-Saharan Africa will have both the

---

15. See *infra* Part II.B.

16. *About UNICEF*, UNICEF, <https://www.unicef.org/about-us> (last visited Mar. 28, 2018) [<https://perma.cc/25VA-8XYB>].

17. UNICEF, *ENDING CHILD MARRIAGE: PROGRESS AND PROSPECTS* 7 (2014) [hereinafter *ENDING CHILD MARRIAGE: PROGRESS AND PROSPECTS*].

18. UNICEF INNOCENTI RES. CTR., *EARLY MARRIAGE: CHILD SPOUSES, INNOCENTI DIGEST NO. 7* 4 (2001) [hereinafter *INNOCENTI REPORT*]. The percentage is calculated using the percentage of women aged twenty-five to twenty-nine married before the age of eighteen. The data are far from perfect as some marriages may not be accounted for because they are unregistered and unofficial. Nevertheless, child marriage trends have been exhaustively studied by the World Fertility Survey and by the Demographic and Health Surveys Program. *Id.*

largest number and global share of child brides.<sup>19</sup> The statistics present a stark picture; the reality of the effects of child marriage on the girls themselves and on the development of the affected African nations vivifies the significance of this issue.

A. *Human Rights Violations: Child Marriage and Its Effects on Poverty, Education, and Health*

Child marriage without free and full consent of both parties is expressly prohibited as a human rights violation by several international treaties, including the CEDAW,<sup>20</sup> the Children's Charter,<sup>21</sup> and the UDHR.<sup>22</sup> It is also implicitly in conflict with the ideals and goals of the African Charter on Human and Peoples' Rights (African Charter).<sup>23</sup> All African states facing the problem of child marriage are party to at least one of these international treaties.<sup>24</sup> These states are not only allowing the perpetuation of a human rights violation, but also hindering the continent's efforts to achieve six of its eight Millennium Development Goals—eliminating extreme poverty, achieving universal primary education, promoting gender equality, reducing child mortality, improving maternal health, and combating HIV and AIDS.<sup>25</sup>

---

19. ENDING CHILD MARRIAGE: PROGRESS AND PROSPECTS, *supra* note 17, at 7.

20. CEDAW, *supra* note 10, art. 16 (mandating “[t]he same right freely to choose a spouse and to enter into a marriage only with their free and full consent”).

21. Children's Charter, *supra* note 11, art. 21(2) (“Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.”).

22. UDHR, *supra* note 9, art. 16(2) (“Marriage shall be entered into only with the free and full consent of the intending spouses.”).

23. African Charter on Human and Peoples' Rights art. 18, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter] (mandating that states eliminate “discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”).

24. See *Member States*, UNITED NATIONS, <http://www.un.org/en/member-states/index.html> (last visited Mar. 28, 2018) (all fifty-four African countries are part of the United Nations, which oversees the UDHR) [<https://perma.cc/G9Y9-XYCF>]; *Status of Treaties: Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf> (all African states except Somalia and Sudan have ratified CEDAW) [<https://perma.cc/NG32-QZWD>].

25. GIRLS NOT BRIDES, ENDING CHILD MARRIAGE IN AFRICA: A BRIEF BY GIRLS NOT BRIDES 4 (2015), <http://www.girlsnotbrides.org/wp-content/uploads/2015/02/Child-marriage-in-Africa-A-brief-by-Girls-Not-Brides.pdf> [hereinafter GIRLS NOT BRIDES] [<https://perma.cc/Y96B-MJKL>].

## 1. The Right to Economic Development

The African Charter guarantees that “[a]ll peoples shall have the right to their economic . . . development.”<sup>26</sup> Poverty is one of the main determinants of child marriages because the arrangement is viewed as a strategy for economic survival.<sup>27</sup> For many African families, the marriage may bring a bride price, such as cattle from the groom’s family,<sup>28</sup> or may simply lessen financial burden through one less mouth to feed, body to clothe, and mind to educate.<sup>29</sup> Further, parents often believe that their daughters will gain from the marriage by receiving security, social status, and a home.<sup>30</sup> In reality, child marriage reinforces the cycle of poverty and therefore has “undermined the very purposes it was meant to achieve” by sending girls into a life of “economic servitude,”<sup>31</sup> in which the girl and her children remain wholly dependent on her husband. Girls married in their youth are not learning the skills and knowledge that would give them employment prospects enabling them to lift themselves and their families out of poverty.<sup>32</sup> A report by the World Bank determined that “higher fertility associated with child marriage may influence women’s roles in the labor market and the number of hours they are able to work.”<sup>33</sup> For example, early and frequent childbearing causes frequent interruptions to work and loss of time for child care, often forcing women into low-paying jobs or unstable work situations.<sup>34</sup>

The right to economic development is an individual right, but excluding half of the population from the workforce also impacts national economic development. A large majority of the female population is unable to gain employment, and those females that do find employment earn lower wages; in turn, this leads to lower consumption levels per capita, exacerbating the poverty cycle.<sup>35</sup>

26. African Charter, *supra* note 23, art. 22.

27. See INNOCENTI REPORT, *supra* note 18, at 6; Silva-de-Alwis, *supra* note 13, at 32; see also ENDING CHILD MARRIAGE: PROGRESS AND PROSPECTS, *supra* note 17, at 3 (it is two and a half times more likely for a girl in the poorest quintile of a state to marry in childhood than one in the wealthiest quintile).

28. INNOCENTI REPORT, *supra* note 18, at 6.

29. See Silva-de-Alwis, *supra* note 13, at 32.

30. CORINNE A. A. PACKER, USING HUMAN RIGHTS TO CHANGE TRADITION: TRADITIONAL PRACTICES HARMFUL TO WOMEN’S REPRODUCTIVE HEALTH IN SUB-SAHARAN AFRICA 48 (Intersentia ed., 2002).

31. Silva-de-Alwis, *supra* note 13, at 1.

32. GIRLS NOT BRIDES, *supra* note 25, at 4.

33. INT’L CTR. FOR RESEARCH ON WOMEN & THE WORLD BANK, THE ECONOMIC IMPACTS OF CHILD MARRIAGE: WORK, EARNINGS, AND HOUSEHOLD WELFARE BRIEF 2 (2017).

34. *Id.*

35. *Id.*

The aforementioned World Bank Report also found that among fifteen countries studied, Nigeria had the largest annual economic cost of child marriage with a loss of earnings and productivity costing \$7.6 billion annually.<sup>36</sup>

## 2. The Right to an Education

In addition to perpetuating generational poverty, child marriage forces young girls to leave school at an early age, severely affecting their personal development. Typically, once married, the girl is forced to leave school to live with her new husband, curtailing both educational and employment opportunities. Studies demonstrate that early marriage is universally associated with low levels of schooling. The restrictions on mobility, domestic burdens, and childbearing that result from marriage directly limit a young girl's access to education.<sup>37</sup> Under Article 17 of the African Charter, "[e]very individual shall have the right to education."<sup>38</sup> The pursuit of education teaches the acquisition of information, the development of independent thought, and the formulation of opinions, without which the right of informed consent is severely impacted.<sup>39</sup> This lack of development of informed consent is particularly damaging for young girls facing the pressure of an unwanted marriage. Young girls are often more complacent, psychologically malleable, and likely to obey orders, especially from an older—and typically physically and psychologically dominant—husband.<sup>40</sup>

## 3. The Right to the Best Attainable State of Health

Under Article 16 of the African Charter, "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health."<sup>41</sup> Early marriages have a significant impact on the mental and physical health of the girls. Social expectations often pressure the young bride to begin having children as soon as she has entered the marriage.<sup>42</sup> The United Nations Populations Fund (UNFPA) reports that three out of four teenagers in Africa are mothers, forty percent of whom are aged seventeen years or under.<sup>43</sup> The Inter-African Committee (IAC) reports that approxi-

---

36. *Id.* at 4.

37. *See* Silva-de-Alwis, *supra* note 13, at 20.

38. African Charter, *supra* note 23, art. 17.

39. PACKER, *supra* note 30, at 77–78.

40. *Id.* at 25–26.

41. African Charter, *supra* note 23, art. 16.

42. PACKER, *supra* note 30, at 25.

43. *Id.*

mately fifty percent of first births in many Sub-Saharan African countries are to women under the age of nineteen.<sup>44</sup> For girls well below eighteen, their bodies are often too immature for pregnancy.<sup>45</sup> They are also less likely to receive proper medical care while living with their husbands.<sup>46</sup> Forced to leave school and isolated from their families, the girls have no access to any form of reproductive health education. Additionally, women who start having children early generally have more children and at shorter intervals.<sup>47</sup> Early marriage and pregnancy also affect the psychological development of young girls, who often face emotional pressure from their husbands, in-laws, and their own families, limiting their ability to make independent decisions about their bodies and lives.<sup>48</sup> Not only is a young bride's first sexual experience often pressured, a girl often continues to experience non-consensual sex throughout the marriage, largely impacting mental health and development.<sup>49</sup> Together, the demands of marriage, pregnancy, labor, and nursing are reflected in higher lifetime risks to the girls' health, both physical and psychological, and their overall livelihood.<sup>50</sup>

## II. LEGAL FRAMEWORK

The United Nations is considered the “overarching human rights regime.”<sup>51</sup> Complementary to the U.N. regime, Europe, Africa, and the Americas have each developed their own regional systems to safeguard human rights.<sup>52</sup> The Council of Europe's framework began its development decades ago as a multi-tiered system and has recently restructured to contain a single court that receives communications from individuals and NGOs. In contrast,

---

44. *Id.*

45. ENDING CHILD MARRIAGE: PROGRESS AND PROSPECTS, *supra* note 17, at 4.

46. *Id.*

47. PACKER, *supra* note 30, at 25.

48. *Why Is Child Marriage a Form of Violence against Women and Girls?*, GIRLS NOT BRIDES (Oct. 7, 2014), <https://www.girlsnotbrides.org/why-is-child-marriage-a-form-of-violence-against-women-and-girls/> [<https://perma.cc/N4A4-2YBF>].

49. *Id.* (stating that “child brides are more likely to describe their first sexual experience as forced”); see also Nisha Varia, *Ending Child Marriage: Meeting the Global Development Goals' Promise to Girls*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2016/ending-child-marriage> (last visited Mar. 28, 2018) (discussing domestic violence and marital rape as a risk of early marriage) [<https://perma.cc/AT7G-48P7>].

50. PACKER, *supra* note 30, at 26–27.

51. See Teresa M. Miguel-Stearns, *Comparing Human Rights Systems*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR. (Apr. 4, 2013), <http://library.law.yale.edu/news/comparing-human-rights-systems> [<https://perma.cc/8MBG-7JNJ>].

52. *Id.* The Inter-American System is outside the scope of this Note.

the African Union's framework is fairly young and consists of a commission and a court. This separation does not allow for the court to receive communications directly from individuals and NGOs. The two systems are juxtaposed to demonstrate the differences in their practices.

A. *The African Union's Human Rights System:  
A Court and a Commission*

The African system of human rights is comprised of the "treaties, principles, and independent organs of the [African Union] that promote and protect human rights throughout the continent."<sup>53</sup> It includes the work of the African Commission on Human and Peoples' Rights (African Commission), and the African Court of Human and Peoples' Rights (African Court).<sup>54</sup> Both forums are guided primarily by the African Charter on Human and Peoples' Rights (African Charter).

1. The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter),<sup>55</sup> adopted in 1981 and entered into force in 1986, is widely considered the most important regional human rights treaty for the continent of Africa.<sup>56</sup> African jurists, NGOs, the United Nations, and the African Union Secretary General led the efforts to pass the African Charter.<sup>57</sup> The intention of the African Charter is to promote and protect human rights and basic freedoms.<sup>58</sup> Intro-

---

53. INT'L JUSTICE RES. CTR., *ADVOCACY BEFORE THE AFRICAN HUMAN RIGHTS SYSTEM: A MANUAL FOR ATTORNEYS AND ADVOCATES* 8 (2016) [hereinafter *ADVOCACY BEFORE THE AFRICAN SYSTEM*]. The African Union (A.U.) is the union of fifty-four African states "organized to promote democracy, rule of law, human rights, peace, and security in Africa." *Id.* at 9. One of the primary goals of the A.U. is "to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law." Org. of African Unity, *Constitutive Act of the African Union* pmbl., OAU Doc. CAB/LEG/23.15 (July 11, 2000).

54. *ADVOCACY BEFORE THE AFRICAN SYSTEM*, *supra* note 53, at 3. There are other regionally-focused bodies present in Africa as well that are outside the scope of this Note. These include the Economic Community of West African States Community Court of Justice, the Southern African Development Community Tribunal, the East African Court of Justice, and the Common Market for Eastern and Southern Africa Court of Justice. *Id.* at 30.

55. African Charter, *supra* note 23.

56. Manisuli Ssenyonjo, *An Introduction to the Development of the African Regional Human Rights System: 30 Years after the Adoption of the African Charter on Human and Peoples' Rights*, in *THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM* 3, 4 (Manisuli Ssenyonjo ed., 2012). The African Charter was ratified by the fifty-three member states of the African Union. *Id.* n.6.

57. *Id.* at 5.

58. See African Charter, *supra* note 23, pmbl.

ducing a new era of protection of human rights, the African Charter relied on existing international human rights treaties and on the legal traditions of Africa.<sup>59</sup> The African Charter does not mention child marriage explicitly, however, several articles address the human rights that are denied as a result of child marriage—the rights to equality,<sup>60</sup> education,<sup>61</sup> and health.<sup>62</sup>

The lack of a specific provision on child marriage in the African Charter was rectified by the African Charter on the Rights and Welfare of the Child (Children’s Charter).<sup>63</sup> The Children’s Charter, adopted in 1990 and entered into force in 1999, “complements the African Charter by addressing children’s particular needs and vulnerabilities.”<sup>64</sup> The African Committee of Experts on the Rights and Welfare of the Child is charged with the interpretation of the Children’s Charter.<sup>65</sup> Article 2 defines every human being below the age of eighteen as a child protected by the Children’s Charter.<sup>66</sup> Article 21 of the Children’s Charter bans child marriage, mandating that “[c]hild marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.”<sup>67</sup>

## 2. The African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights (African Commission) is a quasi-judicial body charged with monitoring

59. See *ADVOCACY BEFORE THE AFRICAN SYSTEM*, *supra* note 53, at 20.

60. Article 18 of the African Charter mandates that “State[s] shall ensure the elimination of every discrimination against women and also the protection of the rights of the woman and the child as stipulated in international declarations and conventions.” African Charter, *supra* note 23, art. 18, § 3.

61. Article 17 of the African Charter guarantees that “[e]very individual shall have the right to education.” *Id.* art. 17, § 1.

62. Article 16 of the African Charter states, “[e]very individual shall have the right to enjoy the best attainable state of physical and mental health.” *Id.* art. 16, § 1.

63. See Children’s Charter, *supra* note 11, art. 21.

64. *ADVOCACY BEFORE THE AFRICAN SYSTEM*, *supra* note 53, at 26. Forty-one A.U. member states have ratified the Children’s Charter. *Legal Instruments*, AFR. COMMISSION ON HUM. & PEOPLES’ RTS., <http://www.achpr.org/instruments/> (last visited Mar. 28, 2018) [<https://perma.cc/ES42-GF3Y>].

65. *The Committee’s Work*, AFR. COMMITTEE EXPERTS ON RTS. & WELFARE CHILD, <http://www.acerwc.org/the-committees-work/> (last visited Mar. 28, 2018) [<https://perma.cc/JMC4-54ZB>].

66. Children’s Charter, *supra* note 11, art. 2.

67. *Id.* art. 21(2).

the implementation of the African Charter.<sup>68</sup> Article 45 of the African Charter sets out three express functions of the Commission: the promotion of human and peoples' rights, the protection of human and peoples' rights, and the interpretation of the Charter.<sup>69</sup>

The African Commission, in its primary protective function, receives communications from state parties, NGOs, and individuals regarding violations of human rights established in the African Charter and other relevant ratified treaties.<sup>70</sup> The only limitation for NGOs bringing petitions to the African Commission is that they must have been granted observer status by the Commission.<sup>71</sup> This has not proved to be an excessive limitation as any NGO "working in the field of human rights in Africa"<sup>72</sup> can receive observer status, and currently, 477 NGOs have been granted this status by the Commission.<sup>73</sup> Yet, although NGOs and individuals can submit communications to the African Commission, this quasi-judicial body only has the power to issue recommendations which are not legally binding on a state party until they are adopted.<sup>74</sup> As one scholar described, this has made the Commission "a toothless bulldog . . . . The Commission can bark . . . . It was not, however, created to

---

68. *Establishment of the Court*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://en.african-court.org/index.php/about-us/establishment> (last visited Mar. 28, 2018) [<https://perma.cc/3FTT-BMKK>]; African Charter, *supra* note 23, art. 30. The Commission was established through Article 30 of the African Charter and was officially inaugurated in 1987. *History*, AFR. COMMISSION ON HUM. & PEOPLES' RTS., <http://www.achpr.org/about/history/> (last visited Mar. 28, 2018) [<https://perma.cc/C5FP-NTVZ>].

69. African Charter, *supra* note 23, art. 45.

70. RULES OF PROCEDURE OF THE AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS r. 62 [hereinafter AFR. COMM'N RULES] (stating that the Commission "may invite any State Party, institution, *organisation*, or *person* capable of enlightening it to participate in its sessions without voting rights") (emphasis added); *see also* African Charter, *supra* note 23, arts. 45, §§ 1(a), 1(c), 47, and 55 (providing for participation of state parties, organizations, and individuals in raising human rights concerns to the Commission).

71. AFR. COMM'N RULES, *supra* note 70, r. 63 ("[A]ny . . . non-governmental organisation with *observer status*, may request that the African Commission include in its agenda for an Ordinary Session a discussion on any human rights issue.") (emphasis added).

72. *Id.* r. 68(1).

73. *NGOs with Observer Status*, AFR. COMMISSION ON HUM. & PEOPLES' RTS., <http://www.achpr.org/network/ngo/by-name/> (last visited Mar. 28, 2018) [<https://perma.cc/FL92-E4QG>].

74. AFR. COMM'N RULES, *supra* note 70, r. 92; AFRICAN COMM'N ON HUMAN & PEOPLES' RIGHTS, COMMUNICATION PROCEDURE, INFORMATION SHEET NO. 3 8-9, [http://www.achpr.org/files/pages/communications/procedure/achpr\\_communication\\_procedure\\_eng.pdf](http://www.achpr.org/files/pages/communications/procedure/achpr_communication_procedure_eng.pdf) [<https://perma.cc/82GP-F43N>].

bite.”<sup>75</sup> This ineffectiveness in the Commission was a significant impetus for the establishment of a regional court.

### 3. The African Court on Human and Peoples’ Rights

Eventually the African Union recognized the weak and ineffective enforcement power of the African Commission.<sup>76</sup> To “complement and reinforce”<sup>77</sup> the function of the Commission, the African Court on Human and Peoples’ Rights was established as the continental human rights court of Africa<sup>78</sup> through Article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (African Court Protocol).<sup>79</sup> The African Court Protocol acknowledged that “the attainment of the objectives of the African Charter . . . requires the establishment of an African Court.”<sup>80</sup> The Protocol came into force in January of 2004;<sup>81</sup> however, the African Court was not operational until 2006, following the election of judges, the appointment of court staff and registrar, and the acquisition of operating funds.<sup>82</sup>

Article 5 of the African Court Protocol denotes that the Commission, state parties, and African intergovernmental organizations have access to the Court.<sup>83</sup> Article 5(3) sets out a different path for NGOs and individuals, who may submit cases to the Court only “in accordance with article 34(6).”<sup>84</sup> Article 34(6) then mandates that “the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of [the] Protocol,”<sup>85</sup> meaning that without a declaration from the state party, the Court may not receive petitions from either individuals or NGOs. As of July 2017, only eight of the thirty state parties to the African Court Protocol made the declaration allowing the Court to receive cases

75. Nsongurua J. Udombana, *Toward the African Court on Human and Peoples’ Rights: Better Late than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45, 64 (2000).

76. Ssenyonjo, *supra* note 56, at 10.

77. Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, AU Doc. AU/LEG/MIN/AFCHPR Prot. 1 rev. 2 (June 1998), pmb. [hereinafter Protocol on the Establishment of African Court].

78. *Welcome to the African Court*, AFR. CT. ON HUM. & PEOPLES’ RTS., <http://en.african-court.org/> (last visited Mar. 28, 2018) [<https://perma.cc/9EFY-DJDU>].

79. Protocol on the Establishment of African Court, *supra* note 77, art. 1.

80. *Id.* pmb.

81. *Welcome to the African Court*, *supra* note 78.

82. *See* ADVOCACY BEFORE THE AFRICAN SYSTEM, *supra* note 53, at 110.

83. Protocol on the Establishment of African Court, *supra* note 77, art. 5(1).

84. *Id.* art. 5(3).

85. *Id.* art. 34(6).

from NGOs and individuals.<sup>86</sup> The lack of access to the Court is particularly problematic,<sup>87</sup> because “individuals and NGOs, and not the African Commission, regional intergovernmental organizations, or state parties . . . [would] be the primary beneficiaries and users of the Court.”<sup>88</sup>

B. *The Council of Europe’s Human Rights System: From a Multi-Tiered System to One Court*

The issue of access to an interregional human rights court is not unique to the African Court. The European system, established decades prior to the African system, previously dealt with the issue. Established by the Council of Europe,<sup>89</sup> the Convention for the Protection of Human Rights and Freedoms (European Convention) was opened for signature in 1950 and entered into force in 1953.<sup>90</sup> To safeguard human rights in its member states as laid out by the European Convention, the Council of Europe originally established a “tripartite structure” consisting of a Commission, a Court, and a Committee.<sup>91</sup> Since then, a series of protocols to the European Convention on Human Rights were adopted to improve and strengthen the supervisory mechanism.<sup>92</sup> Most significantly, Protocol 11, which opened for signature in 1994, merged the court and the commission into a single judicial body, which also allowed the court to receive petitions from individuals.<sup>93</sup>

---

86. These eight States are Benin, Burkina Faso, Cote d’Ivoire, Ghana, Mali, Malawi, Tanzania, and the Republic of Tunisia. *Welcome to the African Court*, *supra* note 78.

87. See *ADVOCACY BEFORE THE AFRICAN SYSTEM*, *supra* note 53, at 18.

88. Makau Mutua, *The African Human Rights Court: A Two-Legged Stool*, 21 *HUM. RTS. Q.* 342, 355 (1999).

89. The Council of Europe is a pan-European organization to which all European countries belong (except Belarus). This organization is not to be confused with the European Union, an economic and political union of twenty-five countries. See Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 *U.S.F. L. REV.* 1, 3–4 (2006).

90. The purpose of the European Convention was to give effect to the rights in the UDHR. *EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS* 3 (Feb. 2014).

91. Explanatory Report to Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, ¶ 9, May 11, 1994, C.E.T.S. 155 [hereinafter Explanatory Report to Protocol 11].

92. Protocols serve to add rights to the Convention or amend provisions of the Convention. To date, there have been a total of sixteen protocols. *THE ECHR IN 50 QUESTIONS*, *supra* note 90, at 3.

93. See Explanatory Report to Protocol 11, *supra* note 91, ¶¶ 1, 10–54.

## 1. Tripartite Structure: Commission, Court, and Committee

The original system set up by the Council of Europe, which entered into force in 1953, had a tripartite structure: a Commission, a Court, and a Committee.<sup>94</sup> The Commission was established to “consider the admissibility of petitions, to establish the facts, to promote friendly settlements and . . . to give an opinion as to whether or not the petitions reveal a violation of the Convention.”<sup>95</sup> The Court was established to “give a final and binding judgment on cases referred to it by the Commission or a Contracting Party.”<sup>96</sup> Finally, the Committee was established “to give a final and binding decision on cases which cannot be referred to the Court or which . . . are not referred to it.”<sup>97</sup>

## 2. Transformation of the System: The European Court of Human Rights

The tripartite system was transformed by Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby (Protocol 11),<sup>98</sup> which was opened for signature in 1994 and came into force in 1998.<sup>99</sup> “This Protocol made the system entirely judicial,”<sup>100</sup> establishing that a “single Court [would] replace two of the existing supervisory organs . . . [and] perform the functions carried out by these organs.”<sup>101</sup> Therefore, the European Commission and the European Court of Human Rights

94. *Id.* ¶ 9.

95. *Id.*

96. *Id.* Contracting parties did not include individual applicants, as this was still considered inappropriate at the time. *Id.* at n.2.

97. *Id.* ¶ 9.

98. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, C.E.T.S. 155 [hereinafter Protocol 11].

99. Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, 2004, C.E.T.S. 194 [hereinafter Explanatory Report to Protocol 14]. Implementation of the European Convention by a court in which individuals would have access was first discussed in 1948 at the Congress of Europe. The idea was revisited in July of 1949 by the European Movement, which submitted a draft of the European Convention to the Committee of Ministers. This draft, however, made mention of both a court and a commission. The debates preceding the establishment of both bodies resulted in the system that entered into force in 1953. Explanatory Report to Protocol 11, *supra* note 91, ¶¶ 6–9.

100. Explanatory Report to Protocol 14, *supra* note 99, ¶ 4.

101. Explanatory Report to Protocol 11, *supra* note 91, ¶ 26. The original Convention, prior to Protocol 11, gave the Committee of Ministers the power to decide whether a party had violated the Convention if the case had not been referred to the Court. Convention for the Protection of Human Rights and Fundamental Freedoms art. 32, Nov. 4, 1950,

became a single judicial body. A significant aspect of this merger was that the European Court could now receive individual applications directly. Prior to this merger, the Court could only receive applications from State parties or from the European Commission.<sup>102</sup> Protocol 11 amended Article 34 of the Convention to read:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.<sup>103</sup>

Ten years after the adoption of Protocol 11, the Council of Europe adjusted the system that had been set up to address the new realities of a single court system.<sup>104</sup> This adjustment was made through Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention (Protocol 14).<sup>105</sup> Protocol 14 became necessary because the system was receiving an influx of applications.<sup>106</sup> However, at the forefront in drafting Protocol 14 was the consideration that the proposed reform should not affect the rights of an individual applicant.<sup>107</sup> The changes that were adopted were therefore procedural, and not “radical” like that of Protocol 11.<sup>108</sup> Three changes to the Court’s procedure are worth noting. First, the filtering system of cases was made more efficient by giving one judge the competency to strike out or declare inad-

C.E.T.S. 005. Protocol 11 abolished the Committee’s competence under former Article 32 of the original Convention. Explanatory Report to Protocol 11, *supra* note 91, ¶ 26.

102. Convention for the Protection of Human Rights and Fundamental Freedoms art. 44, Nov. 4, 1950, C.E.T.S. 005.

103. Protocol 11, *supra* note 98, art. 34. This language is based on the former language of Article 25 of the original Convention, *supra* note 102, which gave the Commission the power to receive individual applications. Explanatory Report to Protocol 11, *supra* note 91, ¶ 85.

104. Explanatory Report to Protocol 14, *supra* note 99.

105. See generally Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, C.E.T.S. 194 [hereinafter Protocol No. 14] (amending the Convention for the Protection of Human Rights and Fundamental Freedoms to make the system better-equipped to adjudicate cases).

106. The influx was partially due to a general increase in applications, but also because thirteen new states had ratified the Convention between 1994—when Protocol 11 opened for signature—and the adoption of Protocol 14. These thirteen states added 240 million individuals under the protection of the Convention. Explanatory Report to Protocol 14, *supra* note 99, ¶¶ 5–6.

107. *Id.* ¶ 10.

108. *Id.* ¶ 35.

missible an individual application.<sup>109</sup> Second, a new admissibility requirement was added for individual applicants—Article 35 of the Convention now allows for the European Court to declare an application inadmissible if “the applicant has not suffered a significant disadvantage.”<sup>110</sup> The Council emphasized that this new requirement should be read to avoid “rejection of cases requiring an examination on the merits.”<sup>111</sup> Third, Protocol 14 addresses repetitive cases, empowering committees of three judges to rule on both the admissibility and merits of a case in one procedure when the application regards a question that is already well-established case law.<sup>112</sup>

### III. ANALYSIS

International human rights law mandates that “how a state treats individuals subject to its jurisdiction is . . . a matter of international concern.”<sup>113</sup> As the primary body for the promotion of human rights on the African continent, the African Union has made a commitment to end child marriage within its member states with the launch of its first Campaign to End Child Marriage in Africa.<sup>114</sup> Additionally, all African states are part of the United Nations, which has made ending child marriage by 2030 a specific target within the worldwide Sustainable Development Goals.<sup>115</sup> To advance the achievement of its goal of ending this recognized human rights violation, the African Union should facilitate access for NGOs and individuals to its primary human rights enforcement forum.

---

109. *Id.* ¶ 38.

110. *Id.* ¶ 39.

111. *Id.*

112. *Id.* ¶ 40.

113. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES PT. VII, INTRODUCTORY NOTE (1987).

114. See *African Union Launches Its First-Ever Campaign to End Child Marriage*, *supra* note 5.

115. The U.N. Sustainable Development Goals’ overall aim is to “end poverty, protect the planet, and ensure prosperity for all.” *Sustainable Development Goals*, UNITED NATIONS, <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last visited Mar. 28, 2018) [<https://perma.cc/3XJA-JLLT>]. To do so, seventeen goals have been laid out, and each contains specific targets to be met within fifteen years of September 2015. *Id.* Goal Five is “Gender Equality” which includes the target to “[e]liminate all harmful practices, such as child, early and forced marriage.” *Id.*

A. *Lessons Learned from the European Court of Human Rights*

The African Court, as a piece of a much younger human rights system,<sup>116</sup> can learn from changes that have taken the European system several decades to implement.<sup>117</sup> The European Convention's control mechanism is regarded as "the most effective international system for the protection of individual human rights to date."<sup>118</sup> Therefore, like the European Court, the African system should make modifications to allow for direct access to NGOs and individuals by repealing Article 34(6) of the African Court Protocol.

1. Direct Access to the African Court for Individuals and NGOs: Repealing Article 34(6) of the African Court Protocol

As currently established, the African Court Protocol does not give individuals or NGOs direct access to the African Court. These parties may reach the Court via two indirect methods—both of which are inefficient and outside the control of the parties. First, applications by individuals and NGOs may reach the Court through the African Commission. The African Commission accepts communications from any "person"<sup>119</sup> or from any NGO with observer status.<sup>120</sup> The communications may then only reach the Court if the Commission so chooses, or "deems [it] necessary."<sup>121</sup> This setup obstructs the possibility of individual and NGO applicants seizing the Court if they *themselves* deem it necessary. Second, applications by individuals and NGOs may reach the Court only in states that have made a declaration accepting the competence of the Court.<sup>122</sup> Currently, only eight states have made this

---

116. As noted in Part I, the African Court became operational in 2009; meanwhile, the European Court has been in operation since 1959. The African human rights system is also younger than the Inter-American system, making it "the youngest of the three judicial or quasi-judicial regional human rights systems." *African Human Rights System*, INT'L JUST. RES. CTR., <http://www.ijrcenter.org/regional/african/> (last visited Mar. 28, 2018) [<https://perma.cc/9VYQ-CJ86>].

117. The idea for a court to which individuals would have access is traceable back to the 1948 Congress of Europe. Explanatory Report to Protocol 11, *supra* note 91, ¶ 6.

118. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 792 (2006).

119. AFR. COMM'N RULES, *supra* note 70, r. 62.

120. *Id.* r. 63(1).

121. *See id.* r. 118(4) ("The Commission may seize the Court at any stage of the examination . . . if it deems necessary.").

122. Protocol on the Establishment of African Court, *supra* note 77, art. 34(6) ("The Court shall not receive any petition . . . involving a State Party which has not made such a declaration.").

declaration.<sup>123</sup> This leaves twenty-two state parties to the African Court Protocol who have not made the requisite declaration, and as a result, there are populations of individuals with no direct access to the Court.<sup>124</sup> In 2012, the majority of applications received by the Court were made against states who had not made the declaration, or who were not party to the Protocol.<sup>125</sup> These indirect methods are insufficient to safeguard the human rights of the continent's vulnerable populations. The President of the African Court stated that "without these ratifications [of the African Court Protocol] and the necessary declarations [under Article 34(6)], the protection afforded by the Court for human and women's rights on the continent will remain a mirage."<sup>126</sup>

In contrast, the European Court has opened its doors to individuals—a development recognized as a "key feature of the European system . . . one that is unique to the world . . . [and] an undeniable achievement hailed by all."<sup>127</sup> The Council of Europe, through the passage of Protocol 11, fully restructured the organization of its human rights system by abolishing the European Commission.<sup>128</sup> The Council of Europe made this change in favor of having a larger, more inclusive European Court.<sup>129</sup> The original process—a Committee proceeding and a Court proceeding—proved expensive and time-consuming for not only the parties, but also for the justice system as a whole.<sup>130</sup> In practice, the proceedings often resembled two *de novo* hearings.<sup>131</sup>

The right of individuals to petition directly before the European Court was a "victory slowly won"<sup>132</sup> and the African Court should not remain complacent while states are either not ratifying the African Court Protocol, or not making the Article 34(6) declara-

123. See *supra* note 86 (listing the eight states).

124. Cf. *African Human Rights System*, *supra* note 116 (listing the thirty countries that are state parties to the African Court Protocol). The twenty-two countries who have not made the declaration are Algeria, Burundi, Cameroon, Chad, Comoros, Congo, Gabon, Gambia, Kenya, Libya, Lesotho, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, the Sahrawi Arab Democratic Republic, South Africa, Senegal, Togo, and Uganda. Rwanda had made the declaration but later withdrew its acceptance of the Court's jurisdiction. *Id.*

125. ADVOCACY BEFORE THE AFRICAN SYSTEM, *supra* note 53, at 18.

126. Ssenyonjo, *supra* note 56, at 4.

127. EUROPEAN COURT OF HUMAN RIGHTS, TEN YEARS OF THE "NEW" EUROPEAN COURT OF HUMAN RIGHTS 1998–2008 SITUATION AND OUTLOOK 14–15 (2008) [hereinafter TEN YEARS OF THE NEW COURT].

128. Protocol 11, *supra* note 98.

129. See Explanatory Report to Protocol 11, *supra* note 91.

130. McKaskle, *supra* note 89, at 12.

131. *Id.*

132. TEN YEARS OF THE NEW COURT, *supra* note 127, at 14.

tion. Therefore, the African Commission should repeal Article 34(6) of the African Court Protocol, which currently reads:

At the time of the 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.<sup>133</sup>

Article 5(3) of the African Court Protocol, with the eliminated reference to Article 34(6), would read, “[t]he Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it.”<sup>134</sup>

The repealing of Article 34(6), unlike Protocol 11, would not eliminate the African Commission. Although the African Court is a better-suited forum for the enforcement and protection of human rights, the African Commission remains important as the primary human rights institute for the promotion of human rights by gathering research through state reports,<sup>135</sup> and interpreting the African Charter.<sup>136</sup> Additionally, the African Commission serves states in the African Union who have not accepted the African Court Protocol altogether.<sup>137</sup>

In repealing Article 34(6) of the African Court Protocol, the African Court may see an influx of applications—the European Court recorded a ninety percent increase in the number of applications received after passing Protocol 11<sup>138</sup>—and therefore,

133. Protocol on the Establishment of African Court, *supra* note 77, art. 34(6).

134. The current language of Article 5(3) directs that NGOs and individuals may reach the Court only in accordance with Article 34(6), which demands that a declaration must be made by the state in question. *Id.*; *see also* Section II.B. The Rules of Procedure of the Court would have to be amended as well to match the changes in the African Court Protocol. Currently, Rule 33(1)(f) states that individuals and NGOs are entitled to submit cases to the Court “provided the requirements of article 34(6) of the Protocol are met.” AFRICAN COURT ON HUMAN & PEOPLES’ RIGHTS RULES OF PROCEDURE r. 33. This phrasing would be eliminated from the Rule.

135. *See* AFR. COMM’N RULES, *supra* note 70, r. 62, 65.

136. African Charter, *supra* note 23, art. 45.

137. *See African Human Rights System, supra* note 116.

138. Although this is an assumption, it is based on the fact that when the Council of Europe made the “radical” change to the European system, the system received an influx of applications. Prior to 1998—the year in which Protocol 11 was passed—the Commission and the Court had given 38,389 decisions and judgments in forty-four years; meanwhile, the Court, after Protocol 11, gave 61,633 decisions and judgments in five years. *See* Explanatory Report to Protocol 14, *supra* note 99, ¶¶ 5, 35 (adopting figures published by the European Court of Human Rights in its Survey of Activities 2003 report). The African Court may not see that much of an influx because the European Court’s influx was caused

should implement several procedural mechanisms at the forefront. An advantage of the Council of Europe having previously made this change is that the African Court can utilize the mechanisms set out in Protocol 14 and adopt the ones that it deems fit for its own system. One particular mechanism is the use of “pilot judgments” for repetitive cases. In the European Court, a committee of three judges is able to rule on both the admissibility and the merits of a case in one procedure when the application regards a question that is already established case law.<sup>139</sup> In application, this procedure may allow the African Court to make a binding ruling on a child marriage petition disallowing a particular aspect of the practice or declaring a domestic law inconsistent with international law obligations. Future petitions from that country would then be efficiently admitted and decided on the merits by a smaller committee of judges, rather than the full bench.

### B. Utilizing the Modified System

A stronger, more independent regional human rights court will be beneficial for a wide range of human rights issues facing African states. Women and children, as the continent’s most vulnerable groups, may be particularly impacted by an increasingly open forum for enforcing human rights.

#### 1. Working with the States

The African Commission in its 2015–2019 Strategic Plans recognized that one negative development and recurring factor was “the lack of political will by State Parties in honouring their international human rights obligations and the enactment, retention, and application of repressive laws.”<sup>140</sup> This lack of political will is also demonstrated by the African Court’s current small caseload as states remain reluctant to bring claims for human rights violations.<sup>141</sup>

---

in part by the accession of new state parties. *See id.* ¶ 5. However, an influx is still expected.

139. *Id.* ¶ 40.

140. AFRICAN COMM’N ON HUMAN AND PEOPLES’ RIGHTS, ‘DELIVERING BETTER’: STRATEGIC PLAN 2015–2019 6, <http://www.achpr.org/about/strategic-plan/> (last visited Mar. 28, 2018) [<https://perma.cc/28Y8-8FYC>].

141. Manisuli Ssenyonjo, *Strengthening the African Regional Human Rights System*, in THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 455, 461–62 (Manisuli Ssenyonjo ed., 2012). *See generally* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT’L L. 611, 613 (explaining that states rarely litigate international rights of their own citizens or citizens of other states).

Therefore, the modification proposal would allow non-state actors to participate in the protection of human rights—actors less concerned with the political ramifications and potential exposition to the international community of human rights violations by states. In contrast to states and intergovernmental organizations, NGOs likely do not have political conflicts of interest,<sup>142</sup> nor do they have a reluctance to hold other states accountable.<sup>143</sup> NGOs can serve to “correct for the pathologies of governments and I[n]ternational O[rganizations].”<sup>144</sup> Further, opening up this regional human rights forum to NGOs will allow them to work more effectively, as oftentimes governments attempt to “limit or prevent their effective operation.”<sup>145</sup>

As international courts, such as the African Court, are strengthened, the issue of their effect on state sovereignty necessarily arises. Repealing Article 34(6) of the African Court Protocol imposes on states the Court’s jurisdiction without them having to make a formal declaration of acceptance. When the Council of Europe decided on Protocol 11, it took notice of this issue. The Council recognized that with the new mechanism, “the jurisdiction of the Court . . . [had become] mandatory” and a “de facto . . . condition for admission to the Organisation.”<sup>146</sup> The European Court over the years has developed what is referred to as the margin-of-appreciation doctrine, “which urges the Court to defer to a domestic judiciary’s assessment of whether there has been a breach of the [European] Convention.”<sup>147</sup> The doctrine has several limitations, including one for addressing violations of nonderogable rights.<sup>148</sup> If the African Court were to adopt a similar doctrine, African states could be assured independence for certain types of cases, just as in

---

142. Of course, not all NGOs “maintain clear boundaries” in staying out of political affairs. However, most recognize the importance of staying “detached.” Further, many NGOs are cautious about staying independent from governments, otherwise, their credibility and motives come into question. See HENRY J. STEINER, *DIVERSE PARTNERS: NON-GOVERNMENTAL ORGANIZATIONS IN THE HUMAN RIGHTS MOVEMENT, THE REPORT OF A RETREAT OF HUMAN RIGHTS ACTIVISTS* 70–74 (1991).

143. Michael H. Posner & Candy Whittome, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269, 272 (1994).

144. Steve Charnovitz, *Illegitimacy of Preventing NGO Participation*, 36 BROOK. J. INT’L L. 891, 894 (2010).

145. Posner, *supra* note 143, at 272–73.

146. Explanatory Report to Protocol 11, *supra* note 91, ¶ 85; see also Andreas Follesdal, *Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights—or Neither?*, 79 LAW & CONTEMP. PROBS. 149, 151 (describing the European Court as a “gatekeeper to the Council of Europe”).

147. Follesdal, *supra* note 146, at 154.

148. *Id.* at 155.

Europe the doctrine allows the European Court to “avoid some . . . controversial assessments.”<sup>149</sup> A large challenge for the European Court, which would largely be applicable to the African Court, was responding to different types of democracies of the different states.<sup>150</sup> Assistance by an international court can serve to equalize the level of human rights in regions containing states at different stages of democratic development.<sup>151</sup>

The role of states in eradicating child marriage is undeniable. Adequate laws regarding marriage age, a functioning birth and marriage age registration system, and strong national courts are all changes that need to be implemented at the domestic level. The European system has acknowledged this need to work with states in its jurisdiction as well, stating:

Any amelioration of the Strasbourg control mechanism<sup>152</sup> . . . will not in itself ensure real and effective protection of human rights within States Parties to the ECHR. Therefore, the success of the Strasbourg system is contingent on adequate human rights protection in member States (thereby short-circuiting or even totally eradicating the need to go to Strasbourg).<sup>153</sup>

Nevertheless, despite being signatories to numerous treaties banning child marriage, a majority of African states are not adequately working to solve the problem. As such, the African Court needs to be strengthened. The goal, as stated above, is “eradicating the need to go to Strasbourg,”<sup>154</sup> or in this case, the African Court; however, unless states are willing to actively meet international obligations, there will still be a mandatory place for the European Court and the African Court.

## 2. Working with the Girls

Repealing Article 34(6) of the African Court Protocol would give access to the African Court to two sets of people: women, including young girls, whose human rights are being affected directly, and

149. *Id.* at 160.

150. *Id.*

151. *Id.* at 152 (explaining that the European Court helps “strong, generally well-functioning democracies . . . correct their minor flaws,” but when new states joined the Council of Europe, the Court refocused its efforts to consolidate democracy.)

152. The European Court of Human Rights is located in Strasbourg, France and is often referred to as the Strasbourg Court. *European Court of Human Rights*, INT’L JUSTICE CTR., <http://www.ijrcenter.org/european-court-of-human-rights/> (last visited Mar. 28, 2018) [<https://perma.cc/5JUP-RUCF>].

153. Andrew Drzemczewski, *The European Human Rights Convention: Protocol No. 11 Entry into Force and First Year of Application*, 79/80 DOCUMENTAÇÃO E DIREITO COMPARADO 221, 246–47 (Nov. 16, 1999).

154. *Id.* at 247.

NGOs, who are in a good position to speak on behalf of these individuals.

NGOs focus their energy, research, and funding on specific issues, regions, and individuals to redress human rights violations, such as child marriage. Currently, there is more funding going into interventions of child marriages because of the regional commitment to end the trend,<sup>155</sup> making the present an ideal time for the African Court to recognize NGO petitions. Access by NGOs, in addition to individuals, is significant because of the social and physical barriers that women and girls may face in protecting their own human rights. Litigation is expensive and takes time. Women, as the sole caretaker for the children of the household, may simply not be able to take the time to petition for their own rights. Social stigma, particularly from “community and customary” gender-based norms that shape the day-to-day, may also disincentivize a woman from bringing her own claim seeking to address a practice that “runs deep into family networks and tribal relations.”<sup>156</sup> This is where NGOs step in. These organizations, by filing petitions on behalf of child brides, are well-versed in the law and can submit more meaningful and effective arguments to the Court.<sup>157</sup> By presenting before the Court petitions cognizant of the applicable legal standards, and better-equipped to help the individual child brides, NGOs improve the efficiency of the judicial process because the Court may receive fewer petitions that do not meet admissibility requirements.

The focus of various NGOs includes a variety of public interest issues, which will thereby create petitions addressing the various causes and consequences of child marriage. For example, some organizations focus on violations of human rights in terms of education,<sup>158</sup> which, as both a cause and effect of child marriage,

---

155. *What Progress Have We Made Towards Ending Child Marriage? Girls Not Brides Launches 5-Year Progress Report*, GIRLS NOT BRIDES (Sept. 21, 2016), <http://www.girlsnotbrides.org/progress-made-towards-ending-child-marriage-girls-not-brides-launches-5-year-progress-report/> [https://perma.cc/4YPM-QV8M].

156. Aparna Polavarapu, *Expanding Standing to Develop Democracy: Third-Party Public Interest Standing as a Tool for Emerging Democracies*, 41 YALE J. INT'L L. 105, 126–27 (2016). For example, a 2010 Amnesty International study revealed that women choose not to report sexual violence in part because of fear of the reaction of their community. AMNESTY INT'L, ‘I CAN’T AFFORD JUSTICE’: VIOLENCE AGAINST WOMEN IN UGANDA CONTINUES UNCHECKED AND UNPUNISHED 39 (2010).

157. Polavarapu, *supra* note 156, at 129.

158. For example, Room to Read focuses in part on empowering girls to complete secondary school and beyond in African countries in the south. *See About Us, ROOM TO READ*, <http://www.roomtoread.org> (last visited Mar. 28, 2018) [https://perma.cc/Y9LL-SWPK].

would ultimately help in decreasing the trend. In working with the Court to find states liable for disallowing girls to continue their education in violation of the African Charter and other international treaties, these organizations will decrease the rate of child marriage. As mentioned, child marriage and education are directly correlated—the higher the level of education reached by a girl, the more likely she is to resist and escape child marriage; conversely, marriage curtails a girl's education.<sup>159</sup> Similarly, public interest organizations that focus on reproductive health can hold states legally liable for discriminatory laws. NGOs are mobilized and ready to hold governments accountable for failing to comply with international and regional law and also often invoke rulings of international tribunals as support for further enforcement.<sup>160</sup> Therefore, NGOs can fill the gap with their own resources to file a public interest claim to advance this cause.

Though NGOs would be the primary users of the new Court system, it is imperative that the Court receives petitions from individuals as well, especially since the “right of individual petition is essential as a matter of principle. It symbolizes the recognition of the individual, no longer merely as an object, but as a subject of international law.”<sup>161</sup> A major component of a practice like child marriage, which denies women education and employment, is rooted in gender inequality. “[W]omen and girls are often *de facto* unequal before the law,”<sup>162</sup> therefore, the problem cannot be solved if they are not included in the international discussion. One “criticism of traditional human rights approaches . . . [is] the tendency of international policymakers to exclude women's experiences and women's voices.”<sup>163</sup> The decision to claim one's rights can therefore be a personal one, working to dispel “the image of a homogenized, essentialized African woman who is ‘powerless, constrained by tradition defined by men, unable to think clearly, and [has] only problems and needs, not *choices*.’”<sup>164</sup> Therefore, the right of a woman to petition the Court on her own behalf is one

---

159. Silva-de-Alwis, *supra* note 13, at 20.

160. Brice Dickson, *Protecting Human Rights through a Constitutional Court: The Case of South Africa*, 66 *FORDHAM L. REV.* 531, 566 (1997).

161. TEN YEARS OF THE NEW COURT, *supra* note 127, at 23.

162. Silva-de-Alwis, *supra* note 13, at i.

163. Tracy Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 *HARV. WOMEN'S L.J.* 89, 91 (1996).

164. Bettina Shell-Duncan, *From Health to Human Rights: Female Genital Cutting and the Politics of Intervention*, 110 *AM. ANTHROPOLOGIST* 225, 231 (2008) (emphasis added) (quoting Corrine A. Kratz, *Female Circumcision in Africa* (Encarta Africana CD-ROM, rel. 1999)).

step forward in giving women a legal voice in a system that has marginalized them.

### CONCLUSION

Sub-Saharan Africa presents the “most extreme scenario” for child marriage in the world, with the highest percentage of girls married without consent prior to turning eighteen years of age. Child marriage without the free and full consent of both parties is prohibited as a human rights violation by several international treaties, including the UDHR, the CEDAW, and the Children’s Charter. Not only is child marriage itself a human rights violation, but as a consequence, young girls are often prevented from continuing their education, suffer from inadequate healthcare after early pregnancies, and are trapped in a lifetime of economic servitude.

As a human rights violation, child marriage is approached from the vantage point of the African Union’s primary human rights enforcement forum: the African Court on Human and Peoples’ Rights. As currently established, the African Court has effectively prohibited direct access by individuals and NGOs. In contrast, the European Court of Human Rights, as the Council of Europe’s primary human rights forum, has opened its doors to individuals—a step that has been recognized as an uncontested modification. This move forward by the European Court provides a model for the younger African Court and gives credibility to the right of individual petitions in regional human rights systems. Therefore, Articles 5(3) and 34(6) in the controlling African Protocol of the Court should be amended and repealed to reflect a right to individual and NGO petitions. Modifying the African Court Protocol as such would open access to two sets of people: women and young girls, whose human rights are directly affected, and NGOs, who are in a good position to speak on behalf of these individuals.

A more accessible forum through the African Court on Human and Peoples’ Rights provides a legal solution that may be effective if utilized well by organizations defending the rights of female children; however, this is only one piece of the complicated puzzle to end this long-lasting custom in this region. Ensuring that these interactions with the African Court and the African Commission have a lasting impact “requires continued, coordinated efforts to ensure awareness . . . and maintain public and government support for reform or accountability.”<sup>165</sup> This solution needs to be effectuated.

---

165. ADVOCACY BEFORE THE AFRICAN SYSTEM, *supra* note 53, at 6.

ated as part of a multifaceted plan that includes other propositions such as reducing the cost and increasing the quality of schooling, and working with cultural and religious leaders who have the largest impact on some of the poorest regions of these states.