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Inaccessible Apexes: Comparing Access to Regional Human Rights Courts and Commissions in Europe, the Americas, and Africa Symposium: Comparing Regional Human Rights Regimes

Claudia Martin

Francoise Hampson

Frans Viljoen

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Inaccessible apexes: Comparing access to regional human rights courts and commissions in Europe, the Americas, and Africa

Françoise Hampson,* Claudia Martin,** and
Frans Viljoen***

The three well-established regional human rights systems (in Europe, the Americas, and Africa) aim to provide access to individuals to a decision and remedy based on the violation of human rights in the founding treaties. In this article, the notion of the “dispute pyramid,” developed in sociolegal studies, generally, is adjusted to describe and help us better understand regional access. Access differs considerably across the three systems, and its major stumbling blocks present themselves at different stages. In the European system, most cases are dismissed at the admissibility phase. In the Inter-American system, most cases are weeded out at the pre-admissibility phase, by the Commission’s Secretariat. In the African system, the greatest constraint to regional access lies in the small number of cases decided domestically. The general trend toward judicialization, observed in all three systems, does not necessarily imply greater access. In order to overcome the impediments to access at the domestic level, quasi-judicial bodies—cultivating rights awareness and understanding—still have a role to play.

1. Introduction

An important feature of the three well-established regional human rights systems is their common aim of providing access to individuals to a decision and remedy based on the violation of human rights within member states. Access to a system’s remedial promise may be limited due to deficiencies at the domestic level (thus inhibiting the submission of cases from the start) and to practices within regional bodies, such as excessive administrative culling, overly strict application of admissibility

* Emeritus Professor, School of Law, University of Essex. Email: fhampson@essex.ac.uk

** Co-Director of the Academy on Human Rights and Humanitarian Law and Professorial Lecturer in Residence, American University Washington College of Law. Email: cmartin@wcl.american.edu.

*** Director of the Centre for Human Rights, Faculty of Law, University of Pretoria. Email: frans.viljoen@up.ac.za.

requirements, or a reluctance of quasi-judicial bodies to refer cases to judicial bodies. Our study of access to the supervisory machinery of these systems (“regional justice”) aims to identify the particular bottlenecks that obstruct access in each of the systems, to explore reasons for any variances, and to derive insights that may improve access to regional justice. Increasing judicialization is a common feature of the three systems. This contribution also reflects on the implications for regional access of this trend.

Our article is limited in three significant respects: (i) It focuses on applications, communications, petitions, complaints, or cases (to which we refer as “cases”), submitted by individuals (or groups of individuals) and not interstate cases. Interstate cases are extremely rare¹; and admissibility criteria for interstate cases differ from those in respect to individual cases. (ii) It discusses contentious cases, and does not extend to the advisory role of institutions in these systems. (iii) It also does not encompass access to interim (precautionary or provisional) measures.²

In Europe, a single judicial institution, the European Court of Human Rights (ECtHR), established under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), has been in place since 1998. The Court’s caseload is staggering.³ In 2014, the ECtHR allocated 56,250 new applications to its three “judicial formations.”⁴ It finalized 86,063 cases, with either a judgment (on the merits) or a decision (on inadmissibility or to strike out).⁵ Still, a huge backlog remains, leading to significant delays in finalizing cases. However, as will be more fully discussed below, only a very small percentage of cases culminate in a remedial order by the ECtHR.

In the Inter-American system, a dual system, comprising the Inter-American Commission of Human Rights (IACHR) and Inter-American Court of Human Rights (IACtHR), is in place. Here too, petitions are numerous but do not nearly reach European levels. In 2014, the IACHR received 1,758 petitions but approved only forty-seven decisions on admissibility, referred nineteen cases to the IACtHR, and issued three merits decisions.⁶ The IACtHR in 2014 delivered sixteen judgments on

¹ A handful in the European system (*see, e.g.*, recent cases, *Ukraine v. Russia*, App. No. 20958/14, and *Ukraine v. Russia II*, App. No. 43800/14); two cases before the Inter-American system, one rejected by the IACHR (*Nicaragua v. Costa Rica*, Inter-State Case No. 1/2006, Report No. 11/07 (Mar. 7, 2007)) and one declared admissible and currently under processing (Franklin Guillermo Aisalla Molina, *Ecuador v. Colombia*, Inter-State Petition IP-02, Admissibility (Oct. 21, 2010)); and only one in the African system (*DRC v. Burundi, Rwanda and Uganda* (2004) Afr. Hum. Rts. L. Rep. 19 (ACHPR 2003), decided by the ACHPR).

² While the importance of and need for access to these measures is undeniable, the issues arising from these measures are quite distinct, and are much more pronounced in the Inter-American than in the other two systems. This assertion is based on the observation of the practice of all three systems, though so far no specific study exists documenting this practice.

³ Available at http://www.echr.coe.int/Documents/Stats_annual_2014_ENG.pdf (last visited February 15, 2018).

⁴ *Id.*

⁵ *Id.*

⁶ Available at <http://www.oas.org/en/iachr/multimedia/statistics/statistics.html> (last visited February 15, 2018). The IACHR received 504 requests for precautionary measures but granted only 33.

the merits.⁷ Obviously, also in this system access to the highest form of remedy, an order of the IACtHR, is very rare. Although the IACHR has a mandate under both the American Declaration of the Rights and Duties of Man (with respect to all OAS member states) and the American Convention of Human Rights (ACHR) (with respect to state parties thereto), this contribution looks only into its Convention-based mandate.

In Africa, the African Commission on Human and Peoples' Rights (ACHPR) has been in place since 1987, and with the election of the first eleven Judges in 2006, the African Court on Human and Peoples' Rights (ACtHPR) has been introduced. Compared to the other two systems, a handful of cases have been submitted to the Commission and Court. In almost a quarter of a decade, the ACHPR has only handled a total of 442 individual communications, of which 361 have been finalized.⁸ This number is a drop in the ocean, considering the pool of potential cases. It must be abundantly clear that some seventeen cases per year, in a vast continent comprising fifty-four state parties to the African Charter on Human and Peoples' Rights (ACHPR), is an unacceptably low caseload. By the end of 2015, the ACtHPR had issued four judgments on the merits and three on provisional measures.⁹

While numbers may impress, we caution against any conclusion that more is necessarily better. Rather, we try to explore the specific features of each of the systems that account for the various figures, while highlighting implications for access. In this contribution, access is considered along two axes: (1) access to what? (2) access by whom? Clearly, access to redress—the ability to participate effectively in the process whereby a remedy is identified—is also crucial, and linked to these issues. However, the issue of access to particular forms of redress falls outside the scope of this article.

2. Access to what?

Access to the regional machinery depends on first clearing the domestic hurdle, that is, seeking redress before domestic courts. Once this barrier has been negotiated, the case still has to proceed through the largely bureaucratized administrative pre-admissibility phase, before it may eventually reach the relevant Commission or Court, for consideration of admissibility. Access to a decision on the merits may result in a quasi-judicial or judicial decision, depending on whether the case ends up before a Commission, or a Court, if a two-tiered system is in place. The possibility of friendly settlement, and its implications for access, is also considered.

⁷ The IACtHR delivered thirteen judgments deciding the objections and merits of contentious cases, and three interpretative judgments; it further issued seven orders on monitoring compliance with judgment; and adopted three new provisional measures. See Inter-American Court of Human Rights, Annual Report 2014, available at <http://www.corteidh.or.cr/tablas/ia2014/ingles/files/assets/common/downloads/publication.pdf>.

⁸ See Commission's "Report on Communications" (ACHPR/53/OS/1204, presented at the Commission's 53rd ordinary session, April 2013, Banjul, The Gambia; by the end of 2012, the reported situation was as follows: a total of 426 cases, of which only 210 had been completed (see Combined 32nd and 33rd Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/782(XXII) Rev. 2, ¶19).

⁹ Available at <http://en.african-court.org/index.php/basic-documents#finalised-cases>.

2.1. Access to domestic courts

One of the main reasons for the limited regional access in most of Africa, in particular, is the small size of the pool of potential cases to be submitted, due to a lack of access at the domestic level. Regional access is propelled by the logic that regional mechanisms only come into play when cases before domestic legal systems had been unsuccessful in providing redress, as expressed in the exhaustion of the domestic remedies requirement. However, this logic falters if access to domestic remedies is illusory. Quite clearly, it would be extraordinarily difficult to research and quantify the exact depth of the pool of potential cases at the domestic level.¹⁰ It is more feasible to identify the *factors* impeding domestic access, which is attempted below. At the domestic level, only a fraction of potential “injurious experiences” ever end up as formally litigated claims.¹¹

Given the obligation to exhaust *domestic* remedies, any analysis of access to the regional machinery ought also to include, as a first step, the question of the “legal” awareness (or “rights literacy”) of alleged victims. Access to justice at the national level assumes a national legal culture in which at least some important wrongs are conceived and pursued as justiciable human rights violations. However, in most of Africa, and in at least some parts of Latin America, few people construct the injuries or wrongs against them as “cases” involving a legal issue about which something can be done. Where expectations of the rule of law and respect for human rights are low, the response to a possible human rights violation may be a shrug of the shoulders as “one of those things” or “only to be expected.”

African “legal culture” is not particularly litigious. Many African societies are poised between two cultural worlds, that of tradition (and recourse to political, diplomatic, administrative, or traditional dispute settlement) and that of modernity (represented by formalized Western courts).¹² This duality leads not only to a bifurcated system and divided loyalties but also to alienation due to the imposed nature of the law—and lawyer-dominated “adversarial legalism.” In traditional societies where one’s life world is determined predominantly by kinship relationships, the likelihood of individual legal recourse is limited. In these societies, the notion of acceptance of the leader’s authority is still deep-seated, and he is viewed as “personification of the moral and political order.”¹³ For those remaining attached to this world view, the post-colonial state is associated with performing this role, and should therefore not be confronted for fear of destabilizing the very order of things. In addition, people feel alienated from formal courts, which are seen as the preserve of a minority elite with proficiency in a European language.

¹⁰ See William L. F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 31 (1980/81); and Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983).

¹¹ Galanter, *supra* note 10, at 12.

¹² Tom Bennet, *Access to Justice and Human Rights in the Traditional Courts of Sub-Saharan Africa*, in AFRICAN PERSPECTIVES ON TRADITION AND JUSTICE 19, 34–38 (T. Bennett et al. eds., 2012).

¹³ E. Adriaan B. van Rouveroy van Nieuwaal, *Chiefs and African States: Some Introductory Notes and an Extensive Bibliography on African Chieftaincy*, 25/26 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1987).

The next step is the decision of the victim that he or she wants to do something about what has happened by getting a lawyer and by invoking the machinery of the law involved. Numerous factors impede access to a lawyer and courts. The legal profession in Africa is underdeveloped, and lawyers are quite scarce.¹⁴ Accessing formal legal processes is complex and requires professional intervention. Legal services are professionalized, cumbersome, and culturally alienating, and the fees are out of the reach of ordinary people. Pro bono legal services, which may serve as a safety net against unaffordability, are largely absent in less developed countries and, in particular, rural areas. A weak and overcommitted civil society generally lacks the resources to fill the gap. In most African societies, there are low literacy levels, in general, and low levels of rights awareness and ignorance of rights—even at the national legal system, not to mention at the regional. Even if a victim can afford access to a lawyer, the competence of that lawyer may be questionable.

A further step involves the need to institute domestic proceedings or appeal an adverse domestic decision. The often crumbling infrastructure, lack of qualified administrative staff, and unmotivated judicial officers due to inadequate remuneration, leading to inertia and delays, frustrate even those who approach the formal domestic legal system in their quest for justice. In authoritarian political dispensations, the prospects of successful access to courts may be dim due to a lack of an independent judiciary, or perception by nationals of corruption and that state organs routinely disregard judicial orders.

Once all these hurdles have been overcome but the case fails before a domestic court, the case may still *not* become the subject of regional justice because it is not re-imagined and re-constructed as a “regional case” due to a low level of awareness or interest in the regional human rights system—not only among ordinary people but also among lawyers.

Fair enough, these factors are not exclusive to Africa,¹⁵ and they also do not present themselves equally in Africa countries. Even if regional contexts differ, there are parallels. In the European system, the access of particularly marginalized groups and stigmatized minorities (Roma), battered women, and refugees is also seriously stifled, starting at the domestic level. The cost of recourse to law has also become a vital element in access to the Strasbourg machinery.¹⁶ Similar to the position in Africa, access to justice in Latin America is not ensured to a large portion of the population—especially the poor—as many studies of the region’s judicial systems show.¹⁷ In spite of ongoing judicial reforms, experts have consistently identified several obstacles as

¹⁴ See, e.g., N. A. Kahn-Fogel, *The Troubling Shortage of African Lawyers: Examination of a Continental Crisis Using Zambia as a Case Study*, 33 PA. J. INT’L L. 719 (2012).

¹⁵ See, e.g., Lisa R. Pruitt & Bradley Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466 (2014).

¹⁶ See *Airey v. Ireland*, App. No. 6289/73, Judgment (Merits) (Oct. 9, 1979); *Tolstoy Miloslavsky v. United Kingdom*, App. No. 18139/91, Judgment (Merits and Just Satisfaction) (July 13, 1995).

¹⁷ See José Thompson (coord.), *ACCESO A LA JUSTICIA Y EQUITAD. ESTUDIO EN SIETE PAÍSES DE AMÉRICA LATINA*, BANCO INTERAMERICANO DE DESARROLLO (2000); *EL ACCESO A LA JUSTICIA EN AMÉRICA LATINA: RETOS Y DESAFÍOS* (Helen Ahrens, Francisco Rojas Aravena, & Juan Carlos Sainz eds., 2015).

the underlying causes preventing individuals from obtaining redress to their human rights violations, including lack of information on the scope of their rights, economic barriers such as lawyer and court's fees, excessive formalism, procedural delays and geographical location of tribunals.¹⁸ Furthermore, language barriers and the insufficient protection of the rights of minorities, including Afro communities and indigenous groups, and other vulnerable groups such as persons with disabilities, children or LGBTI persons constitute additional hurdles impeding full access to the right to justice at the domestic level in the region.¹⁹

2.2. Beyond pre-admissibility: Access to regional bodies

If a case is submitted to the regional machinery, access to a decision on the merits may be thwarted even before the case reaches the admissibility phase. The fate of access is mostly determined at the pre-admissibility stage in the European and Inter-American system, but not so much so in the African system. It is estimated that in the European system 90 percent of the applications received are inadmissible.²⁰ Likewise, it is reported that of 17,466 petitions filed with the IACHR between 2002 and 2013, only 10 percent were accepted to be reviewed for their admissibility.²¹

One important difference between the European and Inter-American systems is that the right to individual petition under Article 34 of the ECHR has been interpreted as requiring that all decisions be made by a judge and such decision has been considered an integral part of the right to individual petition.²² In contrast, there is no practice at the Inter-American level ensuring that the right to individual petition involves review at every level by the IACHR itself, a group of commissioners or even a commissioner alone. Even if IACHR's Rules of Procedure have contemplated since 2000 the creation of a working group of admissibility made up of commissioners to study the admissibility of petitions in between sessions, such a group has never become operational.²³ Therefore, the Executive Secretariat of IACHR is in charge of carrying out the initial sifting of the petitions.

¹⁸ Roberto Gargarella, "Too Far Removed from the People." *Access to Justice for the Poor: The Case of Latin America*, at 3–5, available at http://www.ucl.ac.uk/dpu-projects/drivers_urb_change/urb_society/pdf_violence_rights/gargarella_removed_from_people.pdf.

¹⁹ See *inter alia* Marisa Ramos, *Algunas consideraciones teóricas y prácticas sobre el acceso a la justicia*, in *El Acceso a la Justicia en América Latina: Retos y Desafíos* 57 (Helen Ahrens, Francisco Rojas Aravena, & Juan Carlos Sainz eds., 2015); David Lovatón Palacios, *Experiencias de acceso a la justicia en América Latina*, 50 *REVISTA IIDH* 227 (2009).

²⁰ See *in this regard* http://www.echr.coe.int/Documents/Filtering_Section_ENG.pdf.

²¹ Nelson Camilo Sánchez et al., *El elefante en la sala. El retraso procesal en el sistema de peticiones individuales en el sistema interamericano*, *Desafíos del Sistema Interamericano de Derechos Humanos*, Due Process of Law Foundation, Septiembre 2015, at 243–244.

²² See *CDDH Contribution to the Ministerial Conference Organized by the United Kingdom Chairmanship of the Committee of Ministers*, adopted by the CDDH on February 10, 2012, ¶ 45, in *Reforming the European Convention on Human Rights*, Interlaken, Izmir, Brighton and Beyond, Council of Europe, March 2014, at 307.

²³ See Rules of Procedure of the IACHR, art. 35.

In the European system, the requirement that every application be registered and reviewed by a judge resulted in increased caseloads and unreasonable delays for responding to the applicants due to the inability of the ECtHR to deal with an ever growing number of petitions that reached its peak in 2011.²⁴ Consequently, additional measures were adopted to limit the number of cases proceeding to a judicial formation.

First, the allocation of cases to a judicial formation is preceded by a “pre-allocation” phase. The ECtHR has amended the rules on the lodging of applications, establishing stricter requirements for an application to be considered “valid.”²⁵ Failure to comply with those requirements results in the application not being allocated to any court formation for an admissibility decision,²⁶ unless in exceptional cases.²⁷ Moreover, the application needs to be complete before the expiration of the six-month time limit²⁸; otherwise, it will be rejected and the applicant will be prevented from arguing his case again.²⁹ The number of cases finalized at this stage has steadily increased, from 11,650 in 2009³⁰ to 25,100 in 2014.³¹ As stated before, in 2014, 56,250 cases were allocated to a judicial formation.³²

The Single Judge formation, introduced to deal with large number of applications at the first stage of the proceedings,³³ is complemented with a “filtering section” created at the ECtHR’s Registry to handle the cases from the countries with the great majority of applications against them.³⁴ A single judge may declare a case inadmissible “where such decision can be taken without further examination”³⁵; in other words, to “clear-cut cases, where the inadmissibility of the application is manifest from the outset.”³⁶ The single judge is assisted by a non-judicial rapporteur assigned by the ECtHR’s

²⁴ See CDDH, *Consolidated draft CDDH final report of the longer term future of the Convention system*, GT-GDR-F (2015)010, May 15, 2015, ¶ 62.

²⁵ See Rules of the ECtHR, art. 47.

²⁶ Available at http://www.echr.coe.int/Documents/Report_Rule_47_ENG.pdf.

²⁷ The exceptions include: (i) when the applicant has provided an adequate explanation for the failure to comply; (ii) the application concerns a request for an interim measure; (iii) the court otherwise directs of its own motion or at the request of an applicant. See Rules of the ECtHR, art. 47(5).

²⁸ Available at http://www.echr.coe.int/Documents/Report_Rule_47_ENG.pdf. Before January 1, 2014, it was sufficient to send a letter establishing the substantive elements of the petition to interrupt the six-month time limit.

²⁹ *Id.* The current practice requires that a full and complete application is filed before the six-month period and the date of the dispatch is what counts toward meeting that deadline.

³⁰ Available at http://www.echr.coe.int/Documents/Stats_analysis_2009_ENG.pdf.

³¹ Available at http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf.

³² See *supra* note 3.

³³ Article 27, as introduced by Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, ETS No. 194, adopted on May 13, 2004 and entered into force on June 1, 2010.

³⁴ This section was set up to follow up on the recommendations issued in the declaration resulting from the High level Conference on the future of the European Court of Human Rights at Interlaken on February 18–19, 2010. See in this regard http://www.echr.coe.int/Documents/Filtering_Section_ENG.pdf.

³⁵ See ECHR, art. 27(1).

³⁶ *Explanatory Report to Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, ¶ 67, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.

Registry, whose role is to provide a summary and analysis of the applications and justify their inadmissibility.³⁷ If the single judge agrees with the non-judicial rapporteur, he or she signs an approval sheet that is preserved at the Registry.³⁸ The decision is final³⁹ and there is no obligation to publish it.⁴⁰ The applicant whose case is found inadmissible is notified through a standard letter stating the ground for rejection.⁴¹ In most cases the reason cited to reject the application is that the petition does not disclose any appearance of a violation of the ECHR.⁴² No further reasoning or justification is provided.⁴³

In the Inter-American system, the initial assessment of the claims is done by the Executive Secretariat of IACHR, which reviews the application for compliance with the formal requirements needed for processing. In 2014, the Commission reported that 1,039 petitions were rejected for processing at the initial stage and only 284 were referred for an in-depth admissibility analysis.⁴⁴ If a petition does not meet the requirements, the Executive Secretariat may request that the petitioner satisfy them.⁴⁵ It takes an average of twenty-seven months for the Secretariat to carry out an “initial review” of the applications.⁴⁶ It is not clear if the petitioner is notified at the reception of the application or if the first contact takes place after the initial review is completed.

A section within the Executive Secretariat (the “Registry”) is in charge of processing all incoming petitions, determining whether “based on prima facie analysis,” the petitions establish a violation of a convention right, “whether domestic remedies have been exhausted, and whether the requirements necessary to file the petition have been satisfied.”⁴⁷ Thus, in practice, the Executive Secretariat has the power to reject applications *in limine* on a procedural or substantive basis, including that the complaint does not present a violation, is manifestly groundless, or is out of order. There is no available information regarding the decisions of those claims since the IACHR only makes them available to the applicant. However, it is known that the practice of the IACHR is to send a letter to the applicants rejecting their claim and basing its decision only on the admissibility provision that has not been fulfilled by the petition, in other words, without providing additional reasoning.

The practice in both the European and Inter-American systems of not providing any reasoning to support the rejection of the applications, compounded by the lack

³⁷ See CDDH Interim Activity Report, CDDH(2011)R72, add. 1, ¶ 7.

³⁸ *Id.* ¶ 8.

³⁹ See ECHR, art. 27(2).

⁴⁰ See Rules of the ECtHR, art. 33(4).

⁴¹ See Rules of the ECtHR, art. 52A(1).

⁴² Janneke Gerards, *Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning*, HUM. RTS. L. REV. 6 (2014).

⁴³ *Id.*

⁴⁴ See IACHR, Annual Report 2014, *supra* note 7, ch. II, at 51.

⁴⁵ The Rules also provide that if the Executive Secretariat has any doubt as to whether the requirements referred to have been met, it will consult the Commission.

⁴⁶ Initial review means the analysis carried out by the Secretariat to determine if the petition is not accepted for processing.

⁴⁷ See IACHR, *supra* note 44, ch. VI, Institutional Development and Administrative Affairs, at 670.

of publication of the cases that are declared inadmissible, may raise important questions as to the fairness of the decision and the impossibility of assessing whether sufficient time consideration is provided to all the applications.⁴⁸ This problem has been acknowledged by the Registrar of the ECtHR.⁴⁹ Also, in the Inter-American system such lack of transparency has been criticized by civil society and academic institutions since it gives the Secretariat excessive discretion and may involve a hidden obstacle for access to human rights victims, particularly those who lack representation or are represented by organizations or professionals without expertise in the system.⁵⁰ Certainly, when making an assessment of the IACHR's practice with respect to pre-admissibility it is important to consider that this organ is a quasi-judicial body, whose members are not full time and meet only three times a year for two regular sessions and one extraordinary session. Moreover, it is well documented that the IACHR is cash-strapped and has been facing severe resource issues for most of its history.

Another issue regarding the handling of petitions at the pre-admissibility level that it is worth mentioning is that both the ECtHR⁵¹ and the IACHR⁵² have adopted priority or fast-track policies to expedite treatment of certain cases depending on the urgency or systematic nature of the violations. The application of this rule has expedited the treatment of urgent cases according to a set of categories created by the ECtHR and also helped in addressing issues of a more systematic practice through the use of pilot judgments or other procedural measures.⁵³ In the Inter-American system, the new rule authorizes expediting consideration of a petition due to the age or health condition of the victim, the potential application of the death penalty, the relationship between the petition and precautionary measures already adopted in that case, whether the victim is deprived of liberty, that there is an express intention of the state to enter into a friendly settlement, or when the petition addresses a structural situation. The IACHR had already implemented these rules in practice before they were included in its Rules of Procedure.⁵⁴ Notwithstanding the importance of this practice,

⁴⁸ For a criticism of this practice and the subsequent consideration of cases rejected by the ECtHR and later considered by the Human Rights Committee, see Gerards, *supra* note 42.

⁴⁹ He stated that although giving further reasons to the single judge decisions could add to the workload of the Court, his office is exploring options to provide more standardized justifications to these decisions, once the backlog of these types of cases is dispensed of. *Written Presentation by the Registrar of the European Court of Human Rights*, GT-GDR-F(2015)15, September 6, 2014, at 2.

⁵⁰ Centro de Derechos Humanos, Facultad de Derecho Universidad de Chile, *Estudio: Acceso a la justicia en el Sistema Interamericano de Derechos Humanos*, at 26–27. Also, CEJIL, *Policy Paper, Proposal to Improve the Inter American System of Human Rights: CEJIL's Response to the Permanent Council's Document*, No. 6, at 14 (2012).

⁵¹ Article 41 of the Rules of the ECtHR provides: "In determining the order in which cases are to be dealt with, the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it. The Chamber, or its President, may, however, derogate from these criteria so as to give priority to a particular application."

⁵² In 2012 the IACHR adopted a priority policy to process cases through the procedural rule of "per saltum." See Rules of Procedure of the IACHR, art. 29.

⁵³ See http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

⁵⁴ IACHR, *Reply of the Inter-American Commission on Human Rights to the Permanent Council of the Organization of American States regarding the recommendations contained in the Report of the Special Working Group to Reflect on the Workings of the IACHR with a View to Strengthening the Inter-American Human Rights System*, Oct. 23, 2012, ¶ 116, available at <http://www.oas.org/en/iachr/strengthening/docs/RespCPEn.pdf>.

it may be asked whether the application of this policy would mean that only applications reflecting gross violations of human rights in certain states would be reviewed in a reasonable time,⁵⁵ or reviewed at all.

In the African system, the ACHPR's procedure foresees a process of "seizure" preceding the consideration of the admissibility of complaints. As in the other systems, cases are submitted to the Secretariat. The Secretary is responsible for a first screening of the complaint, to ensure that full contact information is on record, and that information is provided with respect to the admissibility grounds.⁵⁶ The Secretariat must contact the complainant to supplement missing data. When the Secretary is satisfied that the file contains all the necessary information, it is transmitted to the ACHPR for its decision on "seizure." Once the ACHPR has decided to be "seized," the complaint is sent to the state to provide its "observations on admissibility."⁵⁷

An analysis of available information indicates that in practice the seizure procedure has not been an impediment to access. For a long time, on the basis that the ACHPR had not rejected complaints at the seizure stage, it seemed to be redundant, prompting calls for the merger of seizure and admissibility (or, differently put, the abolition of seizure).

However, the ACHPR in 2013 adopted two formal decisions not to be seized.⁵⁸ In the first matter, submitted against the Democratic Republic of Congo, the responsibility of the state was not established. The second matter, ostensibly brought on behalf of the Kenyan President who at the time was indicted before the International Criminal Court, invokes the responsibility of the Kenyan government to have more diligently investigated the violence following a disputed election in 2007. In a finding resembling an admissibility decision in both form and substance, the ACHPR decided not to be seized on the basis that the complaint contained disparaging and insulting language. It also mentioned that there was no indication of steps taken to exhaust domestic remedies; and that the complaint failed to reveal a *prima facie* violation of the ACHPR. While these three factors all relate to admissibility criteria, the ACHPR added another ground: It expressed the view that "for a Complaint of this nature, consent of the Victims should have been sought" and should have been indicated by way of their signatures. This case seems to reveal the true purpose of the seizure phase. Mindful of the fact that the implication of an adverse seizure finding is that the complaint is never brought to the state's attention, it would appear that seizure was designed to allow the ACHPR to wash its hands of a politically contentious case.

2.3. Access to a decision on the merits

The principal potential barrier to obtaining a decision on the merits, once the case is before the relevant body, is its admissibility. However, we also consider briefly the question of friendly settlement.

⁵⁵ See in this respect the response to this issue by the Registrar of the Court, *supra* note 49, at 4–5.

⁵⁶ Rules of Procedure of the ACHPR, r. 93.

⁵⁷ Rules of Procedure of the ACHPR, r. 105.

⁵⁸ Pastor Key Mwand v. Democratic Republic of Congo, Comm. No. 457/13 (Nov. 5, 2013); Uhuru Kenyatta and William Ruto (represented by Innocence Project Africa) v. Republic of Kenya, Comm. No. 464/14 (ACHPR June 4, 2014).

(a) Admissibility

In the European system, only a small percentage of cases are declared admissible.⁵⁹ In 2014, for example, of the 86,063 cases disposed of judicially, 83,657 (or 97 percent) were declared inadmissible.⁶⁰ In the Inter-American system, of the relatively small number of petitions advancing to the admissibility phase, most are declared admissible. In 2014, for example, forty-seven (or 92 percent) were declared admissible, and only four (or 8 percent) inadmissible.⁶¹ The IACHR's practice of trusting the sifting of petitions at an early stage to the Executive Secretariat largely explains both the low number of cases reaching the IACHR and the small number of cases declared inadmissible after their full consideration.⁶² In the African system, a majority of the relatively small number of submitted cases are declared admissible. In 2014, for example, 73 percent of the cases under consideration were declared admissible.

Admissibility criteria are of three different types. The first type (such as the "exhaustion of domestic remedies" requirement) anchors the relevant treaty in international law generally or arguably reflects the legitimate interests of states. The second type (reflected in the "abuse of right" concept) depends on the behavior of the applicant. The third, relating to the substance of the case itself, is potentially a real barrier to access to a determination on the merits.

In ratifying the treaty, a state obviously accepts the obligations contained therein. Therefore, there can be no objection to the rejection of applications *ratione materiae*. Similarly, a state cannot be expected to be accountable for behavior not attributable to the state (incompatibility *ratione personae*). Such a decision is not always free of controversy.⁶³ These requirements are found in each of the three treaties. In the same category, although technically an issue of jurisdiction, is the requirement that the victim (not the alleged perpetrator) must be within the jurisdiction of the state. The ACHR and ECHR have such a requirement, but the AChHPR does not.⁶⁴

The requirement of exhaustion of domestic remedies is also a general rule of international law, and is found in each of the three treaties. It has the potential to be a barrier for applicants. Courts and commissions in all three systems have, through their jurisprudence, ensured that strict formalism is not allowed to trump the interests of justice.⁶⁵ One of the techniques to avoid formalism involves a shifting burden

⁵⁹ See generally DAVID HARRIS ET AL., HARRIS, O'BOYLE, AND WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 43 (3d ed., 2014).

⁶⁰ These applications were declared inadmissible or struck out of the list by a single judge, a committee, or a chamber. See ECHR, Analysis of Statistics 2014, at 6, available at http://www.echr.coe.int/Documents/Stats_analysis_2014_ENG.pdf.

⁶¹ See IACHR, Annual Report 2014, *supra* note 7, ch. II, at 58.

⁶² Another potential explanation is that petitions that have been accepted for consideration by the Executive Secretariat are left without being considered by the Commission due to the procedural backlog. See, in this regard, Sánchez et al., *supra* note 21, at 244–245.

⁶³ See, e.g., Behrami & Behrami v. France, App. No. 71412/01, Decision on admissibility (May 2, 2007), and Saramati v. France, Germany & Norway, App. No. 78166/01, Decision on admissibility (May 2, 2007).

⁶⁴ See ACHR, art. 1; ECHR, art. 1.

⁶⁵ See, e.g., Akdivar & others v. Turkey, App. No. 21893/93, Judgment (Merits) (Sept. 16, 1996); Velásquez Rodríguez v. Honduras, I/A Ct. H.R. (ser. C) No. 4, ¶¶ 63–66, Merits, Judgment of July 29, 1988. See also Community Maya Kaqchikel de los Hornos and El Pericon and its members v. Guatemala, Admissibility, Report No. 87/12, Petition 140/08 (IACHR Nov. 8, 2012), ¶¶ 33–34.

of proof. In the first instance, it is up to the applicant to establish that he or she has exhausted domestic remedies. If the state says nothing, that will be sufficient. If, however, the state provides evidence as to the existence of a genuine remedy, applicants will then have to establish why it was not a genuine remedy or why, in the circumstances, they were not obliged to exhaust it.⁶⁶ Nevertheless, the requirement imposes a significant burden on applicants. They have to pursue every avenue of appeal in relation to the remedy they have chosen, unless it would be demonstrably pointless. Much may depend on the availability of legal aid at the domestic level. The requirement of exhaustion of domestic remedies may be inevitable, legitimate, and reasonable, but that does not prevent it from being a restriction on access. Another way is to take into account the particular cultural characteristics of the applicants. For example, in the case of indigenous peoples the IACHR has consistently stated that these communities must exhaust only those remedies that contemplate the particular characteristics, either economic or social, of these groups “as well as their special situation of vulnerability, their customary law, values, uses and customs.”⁶⁷

It is too early to determine the approach of the ACtHPR, but the ACHPR seem to be following an approach similar to that of the other systems. In fact, the ACHPR has given an even more purposive and generous interpretation than have the other systems.⁶⁸ The ACHPR has consistently held that the requirement that “domestic remedies, if any” need to be exhausted means that only remedies that are “available” (which can be pursued without impediment), “sufficient” (capable of providing the required remedy), and “effective” (offering a real prospect of success) need to be exhausted.⁶⁹ The ACHPR has even gone as far as exempting complainants from this requirement in respect of systemic, widespread, and well-publicized violations, on the basis that the purpose of the requirement (namely, that a state should have notice and thus an opportunity to rectify the situation) had been served.⁷⁰

States may be argued to have a legitimate interest not to be required to defend the same case repeatedly or in different *fora*, based on the principle of *res judicata*. The related requirements of ACHR⁷¹ and ECHR⁷² are therefore unexceptionable. The equivalent in the AChHPR⁷³ is drafted much more loosely.

⁶⁶ See, e.g., Gustavo Giraldo Villamizar Durán v. Colombia, Admissibility, Report No. 99/09, Petition 12.335 (IACHR Oct. 29, 2009), ¶ 31; Velásquez Rodríguez, I/A Ct. H.R. (ser. C) No. 4, ¶ 64.

⁶⁷ Diaguita Agricultural Communities of the Huasco-Altinos and the members thereof v. Chile, Admissibility, Report No. 141/09, Petition 415-07 (IACHR Dec. 30, 2009), ¶ 45; Opario Lemoth Morris et al. (Miskitu Divers) v. Honduras, Admissibility, Report No. 121/09, Petition 1186-04 (IACHR Nov. 12, 2009), ¶ 34; Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and their Members v. Panama, Admissibility, Report 58/09, Petition 12.354 (IACHR Apr. 21, 2009), ¶ 37.

⁶⁸ See, e.g., Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 AM. J. INT'L L. 1 (2003); FRANS VIJJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 323–329 (2012).

⁶⁹ Jawara v. The Gambia, Comm. Nos. 147/95 and 149/96 (ACHPR May 11, 2000), ¶ 32.

⁷⁰ The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Comm. No. 155/96 (ACHPR Oct. 2001), ¶ 38.

⁷¹ ACHR, art. 46(1)(c).

⁷² ECHR, art. 35(2)(b).

⁷³ AChHPR, art. 56(7).

While the need for legal certainty, expressed in the requirement that legal action has to be brought within certain time limits, is well accepted, the length of that period is a matter of contestation. The ACHR and ECHR both require that the application be brought within six months of the final domestic decision (or receipt of the notification of the decision), or of the events said to constitute the violation where there is no domestic decision. The period will be reduced to four months in the case of the ECHR when Protocol 15 enters into force.

While the other two treaties are rigid in stipulating a six-months time limit, their African counterpart sets a flexible open-ended standard.⁷⁴ This difference seems to make much sense, taking into account factors such as low levels of legal literacy; low visibility and awareness of the regional system—particularly among African lawyers—and impediments in accessing domestic courts and a limited cohort of lawyers. While these factors may be present in all parts of the world, their impact is exacerbated in Africa. Any trend of the ACHPR interpreting the “unreasonableness” standard that elevates the time periods in the two other systems to some form of a yardstick for Africa should therefore be resisted. In a case against Zimbabwe, decided in 2008, it observed: “Going by the practice of similar regional human rights institutions, such as the Inter-American Commission and Court and the European Court, six months seem to be *the usual standard*.”⁷⁵ Although the ACHPR also states that it still adopts a case-by-case analysis, it does appear that its previously more flexible approach has become more rigid.⁷⁶ Instead of taking into account all relevant factors in establishing the reasonableness of the time period, the ACHPR now has reference to the period of delay, and if it considers it as unreasonable, the onus seems to be placed on the complainants to show good and compelling reasons why the case had not been brought earlier. This approach, which assumes the desirability of a period limit leaning toward six months, is therefore an example of inappropriate and a-contextual cross-regional interpretive borrowing. In subsequent cases, states have more routinely invoked this requirement. A number of subsequent cases have been declared inadmissible on this ground alone.⁷⁷ Although some of the periods of delay are in fact quite excessive, the risk now looms large that authoritarian governments may routinely convince the ACHPR to adhere to a strict (and a-contextual) approach and thereby contribute to the triumph of narrow formalism over substantive concerns.

⁷⁴ ACHPR, art. 56(6).

⁷⁵ *Majuru v. Zimbabwe*, (2008) Afr. Hum. Rts. L. Rep. 146 (ACHPR 2008) (emphasis added).

⁷⁶ See, e.g., *Lawyers for Human Rights v. Kingdom of Swaziland*, Comm. No. 414/12 (ACHPR July 24, 2013), ¶ 43 (thirty-four months considered unreasonable); *Article 19 and Others v. Zimbabwe*, Comm. No. 305/05, (2010) Afr. Hum. Rts. L. Rep. 126 (ACHPR 2010), ¶¶ 93–97 (twenty-four months considered unreasonable); *Darfur Relief and Documentation Centre v. Republic of Sudan*, Comm. 310/05, (2009) Afr. Hum. Rts. L. Rep. 193 (ACHPR 2009), ¶¶ 75–80 (twenty-nine months considered unreasonable).

⁷⁷ *Priscilla Njeri Echaria* (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya, Commun. No. 375/09 (ACHPR Nov. 5, 2011), ¶ 61 (thirty-one months considered unreasonable); *J.E. Zitha & P.J.L. Zitha v. Mozambique*, Comm. No. 361/08 (ACHPR Mar. 3, 2011), ¶ 114 (thirteen years found unreasonable); *Southern Africa Human Rights NGO Network and Others v. Tanzania*, Comm. No. 333/06 (ACHPR May 26, 2010), ¶ 76 (eleven years found unreasonable).

The second type of admissibility criteria involves the behavior of the applicant. As far as the victim is concerned, an application will be declared inadmissible if it is anonymous or an abuse of the right of petition. The ACHR refers to an application being “obviously out of order”⁷⁸ and the ECHR refers to an “abuse of the right of individual application.”⁷⁹ The AChHPR refers to the use of “disparaging or insulting language.”⁸⁰ The inclusion of this requirement speaks to the stronghold of sovereignty and the thin-skinned nature and sensibilities of those holding power in societies not very open to rigorous criticism. It is regrettable that it has in a number of cases played either a contributory or a determinative role in the ACHPR’s decision to declare a case inadmissible.⁸¹ A similar situation has, however, seeped into the European system, through the ECtHR’s interpretation of the “abuse of right” requirement. In a number of cases, the use of offensive language also leads to cases being declared inadmissible.⁸² However, the approach adopted is quite flexible and heavily influenced by withdrawal of offensive remarks.⁸³

It is the third type of admissibility criteria that raises the greatest potential problem for access. Under the ACHR, a petition has to be rejected if it is “manifestly groundless.”⁸⁴ Under the ECHR, it is inadmissible if it is “manifestly ill-founded.”⁸⁵ There is no express equivalent under the AChHPR. Unlike the other two types of criteria, this one is neither based on anchoring the applicable convention in international law generally nor based on the applicant’s behaviour. An *otherwise admissible* application is being denied a decision on the merits. Such a vague notion clearly gives the regional machinery an apparently wide margin of discretion. Much depends on how the phrase is understood. It is little help to know that it means the applicant must establish a *prima facie* case. Under the ECHR, the former European Commission used the criterion as a filter. In *Powell v. Rayner*,⁸⁶ the Commission delegate explained to the ECtHR how the Commission used “manifestly ill-founded.” He said that for “reasons of judicial economy,” they would find a case inadmissible where they thought the case was arguable but where they were certain they would find no violation on the merits. This enabled the Commission to avoid having to produce a report, while at the same

⁷⁸ ACHR, art. 47(c).

⁷⁹ ECHR, art. 35(3)(a).

⁸⁰ AChHPR, art. 56(3).

⁸¹ See, e.g., *Ligue Camerounaise des Droits de l’Homme v. Cameroon*, Comm. No. 65/92, (2000) Afr. Hum. Rts. L. Rep. 61 (ACHPR 1997), ¶ 13; *Ilesanmi v. Nigeria*, Comm. 268/03 (May 11, 2005), ¶ 40.

⁸² See, e.g., *Düringer and Others v. France*, App. Nos. 61164/00 and 18589/02, Decision (ECtHR Feb. 4, 2003); *Di Salvo v. Italy*, App. No. 16098/05, Decision (ECtHR Jan. 11, 2007) (personal attack against the government’s representative and had used expressions that the Court considered to be insulting); *Milan Rehak v. Czech Republic*, No. 67208/01, Decision (ECtHR May 18, 2004) (offensive language used toward the Court and Registry, in which applicant sought to achieve widest possible circulation of remarks). Contrast with *Manoussos v. Czech Republic and Germany*, App. No. 46468/99 (ECtHR July 9, 2002) (case not declared admissible, because use of offensive language was rare in voluminous submission; and ceased after the applicant had been warned by the Registrar).

⁸³ *Chernitsyn v. Russia*, App. No. 5964/02 (Apr. 6, 2006).

⁸⁴ ACHR, art. 47(c).

⁸⁵ ECHR, art. 35(3)(a).

⁸⁶ *Powell v. Rayner*, App. No. 9310/81, Judgment (Merits) (Feb. 21, 1990).

time finding that the state should have provided access to a domestic remedy to test the claim. The ECtHR rejected the argument and stated that a claim that was manifestly ill-founded could not be arguable (rather than finding that a claim that was arguable could not be manifestly ill-founded).⁸⁷

Like the European system, the IACHR assesses whether a petition presents an apparent or potential violation at the admissibility stage on the basis of a *prima facie* standard of review.⁸⁸ At this stage, the IACHR assesses whether there is a colorable or arguable claim, leaving the determination on the actual existence of the violation to the merits.⁸⁹ Also, on the basis of the principle of procedural economy, the IACHR rejects those petitions that it considers not to have a prospect of success.⁹⁰ Moreover, the IACHR uses the “fourth instance formula” to dismiss petitions in which this organ is called to substitute the domestic authorities in the application of domestic law or the assessment of evidence.⁹¹ The basic premise of the formula is that the IACHR “cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved.”⁹²

On the condition that the criterion of “manifestly groundless” or “manifestly ill-founded” is only used where it is absolutely clear that there is no violation on the merits, it probably does not represent a barrier to good cases. It is important, however, that if there is any doubt as to a violation on the merits, the case should be declared admissible and be subject to further consideration.

The final admissibility criterion only exists under the ECHR. It is much newer and was adopted in response to the crisis of the overloading of the Court. The application is to be declared inadmissible where the victim has not suffered a “significant disadvantage.”⁹³ That ground cannot be used where there has been no domestic consideration of the issue. This qualification will be removed when Protocol 15 enters into force. The Court can override this criterion where, in its view, respect for human rights requires it to do so.

(b) *Friendly settlement*

Friendly settlements are not per se an impediment to access. The goal of international dispute settlement is to resolve the dispute, not to provide a binding legal

⁸⁷ *Id.* ¶ 33.

⁸⁸ See, e.g., *Community Maya Kaqchikel de los Hornos and El Pericon, I/A Ct. H.R., Admissibility*, ¶ 44; *Rafael Rodríguez Castañeda v. México, Inadmissibility*, Report No. 165/11, Petition 492-08 (IACHR Nov. 2, 2011), ¶ 38.

⁸⁹ See, e.g., *Cristina Britez Arce v. Argentina, Admissibility*, Report No. 46/15, Petition 315-01 (IACHR July 28, 2015), ¶ 50; *Daniel Urrutia Labreaux v. Chile, Admissibility*, Report No. 51/14, Petition 1398-05 (IACHR July 21, 2014), ¶ 25.

⁹⁰ *Rafael Rodríguez Castañeda, Inadmissibility*, ¶ 44.

⁹¹ *Rolando Ernesto Gómez García y Bernarda Liliana Gómez García v. Honduras, Inadmissibility*, Report No. 121/12, Petition 764-03 (IACHR Nov. 13, 2012), ¶¶ 35–36; *Luis Guillermo Bedoya de Vivanco v. Peru, Inadmissibility*, Report No. 45/04, Petition 369-01 (IACHR Oct. 13, 2004), ¶ 41; *Edison Rodrigo Toledo Echeverría v. Ecuador, Inadmissibility*, Report No. 16/03, Petition 346-01 (IACHR Feb. 20, 2003), ¶ 38.

⁹² *Marzioni vs. Argentina*, Report No. 39/96, Case 11,673 (IACHR Oct. 15, 1996), ¶ 50.

⁹³ Article 35(3)(b) of the ECHR. See also Dinah Shelton, *Significantly Disadvantaged? Shrinking Access to the European Court of Human Rights*, 16 *HUM. RTS. L. REV.* 303 (2016).

judgment. This is a diplomatic function rather than a judicial one. It is therefore to be expected that the friendly settlement stage of a case will be confidential, even if the rest of the proceedings are public. It is not surprising that, particularly in the case of bodies established before human rights law had established itself as a distinct field of international law, the settlement of cases should have assumed a high priority.

However, if victims are somehow coaxed into settling cases, this procedure could constrain access to justice in the form of a remedy based on a decision on the merits. Inherent to this procedure is a risk that pressure would be put on the applicant. Given that there is no guarantee that the applicant will win the case, he or she may feel that “a bird in the hand is worth two in the bush.” On the face of the treaties, there is no suggestion that human rights bodies should put pressure on applicants to settle. Furthermore, the ACHR and ECHR, and the ACHR’s practice, require that a friendly settlement be based on respect for human rights. Nevertheless, it is not clear on whose initiative this process hinges; in other words, whether the regional mechanism is simply a mouthpiece for the transmission of the offers of the parties or whether they are expected to make their own proposal.

The question of friendly settlements made more sense as part of the original European Convention regime, in which the primary goal of the former European Commission on Human Rights was to effect an agreement between the parties. Being conducted on the basis of confidentiality, such proceedings fit less comfortably into the public justice regime of the ECtHR. While all proceedings before the Commission were confidential, those before the ECtHR are public. Nevertheless, friendly settlement proceedings are confidential.⁹⁴ Following the merger of the Commission and Court, the latter has assumed the friendly settlement function of the former.

There is no evidence suggesting that the ECtHR has coerced applicants to accept friendly settlement proposals.⁹⁵ However, given the need to ease its backlog, the ECtHR has resorted more extensively to striking applications out of its docket through the use of unilateral declarations.⁹⁶ Since unilateral declarations are proposed by states after an attempt to settle a case has failed, if not properly regulated and consistently applied, this instrument may be used to circumvent the wishes of the victims who cannot reject such declarations once the ECtHR has approved them.⁹⁷

⁹⁴ ECHR, art. 39(2).

⁹⁵ But there is evidence that at least in areas of established case law, the ECtHR limits itself to refer the applicant a specific financial proposal to settle the case, without taking into account other measures of redress beyond pecuniary reparation (Helen Keller & David Suter, *Friendly Settlements and Unilateral Declarations: An Analysis of the ECtHR’s Case Law After the Entry into Force of Protocol No. 14*, in *THE EUROPEAN COURT OF HUMAN RIGHTS AFTER PROTOCOL 14—PRELIMINARY ASSESSMENT AND PERSPECTIVES* (FORUM EUROPARECHT 22) 55, 89 (Samantha Besson ed., 2011)).

⁹⁶ Unilateral declarations are mostly used to handle repetitive cases and the ECtHR has established guidelines to deal with sensitive or complex cases. *See in this regard Unilateral Declarations: Policy and Practice*, http://www.echr.coe.int/Documents/Unilateral_declarations_ENG.pdf.

⁹⁷ *See in this regard a critical analysis to the use of unilateral declarations in non-repetitive cases and the risks that this situation may present in Dominika Bychawska-Siniarska, Unilateral Declarations: The Need for Greater Control*, 6 EUR. HUM. RTS. L. REV. 673 (2012).

Under the ACHR, the IACHR places itself at the disposal of the parties to settle the case.⁹⁸ The practice of the IACHR regarding friendly settlement has evolved throughout the years and these changes have been reflected in the different amendments to its Rules of Procedure.⁹⁹ The 2013 amendment to those rules provide that a friendly settlement may be initiated at any stage of the proceedings, including immediately upon the submission of the petition.¹⁰⁰ The process may continue only with consent of the parties and the IACHR plays the role of facilitator of the negotiations.¹⁰¹ The friendly settlement proceedings may be concluded if the IACHR “finds that the matter is not susceptible to such a resolution or any of the parties does not consent to its application, decides not to continue it, or does not display the willingness to reach a friendly settlement based on the respect for human rights.”¹⁰²

Depending on the different composition of the IACHR, the process of friendly settlements has been more or less instigated as a concerted effort to finalize pending cases.¹⁰³ It has become very clear in the last few years that states care very much about the friendly settlement proceeding and expect the IACHR to assume a more central and active role in advocating for the amicable resolution of pending cases.¹⁰⁴ If well implemented, the IACHR’s practice of friendly settlement shows that the resolution of a case through that mechanism may ensure effective access to justice and reparations for human rights victims.¹⁰⁵

If a friendly settlement agreement is reached between the parties, the IACHR issues a report reflecting the facts of the case as well as the terms of such agreement, and makes it public.¹⁰⁶ Once the friendly settlement report is published, the case cannot be referred to the IACHR in case of a state’s lack of compliance. This presents a challenge for the petitioners because by consenting to an agreement, they risk the possibility that if the state fails to respect its commitments there are no legal avenues to enforce such agreement. To improve that situation, the IACHR has established a follow-up mechanism to make an annual assessment of compliance with friendly settlement agreements and a public report of the outcome of such assessment.¹⁰⁷ However, to enhance reliance on this mechanism, the IACHR should either publish the report

⁹⁸ ACHR, art. 48(1)(f).

⁹⁹ See, in general, The Impact of the Friendly Settlement Procedure, OEA/Ser.L/V/II.Doc.45/13 (IACHR Dec. 18, 2013), ¶¶ 30–58 (describing the different amendments to the Rules of Procedure of the IACHR regarding friendly settlement proceedings).

¹⁰⁰ Rules of Procedure of the IACHR, art. 40.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Impact of the Friendly Settlement Procedure, *supra* note 96, ¶¶ 45–47, 55.

¹⁰⁴ See, *inter alia*, Propuesta de Proyecto de Resolución para el periodo extraordinario de sesiones de la Asamblea General y Anexo: Medidas para la Aplicación de las Recomendaciones contenidas en el Informe del Grupo de Trabajo Especial de Reflexión sobre el Funcionamiento de la Comisión Interamericana de Derechos Humanos para el Fortalecimiento del Sistema Interamericano de Derechos Humanos, OEA/Ser.G, CP/doc.4813/12 corr.1, Dec. 20, 2012, Sección 4: Soluciones Amistosas, at 35–36.

¹⁰⁵ Impact of the Friendly Settlement Procedure, *supra* note 99, ch. III.

¹⁰⁶ ACHR, art. 49.

¹⁰⁷ Rules of Procedure of the IACHR, art. 48.

once the terms of the agreement are complied with or keep other legal avenues, such as referral to the IACtHR, open with respect to cases in which the state fails to comply with its commitments.¹⁰⁸ Measures such as those described above should prevent states from abusing the mechanism as a political tool, while lacking a firm commitment to respect the terms of the agreement reached. The IACHR has acknowledged that states have failed to comply, for example, with measures of investigation and punishment of the perpetrators of human rights violations, indicating that only 21 percent of the agreements where these measures were accepted as part of the friendly resolution of a case were actually fulfilled by the state.¹⁰⁹

Friendly settlements have not played a prominent part in the African human rights system. On the one hand, friendly settlement in individual cases does not have a textual basis, as the ACHPR only requires friendly settlement in the context of interstate cases.¹¹⁰ Despite this lacuna, the ACHPR amicably settled a number of cases. On the other hand, the ACtHPR has an explicit legal basis enabling it to seek an amicable settlement in any case before it,¹¹¹ but it has so far not exercised this mandate. The notion of friendly settlement before the ACtHPR is complicated by the fact that the ACHPR is responsible for both facilitating friendly settlement, in respect of cases pending before it, and appearing as a party before the Court (as, for example, in the *Ogiek* case before the ACtHPR).¹¹²

A number of factors explain the surprising lack of prominence of friendly settlement in the African system, especially in the process before the ACHPR, given political invocations of African cultural biases tilting toward conciliation rather than confrontation in dispute resolution. First, there is a small number of cases within the available pool of cases to be “settled amicably.” Second, the relatively egregious nature of violations, linked to the undemocratic nature or many regimes complained against, may have left complainants unenthusiastic about the prospect of reaching such a settlement. Third, the complete lack of cooperation with governments, especially in the earlier years when the ACHPR’s practices were being established, largely precluded the exploration of this possibility. Fourth, the lack of settled cases is also explained by the lack of staff and resources at the level of the ACHPR’s Secretariat, taking into account that such a process may be protracted and labor-intensive, and depends in large part on administrative support to communicate and follow up with the parties.

2.4. Access to second tier

Access to the second tier is premised on the understanding that access to a judicial remedy is of greater (potential) benefit to litigants than quasi-judicial remedies. While

¹⁰⁸ See CEJIL, *Policy Paper*, *supra* note 50, at 22.

¹⁰⁹ See Impact of the Friendly Settlement Procedure, *supra* note 99, ch. III, ¶ 137.

¹¹⁰ ACHPR, art. 52.

¹¹¹ Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, art. 9.

¹¹² African Commission v. Republic of Kenya, App. No. 006/2012, pending consideration before the ACtHPR.

this assumption may be questioned, all three systems have evolved toward greater judicialization. Three models exist for accessing the “second,” judicial, tier: direct access; indirect access; and a hybrid between the two.

In the European system, the hybrid system of a quasi-judicial commission and judicial court morphed into a single judicial avenue to the ECtHR when the Commission became defunct in 1998. When it started, in 1950, the European system provided for optional acceptance of both the right to individual petition (to the Commission) and of acceptance of the ECtHR’s jurisdiction. The Commission could only start examining cases in 1955, when six states had accepted the right of individual petition.¹¹³ The required eight states accepting the ECtHR’s jurisdiction was only reached in 1958, causing the Court to be established in 1959. In 1966, the United Kingdom became only the second major European country, after Germany, to accept the ECtHR’s jurisdiction. Initially, the Commission was reluctant to submit cases to the Court, but later this became routine, culminating in the effective abolition of the Commission, with Protocol 11 in 1994, which entered into force in 1998, allowing all individuals in all state parties direct access to a single judicial institution.

In the Inter-American systems, only states and the IACHR may refer cases to the IACtHR. Judicial justice is thus accessed indirectly, with the Commission acting as gatekeeper. Initially, the IACHR exercised its discretion of referral very sparingly, and few cases reached the IACtHR. Although the IACtHR had been in place from 1979, the IACHR referred its first case (*Velásquez Rodríguez v. Honduras*, which had been submitted to the Commission in 1981), to the Court only in 1986.¹¹⁴ From 2001, however, with the introduction of a rebuttable presumption of referral,¹¹⁵ most merits decisions against states ended up before the IACtHR. In 2014, for example, the IACHR referred nineteen cases to the IACtHR,¹¹⁶ and published only three Article 50 reports (that is, merits reports that were not referred to the Court).¹¹⁷ Even if some debates took place in the early 2000s regarding the adoption of a protocol granting individuals the right to refer cases to the IACtHR, states never officially discussed this proposal.

The African system has elements of both of its predecessors. While, as a rule, applicants may approach the ACtHPR only indirectly, via the ACHPR, direct access to the Court is allowed, exceptionally, if a state makes a declaration to this effect.¹¹⁸ The ACHPR thus controls indirect access, while direct access is in the hands of the individual—provided the state has opened that door by making an optional declaration to that effect. By the end of 2015, of the twenty-seven state parties to the Protocol

¹¹³ Mikael Rask Madsen, *The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence*, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 42, 46 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011).

¹¹⁴ *Velásquez Rodríguez*, I/A Ct. H.R. (ser. C) No. 4.

¹¹⁵ Rules of Procedure of the IACHR, art. 45.

¹¹⁶ IACHR, Annual Report 2014, *supra* note 7, ch. 1, at 22.

¹¹⁷ *Id.*, ch. II.

¹¹⁸ Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights, art. 34(6). On the complementarity between the two institutions, see Annika Rudman, *The Commission as a Party Before the Court—Reflections on the Complementarity Arrangement*, 19 *POTCHESTROOM ELECTRONIC L.J.* 1 (2016).

to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, only seven have accepted direct access; and the four cases that the ACtHPR has decided on the merits had all been submitted directly to this Court.¹¹⁹ By the end of 2015, the ACHPR had not yet referred any case to the ACtHPR after it had taken a decision on the merits. Under its Rules of Procedure, it has a discretion, guided only by the non-compliance (and unwillingness to comply) by the respondent State, to do so.¹²⁰ The ACHPR has, however, submitted cases to the ACtHPR on other bases.¹²¹

3. Access by whom?

This question is investigated with reference to the party alleging a violation (applicant) and the possibility of *amici curiae*. Although access issues also arise in respect of NGOs, as well as the respondent and other states, these aspects are not covered in this article, given our focus on individual access.

3.1. Applicant

Impediments to access may also be linked to the person or entity submitting the complaint. The practice of the three regional institutions varies with regard to who can bring a case.¹²²

Answers to the question whether only the affected person (the “victim”) may submit a case or whether groups-based cases may be submitted differ across the three systems. A fortiori, a group of individual victims can submit a communication on behalf of the wider group to which they belong. While this logic has been followed in the African system, it is less fully accepted in the other two.

Under the AChHPR, a communication can be submitted by groups (as “peoples”) and by a person or group that is not itself the victim of the violation (in the public interest, *actio popularis*). The ACHPR's decision in *Social and Economic Rights Action Center and another v. Nigeria* (the *Ogoniland* case),¹²³ which dealt with the responsibility of the Nigerian government for oil pollution by the Nigerian National Petroleum Company, was based on a case brought by two NGOs, one based in Nigeria and one in the USA. These NGOs did not purport to be direct or indirect “victims” of the alleged violation; neither did they claim to represent a distinct or identified group of affected persons (a “class”). The admission of this case therefore illustrates the unequivocal acceptance by the ACHPR of cases submitted in the public interest (*actio popularis*).

¹¹⁹ *Mtikila v. Tanzania*, App. Nos. 9 and 11/2011, Judgment ACtHPR June 14, 2013); *The Beneficiaries of the Late Norbert Zongo and Others v. Burkina Faso*, App. No. 013/2011, Judgment (ACtHPR Mar. 28, 2014); and *Konaté v. Burkina Faso*, App. No. 4/2013, Judgment (ACtHPR Dec. 5, 2014).

¹²⁰ Rules of Procedure of the ACHPR, r. 118(1).

¹²¹ See, e.g., *African Commission v. Libya* (Provisional Measures case), App. No. 4/2001, Order for Provisional Measures (Mar. 25, 2011), ¶ 25; and *African Commission v. Libya* (Gaddafi's son case), App. No. 2/2013, Order for Provisional Measures (Mar. 15, 2013), ¶ 15.

¹²² See generally Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 *BROOK. J. INT'L L.* 911 (2010).

¹²³ *Social and Economic Rights Action Center*, Comm. No. 155/96.

The acceptance of an *actio popularis* is in line with textual framework of the AChHPR, which guarantees collective (peoples') rights as justiciable rights.

Under the ECHR, the notion of "victim" requires complainants to show that they are directly affected by the measure or practice complained of.¹²⁴ Indirect victims, namely, those "whom the violation would cause harm or who would have a valid and personal interest in seeing it brought to an end,"¹²⁵ may also lodge an application to the ECtHR.

While the ACHR appears to focus on the victim, it is possible for an individual to bring a case on behalf of his or her community, on the condition that the applicant is also a victim. So far the IACHR has avoided dealing with the collective nature of indigenous communities that have claimed violations to their collective rights by concluding, at the admissibility stage, that the victims in the cases were the individual members of the community,¹²⁶ or the community and its members as long as they were an identifiable group of individuals.¹²⁷ However, the IACtHR in the *Kichwa Indigenous People of Sarayaku* case seemed to have gone further by recognizing their rights "as collective subjects of international law and not only as members of such communities or peoples."¹²⁸ At the stage of determining redress, the IACtHR also considers redress for the affected community and not just the individual.

Even if access to the Inter-American system seems very broad and has been compared to an *"actio popularis,"* the Commission and the Court have established that petitions *in abstract* cannot be processed.¹²⁹ Both organs have stated that petitions lodged with the IACHR must identify a victim of the alleged violations or, under certain conditions, a potential victim.¹³⁰ The IACHR has defined potential victim as an individual who "is at imminent risk of being directly affected by a legislative provision."¹³¹

The ECtHR, by way of contrast, focuses entirely on the individual victim. It does allow an individual to represent family members, either in addition to the applicant or where the applicant is the next of kin of a deceased or seriously disabled family member. An applicant cannot, however, bring an application on behalf of a group of people. That not only prevents the use of the ECHR for *actio popularis* claims but also prevents an individual bringing a case on behalf of all the members of his community. Even if *actio popularis* is not accepted in the European system, potential victims, defined as those who have a demonstrated likelihood of being affected by a violation,

¹²⁴ ECtHR, Practical Guide on Admissibility Criteria, 14 (2014), available at http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

¹²⁵ *Id.*

¹²⁶ Indigenous Community Yakey Axa of the Enxet-Lengua People vs. Paraguay, Report No. 2/02, Petition 12313 (IACHR Feb. 27, 2002), ¶ 31.

¹²⁷ Xaxmok Kásek Indigenous Community vs. Paraguay, Admissibility, Report No. 11/03, Petition 322/01 (IACHR Feb. 20, 2003), ¶ 29.

¹²⁸ Kichwa Indigenous People of Sarayaku v. Ecuador, I/A Ct. H.R. (ser. C) No. 245, ¶ 231, Merits and Reparation, Judgment of June 27, 2012.

¹²⁹ Emérita Montoya González v. Costa Rica, Admissibility, Report No. 48/96, Case 11,553 (IACHR Oct. 16, 1996), ¶ 28; Maria Morales de Sierra v. Guatemala, Admissibility, Report No. 28/98, Case 11625 (IACHR Mar. 6, 1998, ¶ 31); Mario R. Chang Bravo v. Guatemala, Petition 283-06 (IACHR July 24, 2008), ¶ 39.

¹³⁰ Emérita Montoya González, Case 11,553, ¶¶ 28–29; Maria Morales de Sierra, Admissibility, ¶¶ 31–35.

¹³¹ Maria Morales de Sierra, Admissibility, ¶ 35.

may file a complaint.¹³² In principle, victims who choose to be represented must provide a duly signed power to a representative to act on their behalf.¹³³ Some exceptions apply, particularly in regard to victims who alleged violations to fundamental rights such as, *inter alia*, the right to life or to human treatment, in which case filing by a third party may be accepted.¹³⁴ Where an individual test case is brought, it has consequences for all those similarly situated,¹³⁵ thus mitigating the effect of the prohibition of *actio popularis* claims. Historically, the inability to bring communal claims has not been a problem, but it has increasingly become so, as cases have been brought from societies functioning more on a communal basis.

3.2. Amici curiae

All three systems allow amici curiae to make representations despite the silence in the foundational texts on this issue. The fact that this procedure was only included in subsequent procedural or operational rules speaks to the growth of interest by an ever broadening of accessibility in these systems. The ECtHR lacked any statutory basis allowing for amicus briefs until 1983, when its revised Rules permitted the Court's president, in the "interest of the proper administration of justice," to invite other states (not parties to the dispute) and "any other person" to submit comments.¹³⁶ Protocol 11 clarified and codified the applicable rules in relation to amicus curiae submissions by opening up possibilities where the president of the ECtHR may invite, or grant leave, to anyone concerned other than the applicants to submit written comments or, in exceptional cases, participate in the hearings.¹³⁷ Initially, the IACtHR's Rules only implicitly allowed for amicus briefs.¹³⁸ Later, the position was formalized and made explicit.¹³⁹ The Rules also specifically allow for amicus briefs during proceedings for monitoring compliance and provisional measures.¹⁴⁰ Although the Rules of Procedure of the IACHR do not clearly outline the applicable rules in relation to the participation of amici curiae, the IACHR generally welcomes their participation.¹⁴¹ The ACHPR's 2010 Rules of Procedure authorize the Commission to admit "any other person" to make presentations during oral hearings in individual communications.¹⁴² Before 2010, some ACHPR provisions were in the absence of an explicit legal basis interpreted to allow the ACHPR to accept amicus curiae submissions.¹⁴³ Also the

¹³² ECtHR, Practical Guide, *supra* note 124, at 16.

¹³³ *Id.* at 18.

¹³⁴ *Id.*

¹³⁵ See, e.g., *Dudgeon v. United Kingdom*, Eur. Ct. H.R. (ser. A) No. 45, ¶¶ 66–68, App. No. 7525/76, Judgment (Oct. 22, 1981).

¹³⁶ 1983 Rules of the ECtHR, r. 37(2).

¹³⁷ ECHR, art. 36(2), and Rules of the ECtHR, r. 44.

¹³⁸ 1980 Rules of Procedure of the IACtHR, art. 34(1).

¹³⁹ See Rules of Procedure of the IACtHR, art. 44.

¹⁴⁰ *Id.*

¹⁴¹ See, e.g., *Jessica Lenahan (Gonzales), et al. v. USA*, Report No. 80/11, Case 12.626 (July 21, 2011), ¶ 13.

¹⁴² Rules of the ACHPR, r. 99(8).

¹⁴³ ACHPR, arts. 46, 52.

ACTHPR, although not explicitly mandated to allow amici, can do so on the basis of its competence to obtain information or hear “any person” other than the parties.¹⁴⁴

A trickle at first, the submission of amicus briefs has increased markedly over the years in the European and Inter-American systems, but remains very limited in the African. Because of the complexity and novelty of the cases that reach the Grand Chamber of the ECtHR, the rate of participation of amici is particularly high in relation to cases decided by this Chamber.¹⁴⁵ According to a 2009 report, leave to intervene by way of written submissions to the ECtHR is almost always granted.¹⁴⁶ The IACtHR has an even more extensive “amicus practice” than its counterpart in Europe.¹⁴⁷ It appears that the IACtHR has never rejected an application to submit amicus curiae briefs. So far, cases before the IACtHR attracted an abundance of amicus curiae submissions.¹⁴⁸ Although only a handful of cases before the ACHPR have seen the participation of an amicus curiae,¹⁴⁹ judging by the meager data so far, their role before the ACTHPR may be more pronounced.¹⁵⁰

4. Conclusion

To explain the limited extent to which legal disputes are crystallized from a much larger universe of invisible, unquantifiable lower-layer “proto-disputes,”¹⁵¹ sociolegal scholars developed the notion of the “dispute pyramid.” We use an adjusted version of this notion to describe regional access. Starting at the broad base of disputes that could potentially be referred (with respect to which domestic remedies had been or need not be exhausted), the pyramid narrows toward its apex, as progressively fewer and fewer cases are (i) actually submitted, (ii) survive the pre-admissibility screening, and thereafter (iii) are declared admissible, culminating in only a minuscule number of cases reaching the “top”: (iv) decisions on the merits.

As the Table 1 below shows, access differs tremendously across the three systems, with the major stumbling blocks to access presenting themselves at different stages. As mentioned, the pyramid depicting regional access has a very broad base, representing the pool of potential cases. Of these, around 100,000 or more cases are submitted

¹⁴⁴ Rules of the ACTHPR, r. 27(3), 45(1).

¹⁴⁵ Laura Van den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, 31 NETHERLANDS Q. HUM. RTS. 271 (2013).

¹⁴⁶ JUSTICE “To assist the Court: Third party interventions in the UK” (2009) ¶ 46 <http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/To-Assist-the-Court-26-October-2009.pdf>

¹⁴⁷ Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*, 611 AM. J. INT’L L. 638 (1994).

¹⁴⁸ See, e.g., Application before the Inter-American Court of Human Rights in the case of Karen Atala and daughters (Case 12.502) v. Chile (IACHR), <http://www.cidh.oas.org/demandas/12.502ENG.pdf>.

¹⁴⁹ Frans Viljoen & Adem Abebe, *Amicus Curiae Participation Before Regional Human Rights Bodies in Africa*, 22 J. AFRICAN L. 32 (2014).

¹⁵⁰ See, e.g., Konaté v. Burkina Faso, App. 4/2013, where a group of more than ten NGOs collectively submitted an amicus brief; see also ¶¶ 141 and 143 of the judgment.

¹⁵¹ Felstiner, Abel, & Sarat, *supra* note 10, at 632.

Table 1. Regional access.*

	European**	Inter-American†	African††
Cases submitted (in 2014)	> 100,000	1,758	45
Cases surviving pre-admissibility screening (% of cases considered in 2014)	65 (<i>n</i> = 103, 800 of 160,600)	21.5 (<i>n</i> = 284 of 1,323)	80 (<i>n</i> = 39 of 49)
Cases declared admissible (% of cases considered in 2014)	2.8 (<i>n</i> = 2,388 of 86,063)	92 (<i>n</i> = 47 of 51)	73 (<i>n</i> = 24 of 33)

*The data presented here may be challenged for its accuracy, but in our view even minor differences of opinion on the data would not alter the bigger picture.

**Data from ECtHR, Annual Report 2014, *available at* http://echr.coe.int/Documents/Annual_Report_2014_ENG.pdf (last visited February 15, 2018): pre-admissibility: 25,100 disposed of administratively, 78,700 rejected/declared inadmissible without full consideration and judgment by single judge, 900 by Chambers, 4,100 by committees; leaving the latter group of 5,000 out, it is a total of 103,800; allocated to a judicial formation: 56,300 (together with 500), is a total of 56,800; in other words, a total of 160,600 is arrived at by adding 56,800 and 103,800. Of a total of 86,063 applications adjudged in 2014, judgments delivered on 2,388 admissible applications; 83,675 decisions on inadmissibility/struck out; thus, 2,388 of 86,063 (2.8 percent) cases declared admissible.

†Data from IACHR, Annual Report 2014, *supra* note 7: 1,323 decisions *whether* to process, with 284 *decisions to process* (thus, 21.5 percent of considered cases proceeding beyond pre-admissibility phase); four inadmissibility reports, forty-seven admissibility reports (thus, 92 percent of cases—forty-seven of fifty-one—considered for admissibility declared admissible).

††Data of the Commission’s 15th Extraordinary Session (EOS) (Mar. 2104); 16th EOS (July 2014); 17th EOS (Feb. 2015) is also included, because the 56th Ordinary session did not take place, due to the Ebola outbreak in West Africa; and 55th Ordinary Session (April–May 2014) has been used: a total of forty-nine cases were considered, of which ten were not seized or rejected due to a lack of diligent prosecution (thus, thirty-nine cases (80 percent) proceeded beyond the pre-admissibility phase); thirty-three cases were considered for admissibility, of which twenty-four (or 73 percent) were declared admissible.

to the ECtHR in any particular year; in the Inter-American system, in 2014, 1,758 petitions were received. By way of sharp contrast, the ACHPR over the same period recorded only forty-five new submissions.

In the European system, many applicants approach the ECtHR, but very few end up with a decision on the merits. A high percentage of cases (in 2014, 65 percent) proceeds to the admissibility phase, but very few cases (around 2.8 percent of cases that made it to this stage in 2014) are found to be admissible, and are thus considered on the merits. Even though the number of initial petitioners in the Inter-American system is much smaller, most of these cases are weeded out at the pre-admissibility phase, by the Secretariat of the IACHR. Only some 21.5 percent of submitted cases proceeded to the admissibility stage in 2014. Perhaps predictably, a high percentage of cases that proceed to be considered by the IACHR are declared admissible (92 percent in 2014), and lead to findings of violations against states. After some hesitance on the part of the IACHR to refer cases to the IACtHR, currently, almost all cases decided by the

Commission are referred to the Court. In the African system, the greatest constraint to regional access lies in the small number of submissions, to begin with. The number of cases arriving at the doorstep of regional mechanisms is so small because the pool of cases decided domestically is so tiny. A significant percentage of cases received survive pre-admissibility screening (in 2014, 80 percent), and are declared admissible (in 2014, 73 percent). No case on the merits has yet proceeded from the Commission to the Court by way of referral from the ACHPR.

Major impediments to domestic legal recourse largely account for the limited number of contentious cases decided by the African human rights system, but these factors are also—perhaps to a lesser extent—present in States making up the other two systems. The victim may not have access because the issue at hand is not regarded as appropriate for formalized judicial resolution at the domestic level. In other words, the overwhelming majority of people in Africa have no real access to the African machinery for a variety of reasons that have nothing to do with the admissibility conditions or the provisions of the AChHPR.

Steps therefore need to be taken to improve domestic implementation, to increase the chances of the problem being corrected at the domestic level. That requires a range of measures to be undertaken, starting with the effective mobilization of civil society to create greater awareness and provide accessible legal services. It is vital that international human rights machinery should not drown under the weight of cases submitted. The solution cannot be to consistently circumvent the exhaustion of the domestic remedies rule. Even if there are exceptions, these exceptions should not themselves become the rule. If domestic courts would as a matter of course be circumvented, the regional institutions would become “courts of first instance,” causing domestic courts to be eclipsed, and opening the regional system to charges of displacing democratic accountability and deliberation. Under the principle of subsidiarity, it is—in the first place—at the national level that regional guarantees have to be brought home, and implemented.

Our study shows that the level of regional access can only partly be attributed to the interpretation of the admissibility criteria. The admissibility criteria, which might constitute a significant barrier to access to the regional machinery, do not generally appear to do so in practice. The relevant bodies have largely taken seriously the admissibility criteria but have not been overly formalistic in their application. To a significant extent, this is attributable to the flexible way in which the commissions and courts have interpreted the requirement of exhaustion of domestic remedies. Still, in the European system, the criteria of “manifestly ill-founded” and “no significant disadvantage” contain the potential for abuse on account of the wide discretion they leave to judges. In the African system, even more so than in other systems, admissibility criteria have for many years not been applied restrictively. However, this trend seems to be somewhat reversed, recently, with the declaration of some cases as inadmissible, based on an a-contextual importation of the six-month rule as a quasi-standard.

The evolution of all three systems seems to suggest an inevitability toward greater judicialization, not only in the normative frameworks but also in their use. Still, as much as there is a common trend, the systems remains distinct, with direct access to

a single judicial institution (the ECtHR); direct access to a quasi-judicial and indirect access to a judicial institution (the IACHR and the IACtHR); and direct access to a quasi-judicial body, and both indirect and direct access to the judicial tier (ACHPR and ACtHPR). It is, however, questionable if an evolution toward greater judicialization necessarily enhances individual access. Arguably, the European system functioned better when there was a commission that had the most important role in decisions on admissibility and fact-finding, and a separate court, which concentrated principally on the decisions on the merits and just satisfaction. In the Inter-American system, the Commission may have better knowledge of the background of the factual circumstances because it may have been involved in engaging with states, conducted studies, undertaken on-site visits, and so on. In the African system, the need for the Commission's promotional activities is still very pronounced. This article identified the lack of rights awareness at the domestic level as a major cause of the paucity of cases submitted to the ACHPR and the ACtHPR. Because the determinants of this state of affairs are deep-seated, and likely to persist for a considerable length of time, the ACHPR, with its ambition of cultivating rights awareness and understanding, needs to remain in place for the foreseeable future. In fact, the ACHPR has in the recent past prioritized its promotional mandate with the effect of neglecting the complaints procedure. It is also possible that increasingly judicialization would render friendly settlements less common.

The overall impression is that progressive interpretations have steered all three systems toward greater individual access. In almost every respect possible, the machinery has overcome potential impediments of textual omissions and deficiencies to allow for an ever broadening pattern of accessibility in these systems. One common constraint relates to resources. The duration of time of sessions and the part-time or full-time tenure all have an impact on access, and largely depend on available resources. However, resource constraint should not be used deliberately to deny access to human right machinery altogether, and should not be an excuse for increasing restrictions on access.

Our analysis provides a picture of the present position on regional access to justice, informed by the past. The length of time for which an institution has existed and the nature of the early caseload makes a difference to its evolution. Just because a particular system lacks a certain feature does not mean that it will not do that in, say, twenty years' time. Access is fluid and evolves over time.