OPEN ACCESS

Scholars International Journal of Law, Crime and Justice

Abbreviated Key Title: Sch Int J Law Crime Justice
ISSN 2616-7956 (Print) |ISSN 2617-3484 (Online)
Scholars Middle East Publishers, Dubai, United Arab Emirates
Journal homepage: https://saudijournals.com

Review Article

The Coloniality of Access to Justice: Individual Standing and the Democratic Legitimacy of the African Court on Human and Peoples' Rights

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DOI: https://doi.org/10.36348/sijlcj.2026.v09i11.001 | **Received:** 07.09.2026 | **Accepted:** 31.10.2026 | **Published:** 07.11.2026

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Abstract

The African Court on Human and Peoples' Rights was established to strengthen continental judicial protection of human rights. However, access to its jurisdiction remains partly dependent on State consent. This paper examines whether the conditional nature of individual standing under Articles 5(3) and 34(6) of the Court Protocol affects the distribution of procedural authority which is between States, rights-holders and the Court. And what this reveals about the Court's democratic legitimacy twenty years after its establishment. The study employs doctrinal legal analysis, treaty interpretation, examination of the Court's jurisprudence and institutional analysis. Although it had limited comparative reference where relevant. Reading the Court's rules of access through the lens of coloniality and democratic legitimacy. The focus is on the connection between the substantive rights and the ability to bring a case before the Court at the continental level. The study shows that the Protocol does acknowledge that individuals are subjects of rights, but denies them the same and autonomous path to the Court in countries that do not accept or have withdrawn their declarations of Article 34(6). Although indirect access through the African Commission provides an alternative route, but referral remains institutionally controlled. It does not place the individual in the same procedural position as a direct applicant. The study therefore identifies a persistent State-centred distribution of procedural authority that can weaken the participatory dimension of the Court's legitimacy. It recommends stronger Commission referrals, greater acceptance of direct jurisdiction, safeguards for proceedings affected by withdrawal, and clearer limits around the use of State consent as a condition of individual access.

Keywords: African Court on Human and Peoples' Rights, Individual standing, Access to justice**,** Democratic legitimacy**,** Coloniality of law.

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1. INTRODUCTION

Twenty years after the Protocol establishing the African Court on Human and Peoples' Rights entered into force on 25 January 2004, the Court occupies an important, but still unsettled, place in Africa's human rights architecture. Created by the 1998 Protocol to strengthen the protection of human and peoples' rights, the Court was conceived to complement and reinforce the protective functions of the African Commission on Human and Peoples' Rights [1]. Its jurisdiction extends to disputes concerning the interpretation and application of the African Charter and other relevant human rights instruments accepted by the respondent State, giving continental adjudication a judicial dimension that the Commission's quasi-judicial structure could not fully provide African Court on Human and Peoples' Rights [2]. Over time, the Court has developed a substantial body of jurisprudence and increasingly addressed questions involving elections, fair trial rights, freedom of expression, indigenous peoples, property, and reparations. Yet twenty years is not only a point for institutional celebration. It is also a useful moment to ask who can actually activate this machinery of continental justice, under what conditions, and with whose consent.

[1] U O Umozurike, The African Charter on Human and Peoples' Rights, vol 2 (Brill 2023).

[2] African Court on Human and Peoples' Rights, Activity Report of the African Court on Human and Peoples' Rights (1 January–31 December 2024) (African Court on Human and Peoples' Rights 2024).

That question becomes particularly difficult when the position of the individual rights-holder is placed at the centre of the inquiry. The African human rights system recognises individuals as holders of rights, but recognition of a right does not necessarily produce an equally direct capacity to enforce it before the continental court [3]. Article 5(3) of the Protocol permits individuals and eligible non-governmental organisations to institute cases directly before the Court, but expressly subjects that possibility to Article 34(6). The latter requires a State Party to make a separate declaration accepting the Court's jurisdiction to receive such applications. Where the declaration has not been made, or has subsequently been withdrawn, the individual cannot simply approach the Court on the same terms as a State or the Commission. The practical consequence is stark: a person may possess a substantive human-rights claim without possessing an unconditional procedural pathway through which that claim can reach the continent's principal human-rights court. Viljoen [4] identified optional direct access as a central condition of meaningful access, while later scholarship has connected the architecture of Article 34(6) with wider problems of state disengagement and institutional legitimacy [5].

Existing literature has therefore examined individual access through questions of accessibility, State sovereignty, institutional design, judicial authority, compliance, and procedural effectiveness. These approaches are necessary, but they leave a deeper question insufficiently examined. Why should the exercise of a right recognised at the continental level remain dependent upon a further act of State permission before the individual can invoke continental judicial protection? The issue is not merely whether Article 34(6) creates a procedural obstacle. It concerns the distribution of legal authority between the State, the individual, and the regional judicial institution. Viewed through the concept of coloniality, this distribution deserves closer scrutiny. Coloniality, as Quijano [6] argues, concerns the persistence of structures of power and knowledge beyond the formal end of colonial rule. Applied cautiously to African human-rights adjudication, the concept directs attention to institutional arrangements that may reproduce hierarchical relationships between political authority and rights-bearing individuals even within formally postcolonial institutions.

Against this background, this article asks: To what extent does the conditional nature of individual standing before the African Court reproduce colonial patterns of state-centred access to justice, and what does this mean for the Court's democratic legitimacy after twenty years? It further examines how individual access has been institutionally constructed; how Article 34(6) mediates the relationship between individual rights and State consent; whether the resulting structure can meaningfully be understood through coloniality; and what its implications are for the Court's democratic legitimacy. The article argues that the conditional model of individual standing reflects a persistent State-centred structure of legal authority in which the enjoyment of substantive rights is not matched by an equivalent capacity to invoke supranational judicial protection. Viewed through coloniality, this disconnect exposes a deeper legitimacy problem which is the fact that a continental human-rights court cannot fully realise its democratic and emancipatory promise where primary rights-holders remain structurally dependent upon State consent to activate its jurisdiction.

The article employs doctrinal legal analysis, treaty interpretation, examination of African Court jurisprudence, and institutional analysis, with limited comparative reference where it assists the African analysis. Its contribution lies in shifting the debate from whether Article 34(6) facilitates or restricts access to a more fundamental inquiry into who possesses the authority to initiate continental justice. The argument does not treat State sovereignty as irrelevant; rather, it asks whether sovereignty should remain the decisive procedural gateway when the institution concerned was created to protect individuals against violations by States. This perspective brings access, standing, and legitimacy into the same analytical frame and provides a basis for considering reforms that could widen individual access while preserving legitimate concerns about institutional authority and the constitutional position of African States.

2. Conceptual and Theoretical Framework

2.1 Coloniality

Colonialism and coloniality describe different legal-historical conditions. Colonialism involved territorial occupation and direct political rule by an external power. [7]Coloniality refers to the institutional

[3] J M Mbaku, 'The Emerging Jurisprudence of the Africa Human Rights Court and the Protection of Human Rights in Africa' (2023) 56 Vanderbilt Journal of Transnational Law 367.

[4] F Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67(1) International and Comparative Law Quarterly 63 https://doi.org/10.1017/S0020589317000513.

[5]S H Adjolohoun and S Oré, 'Entre imperium illimite et decidendi timoré: La réparation devant la Cour africaine des droits de l'homme et des peuples' (2019) 3 African Human Rights Yearbook 318 https://doi.org/10.29053/2523-1367/2019/v3a16.

[6]A Quijano, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1(3) *Nepantla: Views from the South* 533.

[7] J Branch, '"Colonial Reflection" and Territoriality: The Peripheral Origins of Sovereign Statehood' (2012) 18(2) *European Journal of International Relations* 277.

arrangements and hierarchies that can survive the departure of the colonial administrator, including inherited assumptions about authority, knowledge, legal personality and whose interests deserve institutional protection [8]. The distinction matters here because the African Court should not be described as a colonial institution. The question is narrower and harder: whether coloniality persists in the institutional architecture through which Africans pursue continental justice.

The Protocol permits individuals to institute cases directly only where the respondent State has accepted that possibility. Article 5(3) provides that "the Court may entitle ... individuals to institute cases directly before it, in accordance with article 34(6)," while Article 34(6) provides that the Court "shall not receive any petition" against a State that has not made the required declaration [9]. A person whose rights have been violated therefore does not possess an unconditional continental forum. The decisive gateway remains a State's prior consent. The Charter itself places a duty on States: "Member States ... shall recognise the rights, duties and freedoms enshrined in this Charter [10]".

2.2 Coloniality and International Law

Anghie [11] argues that sovereignty itself was shaped through colonial encounters, while Chimni [12] describes international law as a field in which formal equality can coexist with enduring relations of power. The State consequently remains a principal gatekeeper of international legal authority, even though contemporary human-rights law has expanded the position of individuals as subjects of international law [13].

The African system illustrates this tension. Article 55 of the African Charter allows communications other than inter-State complaints to reach the African Commission, but their consideration remains subject to institutional screening, and Article 56 requires, among other conditions, exhaustion of domestic remedies [14]. The Court consequently sits within a layered structure: individuals may speak within the system, yet access to its judicial centre remains dependent on rules substantially mediated by States. Coloniality, on this account, is not located in the identity of the judges or the geographical location of the Court. It appears in the distribution of legal agency.

This does not mean that sovereignty is inherently illegitimate. States remain necessary actors in regional human-rights governance, and consent can serve legitimate constitutional purposes. The concern arises when State consent determines whether the individual rights-holder can reach the very court created to adjudicate those rights.

2.3 Decolonial and TWAIL Approaches

Third World Approaches to International Law (TWAIL) examines the historical and continuing relationship between international law and structures of colonialism, hierarchy and global power, drawing particular attention to how legal institutions affect peoples and States historically positioned at the margins of international legal ordering.

TWAIL offers a useful lens because it asks what international law looks like when viewed from the experiences of peoples historically placed at its margins. It asks that institutional rules be read alongside the power relations that produced and continue to shape them [15]. Three propositions guide this article. State sovereignty has historically structured international legal participation; political independence did not erase inequalities embedded in legal institutions; and access to international adjudication is itself a question of power.

That approach also prevents the easy assumption that African ownership automatically means decolonised law. The Court is an African institution created through regional legal instruments, and its jurisprudence protects individual and peoples' rights. Yet institutional provenance and institutional accessibility are not identical questions. A Court may be regionally owned while still operating through rules that place decisive control over individual access in the hands of States [16]. The tension is therefore constitutional rather than rhetorical.

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[8] R Bomfim and A G M F Bahia, 'Coloniality of Law: A Historical-Institutional Pattern of Power' (2022) 14(29) *Revista Videre* 113.

[9] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (1998).

[10] Organization of African Unity, *African Charter on Human and Peoples' Rights* (1981).

[11] A Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge University Press 2005).

[12] BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8(1) International Community Law Review 3 https://doi.org/10.1163/187197306779173220.

[13] JL Cohen, 'Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization' (2008) 36(4) Political Theory 578.

[14] Organisation of African Unity, African Charter on Human and Peoples' Rights (adopted 27 June 1981, Nairobi; entered into force 21 October 1986) arts 55–56.

[15] JT Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3(1) *Trade, Law and Development* 26.

[16] E Dursun, ME Yawar and A Amani, 'The Role and Importance of National Economic Law in the International Legal Order' (2025) 2(2) *EuroGlobal Journal of Linguistics and Language Education* 46 https://orcid.org/0000-0002-6255-1380.

2.4 Democratic Legitimacy

For this study, democratic legitimacy extends beyond elections. It concerns who can enter the Court's processes, how legal opportunity is distributed, and whether judgments provide remedies for rights violations. Input legitimacy asks who can initiate proceedings and participate. Procedural legitimacy concerns the intelligibility, openness and equality of the rules governing adjudication [17]. Output legitimacy concerns whether the institution can produce remedies for people whose rights have been violated.

Individual standing sits at the intersection of all three. If a victim cannot approach the Court because the respondent State has withheld its Article 34(6) declaration, the difficulty begins as an input problem. It then becomes procedural because the claimant's access depends on a rule over which the claimant has no control.

Finally, it affects output legitimacy where a regional judicial remedy exists in law but remains unavailable to the person seeking it. The Court's democratic credibility therefore cannot be separated from the architecture governing who may place a dispute before it.

2.5 Theoretical Proposition

The framework treats standing as a site where historical power relations become legally operational. The proposed sequence is shown in Figure 1. The argument is not that every restriction on standing is colonial, nor that individual access should be unlimited.

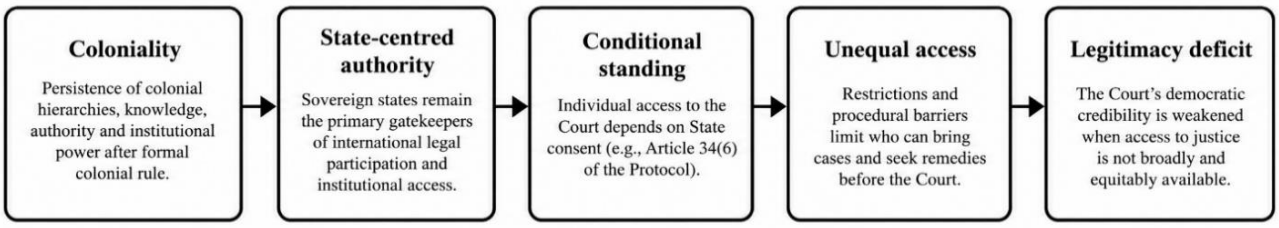


Figure 1: Analytical Framework Linking Coloniality, Conditional Standing and Democratic Legitimacy

The most critical argument is that a continental human-rights court derives part of its democratic legitimacy from the relationship between rights-holders and the institution established to protect those rights. Where that relationship is mediated by a State consent mechanism, the distribution of adjudicative power deserves scrutiny.

3. The Architecture of Access to the African Court

The architecture of access to the African Court begins with a legal instrument that was deliberately designed to expand, rather than replace, the African Charter system. Article 66 of the African Charter provides that "special protocols or agreements may, if necessary, supplement the provisions of the present Charter" [18].

The Protocol establishing the African Court was adopted in Ouagadougou in 1998 and entered into force on 25 January 2004 [19]. The Court therefore emerged as an institutional extension of the Charter's protective framework, intended to complement the African Commission rather than displace it. That relationship matters for access. Article 45 of the Charter assigns the Commission responsibility to "ensure the protection of human and peoples' rights under conditions laid down by the present Charter" [20]. The Protocol then adds a judicial dimension to that protective architecture. The result is a system in which the Commission and Court occupy related but distinct positions: The Commission provides the principal Charter-based avenue for complaints and promotion, while the Court supplies binding judicial determination within the limits of its jurisdiction. The institutional design is therefore complementary, but complementarity does not necessarily produce equality of access.

3.1 Who Can Access the Court?

Article 5(1) of the Protocol identifies the principal institutional applicants: The Commission; states that have brought or are subject to a complaint before the Commission; the state whose citizen is a victim; and African intergovernmental organisations. A state with an interest may also seek leave to join proceedings. This structure gives states and continental institutions relatively clear routes into the Court. Individuals occupy a different position.

Article 5(3) provides that "the Court may entitle relevant Non-governmental Organizations (NGOs) with

[17] G Yong, 'A Comparative Study on Procedural Adjudication' in *Criminal Procedural Trial in China: Procedure of Excluding Illegal Evidence as an Example* (Springer Nature Singapore 2024) 63.

[18] Organisation of African Unity, *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, Nairobi; entered into force 21 October 1986).

[19] A Sylla, 'Reforms of the African Union's Judicial System: Legal and Institutional Challenges Facing the African Court on Human and Peoples' Rights' (2022) 6 *African Human Rights Yearbook* 201.

[20] Organisation of African Unity, *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, Nairobi; entered into force 21 October 1986).

observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol" [21]. The apparently simple phrase "in accordance with" carries considerable constitutional weight. Direct standing is not generated by Article 5(3) alone; it is conditioned by Article 34(6). The individual therefore possesses a recognised procedural possibility, but not an unconditional procedural entitlement.

The distinction is particularly significant because the Court currently has 34 Protocol states, while only a small group maintain Article 34(6) declarations. The Court's own information confirms that the absence of such a declaration requires individual and NGO complaints to proceed initially through the Commission.

3.2 Article 34(6) as the Gatekeeping Mechanism

Article 34(6) is consequently more than a technical jurisdictional clause. It functions as the principal gatekeeping mechanism for direct individual access. It states: "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" [22].

The legal consequence is straightforward but institutionally uncomfortable. Ratification of the Protocol does not itself amount to acceptance of direct individual jurisdiction. The state must take an additional step before the rights-holder can approach the Court directly. As Tardzenyuy [23] argues, Articles 5(3) and 34(6) create a distinctive form of optional jurisdiction in which the declaration is separate from ordinary treaty ratification.

This arrangement places control over the opening of the judicial door principally in state hands. The rights-holder does not decide whether the Court may hear the complaint; the Court does not decide it at the threshold; and ratification alone does not settle the question. The respondent state's prior acceptance remains decisive. The distinction becomes even clearer when declarations are withdrawn. Scholarship has identified the unilateral character of Article 34(6) declarations as a structural weakness because they do not operate in precisely the same way as ordinary treaty obligations [24]. Recent scholarship likewise documents the continuing problem of states withdrawing or refusing the declaration [25].

3.3 Direct and Indirect Access

The system therefore operates through two different routes. Direct access follows the sequence individual or qualifying NGO to African Court, but only where Article 34(6) permits it. Indirect access follows individual to African Commission to African Court. Article 5(1)(a) expressly gives the Commission standing before the Court, creating a bridge between the two institutions.

That bridge is potentially significant because it prevents the absence of a declaration from completely extinguishing judicial possibilities. Yet the bridge is controlled institutionally rather than by the victim. The Commission must decide whether a matter should be referred. Recent research describes this referral function as severely underused and argues that its limited deployment has weakened the practical relationship between the Commission and Court[25]. Thus, indirect access preserves an avenue to continental adjudication, but it does not reproduce the autonomy associated with direct standing.

3.4 The Paradox of Rights Without Equivalent Standing

The architecture ultimately produces a doctrinal paradox. The African Charter speaks directly in the language of rights-holders: "Every individual shall have the right" to various protected rights [26]. Yet the institutional framework through which those rights are judicially enforced does not give every individual an equivalent capacity to invoke the continental court. A person may possess a substantive right under the Charter while lacking an independent procedural route to the institution designed to adjudicate its violation.

That gap matters for democratic legitimacy. A court established to protect individuals cannot derive

[21] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (adopted 9 June 1998, Ouagadougou; entered into force 25 January 2004).

[22] African Union, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, Ouagadougou; entered into force 25 January 2004).

[23] AD Tardzenyuy, 'The Folly of Asking States to Voluntarily Submit to a Higher Power Without Coercion: A Commentary on Article 34(6) of the African Court Protocol through the Lens of Realpolitik' (2026) 26(1) African Human Rights Law Journal 98 https://doi.org/10.29053/1996-2096/2026/v26n1a4.

[24] E Kassoti, 'Interpretation of Unilateral Acts in International Law' (2022) 69(2) Netherlands International Law Review 295.

[25] J Kaunda, 'Bridging the Gap in Individual Access to the African Court: The Role of the African Commission' (LLM mini-dissertation, University of Pretoria 2025).

[26] Organisation of African Unity, *African Charter on Human and Peoples' Rights* (adopted 27 June 1981, Nairobi; entered into force 21 October 1986).

legitimacy solely from the consent of states if the practical ability of those individuals to reach the Court remains dependent upon renewed state consent [27]. The problem is not that state participation is legally irrelevant; treaty jurisdiction necessarily involves consent.

The deeper difficulty lies in the unequal distribution of procedural power created by the architecture itself. The state participates in constructing the Court's jurisdiction and can determine whether direct individual access operates against it, while the rights-holder bears the consequences when that access is unavailable. Coloniality, in this sense, is visible not in the absence of rights, but in the institutional arrangement through which the exercise of those rights remains mediated by authorities positioned above the individual. The question for democratic legitimacy therefore shifts from whether the Court protects rights in principle to whether those whose rights it protects possess a sufficiently meaningful procedural relationship with the Court.

4. Individual Standing and the Coloniality of Access

4.1 From Access to Coloniality

An ordinary access-to-justice analysis would ask whether individuals can reach the African Court, what procedural barriers they encounter, and whether alternative routes remain available. Those questions matter, but they do not fully explain the deeper problem. A coloniality analysis asks a prior question: who has the authority to determine the conditions under which the rights-holder may participate in continental justice? This shifts attention from access as a procedural facility to access as a distribution of legal power. The distinction is especially relevant because the African Union's Constitutive Act expressly combines sovereign equality with popular participation, human rights and the rule of law [28]. Article 4(a) affirms "sovereign equality and interdependence" among member states, while Article 4(c) recognises "participation of the African peoples in the activities of the Union" and Article 4(m) requires respect for "democratic principles, human rights, the rule of law and good governance" [29]. The question, then, is not simply whether a door exists, but who holds the key.

4.2 The State as Gatekeeper of Individual Justice

Article 34(6) of the Court Protocol makes this distribution of authority unusually clear. It provides that a state "shall make a declaration accepting the competence of the Court to receive cases under article 5(3)" and that the Court "shall not receive any petition under article 5(3)" against a state that has not made such a declaration [30]. The Court's jurisdiction depends on a state declaration allowing individual rights-holders to bring cases before it. The state therefore occupies two positions at once. It may be the alleged violator of a right, yet it also determines whether individuals can bypass the state and approach the regional court directly [31].

That arrangement does not make state consent inherently illegitimate. International adjudication ordinarily rests upon consent, and African states retain sovereign authority under the Union's constitutive framework. The difficulty is more specific. Where the respondent controls an additional condition for direct judicial scrutiny, consent becomes a gate through which the rights-holder must pass. Tardzenyuy [32] consequently treats Article 34(6) as a significant structural problem rather than merely a technical jurisdictional rule. The Court itself confirms the practical consequence: where no declaration exists, an individual complaint must ordinarily proceed first through the African Commission.

4.3 Sovereignty and Postcolonial Statehood

The sovereignty dimension deserves a more careful treatment than simply describing state resistance as obstruction. African sovereignty carries a particular historical weight because contemporary states emerged from colonial rule within an international order that repeatedly subordinated African political authority. The insistence upon sovereign equality and non-interference in Article 4(a) and 4(g) of the Constitutive Act therefore cannot be dismissed as an institutional inconvenience [33].

Yet the same instrument commits the Union to human rights, democratic participation and the rule of law. The tension is consequently internal to the postcolonial legal order itself: sovereignty protects

[27] E Rubenstein, 'Conditionalized Sovereignty: The Permission-Based Citizen and the Asymmetry of Legal Maturity' (2026) 8(3) *International Journal for Multidisciplinary Research*.

[28] T Maluwa, 'Constructing African Union Law and Rethinking Supranationalism in African Integration: What Lessons from the European Union?' (2024) 21(2) *International Organizations Law Review* 335

[29] African Union, *Constitutive Act of the African Union* (adopted 11 July 2000, Lomé; entered into force 26 May 2001).

[30] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (adopted 9 June 1998, Ouagadougou; entered into force 25 January 2004).

[31] JM Mbaku, 'The Emerging Jurisprudence of the Africa Human Rights Court and the Protection of Human Rights in Africa' (2023) 56 *Vanderbilt Journal of Transnational Law* 367.

[32] AD Tardzenyuy, 'The Folly of Asking States to Voluntarily Submit to a Higher Power Without Coercion: A Commentary on Article 34(6) of the African Court Protocol through the Lens of Realpolitik' (2026) 26(1) *African Human Rights Law Journal* 98.

[33] African Union, *Constitutive Act of the African Union* (adopted 11 July 2000, Lomé; entered into force 26 May 2001).

African states from external domination, while regional adjudication asks those same states to accept institutional scrutiny in the protection of individuals.

Article 34(6) sits directly within that tension. Its design allows a state to accept the Court while withholding direct individual jurisdiction, thereby preserving a measure of sovereign control over regional adjudication. This was not an accidental consequence. Research on the Court describes optional direct access as part of its institutional design, permitting states to join the system without accepting its full exposure to individual litigation [34]. The critical issue is therefore not whether sovereignty should disappear, but whether a rights-protection institution can remain democratically responsive when sovereign consent determines whose claims may reach it.

4.4 The Coloniality of Legal Participation

Here the concept of coloniality adds something that conventional access analysis can miss. Coloniality need not reproduce itself through openly discriminatory rules. It can persist through institutional arrangements that determine who is authorised to participate, whose voice reaches the adjudicative forum, and whose interests remain mediated by another authority [35]. The individual is the substantive beneficiary of the Charter, yet direct activation of the Court may depend upon a decision made by the state against which the complaint may ultimately be directed.

The resulting problem is therefore one of legal participation. The decisive question is not merely whether an individual possesses a right to seek justice, but whether that individual possesses an autonomous capacity to activate the continental mechanism established to protect that right.

Where the answer depends upon state consent, participation remains mediated through governmental authority. The structure consequently reproduces a vertical relationship between the rights-holder and the state at the very point where regional human-rights adjudication was intended to provide an additional layer of accountability.

4.5 The Problem of Formal Equality

The apparent equality of the arrangement makes the problem harder to see. Individuals formally possess Charter rights; Protocol states formally possess equal sovereignty; and states formally possess the same legal option concerning Article 34(6). Yet equal formal rules can produce unequal procedural consequences. An individual in a state maintaining the declaration can approach the Court directly, whereas an individual with an otherwise comparable claim in a non-declaring state must depend upon the Commission's intervention.

This difference is not theoretical. The Court currently records 34 Protocol states but only seven Article 34(6) declarations, meaning that direct individual and NGO access remains geographically uneven across the continental system [36]. Formal equality between states therefore coexists with differentiated access for rights-holders.

4.6 State Withdrawal and the Fragility of Access

Withdrawal makes the location of legal power even clearer. Rwanda withdrew its declaration in 2017, Tanzania in 2019, and Benin and Côte d'Ivoire in 2020. Recent scholarship finds that these withdrawals were associated with different sovereignty claims rather than a single uniform objection. For instance, Rwanda focused on political opposition, Tanzania on the Court's jurisprudence, Benin on jurisdictional concerns, and Côte d'Ivoire on perceived effects upon domestic legal authority [37].

What matters for this article is what withdrawal reveals institutionally. A state can reduce the direct participatory capacity of individuals without leaving the Court Protocol altogether. The power to alter the practical relationship between the individual and the regional judiciary consequently remains concentrated at state level. The Court's decision in Hossou and Adelakoun v Benin further demonstrates that withdrawal raises difficult questions about sovereignty, consent and the procedural interests of individuals already within the Court's system [38]. The deeper coloniality problem therefore lies in the location of procedural authority: those who hold the rights do not necessarily control the legal mechanism through which continental accountability can be activated. That gap between substantive rights and procedural agency is central to the democratic legitimacy of the African Court.

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[34] KJ Alter, JT Gathii and LR Helfer, 'Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *European Journal of International Law* 293.

[35] OA Olajide, 'Coloniality and Racialization of Informality' (2025) 15(1) *Dialogues in Human Geography* 86.

[36] African Court on Human and Peoples' Rights, *African Court on Human and Peoples' Rights: Basic Information and Institutional Developments* (African Union 2026).

[37] KJ Alter, T Ginsburg and L McCall, 'International Courts and Sovereignty Politics: Design, Shielding, and Reprisal at the African Court' (2025) *Leiden Journal of International Law*.

[38] African Court on Human and Peoples' Rights, *Hossou and Adelakoun v Republic of Benin*, Application No 016/2020 (2021).

5. Standing, State Consent and Democratic Legitimacy

5.1 What Makes a Human Rights Court Democratically Legitimate?

The democratic legitimacy of a human-rights court cannot rest on treaty consent alone. Consent explains how jurisdiction is created, but it says less about how authority is experienced by those whose rights the institution exists to protect. A more complete account should therefore consider accessibility, participation, accountability, reasoned adjudication, effective remedies and institutional responsiveness. This approach fits the African Union's own constitutional vocabulary. Article 4(c) of the Constitutive Act requires "participation of the African peoples in the activities of the Union", while Article 4(m) requires "respect for democratic principles, human rights, the rule of law and good governance" [39]. The Court is therefore situated within a constitutional order that does not treat African integration as an exclusively state-to-state project.

This is important because the Court's legitimacy is ultimately tested at the point where an individual attempt to transform a claimed violation into a judicial proceeding. If that person cannot reach the Court without an additional act of governmental consent, formal institutional legitimacy and participatory legitimacy begin to pull apart. Viljoen [40] similarly observes that optional direct access is necessary for access to the Court, while the Commission's reluctance to refer cases has constrained indirect access.

5.2 Consent-Based Legitimacy versus Rights-Based Legitimacy

Two competing accounts of legitimacy consequently emerge. Under a consent model, the Court possesses legitimate authority because African states voluntarily negotiated, signed and ratified the Protocol [41]. Article 34(6) reflects this logic by requiring a separate declaration before individuals and qualifying NGOs can institute proceedings directly. State consent protects sovereignty and establishes a recognisable legal basis for judicial authority [42]. Removing that element entirely could raise a serious constitutional question: on what basis should a regional court exercise authority over states that have not accepted that particular form of jurisdiction?

The rights-holder model begins elsewhere. Its concern is that human-rights adjudication exists precisely because domestic political authority may fail the individual [43]. From this perspective, the legitimacy of the Court is strengthened when rights-holders can activate its protective jurisdiction without requiring renewed permission from the institution whose conduct they challenge. The two models should not be collapsed into a simple hierarchy. Treaty consent remains foundational to international adjudication, while rights-based legitimacy explains why an institution created to protect individuals may require meaningful individual participation. The difficulty arises where one form of legitimacy restricts the other.

5.3 The Democratic Deficit in Individual Standing

Article 34(6) creates a particular institutional distance between the Court and the individual. The Court currently records 34 Protocol states, yet only seven have deposited declarations accepting direct applications by individuals and NGOs. Thus, an individual's procedural relationship with the Court depends significantly upon the constitutional choice made by the state concerned.

That arrangement produces a democratic deficit in a specific sense. The individual whose rights are adjudicated has less control over access than the state whose conduct may be examined. Civil society occupies a similarly conditional position. The problem is not that judges lack democratic mandates in the conventional electoral sense; courts are not legislatures. Rather, the issue concerns participatory legitimacy: whether the people who stand to benefit from regional rights protection possess a meaningful capacity to initiate the process through which that protection is sought. The Court's experience with direct-access litigation demonstrates why this matter. Its direct-access model has generated considerably more contentious litigation than would be possible where every individual claim first depended upon Commission referral [44].

5.4 Judicial Independence and State Consent

The strongest counterargument is straightforward. If states surrender control over the conditions of jurisdiction, regional adjudication may become detached from the sovereign constitutional

[39] African Union, *Constitutive Act of the African Union* (adopted 11 July 2000, Lomé; entered into force 26 May 2001).

[40] F Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67(1) *International & Comparative Law Quarterly* 63 https://doi.org/10.1017/S0020589317000513.

[41] R Buchan and N Tsagourias, 'Intervention by Invitation and the Scope of State Consent' (2023) 10(2) *Journal on the Use of Force and International Law* 252.

[42] T Berry, *Sovereignty and the Limits of International Law: Regulating Areas Beyond National Jurisdiction* (Taylor & Francis 2023).

[43] A Fagan, 'The Subject of Human Rights: From the Unencumbered Self to the Relational Self' (2024) 42(2) *Nordic Journal of Human Rights* 215 https://doi.org/10.1080/18918131.2024.2339012.

[44] F Viljoen, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67(1) *International & Comparative Law Quarterly* 63 https://doi.org/10.1017/S0020589317000513.

orders that created it [45]. In an African setting, that concern cannot simply be dismissed. Sovereignty has a postcolonial dimension: African states achieved formal independence in circumstances where external powers had exercised extensive authority over their political and legal institutions. Sovereign equality therefore remains a significant principle within African international law.

The African Union itself holds these principles together. Article 4(a) of the Constitutive Act recognises "sovereign equality and interdependence among Member States", while Article 4(c) simultaneously recognises popular participation and Article 4(m) protects human rights and the rule of law [46]. The question is consequently one of constitutional balance rather than simple displacement of sovereignty. Recent research on the African Court's experience reinforces this point. Ravn, Plagis, and Madsen [47] show that Rwanda, Tanzania, Benin and Côte d'Ivoire withdrew their Article 34(6) declarations, but the political and legal reasons differed across the four cases. State consent, therefore, is not merely a technical foundation of jurisdiction; it remains an active site of negotiation over the reach of regional judicial power.

5.5 The African Court's Unique Democratic Context

The legitimacy question should not be answered by importing European assumptions about regional courts and treating the African Court as an institutional replica of the European system. The African Court operates within a continental order shaped by colonial rule, postcolonial sovereignty, Pan-African integration and constitutional pluralism [48]. Its democratic legitimacy must consequently account for both the historical importance of state sovereignty and the contemporary claim that African peoples should participate in continental governance.

The Court's future legitimacy may therefore depend less on choosing between state consent and individual access than on constructing a relationship between them that neither renders sovereignty meaningless nor makes rights procedurally dependent upon the continuing permission of the state. The existing architecture already points towards that possibility. Article 4 of the Constitutive Act combines sovereignty with popular participation and human rights; the Court Protocol combines state jurisdictional consent with a potential route for individual litigation.

The unresolved question is whether that combination can develop into a genuinely participatory form of continental justice. In that sense, individual standing is not merely a procedural question. It is a constitutional question about who participates in the exercise of judicial power, who can call a continental institution to account, and how the authority of that institution is justified to the people whose rights it exists to protect.

6. Twenty Years of Practice: What the Court's Experience Reveals

The African Court entered its twentieth year in 2026 with a record that is considerably more substantial than its early institutional fragility might have suggested. At the anniversary of its establishment, the Court reported more than 370 cases handled since 2006, alongside a body of judgments addressing electoral participation, vulnerable groups, dignity, life and other Charter rights. The jurisprudence therefore provides useful material for testing the argument developed here. The question is not whether the Court has mattered. It plainly has. The harder question is what its twenty years reveal about the relationship between judicial authority and the conditions under which individuals can activate that authority.

6.1 Twenty Years of Jurisprudential Development

The early cases already exposed the Court's potential to become a genuinely accessible continental judicial institution. In Tanganyika Law Society and Legal and Human Rights Centre v Tanzania and Mtikila v Tanzania (2013), the Court addressed questions of political participation and constitutional rights, while Konaté v Burkina Faso (2014) became significant for freedom of expression and proportionality in the context of criminal defamation. Later proceedings, including Ingabire Victoire Umuhoza v Rwanda and Ajavon v Benin, further demonstrated that individual applicants could place politically sensitive claims before a continental judicial body. The cases are significant not simply because of their outcomes, but because they established that individual litigation could generate authoritative interpretations of African human-rights norms.

6.2 The Court as an Institution of Rights Protection

This record cautions against treating the Court as an institution whose principal characteristic is restricted access. Its jurisprudence has progressively

[45] M Rusco, 'Oklahoma v Castro-Huerta, Jurisdictional Overlap, Competitive Sovereign Erosion, and the Fundamental Freedom of Native Nations' (2022) 106 *Marquette Law Review* 889.

[46] African Union, *Constitutive Act of the African Union* (adopted 11 July 2000, Lomé; entered into force 26 May 2001).

[47] SA Ravn, MA Plagis and MR Madsen, 'International Courts and Sovereignty Politics: Design, Shielding, and Reprisal at the African Court' (2025) 38(3) *Leiden Journal of International Law* 597 https://doi.org/10.1017/S0922156524000530.

[48] MA Sanchez, 'The African Court on Human and Peoples' Rights: Forging a Jurisdictional Frontier in Post-Colonial Human Rights' (2023) 19(3) *International Journal of Law in Context* 352.

given practical meaning to rights that might otherwise remain dependent upon domestic enforcement. The Court has also developed a judicial practice involving merits, reparations, provisional measures, admissibility and jurisdiction, thereby moving well beyond the symbolic model sometimes associated with regional human-rights institutions. Its own twentieth-anniversary assessment records 278 judgments and 185 orders by February 2026.

That institutional development matters to the present argument because coloniality should not become a vocabulary for dismissing African judicial agency. The Court is itself an African institutional response to histories of rights violations and weak accountability. Its jurisprudence demonstrates that continental judicial authority can operate as a source of rights protection rather than merely reproduce state power. The critical issue lies elsewhere: the growth of that authority has occurred alongside a jurisdictional structure in which direct individual access remains conditional.

6.3 The Access-Effectiveness Disconnect

This produces the central tension revealed by the Court's first two decades. Judicial authority has expanded while direct individual access remains structurally conditional. Article 5(3) permits individuals and qualifying NGOs to institute cases directly, but Article 34(6) makes that possibility dependent upon a state declaration. The Court's current institutional information confirms that only seven of the 34 Protocol states have such declarations.

The consequence is an uneven continental geography of judicial participation. Two individuals with comparable claims under the African Charter may occupy different procedural positions solely because their states have made different choices concerning Article 34(6). Where direct access is unavailable, the Commission remains an important institutional route, but that route does not give the individual the same control over initiating continental adjudication. The resulting problem is therefore not a contradiction between rights and judicial authority in the abstract. It is a disconnect between the effectiveness of the Court once seized of a dispute and the conditions governing who can seize it.

6.4 The Withdrawal Phenomenon

State withdrawals make this tension particularly visible. Rwanda, Tanzania, Benin and Côte d'Ivoire withdrew their Article 34(6) declarations at different points, and recent scholarship situates these withdrawals within broader patterns of sovereignty politics surrounding international courts [49]. The withdrawals should not, however, be treated automatically as evidence that the Court has failed. They reveal something more complicated: the continuing negotiation between national sovereignty and regional accountability.

Withdrawal demonstrates that direct individual jurisdiction remains politically contingent. A state can participate in the Protocol while subsequently altering the procedural conditions through which individuals may approach the Court. The legal power to modify that relationship therefore remains substantially located at state level. At the same time, the political reasons for withdrawal differ across states, making it difficult to reduce the phenomenon to a single theory of resistance. The better reading is that Article 34(6) has created an institutional space where sovereignty, accountability and individual standing repeatedly collide.

6.5 What Twenty Years Tell Us

Twenty years of practice consequently reveal two realities that must be held together. The Court has developed a significant body of jurisprudence and has demonstrated that continental judicial review can produce concrete consequences for individual rights. Yet the same institution operates within a framework that leaves direct individual jurisdiction dependent upon state consent. The anniversary therefore presents neither a simple success story nor an institutional indictment. It exposes a structural tension at the heart of the Court's design: institutional development has proceeded faster than the democratisation of access to its jurisdiction.

That tension gives the coloniality argument greater analytical force. The problem is not that African states exercise sovereignty, nor that treaty-based courts depend upon consent. It is that the distribution of procedural power can remain vertically organised even within an institution established to protect individuals. The Court's first two decades thus point towards a question for its next twenty years: whether continental human-rights justice can develop a stronger relationship with rights-holders without disregarding the sovereign and constitutional foundations upon which the African regional legal order rests.

7. From State Consent to Rights-Holder Access: Reforming the African Court's Jurisdictional Framework

The future of the African Court does not require an abrupt abandonment of state consent. A more credible reform agenda would alter the relationship between consent and access gradually, while preserving the institutional foundations of the regional system. Five reforms are particularly relevant:

i. Reconsidering Article 34(6)

The first possibility is to reconsider the separate declaration required by Article 34(6). Article 5(3)

[49] S A Ravn, M A Plagis and M R Madsen, 'International Courts and Sovereignty Politics: Design, Shielding, and Reprisal at the African Court' (2025) 38(3) *Leiden Journal of International Law* 597 https://doi.org/10.1017/S0922156524000530.

permits individuals and qualifying NGOs to bring cases directly, yet Article 34(6) makes that possibility dependent upon an additional state declaration. Automatic individual access upon ratification would remove this second layer of consent. Legally, such a change would require amendment of the Protocol or a sufficiently authoritative reinterpretation of its relationship with Article 5(3). Politically, however, it would be considerably harder. States have repeatedly invoked sovereignty when resisting the Court's expanding authority [50]. The more workable objective may therefore be progressive acceptance of automatic access for future ratifications, alongside incentives for existing states to make the declaration.

ii. Strengthening Commission-Court Referrals

A more immediate reform lies within the existing architecture. Article 5(1)(a) authorises the African Commission to institute cases before the Court. This mechanism can provide judicial protection where individuals cannot approach the Court directly, yet its potential has remained limited. Kaunda [51] finds that only three Commission referrals had been made and identifies procedural and institutional constraints affecting the referral process. Clear referral criteria, dedicated institutional capacity and transparent reasons for referral or non-referral could make the Commission a more reliable bridge between individual complaints and continental adjudication. This would not eliminate Article 34(6), but it could substantially reduce its practical consequences.

iii. Limiting the Consequences of Withdrawal

Withdrawal also requires procedural safeguards. The Court's treatment of Rwanda's withdrawal demonstrates that the consequences of withdrawal need not be reduced to an immediate disappearance of judicial protection. In Ingabire Victoire Umuhoza v Rwanda, the Court held that Rwanda's withdrawal did not deprive it of jurisdiction over the pending case and applied a notice period [52]. A clearer Protocol rule could require prospective effect, preserve proceedings already instituted, and establish a defined notice period. Such safeguards would respect the state's ability to withdraw while protecting legitimate procedural expectations already created for applicants. The subsequent withdrawals by Tanzania, Benin, Côte d'Ivoire and Tunisia demonstrate why greater certainty is necessary.

iv. A Rights-Holder-Centred Model of Access

These reforms point towards a conceptual shift from state-centred access to rights-holder-centred access. This does not mean that every jurisdictional limitation should disappear. Exhaustion of domestic remedies, admissibility rules, temporal jurisdiction and other safeguards remain capable of filtering inappropriate claims.

The distinction is that such safeguards should regulate the exercise of judicial jurisdiction rather than allow the respondent state to determine whether the rights-holder can reach the regional court at all. Access would consequently become a procedural entitlement structured around the legitimate requirements of adjudication rather than a privilege dependent principally upon governmental acceptance.

v. A Decolonial Model of Continental Justice

A decolonial model can therefore be organised around four principles. Accessibility requires meaningful routes through which rights-holders can reach continental adjudication. Participation requires individuals and civil society to have a procedural relationship with the institution rather than remain passive beneficiaries of state-created protection. Institutional independence requires state consent to establish the Court's authority without allowing that consent to determine completely whether individual protection remains practically available. Accountability, finally, requires the Court itself to provide transparent procedures, reasoned judgments and clear explanations of jurisdictional decisions.

The objective is not to remove states from the African human-rights system. It is to change the distribution of procedural authority within it. The Court Protocol already contains the institutional foundations for that development: Article 5 recognises individual and Commission pathways, while Article 34(6) supplies the present consent mechanism. The task for the next phase is to ensure that these provisions operate together in a manner that gives substantive meaning to the African Union's commitment to popular participation. Article 4(c) of the Constitutive Act expressly recognises "participation of the African peoples in the activities of the Union". The democratic legitimacy of continental justice should therefore be measured not only by the consent of states that created the Court, but also by the practical capacity of the people whose rights it protects to participate in the justice system those states established.

[50] S A Ravn, M A Plagis and M R Madsen, 'International Courts and Sovereignty Politics: Design, Shielding, and Reprisal at the African Court' (2025) 38(3) *Leiden Journal of International Law* 597 https://doi.org/10.1017/S0922156524000530.

[51] J Kaunda, 'Bridging the Gap in Individual Access to the African Court: The Role of the African Commission' (LLM mini-dissertation, University of Pretoria 2025).

[52] African Court on Human and Peoples' Rights, *Ingabire Victoire Umuhoza v Republic of Rwanda*, Application No 003/2014, Ruling on Jurisdiction, 3 June 2016.

8. CONCLUSION

Twenty years of the African Court's operation provide grounds for both recognition and scrutiny. The Court has moved beyond an experimental regional institution. It has fully developed into a body of jurisprudence that is capable of giving concrete meaning to rights protected under the African Charter. Its experience confirms that continental adjudication can provide an additional forum where domestic mechanisms do not adequately protect individual rights. Yet institutional development has not removed the question at the heart of this article: who can activate that judicial authority?

The reckoning begins with Article 34(6) of the Court Protocol. Article 5(3) recognises the possibility of direct individual and NGO applications, but that possibility remains tied to a state declaration accepting the Court's competence. The result is a structural sequence in which universal rights are recognised, but access to their judicial protection remains subject to conditional standing and state-controlled access. An individual may therefore possess a right under the Charter without possessing an equivalent capacity to place an alleged violation before the continental court. This is where the concept of coloniality becomes analytically useful. The concern is not that African sovereignty is inherently problematic. Rather, procedural authority remains organised in a way that can place governmental consent between the rights-holder and the institution established to protect the right.

The road ahead consequently requires more than an expansion of the Court's jurisprudence. The participation of the African peoples in the activities of the Union (Art. 4(c) Constitutive Act) [[53]] is a commitment of the African Union. Under this commitment, the workings of participation in the continental jurisdiction should be reviewed. However, there is no need to start by immediately abolishing the Article 34(6). Improving the referrals of the Commission, safeguarding pending procedures in case of withdrawal, increasing the acceptance of direct jurisdiction, and introducing clearer guarantees of state consent is crucial. This would provide a gradual bridging of the gap between the individual and the Court.

The central proposition is therefore modest but consequential: the democratic legitimacy of the African Court depends partly upon the relationship between the institution and the people whose rights it protects. Individuals should be understood not merely as beneficiaries of a state-mediated system, but as rights-holders. This would suggest a meaningful procedural relationship to continental justice. The next phase of the African Court's development should therefore be measured not only by the number and significance of its judgments, but also by who has the practical legal capacity to place a claim before it.

[53] African Union, *Constitutive Act of the African Union* (2000).