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PROTECTING HUMAN RIGHTS IN AFRICAN COUNTRIES: INTERNATIONAL LAW, DOMESTIC CONSTITUTIONAL INTERPRETATION, THE RESPONSIBILITY TO PROTECT, AND PRESIDENTIAL IMMUNITIES

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PROTECTING HUMAN RIGHTS IN AFRICAN COUNTRIES: INTERNATIONAL LAW, DOMESTIC CONSTITUTIONAL INTERPRETATION, THE RESPONSIBILITY TO PROTECT, AND PRESIDENTIAL IMMUNITIES

John Mukum Mbaku[*]

In the aftermath of the Cold War, Africans redoubled their efforts to fight impunity and violations of human rights. This renewed effort, however, was part of the struggle that started during the colonial period by Africans to free themselves from European domination and exploitation. Unfortunately, most post-independence African States failed to fully transform the critical domains and provide themselves with institutional arrangements capable of adequately constraining their civil servants and political elites. As a consequence, these countries came to be pervaded by high levels of government impunity, particularly the violation of human rights. During the last several decades, however, grassroots efforts to fight human rights abuses, presidential abuse of power, and government impunity, have increased throughout most African countries. These domestic efforts, coupled with those of the international community, have made it much

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more difficult for Africa's political elites, including presidents, to abuse their powers and engage in behaviors that violate the rights of their fellow citizens. Nevertheless, Africans still have a long way to go in order to eliminate government impunity and create an environment in which human rights are fully recognized and protected. Africans must put in place institutional and legal structures that effectively minimize the chances that government officials will engage in activities that violate human rights and threaten peace and security. In doing so, Africans can benefit significantly from international law, particularly international human rights law.

I. INTRODUCTION

Although the protection of human rights in Africa is the primary responsibility of each African country, African courts, institutions, and citizens, in conjunction with the international community, can play a very important role in fostering an environment that is conducive to the recognition of, respect for, and protection of human rights. Within Africa, the African Union (AU) and regional organizations, such as the Economic Community of West African States (ECOWAS)[1] and the Southern African Development

[1] The Economic Community of West African States (ECOWAS) is a regional economic union of fifteen countries, which are located in West Africa. ECOWAS has its headquarters in Abuja, the capital of Nigeria. In

Community (SADC),[2] are responsible for ensuring the recognition and protection of human rights in the continent. Additionally, these responsibilities apply to domestic and international nongovernmental organizations, such as Human Rights Watch and national human rights organizations. The AU and these regional organizations have a very important role to play in the protection of human rights in the continent, especially in cases where national governments are either unable or unwilling to assume the responsibility to protect citizens, or where the violators of human rights are state actors, other agents of the state, or non-state actors with significant connections to the state. The Darfur Genocide is an example of a situation in which the perpetrators of human rights abuses are state actors and civil society organizations working on behalf of the government. Unfortunately, the AU has not been very successful in protecting the people of the Darfur region of Sudan.[3]

Since 1945, the international community, working through the United Nations (UN) and other multilateral organizations, has provided a strong legal foundation for the recognition and protection of human rights. For example, the UN General Assembly on December 10, 1948, through Resolution 217, adopted the historic

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2015, ECOWAS had a population of over 349 million. Since it was founded on May 28, 1975, ECOWAS has played a significant part in maintaining peace and security, as well as protecting human rights, in West Africa. *See generally* ADEKEYE ADEBAYO, BUILDING PEACE IN WEST AFRICA: LIBERIA, SIERRA LEONE, AND GUINEA-BISSAU (2002) (examining the activities of ECOWAS' mechanism for managing conflicts and ensuring security and peace called ECOMOG).

[2] The Southern African Development Community (SADC) is an inter-governmental organization that consists of sixteen Member States with its headquarters in Gaborone, Botswana. It was established in its present form on August 17, 1992, and currently has a population of 277 million. *See generally* LAURIE NATHAN, COMMUNITY OF INSECURITY: SADC'S STRUGGLE FOR PEACE AND SECURITY IN SOUTHERN AFRICA (2012) (examining, inter alia, the evolution of the SADC's effectiveness as a regional security organization).

[3] *See generally* JUDE COCODIA, PEACEKEEPING AND THE AFRICAN UNION: BUILDING NEGATIVE PEACE (2018) (assessing the effectiveness of peacekeeping operations of the AU).

Universal Declaration of Human Rights (UDHR).[4] The UN and other multilateral organizations have provided many of the international legal instruments that formed the foundation for human rights laws in many countries, including those in Africa. For example, provisions of the UDHR have either been incorporated into the constitutions of many African countries or reference has been made to the UDHR in the constitutions of these countries.[5] For example, Bénin Republic's constitutional designers have directly incorporated provisions of various international human rights instruments into their national constitution.[6] In the Preamble to the Constitution of the Republic of Bénin, one can find the following:

> WE, THE BÉNINESE PEOPLE . . . Reaffirm our attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948, by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 and *whose provisions make up an integral part of this present Constitution and of Béninese law and have a value superior to the internal law*.[7]

In Article 7 of the constitution of Bénin, it is stated that "[t]he rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity . . . shall be an integral part of the . . . Constitution [of Bénin] and of Béninese law."[8] Finally, the Béninese constitution imposes a duty on the government to make certain that citizens are fully educated about the national constitution, the UDHR, the

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4 *See* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 3 (Gudmudur Alfredsson & Asbjorn Eide eds. 1999) (presenting a series of essays that examine the UDHR since its inception in 1948).

5 *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF BÉNIN Dec. 2, 1990, pmbl.

6 *See generally id.*

7 *Id.* at pmbl. (emphasis added).

8 *Id.* at art. 7.

African Charter on Human and Peoples' Rights, and other international human rights instruments.[9]

Angola's constitution makes specific reference to the applicability of international law when courts interpret and apply the country's constitution.[10] For example, Article 26's title, *Scope of Fundamental Rights*, is quite telling and reads as follows:

> 1. The fundamental rights established in this Constitution shall not exclude others contained in the laws and applicable rules of international law.
>
> 2. Constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the Universal Declaration of the Rights of Man, the African Charter on the Rights of Man and Peoples and international treaties on the subject ratified by the Republic of Angola.
>
> *3. In any consideration by the Angolan courts of disputes concerning fundamental rights, the international instruments referred to in the previous point shall be applied, even if not invoked by the parties concerned.*[11]

Additional support to the applicability of international law in Angola is provided in Article 27, which states that "[t]he principles set out in this chapter shall apply to the rights, freedoms and guarantees and to fundamental rights of a similar nature that are established in the constitution or are enshrined in law or international conventions."[12]

In 2010, Kenya provided itself with a new constitution, which introduced the concept of separation of powers with checks and balances.[13] The new constitution created an independent judiciary

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9 *See id*. at art. 40.

10 *See generally* CONSTITUTION OF THE REPUBLIC OF ANGOLA Jan. 21, 2010.

11 *Id.* at art. 26(1)–(3) (emphasis added).

12 *Id.* at art. 27.

13 *See generally* CONSTITUTION (2010) (Kenya).

and spoke directly to the applicability of international law within the country.[14] For example, Article (2)(5) of the constitution states that "[t]he general rules of international law shall form part of the law of Kenya,"[15] effectively making "the rules of international law" justiciable in the courts of Kenya. In addition, the 2010 Kenyan constitution also states that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."[16]

Many other African countries, however, do not make international law—whether it is international human rights or humanitarian law—directly justiciable in their domestic or national courts.[17] For example, while the Constitution of the Republic of South Africa acknowledges and makes reference to international law, it does not make any provision for the latter to be directly justiciable in the courts of South Africa.[18] Nevertheless, the South African constitution imposes on national courts an obligation to "consider international law" when interpreting the Bill of Rights.[19] In Cabo Verde, the constitution states that "[c]onstitutional and legal rules with respect to fundamental rights must be interpreted and integrated in conformance with the Universal Declaration of Human Rights."[20] The Constitution of the Republic of Ghana imposes an obligation on the government to "promote respect for international law."[21] However, Ghana's constitution does not make any provisions for international law to be directly justiciable in Ghanaian courts.[22]

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[14] *See generally id.* at art. 10.

[15] *See id.* at art. 2(5).

[16] *Id.* at art. 2(6).

[17] *See, e.g.*, S. AFR. CONST., 1996.

[18] *See generally id.*

[19] *Id.* at art. 39(1) (stating "[w]hen interpreting the Bill of Rights, a court, tribunal or forum . . . *must* consider international law; and *may* consider foreign law") (emphasis added).

[20] *See* CONSTITUTION OF THE REPUBLIC OF CABO VERDE (1992) (amended in 1995 & 1999), art. 17(3).

[21] CONSTITUTION OF THE REPUBLIC OF GHANA (1992) (amended 1996), art. 40(c).

[22] *See generally id.*

In the struggle to protect human rights in Africa, international law, particularly international human rights and humanitarian law, is very important. International legal instruments, such as the International Covenant on Civil and Political Rights (ICCPR),[23] International Covenant on Economic, Social and Cultural Rights (ICESCR),[24] and the UDHR, are very important to the struggle to recognize and protect human rights in Africa. In fact, the ICCPR, with two optional protocols; the ICESCR, with one optional protocol; and the UDHR were given the name International Bill of Human Rights by the UN General Assembly in its Resolution 217.[25]

In Africa, the AU has also engaged in efforts to promote the recognition and protection of human rights within the continent. At the 1979 Assembly of the Heads of State and Government of the Organization of African Unity (OAU),[26] a resolution was adopted that called for experts to draft a continent-wide human rights instrument. The committee was subsequently set up and produced a draft that was unanimously approved at the 18th Assembly of the Heads of State and Government of the OAU held in June 1981, in

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[23] The ICCPR is a multilateral treaty that was adopted by the United Nations General Assembly with resolution 2200A (XXI) on December 16, 1966 and entered into force on March 23, 1976. *See International Covenant on Civil and Political Rights,* U.N. HUM. RIGHTS OFF. OF THE HIGH COMM'R (Dec. 16, 1966), https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

[24] The ICESCR is a multilateral treaty that was adopted by the UN General Assembly on December 16, 1966 and came into force on January 3, 1976. *See International Covenant on Economic, Social and Cultural Rights,* U.N. HUM. RIGHTS OFF. OF THE HIGH COMM'R (Dec. 16, 1966), https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

[25] *See generally* G.A. Res. 217 (III), International Bill of Human Rights (Dec. 8, 1948). The International Bill of Human Rights also includes two other treaties that were established by the UN; these are the ICCPR (1966), with its two Optional Protocols, and the ICESCR (1966).

[26] The OAU was succeeded by the AU, which was founded on May 26, 2001, in Addis Ababa, and officially launched on July 9, 2002 in South Africa. *See* Constitutive Act of the African Union, AFR. UNION (July 11, 2000), https://au.int/en/constitutive-act [hereinafter Constitutive Act of the African Union].

Nairobi, Kenya.[27] The instrument, which was referred to as the African Charter on Human and Peoples' Rights (the Banjul Charter) entered into force on October 21, 1986.[28] The task of oversight and interpretation of the Banjul Charter was placed in the hands of the African Commission on Human and Peoples' Rights (African Commission) that was set up on November 2, 1987, in Addis Ababa, Ethiopia. Nevertheless, the African Commission is presently headquartered in Banjul, The Gambia.[29]

Other relevant human rights instruments produced by the AU include: the African Charter on Democracy, Elections and Governance;[30] Protocol to the Banjul Charter on the Rights of Women in Africa;[31] Constitutive Act of the African Union;[32] Protocol to the Banjul Charter on the Establishment of the African Court on Human and Peoples' Rights (African Court);[33] African

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[27] *The Banjul Charter*, CLAIMING HUM. RIGHTS: GUIDE TO INT'L PREVENTION OF HUM. RIGHTS VIOLATIONS IN AFR. (Dec. 14, 2009, 4:56 PM) http://www.claiminghumanrights.org/au_charter.html (last visited Jan. 29, 2021) [hereinafter Claiming Human Rights].

[28] *See African Commission on Human and Peoples' Rights*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, http://www.achpr.org/.

[29] *See* Claiming Human Rights, *supra* note 27.

[30] *See generally* AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE (Jan. 30, 2007), http://archive.ipu.org/idd-E/afr_charter.pdf.

[31] *See generally* PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA, https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf.

[32] *See generally* Constitutive Act of the African Union, *supra* note 26.

[33] *See generally* PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE ESTABLISHMENT OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf [hereinafter AFRICAN COURT PROTOCOL].

Charter on the Rights and Welfare of the Child;[34] and African Union Convention Governing Specific Aspects of Refugee Problems in Africa.[35]

This article examines how the international community, through its various legal instruments and institutions, can help promote the recognition and protection of human rights in Africa. In addition to looking at various international human rights instruments and how they can inform and impact the protection of human rights in the African countries, this article pays particular attention to the *Responsibility to Protect* (R2P). The R2P was developed by the International Commission on Intervention and State Sovereignty (ICISS) to serve as a framework for dealing with emerging threats to international peace and security. The R2P is supposed to address both the "root causes and the direct causes of international conflict and other man-made crises putting populations at risk," which include threats to human rights.[36]

In Section II, this article examines the various ways in which international law, particularly international human rights law, can help improve the protection of human rights in Africa. Specifically, this section examines international human rights law and its moderating impact on national legal systems, with specific emphasis on Africa's progressive independent judiciaries and their interpretive powers, which they can use to interpret national laws, including the constitution, and bring them into conformity with international human rights norms. Reference in this section is made

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[34] *See generally* AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD, OAU DOC. CAB/LEGS/24.9/49 (1990), https://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf.

[35] *See generally* OAU CONVENTION GOVERNING SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA, UNHCR THE UN REFUGEE AGENCY, https://www.unhcr.org/en-us/about-us/background/45dc1a682/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted.html.

[36] *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, UN (Dec. 2001), http://www.julianhermida.com/justiceresptoprotect.htm [hereinafter *Responsibility to Protect*].

to two important cases, one from Zimbabwe and the other from South Africa. These two cases show how international law, particularly international human rights law, can help in the determination of the scope of fundamental rights in Africa.

Section III is devoted to examining other tools that can be used by the international community to enhance the protection of human rights in Africa. In this section, particular attention will be paid to the responsibility to protect and the role that this principle plays in the protection of human rights in Africa.

In Section IV, this article examines the failure of the erstwhile OAU to deal effectively and fully with the violation of human rights and other threats to peace and security. It is noted that the Rwandan Genocide, which took place in early spring 1994 resulted in the massacre of nearly a million Tutsi and their Hutu sympathizers.[37] This represents the OAU's most important failure at maintaining continental peace and security. The OAU's failure to act to prevent genocide in Rwanda was due to its decision to adhere strictly to its operating principles, particularly that of non-intervention in the internal affairs of Member States.

The AU, founded on May 26, 2001, in Addis Ababa, Ethiopia and launched on July 9, 2002, in South Africa, was established to replace the OAU.[38] Section V is devoted to an examination of the AU and its role in the protection of human rights in the continent. Mention is made of the AU's non-indifference policy and its relation to the protection of human rights in the continent. In addition, this section examines continental judicial institutions and the role that they play in the protection of human rights.

In Section VI, the article examines the African Commission and the role that it has played in the promotion and protection of human rights in the continent. Section VII examines the Banjul Charter to determine the extent to which it has contributed to improving the environment for the protection of human rights in Africa. Section

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[37] *See generally* LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE (2006) (examining, inter alia, the events leading to the Rwandan Genocide and the genocide itself).

[38] *See* Constitutive Act of the African Union, *supra* note 26.

VIII is devoted to an examination of presidential immunities and how they have contributed to the violation of human rights in the continent. In Section IX, the article provides policy recommendations and suggestions for a way forward for the promotion and protection of human rights in the African countries.

II. INTERNATIONAL LAW AND HUMAN RIGHTS IN AFRICA

A. INTRODUCTION

One can view the demands of international law, including international human rights law, on African countries as an infringement on the right of these countries to govern themselves as they see fit. In each African country, as is the case in other sovereign states, the government is expected to be based on the constitution, where the latter is generally "perceived as essentially a state-centered notion which is linked to the concept of statehood and the idea of a state exercising its sovereign power."[39] Sovereignty is defined as "the supreme, undivided, absolute and exclusive power attributed to the state within a demarcated territory."[40] Although sovereignty grants each African country the right to govern itself without interference from external actors, each African government is not expected to act without constraints.[41] Citizens of a country impose constraints on their government in an effort to prevent civil servants and political elites from acting opportunistically and engaging in activities (e.g., self-dealing, corruption, and rent seeking) that negatively affect wealth creation and economic growth, as well as activities that violate human rights (e.g., denial of a right to a fair trial or education, or failure to protect children against sexual abuse and enslavement).[42] International law, particularly international human rights law, also imposes constraints

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[39] Charles Manga Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, 60 AM. J. COMP. L. 439, 441 (2012).

[40] *Id*.

[41] *See* JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 111–12, 129–32 (2018).

[42] *See id*. at 111–12, 128–30.

on national governments in an effort to prevent them from violating the rights of their citizens.[43]

In each African country, the people form and empower their governments through a constitution to govern and perform certain well-defined activities on their behalf.[44] Specifically, the constitution defines the powers surrendered by the people to the government; imposes constraints on the exercise of these powers in order to minimize self-dealing and other forms of criminal activities; mandates that the government derive all its power to govern from the people; and regulates the allocation of "powers, functions and duties among the various agencies and officers of government as well as defining their relationship with the governed."[45]

As in other countries, the African people are at the center of government and, thus, serve as an important constraint on the exercise of government power. In each country, there are two distinct centers of power, the State and the people.[46] Granted, the government is empowered through the constitution to govern. Nevertheless, it must derive its legitimacy to act from the people, and as a consequence, the consent of the people is a critical requirement for constitutional government. For the government to be effective, it must be accountable, not just to the constitution, but also to the people.

Another important constraint on the ability of each African government to exercise its constitutionally granted powers is international law. For example, Article 2(7) of the UN Charter recognizes the right of States to govern themselves.[47] Specifically, the UN is prohibited by its Charter from intervening in or interfering with "matters which are essentially within the domestic jurisdiction of any state."[48] Nevertheless, Article 2(7) cautions that "this

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43 *See* Fombad, *supra* note 39, at 445.

44 Some of these activities include maintaining law and order and providing public goods and services. *See, e.g.*, MBAKU, *supra* note 41 (examining, inter alia, why people form governments).

45 Fombad, *supra* note 39, at 441–42.

46 *See* MBAKU, *supra* note at 41, at 85.

47 U.N. Charter art. 2, ¶ 7.

48 *Id*.

principle shall not prejudice the application of enforcement measures under Chapter VII"[49] of this Charter. Hence, international law has a significant role to play in the recognition and protection of human rights in Africa.

Over the years, questions have arisen as to whether international law can infringe on the sovereignty of States, including those in Africa. If so, then to what extent can such intervention be undertaken? In 1923, the Permanent Court of International Justice (PCIJ) was called upon to provide an advisory opinion on whether a dispute between France and Great Britain was, by international law, solely a matter of domestic jurisdiction.[50] The dispute in question concerned "Nationality Decrees" issued in Tunis and Morocco—French territory—on November 8, 1921, and whether these decrees applied to British subjects who resided in these territories.[51] The PCIJ, in its advisory opinion, stated that "[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations."[52]

The approach embodied in the PCIJ's advisory opinion has been criticized as being too broad[53] because it essentially "defines the scope of domestic jurisdiction as what is left over after the rules of international law have claimed their jurisdiction."[54] The International Court of Justice (ICJ), which was established in 1945 by the Charter of the UN and is the United Nations' principal

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[49] *Id*. Article 2, ¶ 7 of the UN Charter deals with the various actions that must be taken by the United Nations in order to deal generally with threats to international peace and security, and, in particular, breaches of the peace, and acts of aggression.

[50] League of Nations Covenant art. 15.

[51] *See* Nationality Decrees Issued in Tunis and Morocco (French Zone), Advisory Opinion, 1921 P.C.I.J (ser. B) No. 4, at 143 (Feb. 7).

[52] *Id*. ¶ 40.

[53] *See, e.g*., Anthony D'Amato, *Domestic Jurisdiction*, *in* 1 ENCYCLOPEDIA OF PUB. INT'L L., 1091 (R. Bernhardt ed. 1992).

[54] Fombad, *supra* note 39, at 442.

judicial institution,[55] provided what is considered "a more authoritative position" in the *Case Concerning Military and Paramilitary Activities in and Around Nicaragua (Nicaragua v. The United States of America)*.[56] In its judgment, the ICJ held that as a consequence of the principle of sovereignty, each State has the "choice of a political, economic, social and cultural system and the formulation of foreign policy."[57] However, as the evidence has since shown, "[a] purposive interpretation of the proviso to Article 2(7) of the Charter [of the UN] and the practice of the UN over the decades has shown that the organization could in fact intervene in constitutional matters, which are essentially within the domestic jurisdiction of any state if international peace and security were said to be threatened."[58]

Many of today's international legal experts argue that the United Nations Security Council (UNSC) has been granted the power by the UN to intervene in domestic constitutional law, and in the process, limit, for example, the jurisdiction of domestic courts, if international peace and security are threatened.[59] Thus, in situations where international peace and security are threatened, the UNSC can infringe on a state's sovereign right to govern itself and determine the content of its constitutional law.[60]

Countries that enter into international treaties, including those in Africa, can impose constraints on themselves that limit their sovereign right to determine the content of their constitutional

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[55] In addition to serving as the UN's principal judicial institution, the ICJ also gives advisory opinions to authorized UN organs and specialized agencies. For more on the ICJ, see *generally* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOR OF SIR ROBERT JENNINGS (Vaughan Lowe & Malgosia Fitzmaurice eds. 1996) and HUGH THIRLWAY, THE INTERNATIONAL COURT OF JUSTICE (2016).

[56] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. United States), Judgement, 1986 I.C.J 14 (June 27) (citing *Merits*).

[57] *Id*. ¶ 205.

[58] Fombad, *supra* note 39, at 443; *see also* A. A. Conçado Trindale, *The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations*, 25 INT'L & COMP. L. Q. 715, 751 (1976).

[59] *See* Trindale, *supra* note 58, at 751.

[60] *See* Fombad, *supra* note 39, at 443.

matters.[61] For example, the ICCPR imposes certain obligations on States Parties that have ratified the treaty. This treaty, which is part of international human rights law, "limit[s] states' sovereign right to exclusively determine the content of their domestic constitutional law."[62] While the ICCPR states that "[a]ll peoples have the right . . . [to] freely determine their political status and freely pursue their economic, social[,] and cultural development,"[63] the ICCPR also imposes various obligations on State Parties. For example, the ICCPR requires that each State Party must "respect and . . . ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth[,] or other status."[64]

The ICCPR, with its two optional protocols, is one of three instruments that constitute the International Bill of Human Rights. The binding obligations that it imposes on States Parties represent one way in which international law impacts the recognition and protection of human rights in Africa and other parts of the world.[65] One way to improve the protection of human rights in Africa is for each country's government to sign and ratify all the international human rights instruments and then meet its obligations under these instruments, even if doing so infringes on each state's sovereign right to govern itself and determine the content of its domestic constitutional law.[66]

The infringement on a state's sovereign right to determine the content of its constitutional law by international human rights law must not be viewed negatively—these commitments to uphold provisions of the various international human rights instruments can significantly minimize impunity, improve governance, and promote the recognition and protection of human rights. In the case of

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61 *Id.*

62 *Id.*

63 G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 1 (Dec. 16, 1966).

64 *Id.* at art. 2.

65 *See* Fombad, *supra* note 39, at 443.

66 *See generally id.*

African countries, the need for each of these countries to design and adopt constitutions that conform with the provisions of international human rights instruments should significantly reduce the ability of national governments to act with impunity and abuse the human and fundamental rights of citizens.

There are at least six ways to make certain that human rights are protected in Africa. First, national courts can be empowered and provided with the capacity to enforce existing laws and protect citizen's rights.[67] More importantly, domestic courts can make certain that domestic laws conform with international human rights laws and norms; and the interpretation of domestic laws takes into consideration international human rights instruments.[68] Second, legislators can make certain that national laws, including the constitution, comply with or reflect the provisions of international human rights instruments.[69] Third, the government can make sure that the appropriate officials sign and ratify all international human rights instruments and, if possible, make the provisions of these instruments directly justiciable in domestic courts.[70] Fourth, civil society and its organizations can help develop a human rights culture—one in which citizens voluntarily accept and respect the laws designed to protect human rights.[71] Fifth, each country's institutional arrangements should adequately constrain civil servants and political elites, including the president, so as to minimize impunity and enhance the protection of human rights.[72] Finally, each African country must provide itself with a governing process that is characterized by separation of powers with checks

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[67] *See* Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 125 (2002).

[68] *See generally* Adjami, *supra* note 67.

[69] *See generally id.*

[70] *See id.* at 109.

[71] *See generally id.*

[72] *See* John M. Mbaku, *Constitutional Coups as a Threat to Democratic Governance in Africa*, 2 INT'L COMP., POL'Y, & ETHICS L. REV. 77, 98 (2018) [hereinafter *Constitutional Coups*].

and balances.[73] Checks on the exercise of government power must include, but are not limited to, an independent judiciary; a robust and politically active civil society; and an independent and viable press.

B. INTERNATIONAL HUMAN RIGHTS LAW'S MODERATING IMPACT ON NATIONAL LEGAL SYSTEMS IN AFRICA

How international law, and international human rights law in particular, affects legal systems in African countries is explained by two alternative theories: monism and dualism.[74] Within the monist framework, international law and municipal law make up one single legal order "within a national legal system, with international law superior to national law."[75] Within such a legal system, national courts are obligated to "give effect to principles of international law over superseding or conflicting rules of domestic law."[76] Umozurike argues, however, that although monists generally believe that international law has primacy over conflicting domestic law, there is a small school of "inverted monists" who believe and argue that municipal law takes precedence over international law.[77]

Dualist theorists, on the other hand, argue that international law and municipal law make up two separate, distinct, and independent

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[73] *See* John M. Mbaku, *International Law and the Fight Against Bureaucratic Corruption in Africa*, 33 ARIZ. J. INT'L & COMP. L. 661, 761 (2016).

[74] *See* Adjami, *supra* note 67, at 108–09. *See also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31–33, 41–51 (5th ed. 1998) (examining, inter alia, monist and dualist approaches to international law); Tijanyana Maluwa, *The Incorporation of International Law and Its Interpretational Role in Municipal Legal Systems in Africa: An Explanatory Survey*, 23 S. AFR. Y.B. INT'L L. 45 (1998) (examining, inter alia, the interpretive role of international law in municipal legal systems in Africa) & U. OJI UMOZURIKE, INTRODUCTION TO INTERNATIONAL LAW 29–36 (1993) (noting, inter alia, the concept of "inverted monism").

[75] *See* Adjami, *supra* note 67, at 109; *see also* UMOZURIKE, *supra* note 74, at 29–33.

[76] Adjami, *supra* note 67, at 109.

[77] UMOZURIKE, *supra* note 74, at 30–31.

legal systems.[78] While municipal law takes precedence and enjoys primacy in the governing and regulation of national legal systems, international law is directed exclusively at regulating the relations between "sovereign States in the international system."[79] According to the dualist theory, a municipal legal system can only give effect to international law when the country's lawmakers use legislation to incorporate international law into domestic law, and by doing so, create rights that are justiciable in domestic courts.[80]

In examining international law's "binding status in domestic legal systems,"[81] international legal scholars and jurists distinguish between the different types and sources of international law. Under both the monist and dualist theories, all international norms that have achieved or attained the status of "international customary law"[82] are considered part of domestic or municipal law. In order for an international law principle to attain the status of customary international law, it must meet the definition of Article 38(1)(b) of the Statute of the International Court of Justice, which refers to "international custom, as evidence of a general practice accepted as law."[83] If treaties or conventions have not yet attained the status of international customary law, their status in municipal legal systems depends on whether the State in question follows the dualist or monist model.[84]

Most of today's African states inherited their legal systems and international law frameworks[85] from the countries that colonized

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78 Adjami, *supra* note 67, at 109.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Statute of the International Court of Justice*, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

84 Adjami, *supra* note 67, at 109.

85 Most Francophone countries in Africa have legal systems based on the French Civil law, while Britain's former colonies base their legal systems on the Common law of England and Wales. Nevertheless, South Africa, which at one time was colonized by Great Britain, has a mixed legal system, consisting of the English common law and Roman-Dutch law model. *Id.*

them. The continent's Francophone countries, which were colonized by France and Belgium, adopted the monist approach to international law while those states under British colonial rule inherited the dualist theory.[86]

It is also important to note that the "properties of international law instruments themselves"[87] determine how and the extent to which international law affects a national legal system. For example, the UDHR is "hortatory and aspirational, recommendatory rather than, in a formal case, binding."[88] Nevertheless, international legal scholars have argued that "the years have further blurred the threshold contrast between 'binding' and 'hortatory' instruments."[89] While the UDHR does not have the legal status of a treaty, its position in international law has changed significantly, and it has received favorable treatment in many domestic legal systems since it was adopted by the UN General Assembly on December 10, 1948.[90] Perhaps more important is the fact that over the years arguments have developed which favor viewing "all or parts of [the UDHR] as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter."[91]

What is usually referred to as the International Bill of Human Rights consists of the UDHR, the ICCPR, and the ICESCR—the ICCPR and the ICESCR, however, are binding treaties.[92] Africa-specific human rights treaties include the Banjul Charter, which

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[86] *Id.* at 109–110.

[87] *Id.* at 110.

[88] HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 152 (2008).

[89] *Id*. at 152.

[90] *See id.* at 152, 160–61.

[91] *Id*. at 152.

[92] A treaty, of course, is only binding on States Parties to the treaty. The international law principle of *pacta sunt servanda*, which is codified in Article 26 of the Vienna Convention on the Law of Treaties, is the basis for the binding effect of treaties. Article 26, which is titled "Pacta Sunt Servanda," reads as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

entered into force on October 21, 1982.[93] Article 1 of the Banjul Charter obligates States Parties to incorporate provisions of the Charter in their domestic laws.[94] According to Article 1, "[t]he Member States . . . to the present Charter shall recognize the rights, duties[,] and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."[95] Given the binding nature of treaties, any African country that is a State Party to the Charter who fails to give effect to the provisions of the Charter in its domestic law is in breach of the Charter. The nature of Article 1 of the Banjul Charter implies that the treaty is binding on States Parties regardless of whether they are monist or dualist States.[96]

The OAU, and its successor, the AU, considered the need to give effect to the Charter's provisions in States Parties' municipal law so important that, besides the obligations created by Article 1, they found it necessary to impose additional requirements on States Parties through Article 62.[97] The latter states as follows: "Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter."[98]

As mentioned earlier, several African countries, such as Bénin and Angola, have specific provisions in their constitutions that directly define the role of international law in their municipal legal systems.[99] The Constitution of the Republic of South Africa, 1996, imposes an obligation on national courts to consider international

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[93] African (Banjul) Charter on Human and Peoples' Rights, 21 I.L.M. 58 (1982) [hereinafter Banjul Charter].

[94] *Id*. at art. 1.

[95] *Id*.

[96] *Id*.

[97] *Id*. at art. 1, 62.

[98] *Id*. at art. 62.

[99] *See supra* notes 5–12 and accompanying text.

law when they interpret the country's Bill of Rights.[100] Since the post-apartheid constitution went into effect, South Africa's judiciary has developed a significant body of human rights jurisprudence that has gained international attention.[101] According to Article 39, "[w]hen interpreting the Bill of Rights, a court, tribunal[,] or forum . . . *must* consider international law; and may consider foreign law."[102] Article 233 deals with the application of international law and states that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."[103] Together, these two provisions in South Africa's post-apartheid constitution have significantly "broadened the scope of the courts' power to employ international law as an interpretive guidance when adjudicating domestic Bill of Rights provisions."[104]

Unlike South Africa and a few other countries, most African countries do not explicitly approve the use of international law as an interpretive tool for the adjudication of cases in domestic courts. The failure of many African countries to incorporate the provisions of various international human rights instruments into their domestic law has created a "technical obstacle" to the "use of international human rights instruments as persuasive authority in national court decisions."[105] Nevertheless, many African judiciaries have found ways to overcome this technicality. For example, in *New Patriotic*

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[100] *See generally* Richard Cameron Blake, *The World's Law in One Country: The South African Constitutional Court's Use of Public International Law*, 115 S. AFR. L. J. 668 (1999) (noting, inter alia, the use of international law by South Africa's Constitutional Court); Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (1998) (providing more insight on the above referenced jurisprudence).

[101] *Id.*

[102] S. AFR. CONST., 1996, at art. 39(1)(b)–(c) (emphasis added).

[103] *Id*. at art. 233.

[104] Adjami, *supra* note 67, at 109; *see also* Andre Stemmet, *The Influence of the Recent Constitutional Development in South Africa on the Relationship Between International Law and Municipal Law*, 33 INT'L L. 47 (1999).

[105] Adjami, *supra* note 67, at 112.

Party v. Inspector-General of Police (1993), the Chief Justice of Ghana declared as follows:

> Ghana is a signatory to this African Charter and Member States of the [OAU] and parties to the Charter are expected to recognize the rights, duties, and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think the fact that Ghana has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon.[106]

This approach to the incorporation of international law into the domestic legal system has been referred to as "transjudicial"[107] and "accounts for the actual use of international law and comparative case law in domestic courts, regardless of the binding or nonbinding status of their sources."[108] Some international legal scholars argue that this leads to the "cross-fertilization of international law and comparative case law in domestic courts in continents around the globe"[109] and "evidences the dawn of an era of 'judicial dialogue' and 'judicial comity.'"[110]

1. An Introduction to Human Rights Protections in Post-independence African Countries

Some African constitutions contain bills of rights that were either inserted into their constitutions upon independence or were later incorporated through constitutional amendments during post-independence periods.[111] Various international human rights

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[106] *New Patriotic Party v. Inspector-General of Police*, Accra [Ghana 1993] 1 N.L.P.R. 73, suit 3/93.

[107] *See* Anne-Marie Slaughter, *A Typology of Transjudicial Communication,* 29 U. RICH. L. REV. 99 (1994) (examining and explaining the transjudicial model).

[108] Adjami, *supra* note 67, at 112–113.

[109] *Id.* at 113.

[110] *Id.*

[111] *Id.* at 114.

instruments inspired these bills of rights,[112] which are considered important parts of constitutionalism, a process concerned with "the protection of individual rights and freedom from governmental encroachment."[113] Bills of rights are designed to provide for the legal protection of the rights of citizens. Municipal judiciaries are granted the right by the constitution to guarantee these rights and to hold other branches of the government accountable regarding recognition and protection of these rights—this, it is argued, is the "foundation for human rights constitutionalism."[114]

Although many African countries have been committed to constitutionalism and protection of human rights since the 1990s, significant resistance against the practice of constitutional government in many regions of the continent still remains.[115] This resistance has led to the widespread abuse of human rights in countries such as Cameroon,[116] Burundi,[117] Central African

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[112] *Id.* at 113.

[113] *Id.* at 114. *See also* Carla M. Zoethout & Piet J. Boon, *Defining Constitutionalism and Democracy: An Introduction*, *in* CONSTITUTIONALISM IN AFRICA: A QUEST FOR AUTOCHTHONOUS PRINCIPLES 1, 5 (Carla M. Zoethnout & Marlies E. Pietermaat-Kros eds., 1996) (examining, inter alia, constitutionalism and its relation to democracy).

[114] Adjami, *supra* note 67, at 114.

[115] Fombad argues, for example, that "[w]hile the quality of human rights protection in most African countries increased somewhat after 1990, . . . there has been a steady decline in the quantum of human rights protection enjoyed in the last six years." Charles Manga Fombad, *Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects*, 59 BUFF. L. REV. 1007, 1016 (2011).

[116] Amnesty International has documented human rights violations in Cameroon, "including unlawful killings, destruction of private property, arbitrary arrests, and torture committed by the Cameroonian security forces during military operations conducted in the Anglophone regions." *Cameroon: A Turn for the Worse: Violence and Human Rights Violations in Anglophone Cameroon*, AMNESTY INT'L (June 12, 2018).

[117] *See Burundi: Events of 2017*, HUM. RIGHTS WATCH, https://www.hrw.org/world-report/2018/country-chapters/burundi (last visited Feb. 4, 2021) (recounting, inter alia, the political and human rights crisis that began in Burundi in April 2015 following the announcement by President Pierre Nkurunziza that he would run for a disputed third term).

Republic,[118] Democratic Republic of Congo,[119] South Sudan,[120] Uganda,[121] the Republic of Sudan,[122] and several other countries in the continent.[123] While ruling elites in these countries have at one time or the other openly acknowledged the importance of constitutional limits on the government, they have, nevertheless, been unwilling to acknowledge the inviolability or sacredness of their national constitutions. Instead, they have proceeded to change them at will to meet their political ambitions. In Cameroon, for

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[118] *Central African Republic*, HUM. RIGHTS WATCH, https://www.hrw.org/africa/central-african-republic (last visited Feb. 4, 2021) (presenting a series of reports that detail the abuse of human rights in the Central African Republic).

[119] *Democratic Republic of Congo*, UN HUM. RIGHTS OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/countries/africaregion/pages/cdindex.aspx (last visited Feb. 4, 2021) (presenting a series of reports that shows that the human rights situation in the Democratic Republic of Congo has continued to deteriorate with increases in arbitrary executions; rape; torture; and cruel, inhuman, and degrading treatment, all of which are committed primarily by the army, police, and intelligence services).

[120] *See* Elise Keppler, *UN Report Details Abuses and War Crimes in South Sudan: Trials Needed to Bring Justice for these Atrocities*, HUM. RIGHTS WATCH (Feb. 27, 2018, 11:41 AM), https://www.hrw.org/news/2018/02/27/un-report-details-abuses-and-war-crimes-south-sudan (stating that the UN has determined that fighters in South Sudan's civil war, which started in 2013, have committed many atrocities against civilians, targeting them primarily on the basis of their ethnic identity).

[121] Maria Burnett, *Addressing Torture in Uganda: Five Actions Police Can Take*, HUM. RIGHTS WATCH (June 26, 2018, 12:01 AM), https://www.hrw.org/news/2018/06/26/addressing-torture-uganda (revealing, inter alia, the extent to which Ugandan police torture and mistreat suspects and suggests ways to reform the police and improve respect for human rights).

[122] *Sudan*, AMNESTY INT'L, https://www.amnestyusa.org/countries/sudan/ (last visited Mar. 2, 2021) (detailing, inter alia, human rights violations in Sudan with an emphasis on the Darfur region).

[123] *See* BONNY IBHAWOH, HUMAN RIGHTS IN AFRICA (2018) (providing a historical overview of the struggle to protect human rights in Africa); *see also* CLAUDE E. WELCH, JR., PROTECTING HUMAN RIGHTS IN AFRICA: STRATEGIES AND ROLES OF NONGOVERNMENTAL ORGANIZATIONS (1995) (examining strategies for the protection of human rights in Africa with emphasis on the role played by nongovernmental organizations).

example, while the country's president, Paul Biya, talks about "consolidating the rule of law [and opening] a new page in [the country's] democratic process," he is unwilling to engage in dialogue with Anglophone citizens who have been protesting against his government's efforts to politically and economically marginalize them.[124] Instead, he has sent security forces to brutalize and kill peaceful Anglophone protesters, as well as burn down their villages.[125] In 2008, he changed the constitution to grant himself another term in office, as well as exempt himself from all crimes that he may have committed while in office.[126] In 2018, he and his political party, the Cameroon People's Democratic Movement, engaged in election malpractices in order to secure a win and a seventh term in office.[127] Thus, while he asks other Cameroonians to obey the law, he considers himself above the law.[128]

Some scholars argue that "the lack of autochthonous principles of . . . constitutions [in Africa] presents an obstacle for their societal legitimacy."[129] Others argue that "because of the inherited nature of constitutionalism in postcolonial Africa, resistance to constitutionalism is not only inevitable, but also indispensable to the internalization of viable mechanisms for constraining power."[130] Many scholars cite this argument contending that democratic and constitutional governments did not exist in precolonial Africa and that democracy was an alien institution brought to the continent by the European invaders. Some politicians have gone as far as calling

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124 *See generally Sudan*, *supra* note 122.

125 *Id.*

126 *Id.*

127 *Id.*

128 *See* Adjami, *supra* note 67, at 114. *See also* Moki Edwin Kindzeka, *Cameroon President Vows to 'Deal' with Separatists*, VOA NEWS (Jan. 1, 2018, 7:06 AM) https://www.voanews.com/a/cameroon-president-vows-to-deal-with-separatist/4187305.html.

129 Adjami, *supra* note 67, at 114.

130 *Id.*

democracy an "imperialist dogma."[131] It was this belief in the alien origins of democracy in Africa that gave impetus to many of the military coups that swept the continent in the first few decades of independence.[132] Professor George Ayittey, an expert on indigenous African institutions, argues that scholars' and policymakers' claims that democracy is alien to Africa portray "a rather shameful ignorance of indigenous African heritage."[133] Professor Eme Awa, a former chairman of the Nigerian National Electoral Commission, agreed with Professor Ayittey when he proclaimed: "I do not agree that the idea of democracy is alien in Africa because we had democracy of the total type—the type we had in the city-states where everybody came out in the market square and expressed their views, either by raising their hands or something like that."[134]

With respect to constitutions and the practice of constitutional government, many researchers have concluded that there did exist, in many precolonial African societies, what has been described as "indigenous African constitutions" which, like the Constitution of the United Kingdom, were unwritten and based on customs and traditional practices.[135] These were, as argued by several scholars,

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[131] For example, Ayittey states that "after independence, African leaders dismissed democracy as an imperialist dogma, denounced markets as capitalist institutions, and set out to destroy Western institutions. In so doing, these leaders destroyed their own native institutions." KWAME BADU ANTWI-BOASIAKO & OKYERE BONNA, TRADITIONAL INSTITUTIONS AND PUBLIC ADMINISTRATION IN DEMOCRATIC AFRICA at 147–48 (2009).

[132] *See generally* A. B. ASSENSOH & YVETTE ALEX-ASSENSOH, AFRICAN MILITARY HISTORY AND POLITICS: COUPS AND IDEOLOGICAL INCURSIONS, 1900–PRESENT (2001) (presenting a rigorous examination of military incursions into African politics and their consequences on peaceful coexistence and development).

[133] GEORGE B. N. AYITTEY, INDIGENOUS AFRICAN INSTITUTIONS 469 (2d ed. 2006).

[134] *Quoted in* AYITTEY, *supra* note 133, at 469–470. *See also West Africa*, Feb. 22, 1988, at 310.

[135] *See* Fatou K. Camara (Faculty of Law, Cheik Anta Diop University, Dakar, Senegal), *The Three Most Important Features of Senegal's Legal System that Others Should Understand* 187–92, Presentation at the International Association of Law Schools Conference: Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World (May 30, 2008).

quite effective in regulating sociopolitical interaction in various subcultures in the continent.[136]

While the discussion of whether democracy and constitutionalism are alien to African societies might be of interest to academics and could greatly inform the discourse on human rights in the continent, it is unlikely to appeal to the many Africans who, today, live in extreme poverty and are subjected to various forms of tyranny directed at them by their governments. Individuals and groups that have been forced by the policies of their governments to remain trapped on the economic and political margins indefinitely are not likely to be interested in the historical development of democracy and constitutionalism in Africa.[137] Their interest lies in the type of institutional reforms that would provide their societies with institutional arrangements that safeguard their rights, enhance their ability to participate fully and effectively in political and economic markets, and significantly enhance peaceful coexistence.[138] For example, the establishment of national judiciaries capable of safeguarding the rights of citizens must be a policy imperative for each and every African country. This will allow each African country to develop a "more entrenched human rights constitutionalism."[139] Thus, regardless of the nature of constitutionalism and democracy in precolonial Africa, the public policy imperative in the continent today is the recognition and protection of human rights, which invariably calls for the

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[136] AYITTEY, *supra* note 133, at 295–297. *See also* SALIBA G. SARSAR & JULIUS ADEKUNLE, DEMOCRACY IN AFRICA: POLITICAL CHANGES AND CHALLENGES (Toyin Falola et al. eds., 2012) (arguing, inter alia, that elements of democracy existed in pre-colonial African societies).

[137] *See* Venessa Humpries, *Democracy Is Not Necessarily Good for the Poor, Research Finds*, GUARDIAN (Nov. 15, 2012, 10:04 AM), https://www.theguardian.com/world/2012/nov/15/africa-democary-poverty-relief (noting, inter alia, that democracy may not necessarily lead to good outcomes for the poor).

[138] *See, e.g.*, John Mukum Mbaku, *What Should Africans Expect from Their Constitutions*?, 41 DENV. J. INT'L L. & POL'Y 149 (2013) (arguing, inter alia, that at independence, most Africans wanted constitutions that would protect their fundamental rights from being violated by both state- and non-state actors).

[139] Adjami, *supra* note 67, at 115.

institutionalization of human rights constitutionalism in each and every African country.[140]

The institutionalization of human rights constitutionalism stresses, at the minimum, three important issues: (1) the centrality of human rights in the structure of each country's constitution—each constitution must have a bill of rights which recognizes and provides effective protections for the rights of citizens and incorporates provisions of international human rights instruments; (2) the constitution must provide for a truly independent judiciary empowered to enforce the bill of rights; and (3) the creation of a culture of respect for human rights. Scholars and human rights activists recognize the significant influence that international human rights instruments have on the design of bills of rights for African countries and see this as a positive development in the struggle to improve the human condition on the continent.[141]

2. *Should International Human Rights Instruments Be Used for Adjudication in Africa?*

Some scholars have argued that Africa's present state structures trace their origins to the colonial era.[142] Given the fact that the Europeans did not come to Africa to practice constitutionalism and democratic government, colonial institutional frameworks did not facilitate the practice of constitutionalism or democracy.[143] Instead, colonial laws and institutions were designed to enhance the ability of the European colonizers to dominate and impose their will on Africans and, as a consequence, the protection of the rights of Africans was hardly of interest to the colonial state.[144] Consider, for

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[140] *See, e.g.*, Franck Moderne, *Human Rights and Postcolonial Constitutions in Sub-Saharan Africa*, *in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 315, 323 (Louis Henkin and Albert Rosenthal eds. 1990); Adjami, *supra* note 67, at 115.

[141] *See, e.g.*, Moderne, *supra* note 140, at 322–27; Adjami, *supra* note 67, at 113.

[142] *See, e.g.*, Moderne, *supra* note 140.

[143] *See generally id.*

[144] *See* RICHARD M. BRACE, MOROCCO, ALGERIA, TUNISIA 48 (Prentice-Hall 1964).

example, the attitudes of French colonial officers in Algeria regarding the acquisition of land by French farmers.[145] In 1841, the French Governor of the colony of Algeria, General Thomas Robert Bugeaud, declared that "[w]henever the water supply is good and the land fertile, there we must place colonists without worrying about previous owners. We must distribute the lands [with] full title to the colonists."[146] It is obvious that, in this statement, the French Governor of Algeria and his administration had no interest in protecting and upholding the property rights of native Algerian landowners.[147]

Of course, the French were not the only European colonialists who ignored the rights of African residents in the territories they colonized.[148] Even the United Kingdom, which in 1953 rendered the provisions of the European Convention for the Protection of Human and Fundamental Rights (European Convention) applicable to its African colonies, was comparably disrespectful of Africans' rights.[149] For example, Edward Lugard, the brother of Lord Lugard who at the turn of the twentieth century was the British High Commissioner in the Northern Nigerian colony, was bewildered and embarrassed by the level of brutality visited on defenseless peoples in the colony.[150] On May 21, 1908, he wrote a letter to his brother in which he stated that "they [colonial soldiers, military police, and regular police units] killed every living thing before them"[151] and

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145 *See id*. at 48–50.

146 *Id*. at 48.

147 *See, e.g.*, John Mukum Mbaku & Mwangi S. Kimenyi, *Rent Seeking and Policing in Colonial Africa*, 8 INDIAN J. SOC. SCI. 277 (1995) (arguing, inter alia, that, as a colonial institution, the police were used effectively not to simply maintain law and order, but to help maximize British interests in the colony of Nigeria).

148 *See, e.g.*, Michael Crowder, *Whose Dream Was It Anyway? Twenty-Five Years of African Independence*, 86 AFR. AFF. 7 (1987).

149 European Convention, *infra* note 161. For examples of British brutality towards citizens of their colonies in Africa, see Crowder, *supra* note 148.

150 *See* Crowder, *supra* note 148, at 12.

151 *Quoted in id.*

that "[w]omen's breasts had been cut off and the leader spitted on a stake."[152]

In some European colonies, brutality against Africans and the violation of their rights were considered an important requirement of the job for soldiers and other paramilitary groups.[153] This type of colonial brutality is aptly illustrated by King Leopold II's *Force publique*[154] in the Congo Free State. A junior officer of the *Force publique* provided an eyewitness account of the level of colonial brutality in the Congo Free State, stating:

> We were a party of thirty . . . [sent to] a village to ascertain if the natives were collecting rubber, and, if not, to murder all, men, women, and children. We found the natives sitting peacefully. We asked what they were doing. They were unable to reply, thereupon we fell upon them and killed them all without mercy.[155]

Professor Michael Crowder,[156] an expert on European colonialism in Africa, provided an overview of the extent and level of the brutality visited on Africans by the Europeans during the colonial period. Crowder argues that any "form of resistance" by Africans to colonial rule was "visited by punitive expeditions that were often quite unrestrained by any of the norms of warfare in Europe."[157] He goes on to cite as an example "the bloody suppression of the Maji Maji and Herero uprisings in German East

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152 *Id.*

153 *See, e.g.*, *Force publique*, *infra* note 154.

154 The *Force publique* was the main military force in King Leopold's Congo Free State as well as in the Belgian Congo. For more on the *Force publique*, see *generally* BRYANT P. SHAW, FORCE PUBLIQUE, FORCE UNIQUE: THE MILITARY IN BELGIAN CONGO, 1914–1939 (1984) [hereinafter *Force publique*]. After Belgian Congo gained independence in 1960, the *Force publique* was converted into the Congolese National Army (*L'Armée nationale congolaise*).

155 HENRY RICHARD FOX BOURNE, CIVILIZATION IN CONGOLAND: A STORY OF INTERNATIONAL WRONG-DOING 253 (P. S. King & Son, 1903).

156 *See generally* Crowder, *supra* note 148.

157 *Id.* at 12.

and South West Africa,"[158] and several atrocities associated with the British-sponsored "suppression of the Satiru revolt in Northern Nigeria."[159] As a consequence, one was not likely to find a bill of rights in colonial constitutions nor did many colonies practice constitutionalism and constitutional government.[160]

Some scholars have argued that the European Convention[161] "had a particularly powerful impact on the creation of . . . national rights instruments"[162] in post-independence Africa. There are at least two reasons why the European Convention is seen as a major influence on the construction of bills of rights in the African countries. First, the rights found in the European Convention, it is argued, "are more explicitly defined than those in the Universal Declaration of Human Rights."[163] Second, the European Convention contains a clause that empowered any State Party to the Convention to extend the protections of the Convention to its colonies.[164] According to Article 56(1), "[a]ny State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall . . . extend to all or any of the territories for whose international relations it is responsible."[165] In 1953, the United Kingdom rendered the Convention applicable to its colonies in Africa until they gained their independence.[166]

While the European Convention is said to not have had a major impact on the advancement of human rights in the African colonies through Article 56(1), it nevertheless "is credited with inspiring the bills of rights of at least twenty-six Commonwealth countries, an

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158 *Id.*

159 *Id.*

160 *See id.*

161 *See generally* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

162 Adjami, *supra* note 67, at 116.

163 *Id.*

164 *See generally id.*

165 *Id.*

166 Christof Heyns, *African Human Rights Law and the European Convention*, 11 S. AFR. J. HUM. RIGHTS 252, 255 (1995).

influence of unprecedented scale and geographic scope."[167] Other influences on the development of human rights protections in the African countries include the struggle for civil rights in the United States and the rights jurisprudence developed by the U.S. Supreme Court.[168]

Several authors have examined issues about the applicability and legitimacy of international human rights norms in Africa.[169] In this article, we do not plan to revisit that subject. Instead, we argue that international human rights instruments, regardless of their origins, are critical to the struggle to recognize and protect human rights in African countries. Thus, any African country that seeks to create a domestic environment and culture of respect for human rights must begin by: (1) incorporating the provisions of international human rights instruments into its national constitution, as well as its national legislation, and making these rights justiciable in national courts; and (2) providing a constitutional role for its judiciaries in enforcing human rights.

C. AFRICAN JUDICIARIES AND THE ENFORCEMENT OF HUMAN RIGHTS

Since many African countries have not incorporated provisions of major international human rights instruments into their national constitutions, there is a limitation on the ability of international law to positively impact the protection of human rights. This is

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[167] Adjami, *supra* note 67, at 117. *See also* Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988).

[168] *See, e.g.*, C. R. M. DLAMINI, HUMAN RIGHTS IN AFRICA: WHICH WAY SOUTH AFRICA? (1995) (arguing, inter alia, that the bill of rights contributed significantly to the elimination of racial injustices in the United States and could function similarly in South Africa); MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES (showing, inter alia, the progressive nature of human rights jurisprudence of post-apartheid South African courts compared to the more conservative decisions of U.S. courts).

[169] *See* Adjami, *supra* note 67 (providing an overview of the applicability and legitimacy of human rights norms in the African countries).

especially critical, not only when national legislation conflicts with international human rights norms, but also when customary law and practices offend provisions of international human rights instruments or universal human rights norms. Nevertheless, this deficiency in national constitutions and national legislation can be cured by the judiciary, especially if a system of separation of powers allows for a truly independent judiciary. This would allow the judiciary to use its interpretive powers to interpret national laws in light of international human rights norms. Independent and progressive judiciaries in some African countries are already taking advantage of their ability and right to interpret the constitution and determine the constitutionality of all the country's laws, including customary laws, to strike down laws that they determine are not in line with the national constitution or international human rights norms. For example, in *Ephrahim v. Pastory*, a case that involved conflict between customary law and the Bill of Rights in Tanzania's constitution, the Tanzanian High Court, after establishing the country's commitment to international human rights norms, concluded as follows: "The [international human rights] principles enunciated in the above-named documents are a standard below which any civilized nation will be ashamed to fall. It is clear from what I have discussed that the customary law under discussion flies in the face of our Bill of Rights as well as international conventions to which we are signatories."[170]

By using their interpretive power this way, the courts can give effect to international human rights norms even if these norms are not incorporated into national constitutions and/or national legislation. Thus, in the effort to protect human rights in Africa, lawyers and judges have an important role to play—they can help bring "life to the rights guarantees enshrined in national constitutions."[171]

Unfortunately, many African judiciaries have not always been eager to take a leadership role in promoting adherence to the rule of

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[170] Ephrahim v. Pastory, 87 I.L.R. 106, 110 (Tanz. High Ct. 1990). The Court went on to rule that when there exists a conflict between customary law and fundamental rights, the international standard of the fundamental rights must prevail over the customary or traditional rules.

[171] Adjami, *supra* note 67, at 124.

law and the protection of human rights. In fact, many critics have argued that in many African countries, national judiciaries are actually actively involved in helping incumbent governments undermine the rule of law and commit atrocities against some subcultures, notably religious and ethnic minorities.[172] For example, as argued by noted Abuja, Nigeria-based human rights lawyer and activist, Chidi Odinkalu:

> [T]he judiciaries in Common Law African countries must take substantial responsibility for the collapse of constitutional government . . . . [T]he judiciary in many of these countries deliberately and knowingly abdicated its constitutional role to protect human rights and, in many cases, actively connived in the subversion of constitutional rule and constitutional rights by the executive arm of government.[173]

Judiciaries, such as those in Cameroon, Burundi, Côte d'Ivoire, Rwanda, Uganda, Tunisia, Republic of Congo, Equatorial Guinea, Zambia, and Angola, failed to take action while their presidents manipulated their constitutions to extend their mandates and punish their political opponents.[174] In fact, in countries such as Cameroon,

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[172] Professor Makau Mutua has argued that many newly-independent African countries failed to fully transform the critical domains and that efforts to indigenize and Africanize the judiciary "failed to transform the justice sector from a colonially racist, anti-people, and oppressive instrumentality." Makau Mutua, *Africa and the Rule of Law*, 13 INT'L J. HUM. RIGHTS 159, 161 (2016). In addition, argues Professor Mutua, "[j]udges became extensions of the executive and served at its whim. Instead of becoming fountains of justice, courts were used to instill fear in the populace at the behest of the executive. The courts were used to crush political dissent and curtail civil society." *Id.*

[173] *Quoted in* Adjami, *supra* note at 67, at 124.

[174] *See, e.g.*, Isaac Mufumba, *Presidents Who Amended Constitution to Stay in Power*, DAILY MONITOR (UGANDA) (Sept. 18, 2017) http://www.monitor.co.ug/Magazines/PeoplePower/Presidents-who-amended-constitution-to-stay-in-power/689844-4099104-qj5n58z/index.html (last

the judiciary evolved into a legal tool used by the president to punish his opponents, impose his will on citizens, and ensure his continued monopolization of political power.[175] The judiciary has a very important role to play in national elections in Cameroon—judges perform a supervisory function over the counting of votes and the determination of who is the winner.[176] Fombad notes that in "preparations for the 1996 and 1997 elections, a presidential decree doubled [judicial] salaries, and in the case of Supreme Court judges, the increase of almost 200 percent came with numerous perks and privileges.[177] There was nothing fortuitous in this. Judges preside over the divisional election supervisory and vote-counting commissions that tabulate election results, which are then sent to the national vote-counting commission."[178] This was designed, of course, to ensure electoral victory for the incumbent president.

Throughout the one-party era in Africa, most judiciaries served almost exclusively at the pleasure of the president and not to enforce the constitution or enhance adherence to the rule of law or safeguard the rights of citizens. In countries whose governments had been seized by the military, the courts either did not function or were transformed into tools used by the ruling elites to suppress anti-government opinion.[179]

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visited on Feb. 23, 2021); Takudzwa Hillary Chiwanza, *African Presidents and Their Love for Changing the Constitutions*, AFRICAN EXPONENT (Oct. 10, 2017) https://www.africanexponent.com/post/8604-african-presidents-are-always-chaging-their-constitutions (last visited on Feb. 6, 2021).

[175] *See infra* note 179.

[176] *Id.*

[177] *Id.*

[178] Fombad argues, for example, that in Cameroon, the judiciary has been "reduced to allies and partners of the executive in enjoying the spoils of power." Charles Manga Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control,* in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE STUDIES 234, 247–48 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds. 2000).

[179] For example, there were military coups in Nigeria; Dahomey/Bénin; Upper Volta/Burkina Faso; Republic of Congo; Mali;

In the early 1990s, when many African countries began their transition to democracy and governance processes undergirded by the rule of law, renewed interest emerged in making certain that the judiciary was granted enough independence by the constitution to enable it to function, not only as an effective check on the exercise of government power, but also as a major tool to ensure that international human rights law is given effect in the interpretation of domestic or national laws.[180] At this time, there was also talk in the continent of the need to take cognizance of the Bangalore Principles,[181] which were developed in 1988 at a judicial colloquium

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Central African Republic/Empire; and Mauritania. *See* Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. STUD. 181, 190 (1997). Karen A. Mingst argues that during military rule in Nigeria, "when the government claimed it was necessary to refrain from implementing issues in the constitution, the courts did not resist the argument. Both courts and judges acted very circumspectly, perhaps the reason that the military preserved the institution [i.e., the judiciary]." Karen A. Mingst, *Judicial Systems of Sub-Saharan Africa: An Analysis of Neglect*, 31 AFR. STUD. REV. 135, 140 (1988) (examining, inter alia, judicial and legal systems in Africa, including that in Uganda).

[180] Some legal scholars, however, have questioned the so-called "global expansion of judicial power." Specifically, they argue that "American-style judicial review" may actually subvert "the democratic ideal of government by the people and is therefore deeply problematic." Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 637 (2003). It is important to note, however, that in the African countries, which have imperial presidencies and relatively weak civil societies, the courts may be the only effective tool to fight government impunity and safeguard the fundamental rights of citizens. Of course, in some African countries, human rights activists no longer have faith in national courts to fully and effectively prosecute international crimes. As a consequence, these activists are looking to the International Criminal Court (ICC) as a court of last resort. *See* Sanji Mmasenono Monageng, *Africa and the International Criminal Court: Then and Now*, in AFRICA & THE INT'L CRIM. CT. 13, 16 (Gerhard Werle, Lovell Fernandez & Moritz Vormbaum eds. 2014).

[181] *The Bangalore Principles*, 1 DEVELOPING HUM. RIGHTS JURISPRUDENCE (Commonwealth Secretariat ed., 1988). *See also* The Hon.

in Bangalore, Pakistan and represented a statement by judges from several countries regarding the need to incorporate international human rights norms into their national constitutions and how to do so.[182] For example, Principle 7 states:

> [T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law—whether constitutional, statute or common law—is uncertain or incomplete. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation, or common law.[183]

Some international legal scholars argue that, as a result of the existence of the Bangalore Principles, judges now have an obligation to adopt and follow this interpretive principle.[184] It is important to note, however, that the Bangalore Principles will not apply in the case where the domestic constitution is clear, unambiguous, and is not inconsistent with international law.[185] The Bangalore Principles, argue some legal scholars, "are a statement of understanding among judges recognizing the extent of their power in interpreting laws in their common law systems and the degree to which using this power in the incorporation of international human rights in national jurisprudence will advance human rights at the national level."[186]

Justice Michael Kirby AC CMG, *The Road from Bangalore: The First Ten Years of the* Bangalore Principles *on the Domestic Application of International Human Rights Norms*, http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_bang11.htm (last visited on Mar. 2, 2021).

182 *See The Bangalore Principles*, *supra* note 181.

183 *Id.* at art. 7.

184 Fombad, *supra* note 39, at 457–58.

185 *Id.* at 457.

186 Adjami, *supra* note 67, at 126.

In Africa, the real challenge to the enforcement of human rights is not likely found in countries that have governing processes characterized by separation of powers, with a fully independent judiciary, even if international human rights law has not been incorporated into national constitutions and legislation. Instead, the major challenge is posed by "countries in which a legal infrastructure exists to enforce rights provisions yet a repressive government is in power that would stifle and intimidate efforts to enforce rights against the government before the courts."[187] In these countries, lawyers and judges represent important gatekeepers who can minimize the abuse of human rights, even in countries with opportunistic politicians.[188]

1. International Law and the Scope of Fundamental Rights in Africa: Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General and Others

The question of interest is: To what extent can international law help in the determination of the scope of a fundamental right in Africa? An examination of a case from the Supreme Court of Zimbabwe can help us appreciate how making reference to "regional and African and international [legal] sources has led to progressive decision making" in many African countries.[189]

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[187] *Id.* at 129.

[188] *See, e.g.*, Hon. Justice Philip Nnaemeka-Agu, *The Role of Lawyers in the Protection and Advancement of Human Rights*, 18 COMMW. L. BULL. 734, 736, 744 (1992) (examining, inter alia, the role of lawyers in the protection of human rights in Nigeria). The Hon. Justice Philip Nnaemeka-Agu was, at the time, a Justice of the Supreme Court of Nigeria, and this article is part of an address he delivered during the Law Week celebrations of the Nigerian Bar Association, Imo State of Nigeria, on February 10, 1992.

[189] Adjami, *supra* note 67, at 146.

On March 13, 1993, Zimbabwe's Minister of Justice, Legal, and Parliamentary Affairs announced that four men[190] who had been convicted of murder and sentenced to death would be hanged within a few days.[191] In reaction to the Justice Minister's decision to proceed with the execution of the four men, the Catholic Commission for Justice and Peace in Zimbabwe (Catholic Commission)[192] filed a "chamber application" with the Supreme Court of Zimbabwe, seeking the Court to order the respondents—"the Attorney-General, the Sheriff of Zimbabwe, and the Director of Prisons"—to delay the executions.[193] Specifically, the Supreme Court of Zimbabwe was being called upon to decide whether to:

> (i) declare that the delay in carrying out the sentence of death constitutes a contravention of section 15(1) of the Constitution of Zimbabwe (the Constitution); and
>
> (ii) order that such sentences be permanently stayed.[194]

Essentially, the Supreme Court of Zimbabwe, under the direction of Chief Justice Gubbay, was called upon to decide whether carrying out the sentence of execution by hanging of the four men for convictions of murder violates the "inhuman and degrading punishment" provision of Article 15(1) of the

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[190] The men were "Martin Bechani Bakaka, Luke Kingsize Chiliko, Timothy Mhlanga, and John Chakara Zacharia Marichi." Catholic Comm'n for Justice and Peace in Zim. v. Attorney-General of Zim. and Others (Zim. Sup. Ct. 1993), at 5 [hereinafter *Catholic Comm'n for Justice and Peace*].

[191] *See* John Hatchard, *Delay and the Death Sentence: The Zimbabwean Approach*, 37 J. AFR. L. 185, 1 (School of Oriental & Afr. Studies, Univ. of London, 1993) (providing a preliminary analysis of *Catholic Comm'n for Justice and Peace*).

[192] The Catholic Commission for Justice and Peace in Zimbabwe (CCJPZ) is a non-governmental organization that is dedicated to the recognition and protection of human rights in Zimbabwe. It was established in 1972 as the Catholic Commission for Justice and Peace in Rhodesia. The name of the organization was changed in 1980 when Southern Rhodesia gained independence and took the name Zimbabwe.

[193] *Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 5.

[194] *Id.*

Constitution of Zimbabwe.[195] The four men were actually convicted of capital murder in 1988 and they subsequently appealed their convictions, but those appeals failed.[196] The men remained in prison until the Minister of Justice announced their executions on March 13, 1993.[197] In its analysis, the Supreme Court of Zimbabwe noted the claim by the petitioners that "by March 1993 the executions had been rendered unconstitutional due to the dehumanizing factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions under which prisoners are confined in the condemned section at Harare Central Prison."[198] Chief Justice Gubbay noted that the Supreme Court of Zimbabwe's earlier judgment "dismissing the appeals of the condemned prisoners [could not] be disturbed" and that "the constitutionality of the death penalty per se, as well as the mode of its execution by hanging, [were] also not susceptible to attack."[199]

In the view of the Supreme Court of Zimbabwe, the main issue to be decided was as follows:

> [W]hether, even though the death sentences were the only fitting and proper punishments to have imposed, supervening events[200] establish that their execution on the appointed dates would have constituted inhuman or degrading treatment in violation of section 15(1) of the Constitution.[201]

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[195] Section 15(1) of the Constitution of Zimbabwe, 1980 is found in Chapter III, which is titled *The Declaration of Rights*, and it states as follows: "No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment." CONSTITUTION OF ZIMBABWE (1980), ch. 3, § 15(1), http://www.refworld.org/docid/3ae6b5720.html.

[196] *Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 6.

[197] *Id.*

[198] *Id.* at 5.

[199] *Id.*

[200] The supervening events were the long delays in carrying out the executions. *Id*. at 5–6.

[201] *Id.*

Gubbay then made reference to § 24(1) of the Constitution of Zimbabwe,[202] which "vests in the Supreme Court the power to deal with constitutional issues as a court of first instance."[203]

Gubbay began the analysis by examining "the availability of constitutional protection to condemned prisoners" in Zimbabwe.[204] Arguing that prisoners "by mere reason of a conviction,"[205] are not "denuded of all the rights they otherwise possess,"[206] he concluded that "a prisoner who has been sentenced to death does not, therefore, forfeit the protection afforded by § 15(1) [of the constitution of Zimbabwe] in respect to his treatment while under confinement."[207] The structure of the analysis undertaken in the *Catholic Commission* opinion follows the opinion Gubbay provided in *State v. Ncube & Others*.[208] In the *Ncube* opinion, Gubbay "expressed the view that section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency."[209] Chief Justice Gubbay then proceeded to consult international jurisdictions, including academics, in order "to

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[202] Section 24(1) of the Constitution states as follows: "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of the person detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress." CONSTITUTION OF ZIMBABWE (1980), ch. 3, § 24(1), http://www.refworld.org/docid/3ae6b5720.html.

[203] *Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 9.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* (citing Conjwayo v. Minister of Justice, Legal & Parliamentary Affairs & Another (Zim. Sup. Ct. 1992)).

[208] *Compare* State v. Ncube & Others (Zim. Sup. Ct. 1987), *with Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 9–10.

[209] *Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 9 (citing State v. Ncube & Others (Zim. Sup. Ct. 1987)).

establish the factual record of the suffering involved in delayed death sentences."[210]

Gubbay then undertook a survey of "judicial attitudes towards the constitutionality of executions given a long delay"[211] by searching for precedents "in Zimbabwe, India, the United States, and the West Indies."[212] After examining the attitude of courts to the delay in executing a sentence of death in these countries,[213] the Chief Justice then undertook a detailed examination of the decision of the European Court of Human Rights (European Court) in *Soering v. United Kingdom*—that decision had blocked the extradition to the United States from the United Kingdom of a suspect who was wanted by American authorities for trial.[214] The suspect, Soering, was a German national who was wanted for murder in Bedford County, Virginia (USA).[215] He fled to Europe but was later arrested in England on a charge of check fraud.[216] After he was indicted in Bedford County on two counts of brutal murders, the United States filed an order for his extradition based on a 1972 Extradition Treaty with the United Kingdom.[217]

A court in the UK subsequently found Soering extraditable to the United States.[218] Appeals against the decision were unsuccessful

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[210] Adjami, *supra* note 67, at 147 (citing *Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 9).

[211] *Id.* (citing *Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 9, 13–25)

[212] *Id.*

[213] That is Zimbabwe, India, the United States, and the West Indies. *See Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 13–14; India at 14–16; United States of America at 16–19; the West Indies at 19–22.

[214] *Id.* at 22–24.

[215] *See infra* note 218.

[216] *Id.*

[217] *See* 1972 UK-USA Extradition Treaty, U.K.-U.S., *entered into force* Jan. 21, 1977, 28 U.S.T. 227.

[218] After several UK courts, including the House of Lords (then, the country's highest judicial body), rejected Soering's petition against

and Soering was ordered to be handed over to U.S. authorities.[219] Nevertheless, Soering filed a complaint with the European Commission of Human Rights (ECHR), and the ECHR advised the UK government to delay the extradition until the ECHR had fully investigated the situation.[220] The UK government complied. In arguments before the ECHR, Soering alleged that should the UK extradite him to the United States, the UK would involve itself in a violation of Article 3 of the European Convention on Human Rights because the conditions under which death row prisoners were detained at Virginia's Mecklenburg Correctional Center were inhuman and degrading.[221] The ECHR ruled, six votes to five, against Soering[222] but decided to refer the case to the European Court, which unanimously held that there existed a real risk that if Soering was extradited to the United States, he was likely to be found guilty by a Virginia court and sentenced to death, and that the suffering Soering would experience on death row would violate Article 3 of the European Convention on Human Rights.[223]

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extradition, the UK Secretary of State, on August 3, 1988, signed a warrant ordering Soering's extradition to the United States authorities. Nevertheless, Soering was not transferred to U.S. custody because of his pending timely appeal to the European Commission of Human Rights. *See* Soering v. United Kingdom (No. 161), 11 Eur. Ct. H.R. 439 (ser. A) 444–48 (1989).

219 *Id.*

220 *See generally* Eur. H.R. Rep. 14038/88.

221 Article 3 states as follows: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Eur. Ct. H.R. (1950), Eur. Conv. on H.R., art. 3, https://www.echr.coe.int/Documents/Convention_ENG.pdf. *See also* Eur. H.R. Rep. 14038/88, ¶ 90.

222 The European Commission of Human Rights held "by six votes to five, that the extradition of the applicant [Jens Soering] to the United States of America in the circumstances of the present case would not constitute treatment contrary to Article 3 (Art. 3) of the [European] Convention [on Human Rights]." Eur. H.R. Rep. 14038/88, ¶ 154.

223 The European Court based its determination on a thorough assessment of death row conditions at Virginia's Mecklenburg Correctional Center. Chief Justice Gubbay quotes extensively from the European Court's

Next, Zimbabwean Chief Justice Gubbay referred to the decisions of the United Nations Human Rights Committee (UNHRC)[224] and considered the UNHRC's attitude toward "the death row phenomenon,"[225] given Member States' obligations under Article 7 of the ICCPR.[226] The UNHRC made decisions in several cases and in one of them, the majority held:

> In States whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies. A delay of ten years between the judgment of the Court of Appeal and that of the Judicial Committee of the Privy Council is disturbingly long. However, the evidence before the Committee

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judgment regarding its assessment of conditions at the death row part of the Mecklenburg Correctional Center. *See Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 22–24. *See also* Eur. H.R. Rep. 14038/88, ¶ 154. In its ruling, the European Court declared that in the event of the Secretary of State's decision to extradite the applicant to the United States of America being implemented, there would be a violation of Article 3 of the European Convention on Human Rights.

[224] *Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 24–25.

[225] That is, "whether the length of detention on death row amounted to a violation of the prohibition against 'torture or cruel, inhuman or degrading treatment or punishment' under [A]rt[icle] 7 of the [International] Covenant [on Civil and Political Rights]." *Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 24.

[226] Article 7 of the *International Covenant on Civil and Political Rights* states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." International Covenant on Civil and Political Rights, G.A., 2 J. INT'L L. & PRAC. 603, 622, at 606 (1993). *See Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), at 24.

> indicates that the Court of Appeal rapidly produced its written judgment and that the ensuing delay in petitioning the Judicial Committee is largely attributable to the authors.[227]

However, a dissent from one of the members of the UNHRC read as follows:

> The conduct of the person concerned with regard to the exercise of remedies ought to be measured against the States involved. Without being at all cynical, I consider that the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly. . . . In this type of case, the elements involved in determining the time factor cannot be assessed in the same way if they are attributable to the State [P]arty as if they can be ascribed to the condemned person. A very long period on death row, even if partially due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the State [P]arty from its obligations under art 7 of the Covenant.[228]

The Zimbabwe Supreme Court's survey of international sources, nevertheless, was not designed to review the country's compliance with its obligations under international law.[229] Instead, the Court "viewed its role primarily as one of elevating its national human rights jurisprudence to the international or civilized standard . . . ."[230] The Court's review of international sources, nevertheless, did not provide a consensus on the issue of delayed death sentences. Gubbay, however, found foreign and international authorities that supported and bolstered "his eventual holding that struck down the pending execution of the prisoners as unconstitutional."[231] He relied

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[227] *Quoted in Catholic Comm'n for Justice and Peace in Zimbabwe v. Attorney-General & Others* (Zim. Sup. Ct. 1993), at 25.

[228] *Id.* at 25 (emphasis added).

[229] Adjami, *supra* note 67, at 147.

[230] *Id.*

[231] *Id.* at 148.

on majority opinions in several Indian cases,[232] dissenting opinions in a Jamaican case,[233] a dissenter in the UN Human Rights Committee decision,[234] and a Canadian case.[235] The Chief Justice also surveyed the death row phenomenon with respect to cases from several U.S. states and ordered as follows:

> 1. The application is allowed with costs.
>
> 2. The sentence of death passed upon Martin Bechani Bakaki, Luke Kingsize Chiliko, Timothy Mhlanga[,] and John Chakara Zacharia Marichi is, in each case, set aside and substituted with a sentence of imprisonment for life.[236]

Thus, in this landmark decision, the Chief Justice set aside the death sentences against the four convicts and sentenced them to life imprisonment.[237] Zimbabwe's Chief Justice, in rendering the decision in the Catholic Commission case, consulted and sought guidance from foreign and international law.[238] In doing so, the Chief Justice remarked that § 15(1) of the Constitution of Zimbabwe " . . . is nothing less than the dignity of man."[239] He went on to state that § 15(1) "is a provision that embodies broad and idealistic notions of dignity, humanity[,] and decency . . ." and ". . . guarantees that punishment or treatment of the individual be exercised within the ambit of [civilized] standards."[240] Addressing the case before the Court, the Chief Justice noted that the determination of "whether a form of torture, punishment[,] or treatment, is inhuman or degrading is dependent upon the exercise of a value judgment" and

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232 *See Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), ¶¶ 76–77.
233 *Id.* ¶¶ 76–77.
234 *Id.* ¶ 89.
235 *Id.* ¶¶ 86–87.
236 *Id.* ¶ 130.
237 *Id.*
238 *Id.* ¶¶ 13–27, 130.
239 *Id.* ¶ 23.
240 *Id.*

> [o]ne that must not only take account of the emerging consensus of values in the [civilized] international community (*of which this* country [i.e., Zimbabwe] *is a part*), as evidenced in the decisions of other Courts and the writings of leading academics, but of contemporary norms operative in Zimbabwe and the sensitivities of its people.[241]

In interpreting domestic law, including constitutional provisions, regarding human rights in Zimbabwe, argued the Chief Justice of Zimbabwe, courts must take cognizance of the "emerging consensus of values in the civilized international community"; the fact that Zimbabwe is part of that "[civilized] international community;" ". . . decisions of other Courts"—that is, courts in other countries; "the writings of leading academics;" "contemporary norms operative in Zimbabwe;" and "the sensitivities of [the] peoples" of Zimbabwe.[242]

2. *The Use of International and Comparative Sources in Domestic Interpretation:* State v. Makwanyane *(South Africa)*

In the matter of the *State v. Makwanyane*, the Constitutional Court of the Republic of South Africa, the country's highest court, was called upon to determine whether the death penalty is "consistent with the provisions of the Constitution."[243] This case was decided under South Africa's Interim Constitution. Although Chapter Three of South Africa's Interim Constitution sets out the fundamental rights to which every South African is entitled under the constitution and "contains provisions dealing with the way in which the Chapter is to be interpreted by the Courts,"[244] the constitution does not deal specifically with the death penalty. Nevertheless, § 11(2), prohibits "cruel, inhuman or degrading treatment[,] or punishment."[245] Since the constitution does not provide a "definition of what is to be regarded as 'cruel, inhuman or

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241 *Id.* (emphasis added).

242 *Id.* ¶ 3.

243 The State v. T. Makwanyane & M. Mchunu, Case No. CCT/3/94, Judgment, ¶ 5 (Const. Ct. of the Republic of S. Afr. 1995).

244 *Id.* ¶ 8.

245 CONST. OF THE REPUBLIC OF S. AFR. ACT 200 OF 1993, § 11(2).

degrading,'" the Constitutional Court was called upon to "give meaning to these words."[246]

The challenge to the death penalty in the Republic of South Africa arose under § 11(2) of the Interim Constitution,[247] and was also examined under §§ 8–10 of the Interim Constitution.[248] Our interest in this case is in the use, by the Constitutional Court of South Africa, of international and foreign comparative law in determining the constitutionality of the death penalty. In a section titled "International and Foreign Comparative Law,"[249] the Constitutional Court's president, Chaskalson P, examined capital punishment in the United States[250] and India.[251] Chaskalson P also surveyed opinions of the UN Human Rights Committee and the European Court that deal specifically with "the treatment of the rights to dignity, life, and freedom from cruel, inhuman[,] and degrading punishment."[252] The examination of these various opinions on the death penalty was designed to help the Constitutional Court ". . . contextualize the South African decision with international attitudes and to offer comparative views on the scope of rights in national views and international forums."[253] In doing so, Chaskalson P stated the South African position on the role of international and comparative law: "We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it."[254]

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246 The State v. T. Makwanyane & M. Mchunu, Case No. CCT/3/94, Judgment, ¶ 8.

247 *See* CONST. OF THE REPUBLIC OF S. AFR. ACT 200 OF 1993, § 11(2).

248 *Id.* §§ 8-10.

249 The State v. T. Makwanyane & M. Mchunu, Case No. CCT/3/94, Judgment, at 22.

250 *Id.* ¶¶ 40–62.

251 *Id.* ¶¶ 70–79.

252 Adjami, *supra* note 67, at 151; *see also* The State v. T. Makwanyane & M. Mchunu, Case No. CCT/3/94, Judgment, at 48–73.

253 Adjami, *supra* note 67, at 151.

254 The State v. T. Makwanyane & M. Mchunu, Case No. CCT/3/94, Judgment, ¶ 39.

The Constitutional Court held that the death penalty offends the South African constitution, and hence is unconstitutional.[255] Chaskalson P, speaking for the Constitutional Court, anchored the Court's opinion on the following principle:

> The rights to life and dignity are the most important of all human rights and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.[256]

In addition to relying on international and foreign comparative law, the *Makwanyane* decision also consulted African cases dealing with the death penalty; specifically the *Catholic Commission* (Zimbabwe)[257] case, which describes the death row phenomenon.[258] In addition, the *Makwanyane* decision also paid close attention to Chief Justice Gubbay's reasoning in the decision of the *Catholic Commission* case.[259] Finally, concurring judgments in *Makwanyane* make references to other African cases, notably *Ex parte Attorney-General, Namibia* [260] and *Ncube*.[261]

The cases discussed here reveal that courts in many African countries are gradually turning to international sources as ". . . interpretive devices and authoritative precedent for determining the scope of fundamental rights enshrined in constitutional bills of

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[255] *See generally id.*

[256] *Id.* ¶ 144.

[257] *See Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993), ¶ 1.

[258] *See, e.g.*, the State v. T. Makwanyane & M. Mchunu, Case No. CCT/3/94, Judgment, ¶ 177.

[259] *Id.*

[260] *Ex Parte Attorney-General, Namibia: In re Corporal Punishment* (3) SA 76 (1991 NmSC).

[261] State v. Ncube (2) SA 702 (Zim. 1988).

rights."[262] Judges in the African countries are looking to international law, particularly international human rights law, to provide them with the necessary tools to help them determine the scope of the fundamental rights enshrined in their domestic constitutions.[263] In doing so, they shy away from invoking provisions of international human rights instruments, which have not yet been incorporated into their municipal legal orders.[264] Nevertheless, these African judges do not grant any ". . . interpretive primacy to these [international human rights instruments] over nonbinding instruments or other informal statements of principles."[265]

III. THE RESPONSIBILITY TO PROTECT AND HUMAN RIGHTS IN AFRICA

A. INTRODUCTION

In 1992, then UN Secretary-General, Boutros Boutros-Ghali, authored a report called *An Agenda for Peace*,[266] in which he spelled out ways in which he believed intergovernmental organizations could respond more effectively and fully to threats to international peace and security.[267] The report looked specifically at three important areas that were suggested by the UN Security Council: preventive diplomacy, peacemaking, and peace-keeping.[268] The

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262 Adjami, *supra* note 67, at 151.

263 *Id.*

264 *Id.*

265 *Id.* at 152.

266 The document was officially called *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping* and was produced by the Secretary-General at the request of the UN Security Council. It was subsequently presented to the UN Security Council at its summit meeting on January 31, 1992. *See* U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, UN Doc. A/47/277 (1992) [hereinafter *Agenda for Peace*].

267 *Agenda for Peace*, *supra* note 266.

268 *Id.*

Secretary-General added one more area, which he believed was a "closely-related concept:" post-conflict peace-building.[269]

The Secretary-General's report was released in early 1992 at a time when there were tremendous changes in the global system—both the Soviet Union and socialism in Eastern Europe had collapsed and the Cold War was coming to an end.[270] In Africa, South Africa's dreaded and racially-based apartheid system was in the process of being replaced and the country was about to usher in a new nonracial democratic system;[271] and many of Africa's dictatorships had fallen or were about to fall.[272] Throughout the world, previously exploited and marginalized peoples were rising up to assert their right to govern themselves, and it was becoming quite evident that the recognition and protection of human rights were gaining significant importance in the global legal order.[273] In fact, in his report to the UN Security Council, Boutros-Ghali emphasized the need and urgency for the post-Cold War global society to "enhance respect for human rights and fundamental freedoms."[274] The end of the Cold War, the Secretary-General believed, had offered "all nations large and small," the opportunity

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269 *Id.* ¶ 5.

270 NICK BISLEY, THE END OF THE COLD WAR AND THE CAUSES OF SOVIET COLLAPSE (2004) (examining, inter alia, the causes of the collapse of the Soviet Union and the end of the Cold War).

271 *See generally* THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE (John Mukum Mbaku & Julius O. Ihonvbere eds. 2003) (examining, inter alia, changes that were taking place in Africa in the early-to-mid-1990s). *See also* JOHN C. EBY & FRED MORTON, THE COLLAPSE OF APARTHEID AND THE DAWN OF DEMOCRACY IN SOUTH AFRICA, 1993 (2017) (examining, inter alia, the collapse of South Africa's apartheid system and the emergence of a non-racial democratic dispensation); ROBERT HARVEY, THE FALL OF APARTHEID: THE INSIDE STORY FROM SMUTS TO MBEKI (2001) (examining, inter alia, events leading to the collapse of apartheid in South Africa).

272 *See, e.g.*, CRAWFORD YOUNG & THOMAS TURNER, THE RISE & DECLINE OF THE ZAIRIAN STATE (1985) (examining, inter alia, the rise and collapse of the dictatorship of Mobutu Sese Seko, dictator of Zaire (now Democratic Republic of Congo), who came to power through a military coup in 1965 and was ousted by rebel forces in 1997).

273 *See Agenda for Peace*, *supra* note 266.

274 *Id.* ¶ 5.

to achieve the cherished objectives of the UN Charter, which included "a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, 'social progress and better standards of life in larger freedom.'"[275]

The Secretary-General went on to argue that the opportunity, made possible by the end of the Cold War, must not be squandered by the type of intergovernmental bickering that had characterized the global order that followed the end of the Second World War and lasted through the Cold War.[276] Instead, the UN and its Member States must dedicate themselves to improving conditions for peaceful coexistence and the recognition and protection of human rights and fundamental freedoms.[277]

For many years, the Security Council, in its capacity as the primary UN organ charged with maintaining international peace and security, had failed to take an active role in dealing quickly, effectively, and fully, with threats to international peace and security.[278] As a consequence, the international community was unable to respond effectively to the pervasive abuse of human rights and fundamental freedoms in many parts of the world, including atrocities committed against citizens in many African countries, for

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275 *Id.* ¶ 3.
276 *Id.*
277 *Id.* ¶¶ 3–5.
278 *Id.*

example, Nigeria,[279] Republic of Sudan,[280] and Rwanda.[281] In fact, the failure of the UN and other regional organizations, such as the AU, to develop and implement effective legal mechanisms for dealing with threats to peace, security, and human rights has produced genocidal wars in Darfur (Sudan), Rwanda, and other parts of the continent.[282]

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[279] During the Nigerian Civil War (1967–1970), the OAU considered the conflict an internal affair and one that had to be resolved by Nigerians themselves. As a consequence, the OAU made no effort to prevent the atrocities committed against civilians, many of them Biafran children. *See, e.g.*, JOHN J. STREMLAU, THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967–1970 (1977) (providing, inter alia, an overview of the atrocities committed against civilian populations during the Nigerian Civil War). Despite the fact that the OAU's successor organization, the AU, has adopted a more progressive approach to conflicts that involve the violation of human rights, it is still slow to respond. For example, since 2016, the Francophone-dominated central government in Cameroon has launched a genocidal war on the country's Anglophone Regions—North West and South West—which has resulted in the killing of many civilians and the destruction of many Anglophone villages. *See* Peter Zongo, *'This Is a Genocide': Villages Burn as War Rages in Blood-Soaked Cameroon*, GUARDIAN (UK), May 30, 2018, https://www.theguardian.com/global-development/2018/may/30/cameroon-killings-escalate-anglophone-crisis. Yet, after more than two years of what the international press is calling genocide against Anglophones by government security forces, the AU is yet to take any action to stop these government-induced atrocities.

[280] *See* LEVY, *infra* note 282 (examining, inter alia, atrocities committed against the peoples of the Darfur region of Sudan by government forces and those of militias affiliated with the government).

[281] *See* MELVERN, *infra* note 282 (describing atrocities committed against Rwanda's Tutsi citizens and their Hutu sympathizers by the Hutu-dominated government and the Interahamwe, a Hutu paramilitary organization).

[282] *See, e.g.*, JANEY LEVY, GENOCIDE IN DARFUR (2009) (examining, inter alia, the genocide in the Darfur region of the Republic of Sudan); LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE (2004) (recounting events leading to and including the Rwandan Genocide); PETER BAXTER, BIAFRA: THE NIGERIAN CIVIL WAR, 1967–1970 (2014) (examining, inter alia, the various atrocities committed during the civil war that took place in Nigeria from 1967 to 1970).

As the world moved into the twenty-first century, and as previously oppressed peoples continued to fight for their rights and freedoms, including their right to self-determination, the protection of human rights emerged as an important issue in global governance.[283] Former UN Secretary-General and Ghanaian diplomat Kofi Annan[284] appealed to the UN General Assembly to find ways to deal with threats to international peace and security, including, if necessary, "humanitarian intervention" to deal with sectarian and other types of violence that violate human rights in particular and threaten international peace and security in general.[285] Annan then posed a question to the international community—one that dealt directly with whether intervention by the international community in the internal affairs of Member States of the UN would represent an interference in the sovereignty of these States.[286] He inquired: "[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that affect every precept of our common humanity?"[287]

In response to this challenge to the international community regarding the protection of human rights and fundamental freedoms and other threats to international peace and security, the Canadian Government, with the help of several foundations, established the ICISS and announced the latter's formation to the UN General

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[283] *See OHCHR and Good Governance*, UN HUM. RIGHTS OFF. OF THE HIGH COMM'R, https://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx (last visited Feb. 6, 2021).

[284] Kofi Annan served as the Secretary-General of the United Nations from January 1, 1997, to December 31, 2006. He passed away on August 18, 2018, in Bern, Switzerland. *Biography*, KOFI ANNAN FOUND. (Aug. 19, 2018), https://www.kofiannanfoundation.org/kofi-annan/biography/ (last visited Feb. 6, 2021).

[285] *See Responsibility to Protect*, *supra* note 36.

[286] *See id.*

[287] *Id.*

Assembly in September 2000.[288] The ICISS was tasked with wrestling with a range of questions, including "legal, moral, operational[,] and political" issues, and in doing so, the organization was expected to "consult with the widest possible range of opinion around the world and to bring back a report that would help the Secretary-General and others find some new common ground."[289]

After research and consultation with various stakeholders, the ICISS established a new approach to dealing with threats to international peace and security, including those involving the abuse of human rights and fundamental freedoms.[290] The ICISS called this new approach to dealing with threats to international peace and security the R2P. As detailed in the ICISS Report, the R2P incorporates three important elements, which are:

> A. The responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.
>
> B. The responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention.
>
> C. The responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery,

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288 *See generally The Responsibility to Protect*, DEP'T OF PUB. INFO. (2014), https://www.un.org/es/preventgenocide/rwanda/assets/pdf/Backgrounder%20R2P%202014.pdf (stating, inter alia, that "[f]ollowing the tragedies in Rwanda and the Balkans in the 1990s, the international community began to seriously debate how to react effectively when citizens' human rights are grossly and systematically violated" and that "[t]he expression 'responsibility to protect' was first presented in the report of the International Commission on Intervention and State Sovereignty (ICISS), set up by the Canadian Government in December 2001").

289 *Responsibility to Protect*, *supra* note 36.

290 *See id.*

> reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.[291]

Since 2005, the R2P has been recognized as global society's unanimous commitment to confront threats to international peace, including activities of state and nonstate actors that violate human rights, such as genocides, ethnic cleansings, and other mass atrocities. In Resolution 60/1 of September 16, 2005, the UN General Assembly adopted the 2005 World Summit Outcome Document (2005WSOD),[292] and by doing so, the international community formally registered its commitment to combat threats against international peace and security, including those that were targeted at preventing and protecting human rights and fundamental freedoms. According to Article 138 of the 2005WSOD, "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing[,] and crimes against humanity.[293] This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means."[294] Of course, the atrocities listed in Article 138 of the 2005WSOD represent direct assaults on human rights and fundamental freedoms; hence, the obligation imposed on Member States of the UN to prevent these crimes also represents an understanding on their part to protect human rights.[295]

But what happens when and if a Member State fails to fulfill its R2P obligations and does not protect its citizens from atrocities committed by state or nonstate actors? The international community, working through and with the help of the UN—particularly the UN Security Council—"has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means . . . to help protect populations from genocide, war crimes, ethnic cleansing[,] and crimes against humanity."[296] Implied in this statement is that the international community has the responsibility

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291 *Responsibility to Protect*, *supra* note 36.
292 G.A. Res. 60/1 (Oct. 24, 2005).
293 *Id.* at art. 138.
294 *Id.*
295 *See id.*
296 *Id.* at art. 139.

to ensure the recognition and protection of human rights. If, however, the peaceful approach is not successful in fully and effectively resolving various threats to international peace and security, including the protection of human rights, the international community is "prepared to take collective action, in a timely and decisive manner, through the UN Security Council, in accordance with the UN Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate."[297]

It is important to recognize the fact that the R2P is a political commitment and not a legally binding obligation on the part of Member States of the UN.[298] Nevertheless, this commitment flows directly from binding international norms—specifically norms that have either been assumed under or have evolved from various international human rights instruments, including, for example, the Convention on the Prevention and Punishment of the Crime of Genocide, as well as various norms of customary international law.[299]

During his service as Secretary-General, Kofi Annan showed significant support for and interest in using the UN and various regional organizations, such as the AU, to minimize threats against international peace and security, including atrocities committed against peoples around the world.[300] For example, in 2003, Annan convened a High-Level Panel on Threats, Challenges and Change (High-Level Panel), and the following year, the High-Level Panel produced a report titled *The Secretary-General's High-Level Panel Report on Threats, Challenges and Change, A More Secured World:*

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[297] *Id.*

[298] *See About*, UN OFF. ON GENOCIDE PREVENTION & THE RESP. TO PROTECT, https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml (last visited Feb. 8, 2021).

[299] *See generally* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[300] Mr. Annan was particularly concerned about the possibility of repeat atrocities, such as those that occurred in Rwanda in 1994. *See, e.g.*, *Responsibility to Protect*, *supra* note 36.

Our Shared Responsibility (High-Level Panel Report).[301] In the High-Level Panel Report, the UN endorsed the "emerging norm that there is a collective international responsibility to protect, exercisable by the [UN] Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing[,] or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent."[302] In 2005, Annan presented a report titled *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, which made clear that "the primary responsibility for implementing human rights lies with governments."[303]

In 2006 the UNSC formally and officially recognized the R2P through Resolution 1674[304] and affirmed "the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing[,] and crimes against humanity."[305] Ban Ki-moon, who took over from Kofi Annan as the UN Secretary-General on January 1, 2007, also fully supported the R2P.[306] In early 2008, Ban Ki-moon appointed Edward C. Luck as the UN's first Special Adviser on the R2P.[307] The Secretary-General indicated that: "Mr. Luck's work will include the responsibility to

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301 U.N. Secretary-General, *The Secretary-General's High-Level Panel Report on Threats, Challenges and Change, A More Secured World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

302 *Id.* ¶ 203.

303 U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, U.N. Doc. A/59/2005/Add.3, ¶ 22 (May 26, 2005).

304 S.C. Res. 1674 (Apr. 28, 2006).

305 *Id.* ¶ 4.

306 *See UN Press Release: Secretary-General Appoints Edward C. Luck of United States Special Adviser*, U.N. Press Release No. SG/A/1120–BIO/3963 (Feb. 21, 2008) (noting the appointment, by the UN Secretary-General, of Edward C. Luck, as the UN's first Special Adviser on the R2P).

307 *Id.*

protect, as set out by the General Assembly in paragraphs 138 and 139 of the 2005 World Summit Outcome document."[308]

In several reports produced by or under the direction of Ban Ki-moon, it was made clear that the primary responsibility for protecting populations against international crimes (e.g., genocide, crimes against humanity, war crimes, and ethnic cleansing) belonged to each Member State.[309] The UN Secretary-General also stressed the need for international assistance to help countries build the necessary capacity to confront threats to international peace, including the abuse of human rights and fundamental freedoms.[310] In 2009, Ban Ki-moon presented a report titled *Implementing the Responsibility to Protect to the UN General Assembly*.[311] In the report, the Secretary-General articulated a three-pillar strategy for the implementation of the R2P.[312]

The first pillar deals with "[t]he protection responsibilities of the State"—each State must shoulder the responsibility to protect its citizens from international crimes, including making certain that human rights are respected and protected.[313] The second pillar deals with the need for the international community to help each country develop the capacity to confront international crimes.[314] This pillar emphasizes the cooperation of Member States, regional and sub-regional organizations, civil society, and the private sector in dealing with international crimes, including the creation of a culture of respect for human rights.[315] The third pillar addresses the

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[308] *Id*. Paragraphs 138 and 139 deal with the "responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity." *See* G.A. Res. 60/1 (Oct. 24, 2005), at art. 138–39.

[309] *See, e.g.*, U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

[310] *Implementing the Responsibility to Protect*, *supra* note 309, at summary.

[311] *Id*.

[312] *See id*. ¶ 11.

[313] International crimes include: genocide, war crimes, ethnic cleansing, and crimes against humanity. All these crimes represent major threats to human rights and fundamental freedoms in Africa. *See id*. ¶ 11(a).

[314] *See id*. ¶ 11(b).

[315] *See id*.

contributions[316] of the international community and advises the latter to respond "collectively in a timely and decisive manner when a state is manifestly failing to"[317] protect its citizens against international crimes.[318]

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[316] These are the contributions of the international community to the protection of all global citizens from international crimes; the development of necessary capacity within each country and within regions of the globe to respond fully and effectively to international crimes (e.g., genocide); and the creation, within each country and region, of a culture that recognizes, promotes, and defends human rights. In Africa, there have been significant achievements in the area of human rights, many of them inspired by events taking place in the international community (e.g., the end of the Cold War and the disintegration of the Soviet Union). For example, Africans have adopted the African Charter on Human and Peoples' Rights; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; the African Charter on the Rights and Welfare of the Child; the Constitutive Act of the African Union, which makes the protections and promotion of human rights an explicit and important part of the AU's mandate; and the African Court on Human and Peoples' Rights. *See, e.g.*, THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA: INTERNATIONAL, REGIONAL NATIONAL PERSPECTIVES (Danwood Mzikenge Chirwa & Lilian Chenwi eds. 2016) (presenting a series of essays that argue, inter alia, that the movement to recognize, promote, and defend human rights in Africa has benefited significantly from the international community, but unlike Europe and the United States, Africa has given recognition, not just to civil and political rights, but also to economic, social, and cultural rights as well).

[317] *Implementing the Responsibility to Protect*, *supra* note 309, ¶ 11(c).

[318] Pillar number three, which calls for the international community to act in a "timely and decisive manner when a State is manifestly failing to" protect its citizens, is especially important given the genocides in Rwanda and Darfur (Sudan). *Id.* In addition to the fact that both the Rwandan and Sudanese states failed to protect their peoples from international crimes, the governments themselves were the actual source of the atrocities committed against citizens of both countries. Furthermore, the international community failed to act (i.e., intervene) in a "timely and decisive manner." *Id; See, e.g.*, ROMÉO DALLAIRE, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA (2004) (examining, inter

In 2009, the United Nations General Assembly recognized the R2P through Resolution 63/308 of October 7, 2009.[319] The United Nations General Assembly indicated that it would "continue [its] consideration of the responsibility to protect,"[320] and that it would engage in several interactive dialogues to deal with different aspects of the R2P and its implementation.[321] One of the dialogues, the one held in 2012, focused exclusively on "timely and decisive responses and the 2013 dialogue was devoted to state responsibility and prevention."[322]

In 2011, then UN Secretary-General, Ban Ki-moon, presented a report titled *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*,[323] to the UN General Assembly and the UN Security Council. In the report, he addressed the role that can be played by regional and sub-regional organizations in protecting populations against international

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alia, the failure of the international community to intervene to prevent the massacre of Tutsis and their Hutu sympathizers in Rwanda in the spring of 1994); FRANCIS DENG, ET AL., SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (2010) (arguing, inter alia, that sovereignty can no longer be seen or used as protection against international intervention to end the abuse of human rights when national governments are either unwilling or unable to prevent the perpetuation of atrocities against citizens); RICHARD BARLTROP, DARFUR AND THE INTERNATIONAL COMMUNITY: THE CHALLENGES OF CONFLICT RESOLUTION IN SUDAN (2011) (detailing the challenges faced by the international community as it has sought to deal with the atrocities committed against the peoples of Darfur by the government of Sudan and its affiliated militias).

[319] G.A. Res. 63/308, *The Responsibility to Protect*, UN Doc. (Oct. 7, 2009).

[320] *Id*. ¶ 2.

[321] *See Implementing the Responsibility to Protect*, *supra* note 309, ¶¶ 51, 72.

[322] *From Non-Interference to Non-Indifference: The African Union and the Responsibility to Protect*, at 8, INT'L REFUGEE RIGHTS INITIATIVE (Sept. 2017), http://refugee-rights.org/wp-content/uploads/2017/09/AU-R2P-final.pdf [hereinafter INT'L REFUGEE RIGHTS INITIATIVE].

[323] U.N. Secretary-General, *The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect*, U.N. Doc. A/65/877–S/2011/393 (June 27, 2011).

crimes.[324] He went on to declare that "[o]ver the last three years, [the UN had] applied principles of the responsibility to protect in [its] strategies for addressing threats to populations in about a dozen specific situations," and "[i]n every case, regional and/or sub-regional arrangements have made important contributions, often as full partners with the United Nations."[325]

The R2P represents an important mechanism through which the international community can participate in and contribute to the prevention of atrocities, such as genocide and crimes against humanity, that violate human rights and fundamental freedoms in Africa. However, in order for the international community to contribute positively to the fight against international crimes and the improvement of the environment for the protection of human rights in Africa, regional, sub-regional, and national organizations in the continent must grant their cooperation. For example, the AU, as well as sub-regional organizations, such as the ECOWAS, working in cooperation with the UNSC, are more likely to deal successfully with threats to international peace and security in Africa than any of these organizations working alone.[326]

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[324] *See id*. ¶ 1.

[325] *Id*. ¶ 4.

[326] Such cooperation was critical in forcing Yahya Jammeh, former president of The Gambia, out of power. Jammeh, who came to power through a military coup in 1994, had lost his re-election bid in a December 2016 presidential election. Nevertheless, after first acknowledging and conceding his defeat to opposition leader, Adama Barrow, he later refused to leave office. ECOWAS, with the support of the UN Security Council and the AU, finally pushed him out, clearing the way for the president-elect, Barrow, to take the oath of office. *See, e.g*., Colin Freeman, *Gambia's Ousted Dictator Is Living the Good Life in a Palace in Equatorial Guinea*, FOREIGN POL'Y (Apr. 3, 2017, 11:05 AM), https://foreignpolicy.com/2017/04/03/gambias-ousted-dictator-is-living-the-good-life-in-a-palace-in-equatorial-guinea/; Dionne Searcey & Jaime Yaya Barry, *Yahya Jammeh, Gambian President, Now Refuses to Accept Election Defeat*, THE N.Y. TIMES (Dec. 9, 2016), https://www.nytimes.com/2016/12/09/world/africa/yahya-jammeh-gambia-rejects-vote-defeat-adama-barrow.html.

IV. THE FAILURE OF THE OAU TO DEAL FULLY WITH THREATS TO PEACE AND SECURITY IN AFRICA

On May 25, 1963, African countries met at Addis Ababa, Ethiopia where they founded the OAU and granted it the power to undertake certain activities on their behalf.[327] In addition to making sure that all remaining colonies and non-self-governing territories in the continent were liberated and granted their independence, the OAU was directed to promote regional cooperation among the new countries in order to promote peace and security as well as rapid economic growth and development.[328]

Given the fact that the OAU was not granted the power to enact legislation that was binding on its Member States, it was expected to undertake its objectives through the harmonization of its Member States' policies.[329] Within the OAU, the highest governing organ was the Assembly of Heads of State and Government, and its main function was to "discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization."[330] The Council of Ministers, which consisted of foreign ministers of the Member States, was responsible for the operationalization of the work of the Assembly of Heads of State and Government.[331] Specifically, the Council of Ministers was tasked with implementing "the decision of the Assembly of Heads

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[327] *See* OAU Charter, art. XVIII(2), May 25, 1963, 479 U.N.T.S. 39.

[328] *Id*. at arts. II(1)(d), 2(a)–(b).

[329] INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 9.

[330] Article VIII of the OAU Charter states as follows: "The Assembly of Heads of State and Government shall be the supreme organ of the Organization. It shall, subject to the provisions of this Charter, discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization. It may in addition review the structure, functions and acts of all the organs and any specialized agencies which may be created in accordance with the present Charter." OAU Charter, *supra* note 327, at art. VIII.

[331] The OAU's Council of Ministers usually held two meetings a year and it was subordinate to the Assembly of Heads of State and Government (AHSG). Its principal responsibility was to prepare the AHSG's agenda and implement the latter's decisions. The CM eventually emerged as the OAU's driving force. OAU Charter, *supra* note 327, at art. XII(1).

of State and Government," as well as "coordinat[ing] inter-African cooperation in accordance with the instructions of the Assembly."[332] In addition to the Council of Ministers and the Assembly of Heads of State and Government, the OAU was also armed with two other institutions or organs, namely, the General Secretariat[333] and the Commission of Mediation, Conciliation and Arbitration (CMCA).[334] The CMCA was designed to function as the OAU's dispute resolution mechanism.[335] In addition to the fact that the CMCA could only deal with disputes between Member States, disputes could be referred to the CMCA only with the prior consent or approval of the Member States.[336] The CMCA was a judicial dispute resolution mechanism,[337] but it was "stillborn and has never worked"[338] because ". . . member states have shown a strong preference for political processes of conflict resolution rather than for judicial means of settlement."[339]

Africa experienced many challenges to peace and security during most of the OAU's existence.[340] In addition to struggles of the many colonies that had yet to gain independence by 1963 when the OAU came into existence, there were several civil wars and interstate conflicts that required urgent action from the continental organization.[341] There were also struggles for independence in the Portuguese colonies of Angola, Mozambique, Guinea-Bissau, and

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[332] *Id.* at art. XIII(2).
[333] *Id.* at arts. XVI–XVIII.
[334] *Id.* at art. XIX.
[335] *See id.*
[336] *See generally id.*
[337] *See* INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 9.
[338] *Rwanda: The Preventable Genocide*, AFR. UNION (July 2000), ¶ 11.4, http://www.refworld.org/docid/4d1da8752.html.
[339] *Id.*
[340] *See* MONDE MUYANGWA & MARGARET A. VOGT, AN ASSESSMENT OF THE OAU MECHANISM FOR CONFLICT PREVENTION, MANAGEMENT AND RESOLUTION, 1993–2000, at 5 (2000).
[341] *Id.* at 5.

Cape Verde,[342] as well as efforts to liberate Southern Rhodesia (Zimbabwe),[343] South West Africa (Namibia),[344] and apartheid South Africa from white supremacist regimes.[345] During the period

[342] *See generally* AL VENTER, PORTUGAL'S GUERRILLA WARS IN AFRICA: LISBON'S THREE WARS IN ANGOLA, MOZAMBIQUE AND PORTUGUESE GUINEA 1961–74 (2013) (detailing the struggle for independence in the Portuguese colonies of Angola, Mozambique, Guinea-Bissau (Guiné-Bissau), and Cape Verde (Cabo Verde)). Note that during the colonial period, Guinea-Bissau was referred to as Portuguese Guinea.

[343] *See generally* ELIAKIM M. SIBANDA, THE ZIMBABWE AFRICAN PEOPLE'S UNION, 1961–87: A POLITICAL HISTORY OF INSURGENCY IN SOUTHERN RHODESIA (2005) (presenting a detailed analysis of the struggle for independence in Southern Rhodesia); LOUISE WHITE, SOVEREIGNTY: RHODESIAN INDEPENDENCE AND AFRICAN DECOLONIZATION (2015) (examining the struggle for independence and democracy in Southern Rhodesia with special emphasis on white and African perspectives).

[344] *See generally* RICHARD DALE, THE NAMIBIAN WAR OF INDEPENDENCE, 1966–1989: DIPLOMATIC, ECONOMIC AND MILITARY CAMPAIGNS (2014) (detailing the struggle for independence in the former German colony of South West Africa, which gained independence in 1990 and took the name Namibia).

[345] *See generally* DAVID MERMELSTEIN, THE ANTI-APARTHEID READER: THE STRUGGLE AGAINST WHITE RACIST RULE IN SOUTH AFRICA (1987) (detailing the struggle against the racist apartheid regime in South Africa); SHERIDAN JOHNS & R. HUNT DAVIS, MANDELA, TAMBO, AND THE AFRICAN NATIONAL CONGRESS: THE STRUGGLE AGAINST APARTHEID, 1948–1990: A DOCUMENTARY SURVEY (1991) (examining the struggle for independence in South Africa, beginning with the formal establishment of the apartheid regime in 1948 to the release of Nelson Mandela from prison in 1991).

lasting from 1963 to 1993, there were civil wars or major conflicts in Nigeria,[346] Chad,[347] Liberia,[348] Sierra Leone,[349] and Somalia.[350]

In its first thirty years of existence, the OAU was quite successful in managing some conflicts—notably those dealing with "colonially-inherited borders."[351] Nevertheless, the OAU played its most significant role in the struggle to end European colonialism in Africa, including the elimination of the dreaded apartheid system in South Africa.[352] It worked cooperatively with various international actors, including the UN and the Frontline States,[353] to support

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[346] *See generally* PETER BAXTER, BIAFRA: THE NIGERIAN CIVIL WAR, 1967–1970 (providing a critical overview of the Nigerian civil war).

[347] *See generally* MARIELLE DEBOS, LIVING BY THE GUN IN CHAD: COMBATANTS, IMPUNITY AND STATE FORMATION (Andrew Brown trans., Zed Books Ltd. 2016) (examining the pervasiveness of sectarian violence in Chad, as well as state-sponsored repression of citizens).

[348] *See generally* MARK HUBAND, THE LIBERIAN CIVIL WAR (1998) (providing an overview of the civil war that began in Liberia in 1989).

[349] *See generally* LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE (2005) (providing a first-person account of the civil war in Sierra Leone); KIERAN MITTON, REBELS IN A ROTTEN STATE: UNDERSTANDING ATROCITY IN SIERRA LEONE (2015) (detailing the transformation of ordinary people into sadistic killers during the civil war in Sierra Leone).

[350] MARY HARPER, GETTING SOMALIA WRONG?: FAITH, WAR AND HOPE IN A SHATTERED STATE (2012) (examining the transformation of Somalia into a failed state).

[351] *See* MUYANGWA & VOGT, *supra* note 340, at 5. (the OAU was successful, for example, in managing border disputes between Algeria and Morocco; Mali and Upper Volta (Burkina Faso); Somalia and Kenya; and Ethiopia and Somalia).

[352] *See infra* note 353 and accompanying text.

[353] The Frontline States (FLS) were a loose coalition of countries in southern Africa, which, from the 1960s to the 1990s, committed significant resources to ending the apartheid system and white minority rule in South Africa and Southern Rhodesia. The FLS included Angola, Botswana, Mozambique, Tanzania, Zambia, and Zimbabwe. *See generally* STUDIES IN THE ECONOMIC HISTORY OF SOUTHERN AFRICA: THE FRONT-LINE STATES (Zbigniew A. Konczacki et al. 1990) (examining, inter alia, economic

liberation movements in Zimbabwe, Namibia, and South Africa.[354] The OAU, however, was not successful in fully resolving the question of the independence of the Western Sahara.[355] Aside from these few successes, the OAU failed miserably in its efforts to confront threats to peace and security in the continent.[356] Researchers have identified several factors that they believe explain why the OAU had a disappointing record in dealing with challenges to peace and security in Africa from its founding in 1963 to the early 1990s.[357] These include limitations imposed on the OAU by its founding document; the inadequacies of its conflict management institutions; the lack of political will among Member States' leaders; the lack of capacity, experience, and financial resources; and the constraints imposed on the OAU by external actors, many of which intervened in the continent's affairs.[358]

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developments in the Frontline States); CAROL B. THOMPSON, CHALLENGE TO IMPERIALISM: THE FRONTLINE STATES IN THE LIBERATION OF ZIMBABWE (1985) (examining the contributions of the Frontline States to the liberation of Zimbabwe); GILBERT M. KHADIAGALA, ALLIES IN ADVERSITY: THE FRONTLINE STATES IN SOUTHERN AFRICAN SECURITY, 1975–1993 (2007) (providing a comprehensive examination of the founding of the Frontline States alliance and its contributions to liberation movements in Southern Africa).

354 *See generally* SAUL DUBOW, APARTHEID, 1948–1994 (2014) (examining, inter alia, the contributions of the Frontline States to the end of apartheid in South Africa and the coming into place of a non-racial democratic system).

355 *See generally* PERSPECTIVES ON WESTERN SAHARA: MYTHS, NATIONALISMS, AND GEOPOLITICS (Anouar Boukhars & Jacques Roussellier eds. 2014) (examining, inter alia, the struggle for independence in the Western Sahara and the failure of the OAU to resolve the Morocco's claims over most of the territory).

356 *See* Abu Alhassan (Ghana Army), *The African Peace and Security Architecture: Myth or Reality*, U.S. Army War College, Carlisle Barracks, PA 17013, Strategy Research Project (March 2013), at 4–5, https://apps.dtic.mil/dtic/tr/fulltext/u2/a588906.pdf (noting, inter alia, that the "OAU's overall record of providing peace and security in Africa from 1963 to 1993 was a fiasco").

357 *See id*.

358 *See* MUYANGWA & VOGT, *supra* note 340, at 6.

One of the most important limitations on the OAU's ability to deal with threats to peace and security in the continent was its founding document's Article III, which set forth the principles under which the organization was to operate.[359] One of those principles was "[n]on-interference in the internal affairs of [Member] States."[360] The non-interference principle and the requirement that Member States of the OAU dutifully exercise "[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence,"[361] effectively "hampered the OAU's role in resolving intra-state conflicts."[362] This is illustrated by the civil war, which raged in Nigeria from 1967 to 1970; this conflict was, perhaps, the greatest challenge to the OAU during the period 1963–1993.[363]

The OAU saw the position taken by Biafra to secede as a threat to the territorial integrity of the Nigerian Federation.[364] Nevertheless, the OAU considered the conflict an internal matter and one that the Nigerians needed to resolve without external interference.[365] The conflict also caused a schism within the organization, demonstrated by the fact that four countries—Gabon, Côte d'Ivoire, Tanzania, and Zambia—"challenged the [OAU] [C]harter's stipulations on territorial integrity and non-interference by pledging their support for the Biafran secessionist cause."[366] The civil war ended in 1970 after Biafra surrendered, but the OAU had

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359 OAU Charter, *supra* note 327, at art. III(2).

360 *Id.*

361 *Id.* at art. III(3).

362 *See* MUYANGWA & VOGT, *supra* note 340, at 6.

363 *See generally* JOHN J. STREMLAU, THE INTERNATIONAL POLITICS OF THE NIGERIAN CIVIL WAR, 1967–1970 (Princeton Univ. Press 1977) (examining, inter alia, the OAU's failed efforts to act to stop the bloody confrontation between the Republic of Biafra and the government of the Federal Republic of Nigeria).

364 *See* Onyeonoro S. Kamanu, *Secession and the Right of Self-Determination: An O.A.U. Dilemma*, 12 J. MOD. AFR. STUD., 355, 364, 373–74 (1974) (discussing OAU action during Biafran secession conflict).

365 *See id*. at 372.

366 *See* MUYANGWA & VOGT, *supra* note 340, at 6.

contributed virtually nothing to bring an end to the conflict and avoid the atrocities committed against civilians.[367]

Given the OAU's inherent weaknesses, Member States usually preferred to take their cases to other multilateral institutions, including the International Court of Justice.[368] Even in cases where Member States decided to seek assistance from the OAU in resolving their conflicts, they often chose to bypass the organization's Commission on Mediation, Arbitration, and Reconciliation, and instead opt for "ad hoc mediation and consultation committees and delegations, diplomacy, and good offices."[369]

The OAU's failure in resolving the civil war in Chad revealed its lack of capacity and experience with confronting threats to peace and security in the continent.[370] Although the OAU did eventually intervene militarily in Chad, the effort was a total failure because it "was late, poorly planned and financed, [and] lacked a clear mandate and the resources necessary to accomplish the mission.[371] The mission, which had been approved in 1980, failed to arrive in Chad until 1981 by which time the cease-fire had broken down."[372] The OAU's poorly equipped peacekeeping force was eventually forced to leave Chad in 1981 while the civil war raged and political and economic conditions continued to deteriorate.[373]

The lack of financial resources significantly contributed to the OAU's failure to undertake humanitarian intervention.[374] Some observers argue that this lack of resources was due to the fact that

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[367] *See* 1ANTHONY KIRK-GREENE, CRISIS AND CONFLICT IN NIGERIA: A DOCUMENTARY SOURCEBOOK, 1966–1970 (1971) (examining military intervention in the First Republic and its aftermath, the civil war, and efforts to bring about peace in Nigeria).

[368] *See* MUYANGWA & VOGT, *supra* note 340, at 6–7.

[369] *Id.*

[370] *Id.*

[371] *Id.*

[372] *Id.*

[373] *Id. See also* TERRY M. MAYS, AFRICA'S FIRST PEACEKEEPING OPERATION: THE OAU IN CHAD, 1981–1982 (Praeger Publishers 2002) (providing an overview of the OAU's intervention efforts in Chad).

[374] *See* MUYANGWA & VOGT, *supra* note 340, at 7.

Member States did not have faith in the organization and were not willing to pay their dues.[375] Since the OAU's main source of financing was contributions from Member States, the failure of these countries to fulfil their financial obligations to the organization had a significant negative impact on its performance.[376]

The persistent interest of external actors in Africa and their determined efforts to exploit Africa and Africans represented an important constraint on the ability of the OAU to engage in humanitarian intervention in the continent.[377] During the Cold War, Africa became "a battleground for the United States and the Soviet Union as the two superpowers competed for ideological and strategic dominance."[378] In the Horn of Africa and Southern Africa, superpower intervention, which included the supply of military equipment and financial resources to both sides in each conflict, prolonged these conflicts and intensified the "devastation caused" by these interventions.[379]

In 1993, the OAU moved to establish the Mechanism for Conflict Prevention, Management, and Resolution (MCPMR) with the objective of managing and resolving conflicts throughout the continent.[380] The MCPMR emerged at a time when the continent was overwhelmed by refugees and internally displaced persons.[381] Nevertheless, the OAU was unable to move quickly and work efficiently and effectively to resolve many of the sectarian conflicts

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375 *Id.*

376 *Id. See generally* ISIAKA A. BADMUS, THE AFRICAN UNION'S ROLE IN PEACEKEEPING: BUILDING ON LESSONS LEARNED FROM SECURITY OPERATIONS (Palgrave Macmillan 2015) (describing, inter alia, the failure of Member States to meet their financial obligations to the OAU/AU).

377 *See* MUYANGWA & VOGT, *supra* note 340, at 7.

378 *Id.*

379 *Id.*

380 Larry Benjamin et al., *Declaration of the Assembly of Heads of State and Government on the Establishment Within the OAU of a Mechanism for Conflict Prevention, Management and Resolution*, 1 S. AFR. J. INT'L AFF. 126 (1993).

381 It has been estimated that at this time, there were as many as 5.2 million refugees and 13 million internally displaced persons in the continent. *See* MUYANGWA & VOGT, *supra* note 340, at 11.

that were pervading the continent.[382] This is evidenced by the conflict that emerged in Rwanda in the Spring of 1994 when the Rwandan President Juvénal Habyarimana was killed after a plane he was flying in was shot down as it prepared to land in Kigali on April 6, 1994.[383] In just 100 days, members of the Hutu paramilitary organization, Interahamwe, killed over 800,000 Tutsi and their Hutu sympathizers.[384] The Rwandan Genocide represented the OAU's most significant failure in maintaining continental peace and security in the post-Cold War period. It was this failure that gave impetus to the founding of the AU.[385]

The decision of the OAU to strictly adhere to its operating principles, particularly that of "non-intervention," as well as the failure of the organization to secure the necessary financial resources to finance its various intervention missions effectively prevented the organization from coordinating efforts to deal fully with threats against peace and security in the continent.[386]

V. THE AFRICAN UNION, HUMAN RIGHTS, AND THE RESPONSIBILITY TO PROTECT

A. INTRODUCTION

Although there are many reasons why Africans had decided to replace the OAU with a new organization called the African Union

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[382] *Id.*

[383] *See* LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE (Verso 2004).

[384] *See id.*

[385] *See generally* JOHN ILIFFE, OBASANJO, NIGERIA & THE WORLD 220 (James Currey 2011) (arguing, inter alia, that the creation of the AU came from three directions, including widespread dissatisfaction with the OAU, which was ill-equipped to deal with the continent's economic decline and to intervene in the internal affairs of Member States to prevent atrocities, such as the Rwandan Genocide).

[386] *See* GABRIEL S. NDUGULILE, THE ORGANIZATION OF AFRICAN UNITY (OAU), ITS SUCCESSES AND FAILURES IN THE LIBERATION STRUGGLE: A CASE STUDY OF ZIMBABWE (Centre for Foreign Relations 1981) (examining the OAU's successes and failures in Africa's liberation movements using Zimbabwe as a case study).

(AU), the most important one concerns the failure of the OAU to deal fully and effectively with many of the continent's conflicts, including especially the Rwandan Genocide, which had been responsible for the deaths of thousands of people.[387] In addition to causing the deaths of many people, these conflicts also destroyed the productive capacities of many of the continent's already fragile economies.[388]

The release of the 1990 Declaration on the Political and Socio-Economic Situation in Africa indicated that the OAU had outlived its usefulness.[389] The declaration emphasized the belief that Africa was entering a new era in its political and economic transformation in which less emphasis would be placed on liberation from colonialism in favor of economic growth and development and regional integration.[390] Specifically, the declaration stated that Member States of the OAU were determined to "work assiduously towards economic integration through regional cooperation" and were also "determined to take urgent measures to rationalize the existing economic groupings in our continent in order to increase their effectiveness in promoting economic integration and establishing an African Economic Community."[391]

In 1991, African countries, in keeping with the post-Cold War emphasis on economic development and regional integration,

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[387] For example, civil wars in Liberia and Sierra Leone caused significant damage to their infrastructures and significantly reduced their productive capacities. *See* FELIX GERDES, CIVIL WAR AND STATE FORMATION: THE POLITICAL ECONOMY OF WAR AND PEACE IN LIBERIA (Campus Verlag 2013) (examining, inter alia, the impact of war on state formation, economic development, and peace-making in Liberia); *see also* LANSANA GBERIE, A DIRTY WAR IN WEST AFRICA: THE RUF AND THE DESTRUCTION OF SIERRA LEONE (Indiana University Press 2005) (examining, inter alia, the impact of the civil war on the economic and political systems in Sierra Leone).

[388] *See generally* GERDES, *supra* note 387.

[389] *Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World*, ORG. OF AFR. UNITY, AHG/Decl. 1 (XXVI) (1990), https://archives.au.int/handle/123456789/715.

[390] *Id.* ¶ 8.

[391] *Id.* ¶ 8.

adopted a treaty establishing the African Economic Community (Abuja Treaty).[392] The main objective of the Abuja Treaty was "to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote an endogenous and self-sustained development."[393] This important objective was to be accomplished through "the strengthening of existing regional economic communities and the establishment of other communities where they do not exist."[394]

In 1999, at the OAU Assembly of Heads of State and Government summit in Sirte,[395] Libya, African leaders, under the leadership of Libyan leader Muammar Gaddafi, announced their intention to create a new continental organization they believed would "fast track the creation and implementation of the institutions contemplated by the Abuja Treaty."[396] The new institution was the AU, which took over the duties of the OAU and incorporated the African Economic Community.[397] The AU has been described as "essentially a merger of the largely political ambitions of the OAU and the mainly economically minded African Economic Community, with the addition of some organs and with an acceleration of pace in economic integration, as stipulated in the Sirte Declaration."[398] The AU is said to have "supplanted the OAU largely out of a sense of frustration among African leaders about the

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[392] The treaty was officially referred to as *The Treaty Establishing the African Economic Community* (Abuja Treaty), adopted on June 3, 1991, and entered into force on May 12, 1994. TREATY ESTABLISHING THE AFRICAN ECONOMIC COMMUNITY, ORG. OF AFR. UNITY (June 3, 1991).

[393] *Id.* at art. 4(1)(a).

[394] *Id.* at art. 4(2)(a).

[395] Robert Nolan, *The African Union After Gaddafi*, J. DIPL. & INT'L REL. (Dec. 5, 2011), http://blogs.shu.edu/diplomacy/2011/12/the-african-union-after-gaddafi/ (arguing that during the Sirte (Libya) summit in 1999, "Gaddafi helped convince 45 African heads of state to approve the creation of the African Union, and for more than a decade, he was the largest patron and most outspoken advocate.").

[396] INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 10.

[397] Constitutive Act of the African Union, *supra* note 26.

[398] FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 164 (2nd ed. 2012).

slow pace of economic integration and awareness that the many problems on the continent necessitated a new way of doing things."[399]

When African leaders created the AU, they modified the principles of the OAU.[400] In doing so, they were fully "[c]onscious of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security, and stability as a prerequisite for the implementation of our development and integration agenda."[401] The Constitutive Act of the African Union,[402] like its predecessor, the OAU Charter, continues a prohibition on "the use of force or threat to use force among Member States of the Union"[403] and retains the OAU's principle of "non-interference by any Member State in the internal affairs of another."[404] However, unlike the OAU, the AU reserves the right to intervene in "a Member State pursuant to a decision of the Assembly [of Heads of State and Government] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[405] The Constitutive Act of the African Union grants each Member State the right "to request intervention from the [African] Union in order to restore peace and security."[406]

The designers of the Constitutive Act of the African Union, like those who developed the R2P, were concerned about *inaction* on the part of Member States and consequences for peace and security in the continent.[407] For example, in 1994, inaction by the UN, the global community, and the AU, resulted in the Rwandan

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399 INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 10.

400 *See generally* Constitutive Act of the African Union, *supra* note 26.

401 *Id.* at pmbl.

402 *Id.*

403 *Id.* at art. 4(f).

404 *Id.* at art. 4(g).

405 *Id.* at art. 4(h).

406 *Id.* at art. 4(j).

407 *See id.*; *see also Responsibility to Protect*, *supra* note 36.

Genocide.[408] In the introduction to the R2P document, the ICCIS states:

> The United Nations (UN) Secretariat and some permanent members of the Security Council knew that [Rwandan] officials connected to the then government were planning genocide; UN forces were present, though not in sufficient number at the outset; and credible strategies were available to prevent, or at least mitigate, the slaughter which followed. But the Security Council refused to take the necessary action. That was a failure of international will—of civic courage—at the highest level. Its consequence was not merely a humanitarian catastrophe for Rwanda: the genocide destabilized the entire Great Lakes region and continues to do so.[409]

Although the Constitutive Act of the African Union does not specifically mention the Rwandan Genocide, like the R2P document, it nevertheless indicates that the Heads of State and Government of the Member States were quite aware of the inaction that had led to genocide and other types of atrocities in various parts of the continent.[410] It has been argued that the "inclusion of . . . R2P-like provisions [in the Constitutive Act of the African Union] arose from concern about the OAU's failure to stop internal conflicts, as well as widespread human rights violations occurring within states, including those instigated by the regimes of Idi Amin in Uganda and Jean-Bédel Bokassa in the Central African Republic."[411] Although the OAU mitigated and minimized some types of conflicts, particularly those involving "trans-boundary claims"[412] and those "fueled by irredentism,"[413] it greatly intensified others by "legitimizing the preservation of the status quo and delegitimizing

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408 *Responsibility to Protect*, *supra* note 36.

409 *Id*.

410 *See* Constitutive Act of the African Union, *supra* note 26, at pmbl.

411 INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 11.

412 James Busumtwi-Sam, *Architects of Peace: The African Union and NEPAD*, 7 GEO. J. INT'L AFF. 71, 74 (2006).

413 *Id*.

the grievances of disaffected groups."[414] In fact, the failure of public policy in many African countries to grant a hearing to the grievances of many excluded and marginalized groups (e.g., religious and ethnic minorities) gave rise to violent and destructive mobilization as groups fought to improve their levels of political and economic participation. Examples of ethnocultural groups that have engaged in violent and destructive mobilization in an effort to minimize their political and economic marginalization include the Igbos of Nigeria, several indigenous ethnic groups in Liberia, and the Anglophones of Cameroon.[415] The Igbos of Nigeria, together with other minority groups from the then Eastern Region of Nigeria, fought a brutal civil war that lasted from 1967 to 1970 in an attempt to secede from the Federal Republic of Nigeria.[416] Several indigenous ethnic groups in Liberia, under the leadership of Sargent Samuel K. Doe of the Krahn ethnic group, engaged in violent activities to dismantle the more than 100-year old minority Americo-Liberian hegemony and replace it with a governing process that was supposed to improve political and economic participation for indigenous groups.[417] The Anglophones of Cameroon took up arms in 2018 to fight what they argue is domination and exploitation by the Francophone-dominated central government.[418]

By the early-to-mid-1990s, as grassroots pro-democracy movements continued to dismantle dictatorships and authoritarian governments throughout the continent, there emerged new emphasis on the recognition and protection of human rights, including especially those of heretofore marginalized groups (e.g., women, children, the poor, ethnic and religious minorities, and other vulnerable groups).[419] Nevertheless, despite these transformations

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414 *Id*.

415 *See, e.g*., JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 2–3 (2018).

416 *See id*.

417 *See id*.

418 *See id*.

419 *See id.*

in the governance architectures of many countries on the continent, the violation of human rights remained a major problem.[420]

This lack of progress in minimizing impunity and enhancing the protection of human rights on the continent came from the failure of many African countries to provide themselves with effective institutional arrangements—that is, those capable of adequately constraining the State and minimizing the ability of state custodians (i.e., civil servants and political elites) to engage in activities that violate the rights of citizens. For example, after the dictatorship of Mobutu Sese Seko in the Democratic Republic of Congo (DRC) was ousted in 1997, subsequent governments were either unable or unwilling to engage the country's various subcultures in robust institutional reforms to create effective governance structures.[421] Laurent-Désiré Kabila, who ruled the country from 1997 until his assassination in 2001, never made any effort to engage the people of the DRC in necessary institutional reforms.[422] Instead, he chose to retain the dysfunctional governance architecture that had allowed impunity to become pervasive throughout Mobutu's more than 30-year rule.[423] When Laurent-Désiré Kabila was assassinated in 2001, his son, Joseph, took over as president of the DRC, and like his father, Joseph Kabila did not undertake the necessary reforms to improve governance in the DRC.[424] As a consequence, state and non-state agents continued to violate human rights with impunity.[425]

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[420] *See id*.

[421] *See infra* note 425.

[422] *See infra* note 425.

[423] *See infra* note 425.

[424] *See infra* note 425.

[425] *See generally* MICHAEL DEIBERT, THE DEMOCRATIC REPUBLIC OF CONGO: BETWEEN HOPE AND DESPAIR (2013) (examining, inter alia, the failure of DRC governments, including that of Joseph Kabila, to fully transform the country and provide it with effective institutional arrangements); *see generally* JEAN-LOUIS PETA IKAMBANA, MOBUTU'S TOTALITARIAN POLITICAL SYSTEM: AN AFROCENTRIC ANALYSIS (2006) (arguing, inter alia, that Mobutu's political system, which began in 1965 and ended in 1997, was totalitarian, with Mobutu putting his own personal

It was within this type of institutional environment, one characterized by dysfunctional economic and political institutions, that African leaders began the effort to transform the OAU into the AU. Of course, there were exceptions. Countries such as Ghana and post-apartheid South Africa had managed to provide themselves with progressive constitutions and governing processes undergirded by separation of powers with effective checks and balances. Of particular interest in these countries was the fact that fair, free, and credible elections were producing change in government without any resort, by losing political groups, to violent mobilization, as was occurring in other African countries.[426] The post-apartheid constitution of the Republic of South Africa, for example, created the position of president and limited the president's mandate to a maximum of two terms.[427] Nelson Mandela was elected post-apartheid South Africa's first president and took office on May 10, 1994.[428] He chose not to compete for a second term and left office peacefully after the end of his term in 1999.[429] On April 28, 1992, Ghana approved a new constitution and ushered in the Fourth Republic.[430] Since then, there has been peaceful change of government; for example, in the 2016 presidential election that took place on December 7, 2016, the incumbent president John Dramani Mahama lost to opposition candidate, Nana Akufo-Addo.[431] Mahama conceded and left office, allowing for a peaceful transition.[432]

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interests at the center of public policy); FRANÇOIS NGOLET, CRISIS IN THE CONGO: THE RISE AND FALL OF LAURENT KABILA (2010) (examining, inter alia, the ascent of Kabila to the pinnacle of power in the DRC in 1997 and his fall through an assassin's bullet in 2001).

426 *See generally infra* note 432.

427 *See infra* note 432.

428 *See infra* note 432.

429 *See infra* note 432.

430 *See infra* note 432.

431 *See infra* note 432.

432 *See, e.g.*, *Ghana: John Mahama's Concession Speech*, NEWS24 (Dec. 12, 2016), https://www.news24.com/Africa/News/ghana-john-

The AU is governed by sixteen principles,[433] and of these, six of them make explicit or implicit reference to human rights, including "respect for democratic principles, human rights, the rule of law and good governance,"[434] and "respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities."[435] The AU's "objectives" also reference human rights—the AU pledged to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments."[436] Finally, the AU pledged to work closely and cooperatively with its Member States to promote peace, security, stability, democracy, and good governance.[437]

It is argued that "[t]he legal and policy documents of the African Union (AU) are founded on a human security paradigm that obliges the continental body to maintain a non-indifference stance on human rights abuses."[438] The AU's non-indifference policy is significantly different from the "state-centric security principle of the Organization of African Unity, which gave excessive privileges

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mahamas-concession-speech-20161212. The peaceful regime changes that have taken place in both South Africa and Ghana are a contrast to the violence that has accompanied presidential elections in Kenya or the unwillingness of Yahya Jammeh to leave office after losing the presidential election in The Gambia. *See generally Gambia Talks Fail as President Refuses to Step Down*, BBC NEWS (Jan. 14, 2017), https://www.bbc.com/news/world-africa-38621092; *see generally* Eyder Peralta, *Post-Election Violence Continues in Kenya, as Opposition Leader Returns*, NPR NEWS (Nov. 18, 2017, 5:43 PM), https://www.npr.org/2017/11/18/565095126/post-election-violence-continues-in-kenya-as-opposition-leader-returns (detailing the sectarian violence that took place in the aftermath of general elections in Kenya in August 2017).

433 *See* Constitutive Act of the African Union, *supra* note 26, at art. 4.

434 *Id.* at art. 4(m).

435 *Id.* at art. 4(o).

436 *Id.* at art. 3(h).

437 *See id.* at art. 3(a), (f), (g), & (h).

438 Ndubuisi Christian Ani, *The African Union Non-Indifference Stance: Lessons from Sudan and Libya*, 6 AFR. CONFLICT & PEACEBUILDING REV. 1, 1 (2016).

to state elites."[439] To implement its non-indifference principle, minimize threats to peace and security, and promote good governance in all its Member States, the AU created "a dedicated . . . machinery"[440] which "supports the [AU's] commitment to intervene in respect of war crimes, genocide and crimes against humanity."[441] This new machinery, which was dedicated to fighting threats to peace and security, consisted of the Peace and Security Council (PSC)[442] and subsidiary organs, namely, the New Partnership for Africa's Development;[443] the Banjul Charter;[444] the African Court;[445] the Protocol on Amendments to the Protocol on

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[439] *Id*. at 1.

[440] INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 12.

[441] *Id.* at 12.

[442] *Id.* at 12. The AU was established by the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, which entered into force on December 26, 2003. *Protocol Relating to the Establishment of the Peace and Security Council of the African Union,* AFR. UNION, https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union (last visited on November 18, 2018).

[443] INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 14. The New Partnership for Africa's Development (NEPAD) was established in 2002 as a "strategic framework for the socio-economic development of the continent." *New Partnership for Africa's Development (NEPAD)*, AFR. UNION, https://au.int/en/organs/nepad (last visited on Nov. 16, 2018). It was expected to serve as the "primary mechanism to coordinate the pace and impact of Africa's development in the 21st century." *Id*.

[444] INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 15. The Africa Charter on Human and People's Rights was adopted on June 27, 1981 and entered into force on October 21, 1986. *Africa (Banjul) Charter on Human and Peoples' Rights*, *adopted* June 27, 1981, 5, 21 I.L.M. 58 (1982), https://www.achpr.org/legalinstruments/detail?id=49.

[445] INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 15. The African Court on Human and Peoples' Rights ("ACtHPR") is a continental court that was established by African countries to "ensure . . . the protection of human and peoples' rights in Africa." *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, AFR. UNION, *adopted* June 10, 1998, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-

the Statute of the African Court of Justice and Human Rights;[446] and the Ezulwini Consensus.[447]

B. THE PEACE AND SECURITY COUNCIL OF THE AFRICAN UNION, HUMAN RIGHTS AND THE R2P

On July 9, 2002, the AU adopted the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (PSC Protocol)[448] and established the PSC.[449] The PSC was established specifically to serve as a "collective security and early-warning arrangement to facilitate timely and efficient response to

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rights-establishment-african-court-human-and (last visited on Nov. 19, 2018). The ACtHPR was designed to "complement and reinforce the functions of the African Commission on Human and Peoples' Rights." *Id.* It was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights—the Protocol was adopted by Member States of the then OAU in Ouagadougou, Burkina Faso, in June 1998 and came into effect on January 25, 2004. *Welcome to the African Court,* AFR. CT. ON HUM. & PEOPLE'S RIGHTS, http://en.african-court.org/ (last visited on Feb. 10, 2021).

[446] INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 16; *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, art. 7, AFR. UNION, *adopted* June 27, 2014, https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (last visited on Mar. 2, 2021).

[447] INT'L REFUGEE RIGHTS INITIATIVE, *supra* note 322, at 17; *The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus,"* AFR. UNION, at 1, AU Doc. Ext/EX.CL/2(VII) (Mar. 7–8, 2005).

[448] *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, art 22, AFR. UNION, *adopted* July 9, 2002, https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union [hereinafter PSC Protocol].

[449] *Id.* at art. 2, ¶ 1. According to Article 2(1) of the PSC Protocol, "[t]here is hereby established, pursuant to Article 5(2) of the Constitute Act [of the African Union], a Peace and Security Council within the [African] Union, as a standing decision-making organ for the prevention, management and resolution of conflicts." *Id.*

conflict and crisis situations in Africa."[450] In addition, it was also designed to "promote peace, security and stability in Africa, in order to guarantee the protection and preservation of life and property, the well-being of the African people and their environment, as well as the creation of conditions conducive to sustainable development."[451] With respect to human rights, the PSC was empowered to "promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts."[452]

The PSC is made up of fifteen Member States elected on the basis of equal rights—ten countries are elected to serve a term of two years and five are elected to serve a term of three years.[453] The PSC adopted a voting rule allowing decisions to be made by consensus.[454] However, if consensus cannot be reached, a simple majority may decide procedural matters. Nevertheless, decisions on all other matters must be made by a two-thirds majority of "its Members voting."[455]

The PSC is assisted by the African Union Commission, the PSC's Peace and Security Department, and four dedicated institutions that were created through the PSC Protocol. These are

450 *Id.*
451 *Id.* at art. 3, ¶ a.
452 *Id*. at art. 3, ¶ f.
453 *Id*. at art. 5, ¶ 1.
454 *Id*. at art. 8, ¶ 13.
455 *Id*.

the Panel of the Wise;[456] the Continental Early Warning System;[457] the African Standby Force;[458] and the Peace Fund.[459] The AU's "overall security architecture . . . has the primary responsibility for promoting peace, security and stability in Africa."[460] The AU's relationship with "the Regional Economic Communities/Regional Mechanisms for Conflict Prevention, Management and Resolution

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[456] *Panel of the Wise (PoW)*, AFR. UNION PEACE & SEC. (Apr. 24, 2018), http://www.peaceau.org/en/page/29-panel-of-the-wise-pow. The Panel of the Wise is "one of the critical pillars of the Peace and Security Architecture of the (APSA). Article 11 of the [PSC Protocol] . . . sets up a five-person panel of 'highly respected African personalities from various segments of society who have made outstanding contributions to the cause of peace, security and development on the continent' with a task 'to support the efforts of the PSC and those of the Chairperson of the Commission, particularly in the area of conflict prevention." *Id.*

[457] *The Continental Early Warning System (CEWS)*, AFR. UNION PEACE & SEC. (May 15, 2018) http://www.peaceau.org/en/page/28-continental-early-warning. The CEWS is "one of five pillars of the African Peace and Security Architecture" it collects and analyzes the data and provides the PSC and institutions with interest in peace and security in Africa with important advice. *Id*.

[458] *The African Standby Force (ASF)*, AFR. UNION PEACE & SEC. (Feb. 26, 2019), http://www.peaceau.org/en/page/82-african-standby-force-asf-amani-africa-1. The Constitutive Act of the African Union grants the AU the right to intervene in a Member State in grave circumstances (war crimes, genocide, and crimes against humanity). *Id.* The PSC Protocol's Article 13 establishes an African Standby Force and indicates that "[s]uch Force shall be composed of standby multidisciplinary contingents, with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice." PSC Protocol, *supra* 448, at art. 13, ¶ 1. The ASF functions under the direction of the AU and supports the AU's right to intervene in the internal affairs of member states as prescribed by article 4(h) of the Constitutive Act of the African Union. *The African Standby Force (ASF)*, *supra* note 458.

[459] *Peace Fund*, AFR. UNION, https://au.int/en/peace-fund (last visited Feb. 17, 2021). The African Union Peace Fund was established under Art. 21 of the PSC Protocol and charged with financing the AU's peace and security operations. *Id.* In July 2016, the Assembly of Heads of State and Government of the AU "decided that the Peace Fund would be endowed with $325m in 2017, rising to a total of $400m by 2020 from the 0.2% levy." *Id.*

[460] PSC Protocol, *supra* note 448, at art. 16, ¶ 1.

is [considered] a key APSA component."[461] The PSC also cooperates and works with other AU organs such as the Pan-African Parliament, the African Commission, and civil society organizations, all of which are important to minimizing threats to peace and security, as well as protecting human rights.[462] Such cooperation is very important if the PSC is to succeed in preventing impunity and enhancing the protection of human rights in the African countries.[463]

C. CONTINENTAL JUDICIAL INSTITUTIONS AND THE PROTECTION OF HUMAN RIGHTS IN AFRICA

The AU's institutional architecture includes judicial and other legal institutions tasked with promoting the protection of human rights and minimizing threats to peace and security.[464] The Banjul Charter is the continent's main instrument for the promotion and protection of human rights.[465] The Banjul Charter is "an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent."[466] Oversight and interpretation of the Banjul Charter is placed in the hands of the African Commission—the African Commission was established in 1987 and currently has its headquarters in Banjul, The Gambia.[467] In 1998, the AU adopted a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples'

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461 *The African Peace and Security Architecture (APSA)*, AFR. UNION PEACE & SEC. (Oct. 02, 2012), http://www.peaceau.org/en/topic/the-african-peace-and-security-architecture-apsa.

462 *Id.*

463 *Id.*

464 *AU in a Nutshell*, AFR. UNION, https://au.int/en/au-nutshell (last visited Feb. 17, 2021).

465 Banjul Charter, *supra* note 93.

466 *Id*.

467 *African Commission on Human and Peoples' Rights*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS, https://www.achpr.org/home (last visited Feb. 10, 2021).

Rights (African Court Protocol)[468]—the Protocol provided for the establishment of an African Court.

The African Court was "established by virtue of Article 1 of the [African Court Protocol]"[469] and, as of the writing of this article, "only nine (9) of the thirty (30) States Parties to the [African Court Protocol] had made the declaration recognizing the competence of the Court to receive cases from NGOs and individuals."[470] The African Court has "jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the [Banjul Charter, the African Court Protocol] and any other relevant human rights instrument ratified by the States concerned."[471]

The African Court Protocol mandates that "[t]he Court shall consist of eleven judges, nationals of Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights."[472] In addition to the requirement that judges must be personally qualified and have experience in the field of human and peoples' rights, the judges chosen to serve on this continental tribunal must represent the continent's five major regions, "the various African legal systems of Islamic law, Common and Civil law, African customary law and South African Roman-Dutch law, as well as ensuring that African traditions are taken into account."[473] In addition to the requirement that "there is adequate gender representation,"[474] only "States Parties to the Protocol may each propose up to three candidates, at least two of whom shall be

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[468] *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, AFR. UNION (June 10, 1998).

[469] *Welcome to the African Court*, *supra* note 445.

[470] *Id*.

[471] *Id*.

[472] AFRICAN COURT PROTOCOL, *supra* note 33, at art. 11.

[473] Andreas Zimmermann & Jelena Bäumler, *Current Challenges Facing the African Court on Human and Peoples' Rights*, 7 KAS INT'L REP. 38, 41 (2010).

[474] AFRICAN COURT PROTOCOL, *supra* note 33, at art. 14(3).

nationals of that State."[475] It is quite likely, then, that judges from States that are not party to the African Court Protocol can be nominated to serve on the African Court.[476]

The African Court's first eleven judges were selected in 2006. While they represented various regions and legal systems, the selection was criticized because some of the judges lacked expertise and experience in the field of human rights law. The selection also received criticism for its lack of gender representation—only two women were nominated.[477]

Whether one is submitting a case to the African Commission or the African Court, a very important and fundamental question of law (that includes human rights law) "is whether a given mechanism (commission, committee or court) has jurisdiction to preside over a given case."[478] A question that deals with the issue of the jurisdiction of the African Court, can be "broken down into three components,"[479] viz: "jurisdiction over the subject matter (competence *ratione materiae*); jurisdiction over the person (competence *ratione personae*); and jurisdiction to render the particular judgment sought."[480] The African Commission and the African Court have jurisdiction over subject matter or persons "to the extent granted to [them] by [their] enabling act or legislation."[481]

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475 *Id.* at art. 12(1).

476 *See* Zimmermann & Bäumler, *supra* note 473, at 41.

477 *See generally* VILJOEN, *supra* note 398 (examining, inter alia, the failure of the selection process for judges to serve on the African Court of Human and Peoples' Rights to provide for adequate gender representation).

478 Robert Wundeh Eno, *The Jurisdiction of the African Court on Human and Peoples' Rights*, 2 AFR. HUM. RIGHTS L. J. 223, 224 (2002).

479 *Id*.

480 *Id*.

481 *Id*.

1. Subject Matter Jurisdiction

The African Court Protocol[482] defines the jurisdiction of the African Court and provides for "three heads of jurisdiction"[483]—the "contentious (adjudicatory), advisory and conciliatory" jurisdictions.[484] With respect to the adjudicatory (contentious) jurisdiction, the African Court deals with "subject matter jurisdiction" and "personal jurisdiction."[485] According to Article 3(1) of the African Court Protocol, "[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the State concerned."[486]

Article 3(1) should be read together with Article 7—the latter provides: "[t]he Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned."[487] Such a reading allows the reader to recognize that the jurisdiction of the African Court is significantly wider than that of other regional instruments.[488] For example, unlike the European and

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[482] *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, AFR. UNION, June 10, 1998. The African Court Protocol came into force on January 25, 2004. The African Court Protocol was replaced by the Protocol on the Statute of the African Court of Justice and Human Rights on July 1, 2008. The African Court of Justice and Human Rights Protocol merged the African Court on Human and Peoples' Rights with the Court of Justice of the African Union. *See Protocol on the Statute of the African Court of Justice and Human Rights*, AFR. UNION (July 1, 2008), at ch. I.

[483] Eno, *supra* note 478.

[484] *Id.* at 225. *See also* AFRICAN COURT PROTOCOL, *supra* note 33, at arts. 3, 4, 9.

[485] Personal jurisdiction deals with who can file a complaint with the African Court. *See, e.g.*, Eno, *supra* note 478, at 225.

[486] AFRICAN COURT PROTOCOL, *supra* note 33, at art. 3(1).

[487] *Id.* at art. 7.

[488] For example, the European Convention on Human Rights and the American Convention on Human Rights. *See* EUROPEAN CONVENTION FOR

American Conventions on Human Rights, the Banjul Charter provides for the protection of "not only civil and political rights but also economic, social and cultural rights."[489]

Although the African Charter can "be interpreted drawing inspiration from other international human rights instruments,"[490] any case brought before the African Court "must be decided with reference to the African Charter."[491] According to Article 45(2) of the African Charter, the African Commission must "[e]nsure the protection of human and peoples' rights under conditions laid down by the [African Charter on Human and Peoples' Rights]."[492] As mandated by the African Court Protocol, the African Court "will exercise direct jurisdiction over all human rights instruments 'ratified by the states concerned.'"[493] This provision has been interpreted to imply that the African Court's jurisdiction extends to "all regional, sub-regional, bilateral, multilateral, and international treaties."[494] The African Court, then, must not "limit itself to the African Charter, but can refer to other treaties ratified by [African

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THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND PROTOCOL, COUNCIL OF EUROPE (Nov. 4, 1950), https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c=; *American Convention on Human Rights*, INTER-AM. COMM'N ON HUM. RIGHTS (Nov. 22, 1969), https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm.

489 PRACTICAL GUIDE: THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: TOWARDS THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS, INT'L FEDERATION FOR HUM. RIGHTS (Apr. 2010), https://www.fidh.org/IMG/pdf/african_court_guide.pdf, at 55. For example, article 22 of the Banjul Charter states that "[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." *See* Banjul Charter, *supra* note 93, at art. 22.

490 Eno, *supra* note 478, at 226.

491 *Id.*

492 Banjul Charter, *supra* note 93, at art. 45(2).

493 Eno, *supra* note 478, at 226; *see also* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 7.

494 Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RIGHTS & DEV. L.J. 45, 90 (2000).

States], including UN treaties, bilateral and multilateral treaties at regional and sub-regional level."[495]

Such wide jurisdiction for the African Court is critical to the protection of human rights because it provides additional protections for individuals "whose rights are not adequately protected in the African Charter."[496] Such persons can "easily hold the state concerned accountable by invoking another treaty to which that state is a party—either at UN level or sub-regional level."[497] It has been argued, for example, that the African Charter does not provide adequate protections to women's rights.[498] As argued by Odombana, "[r]ather than rely on the Charter then, an aggrieved woman or group of women could bring a case to the African Court under another international treaty that better protected her [their] rights."[499]

In addition, if a State were to invoke a "clawback clause" in an effort to "justify a breach of internationally protected rights: the victim could simply invoke a treaty protecting the same rights, such as the ICCPR, that did not include a similar clawback clause."[500] Some scholars have argued that if this interpretation is accepted and utilized by the African Court, that could imply that "all human rights treaties ratified by a [S]tate [P]arty to the [African Court] Protocol in the past will become justiciable, and future ratifications will have the same consequence."[501] Within such a framework, it is further argued, African States "might be deterred not only from ratification of the [African Court] Protocol, but from ratification of any human rights treaty."[502]

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495 *See* Eno, *supra* note 478, at 226–227.

496 *Id.* at 227.

497 *Id.*

498 *See The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights*, CTR. FOR REPRODUCTIVE RIGHTS (2006), at 2–3 (arguing that in response to widespread activism, subsequent protocols were enacted to supplement the African Charter in an effort to protect women's rights).

499 Udombana, *supra* note 494, at 91.

500 *Id.*

501 *See* Eno, *supra* note 478, at 227.

502 *See* Christof Heyns, *The African Regional Human Rights System: In Need of Reform?*, 2 AFR. HUM. RIGHTS L. J. 155, 167 (2001).

Human rights law professor and expert on human rights in Africa, Professor Christof Heyns, has argued that "[i]n one fell swoop, Africa will have jumped from a region without a court, to a region where all human rights treaties, whether they are of UN, OAU or other origin, are enforced by a regional court, even though the UN itself does not enforce them through a court of law. It would be highly unusual for an institution from one system (AU) to enforce the treaties of another system (UN)."[503]

Udombana, however, argues that these fears are totally unfounded and that "the Court's discretionary jurisdiction over cases filed by individuals and NGOs will limit the number of cases that actually reach the Court to a manageable number, ensuring that those with the greatest merit are heard."[504] Nevertheless, despite arguments to the effect that a "broad interpretation would open a Pandora's box and may flood the African Court with a lot of cases,"[505] it is important and critical that the Court have wide jurisdiction so that it can more effectively carry out its functions to safeguard the rights of the citizens of African countries.[506]

Regarding the argument that granting broad jurisdiction to the African Court could negatively affect the willingness of some countries to ratify a particular human rights instrument, it should be noted that any country that would use the excuse of "broad jurisdiction for the Court" to decline to sign and ratify human rights instruments is a State that "is not committed to the promotion and protection of human rights."[507] In addition to the fact that granting broad jurisdiction to the African Court would significantly frustrate those African countries which have devised "sophisticated strategies" to avoid being held accountable for their violation of human rights, it will also "expose those states that took ratification as [merely] a public relations exercise."[508]

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503 Heyns, *supra* note 502, at 167.
504 Udombana, *supra* note 494, at 91.
505 Eno, *supra* note 478, at 227.
506 *See id.* at 228.
507 *See id.*
508 *See id.*

2. Personal Jurisdiction

Article 5 of the African Court Protocol defines the African Court's competence with respect to persons who can appear before the Court or who can submit matters to the Court.[509] Article 5 divides jurisdiction into (i) compulsory (automatic); and (ii) optional jurisdictions.[510] With respect to compulsory jurisdiction, Article 5 (1) provides that the following have the right to submit cases and/or matters to the African Court:

> (a) The Commission
>
> (b) The State Party which had lodged a complaint to the Commission
>
> (c) The State Party against which the complaint has been lodged at the Commission
>
> (d) The State Party whose citizen is a victim of human rights violation
>
> (e) African Intergovernmental Organizations.[511]

A State Party that "has an interest in a case . . . may submit a request to the Court to be permitted to join."[512] Article 5(3) deals with other claimants and includes individuals and non-governmental organizations (NGOs): "The Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with [A]rticle 34(6) of this Protocol."[513] Article 34(6) states that "[a]t 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 [A]rticle 5(3) of this

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509 AFRICAN COURT PROTOCOL, *supra* note 33, at art. 5.
510 *See id.*
511 *Id.* at art. 5(1).
512 *Id.* at art. 5(2).
513 *Id.* at art. 5(3).

Protocol. The Court shall not receive any petition under [A]rticle 5(3) involving a State Party which has not made such a declaration."[514]

It is important to note that the discretion to allow individuals and NGOs to have direct access to the African Court "lies jointly with the target state and the Court."[515] If an individual or NGO files a case with the African Court, the latter can only proceed with the case if the State has already "made an express declaration accepting the Court's jurisdiction to hear the case."[516] In addition, "the Court has a discretion to grant or deny access at will."[517] It has been argued that the requirement that States make a separate declaration "in the case of individual and NGO communications is in line with the procedural law of other human rights systems."[518]

Since, in the African human rights system, "no special declaration is required to access the Commissions," the latter "could

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[514] *Id.* at art. 34(6).

[515] Eno, *supra* note 478, at 230.

[516] *Id. See also* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 34(6).

[517] Eno, *supra* note 478, at 230.

[518] *Id.* For example, Article 41(1) of the International Covenant on Civil and Political Rights states that "[a] State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration." *See International Covenant on Civil and Political Rights*, UN HUM. RIGHTS OFF. OF THE HIGH COMM'R, 999 U.N.T.S. 171 (December 16, 1966), https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx; Article 21 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, makes a similar declaration; *see Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN HUM. RIGHTS OFF. OF THE HIGH COMM'R, 1465 U.N.T.S. 85 (Dec. 10, 1984), https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.

therefore be seen as a necessary barrier to weed out frivolous and unnecessary communications that might find their way to the courts if direct access were allowed."[519] It is argued that "[w]hile [the] limitation [under Article 5(3) of the African Court Protocol] may have been necessary to get states on board [to ratify the Protocol], it is nevertheless disappointing and a terrible blow to the standing and reputation of the [African Court] in the eyes of most Africans."[520] Mutua goes on to argue that "it is individuals and NGOs, and not the African Commission, regional intergovernmental organizations, or states parties, who would be the primary beneficiaries and users of the court."[521] In addition, argues Mutua, "[t]he court is not an institution for the protection of the rights of states or OAU [AU] organs"; instead, "[a] human rights court is primarily a forum for protecting citizens against the state and other governmental agencies" and hence, the "limitation [to access placed by the Protocol on individuals and NGOs] will render the court virtually meaningless unless it is interpreted broadly and liberally."[522]

3. The African Court's Advisory Jurisdiction

In addition to the African Court's contentious jurisdiction,[523] the African Court Protocol also empowers the Court to render advisory opinions.[524] As provided for in Article 4(1) of the Protocol: "At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission."[525] When compared to other international rights tribunals, the African Court exercises relatively

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519 Eno, *supra* note 478, at 230.

520 *See* Makau Mutua, *The African Human Rights System: A Critical Evaluation*, at 28, http://hdr.undp.org/sites/default/files/mutua.pdf.

521 *Id*.

522 *Id.*

523 *See* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 3.

524 *See id.* at art. 4.

525 *See id.* at art. 4(1).

wider jurisdiction "in terms of who may submit requests for advisory opinions on legal matters."[526]

For example, under the American Convention on Human Rights, only Member States of the Organization of American States (OAS) and the OAS' organs are granted the right to seek advisory opinions from the Inter-American Court of Human Rights.[527] According to Article 64(1) of the American Convention on Human Rights, "[t]he member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.[528] Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court."[529]

The African Court as designed by the OAU, on the other hand, is granted power to exercise "advisory jurisdiction" over the OAU (now the AU), Member States of the AU, AU organs, as well as "any African organization recognized by the OAU [AU]."[530] Scholars, such as Udombana, have argued that this relatively wide advisory jurisdiction, which has been granted to the African Court, "should allow for a more robust and sustained analysis of the meaning of the Charter, the Protocol, and the compatibility of domestic legislation and regional initiatives with the rights norms contained therein."[531]

It is also argued that the "African Court's advisory jurisdiction is also the broadest of the three regional systems[532] in terms of subject matter."[533] Within the African system, the African Court is

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526 Udombana, *supra* note 494, at 91–92.

527 *See* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123 at art. 64.

528 *Id.* at art. 64(1).

529 *Id.*; *see also* Udombana, *supra* note 494, at 91–92.

530 *See* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 4(1).

531 Udombana, *supra* note 494, at 92.

532 The three regional systems are the American Convention on Human Rights, the European Convention on Human Rights, and the African Convention on Human and Peoples' Rights.

533 Udombana, *supra* note 494, at 92.

empowered to "provide an opinion on any legal matter relating to the Charter,"[534] the Protocol, as well as "any other relevant human rights instruments [ratified by the States concerned]."[535] Udombana states, for example, that according to Article 4(1), the African Court "could conceivably issue an advisory opinion on the compatibility of domestic legislation affecting land rights, housing availability, or food prices with the obligations assumed under the International Covenant on Economic, Social and Cultural Rights by an African State Party thereto."[536]

But, when must the African Court exercise its power to render advisory opinions? Unfortunately, the African Court Protocol does not provide any guidelines on how the African Court can determine when it should or should not exercise its advisory jurisdiction. While the African Court has wide discretion as to the situations in which it can exercise its advisory jurisdiction, it is required to "give reasons for its advisory opinions" and "every judge [of the Court is] entitled to deliver a separate or dissenting decision."[537]

Although the African Court's advisory opinions are not "formally binding on any specific party," they, nevertheless, "derive their value as legal authority from the character of the Court as a judicial institution."[538] The African Court's advisory jurisdiction is generally considered very critical to the development of "human rights jurisprudence"[539] in the continent. In addition to the fact that the Court's advisory opinions can have a significant impact on the development of human rights jurisprudence in Africa, these opinions are likely to also "significantly impact the domestic application of the Charter and other international human rights principles."[540] As the main legal authority on the Banjul Charter, the African Court is the appropriate institution to be called upon to

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534 AFRICAN COURT PROTOCOL, *supra* note 33, at 4(1).
535 *Id.*
536 Udombana, *supra* note 494, at 92.
537 AFRICAN COURT PROTOCOL, *supra* note 33, at 4(2).
538 Udombana, *supra* note 494, at 93.
539 *Id.*
540 *Id.*

determine whether a country's legislation is "inconsistent with the Charter" and consequently, is "unlawful."[541]

In *Civil Liberties Organization v. Nigeria*,[542] a Nigerian non-governmental organization, the Civil Liberties Organization, filed a communication with the African Commission alleging that "the military government of Nigeria [had] enacted various decrees in violation of the African Charter, specifically the Constitution (Suspension and Modification) Decree No. 107 of 1993, which not only suspends the Constitution but also specifies that no decree promulgated after December 1983 can be examined in any Nigerian Court; and the Political Parties (Dissolution) Decree No. 114 of 1993, which, in addition to dissolving political parties, ousts the jurisdiction of the courts and specifically nullifies any domestic effect of the African Charter."[543]

In its ruling, the Commission held that the Nigerian law was incompatible with the country's obligations under the African Charter.[544] Specifically, the Commission stated that:

> If Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice, which it has not done. Nigeria cannot negate the effects of its ratification of the Charter through domestic action. Nigeria remains under the obligation to guarantee the rights of Article 7 to all of its citizens.[545]

The African Commission also held that "the Decrees in question constitute a breach of Article 7 of the Charter, the right to be heard; [that] the ouster of the courts' jurisdiction constitutes a breach of Article 26, the obligation to establish and protect the

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[541] *Id.*

[542] Civil Liberties Organization v. Nigeria, Communication 129/1994, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], 17 Ordinary Session, (Mar. 22, 1995), https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/1995/4.

[543] *Id.* at ¶ 1.

[544] *Id.* at holding.

[545] *Id.* at ¶ 13.

courts; [and that] the act of the Nigerian Government to nullify the domestic effect of the Charter constitutes a serious irregularity."[546]

4. Challenges to the Effectiveness of the African Court

For the African Court to succeed as an instrument for the protection of human rights in Africa, it must be able to overcome what have been referred to as "potential barriers" to its effectiveness.[547] It has been noticed that during the last several years, the African Commission has suffered from various "structural and normative deficiencies that have plagued"[548] its ability to effectively and fully carry out its functions. But, what have these deficiencies been? These include "the non-binding nature of the African Commission's decisions," "the lack of enforceable remedies," and "the lack of independence and creative vision of the Commission."[549]

The African Court was established to adjudicate "all cases and disputes submitted to it concerning the interpretation and application of the [African Court Protocol] and any other relevant Human Rights instrument ratified by the States concerned."[550] The African Court ensures the protection of human and peoples' rights in the continent. According to the African Court Protocol, the Court is empowered to "complement [and reinforce] the protective mandate of the African Commission on Human and Peoples' Rights"[551]—the two institutions, working together and with other organs of the AU,[552] are expected to ensure the effective protection of human rights in the continent.

Potential challenges to the Court's effectiveness include, but are not limited to: (i) ratification; (ii) access to the Court by individuals and NGOs; (iii) funding of the Court's operations and activities; (iv) independence of the judiciary; (v) selection of competent and

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546 *Id.* at holding.
547 *See* Udombana, *supra* note 494, at 98.
548 *Id.*
549 *Id.*
550 AFRICAN COURT PROTOCOL, *supra* note 33, at art. 3.
551 *Id.* at art. 2.
552 For example, the AU's Peace and Security Council.

independent judges (i.e., non-partisan judges); (vi) interpretation of the Court's mandate and jurisdiction; (vii) enforcement; and (viii) others.[553]

a. Ratification

According to Article 34(3) of the African Court Protocol, "[t]he Protocol shall come into force thirty days after fifteen instruments of ratification or accession have been deposited . . . with the Secretary-General [of the OAU]."[554] As of 2018, twenty-four States have signed and ratified the African Court Protocol; twenty-five States have signed but have not ratified the African Court Protocol; and five States have neither signed nor ratified the African Court Protocol.[555] The African Court Protocol entered into force on January 25, 2004.[556] Given the fact that enough States have signed and ratified the Protocol for it to enter into force, ratification is no longer a major constraint to the Court's effectiveness.[557]

b. Declarations by States Under Article 34(6) and Direct Access to the Court by Individuals and NGOs

Under Article 34(6), States must affirmatively "make a declaration accepting the competence of the Court to receive cases

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[553] *See* Udombana, *supra* note 494, at 66–73.

[554] *See* AFRICAN COURT PROTOCOL, *supra* note 33, at 34(3)–(7). The AU, which was founded on May 26, 2001 in Addis Ababa, Ethiopia, and launched on July 9, 2002 in Durban, South Africa, replaced and took over the activities of the OAU. The Chairperson of the AU is now Depositary.

[555] *See Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, http://www.achpr.org/instruments/court-establishment/ratification/ (last visited on Dec. 13, 2018) [hereinafter *Ratification Table*].

[556] *See Protocol on the Statute of the African Court of Justice and Human Rights*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS (July 1, 2008), https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights.

[557] *See Ratification Table*, *supra* note 555.

under Article 5(3)[558] of [the] Protocol."[559] Without such a declaration or affirmative opt in, individuals and NGOs cannot have direct access to the Court. There is fear that this requirement will have significant negative impact on individuals and NGOs, the parties that have the "greatest incentive and need to use human rights institutions such as the Court."[560] On the other hand, States Parties, especially those pervaded by government impunity, are unlikely to "readily support direct access [to the Court] by these parties."[561]

It has been suggested that although the provision in Article 34(6) was inserted in the African Court Protocol "to facilitate the early ratification of the Protocol, it would perhaps have been more effective to include a provision that permitted States Parties to *opt out* of accepting the otherwise automatic jurisdiction of the Court over individual and NGO petitions."[562] It is argued further that under the opt out option, "States Parties would have retained the power to restrict direct access to the courts, but civil society would have had a greater rallying point around which to pressure governments to withdraw any such declaration."[563]

Another constraint on the ability of NGOs to have direct access to the African Court is made possible by Article 5(3), which permits direct access to the African Court only to "relevant [NGOs] with observer status before the [African] Commission."[564] This provision places many human rights NGOs in the continent, especially those with limited resources, in a situation in which they are not likely to be able to successfully complete the expensive process necessary to gain observer status before the African Commission.[565] Unlike the

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[558] Article 5(3) states that "[t]he Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol." *See* AFRICAN COURT PROTOCOL, *supra* note 33, at 5(3).

[559] *See* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 34(6).

[560] *See* Udombana, *supra* note 494, at 98.

[561] *Id.*

[562] *Id.* at 99.

[563] *Id.* at 98.

[564] *See* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 5(3).

[565] *See* Udombana, *supra* note 494, at 99–100.

African human rights system, the Inter-American system provides a more welcoming and less restrictive system for access to the Inter-American Commission on Human Rights.[566] According to Article 44, "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the [American] Commission containing denunciations or complaints of violation of this Convention by a State Party."[567] The American Convention's more open-door process provides the opportunity for many NGOs in the Americas, including even small ones with limited resources, to gain access to and place petitions before the Inter-American Commission on Human Rights.[568]

c. Financial Independence of the Court

Securing enough financial resources to fund the African Court's activities remains an important constraint to the Court's effectiveness. Article 32 of the African Court Protocol elaborates how the Court's budget is to be determined and who is responsible for providing the necessary financial resources for the Court.[569] According to Article 32, "[e]xpenses of the Court, emoluments and allowances for judges and the budget of the registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court."[570] This responsibility, of course, has passed to the AU, the successor organization to the OAU.[571]

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[566] *See* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123, at art. 64.

[567] *Id.* at art. 44.

[568] *See id*.

[569] *See* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 32.

[570] *Id*.

[571] According to art. 33(1) of the Constitutive Act of the African Union, "[t]his Act [i.e., Constitutive Act of the African Union] shall replace the Charter of the Organization of African Unity." *See* Constitutive Act of the African Union, *supra* note 26, at art. 33(1).

Like any other court, the African Court must have "financial security—security of salary or other remuneration, and, where appropriate, security of pension."[572] The Supreme Court of Canada has noted that "[t]he essence of such security is that the right to salary and pension should be established by law and not subject to arbitrary interference by the Executive in a manner that could affect judicial independence."[573] According to Article 9(1) of the Constitutive Act of the African Union, the Assembly of Heads of State and Government is responsible for adopting the budget of the Union, which includes the African Court's budget.[574] The budget of the AU is provided by contributions from Member States.[575] The African Court cannot function effectively to protect human rights in the continent unless it has financial independence, free of political interference from the AU and its Member States. For example, some scholars argue the African Commission, which complements the activities of the African Court, has, on occasion, been unable to fulfill its functions because of "lack of funds."[576] Over the years, the African Commission has had to depend on donations, most of them

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[572] Valente v. The Queen, [1985] 2 S.C.R. 673, 676 (Can.). This is the Supreme Court of Canada case that set the standards for judicial independence in Canada. *See also* Ian Greene, *The Doctrine of Judicial Independence Developed by the Supreme Court of Canada*, 26 OSGOODE HALL L. J. 177, 179 (1988).

[573] *Valente*, 2 S.C.R. at 676. In the case of the African Court, the "Executive" would be Assembly of Heads of State and Government of the AU.

[574] *See* Constitutive Act of the African Union, *supra* note 26, at art. 9(1).

[575] At the Twenty-Seventh African Union Summit in Kigali, Rwanda in July 2016, the Assembly of Heads of State and Government adopted a decision to impose a "0.2% levy on eligible imports to finance the African Union." *See What Is Financing of the Union*, AFR. UNION, https://au.int/web/en/what-financing-union (last visited Feb. 18, 2021).

[576] *See* Udombana, *supra* note 494, at 100.

coming primarily from outside the continent, in order to maintain its operations.[577]

The recognition and protection of human rights must be considered an integral part of the effort to promote peaceful coexistence and human and economic development in Africa. Hence, it must be an integral part of the mission of the AU and its various organs, particularly, the African Court and the African Commission. Nevertheless, in order for the African Court and African Commission to perform their functions, they must be provided the resources that they need.[578] This, of course, calls for all Member States to ensure the financial independence of both the African Court and the African Commission.

d. Independence of the Court

In order for the African Court to perform its functions, its independence must be guaranteed. As argued by Udombana, "[t]he Court must be insulated from all manner of political wrangling by Member States, particularly in the appointment of and composition of judges, and ensured absolute autonomy in its undertakings."[579] He adds that "[j]udicial independence is necessary to give the Court the honor, prestige, integrity, and unrestrained liberty to do justice."[580]

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[577] *See Chapter Nine Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS (1995–1996), https://archives.au.int/bitstream/handle/123456789/2082/9e%20Rapport%20Annuel_E.pdf?sequence=1&isAllowed=y (last visited Feb. 18, 2021). As detailed in the Ninth Annual Activity Report, the Commission had to suspend several projects because of OAU's financial problems. *See id*. at XI(b)(i)(31). In addition, the Commission received financial subventions from the United Nations Center for Human Rights and the Raoul Wallenberg Institute. *See id.* at XI(b)(iii)(32)–(33).

[578] *See* Udombana, *supra* note 494, at 66.

[579] *Id.* at 101.

[580] *Id.*

In order for a trial to be fair, "the judge or judges on the case must be independent."[581] In fact, "[a]ll international human rights instruments refer to a fair trial by 'an independent and impartial tribunal.'"[582] The International Commission of Jurists argues that judicial "independence refers both to the individual judge as well as the judiciary as a whole."[583] According to the UN Basic Principles on the Independence of the Judiciary, "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[584]

The International Commission of Jurists also notes that judiciary independence has been specifically recognized in various regional contexts, namely, "Africa and Asia-Pacific."[585] The African Commission, at its Nineteenth Ordinary Session held from March 26, 1996 to April 4, 1996, at Ouagadougou, Burkina Faso, adopted a resolution to respect and strengthen the independence of the judiciary.[586] In this resolution, the African Commission specifically calls upon Member States of the AU to:

- Repeal all their legislation which are inconsistent with the principles of respect of the independence

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[581] *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No. 1*, INT'L COMM'N OF JURISTS (2007), at 17, https://www.refworld.org/pdfid/4a7837af2.pdf [hereinafter INT'L COMM'N OF JURISTS].

[582] *Id*.

[583] *Id*.

[584] *Basic Principles on the Independence of the Judiciary*, UN HUM. RIGHTS OFF. OF THE HIGH COMM'R, art. 1, https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx.

[585] INT'L COMM'N OF JURISTS, *supra* note 581, at 17.

[586] *See 21: Resolution on the Respect and the Strengthening on the Independence of the Judiciary*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, https://www.icj.org/wp-content/uploads/2014/10/African-Commission-Resolution-on-the-Respect-and-the-Strengthening-on-the-Independence-of-the-Judiciary.pdf.

> of the judiciary, especially with regard to the appointment and posting of judges;
>
> - Provide, with the assistance of the international community, the judiciary with sufficient resources in order to enable the legal system fulfil its function;
>
> - Provide judges with decent living and working conditions to enable them maintain their independence and realize their full potential;
>
> - Incorporate in their legal systems, universal principles establishing the independence of the judiciary, especially with regard to security of tenure;
>
> - Refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates.[587]

In order for the African Court to succeed in enforcing the provisions of the Banjul Charter, as well as advance the protection of human rights in the continent, its judges must be granted "security of tenure," "financial security" free from "arbitrary interference by the [AU and its Member States] in a manner that could affect judicial independence," and "institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function."[588]

It is suggested that the independence of the judges of the African Court is structurally protected by the African Court

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587 *Id*. at 1.

588 *See Valente*, 2 S.C.R., at 676.

Protocol's removal[589] and salary provisions.[590] Article 17 of the Protocol also speaks to the independence of the judges. It states:

> 1. The independence of the judges shall be fully ensured in accordance with international law.
>
> 2. No judge may hear any case in which the same judge has previously taken part as agent, counsel or advocate for one of the parties or as a member of a national or international court or a commission of enquiry or in any other capacity. Any doubt on this point shall be settled by decision of the Court.
>
> 3. The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law.
>
> 4. At no time shall the judges of the Court be held liable for any decision or opinion issued in the exercise of their functions.[591]

Despite these assurances, it is still feared that the independence of the African Court and its judges can still be threatened by the failure of Member States to pay their dues to the AU.[592] In addition to making certain that judges and other court staff are paid regularly,

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[589] *See* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 19. Article 19 states that "[a] judge shall not be suspended or removed from office unless, by the unanimous decision of the other judges of the Court, the judge concerned has been found to be no longer fulfilling the required conditions to be a judge of the Court."

[590] *Id.* at art. 32.

[591] *Id.* at art. 17.

[592] *See, e.g.*, *African Union Strengthens Its Sanction Regime for Non-Payment of Dues*, AFR. UNION (Nov. 27, 2018), https://au.int/en/pressreleases/20181127/african-union-strengthens-its-sanction-regime-non-payment-dues (noting, inter alia, the pervasive non-payment of dues by Member States of the AU, a process that hampers the ability of the AU's organs to perform their functions).

promptly, and in full, the African Court must be provided with other necessary resources; these resources include, but are not limited to, a well-equipped law library (including access to necessary law reviews and journals, and the decisions of other international human rights tribunals), computers, other office materials (e.g., paper, writing pens, etc.), and other supplies needed for the effective functioning of an international human rights tribunal.[593] Hence, Member States of the AU must not subject the African Court's funding to political blackmail or manipulations, for, if they do so, the Court will be unable to function effectively as a defender of human rights in the continent.[594]

e. Selection of Judges

According to Article 14 of the African Court Protocol, "[t]he judges of the Court shall be elected by secret ballot by the Assembly from the list referred to in Article 13(2) of the present Protocol."[595] Article 13 empowers each Member State to nominate individuals for "the office of the judge of the Court."[596] Since the effectiveness of the Court depends, to a significant extent, on the extent to which its judges are skilled in international law generally and international human rights law in particular, it is important that the process of nomination of judicial candidates by national governments is not politicized—national governments must select and send to the African Union Commission only individuals who are qualified to

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[593] *See, e.g.*, Udombana, *supra* note 494, at 101 (noting, inter alia, with reference to the African Court, that a "court lacking a library, paper, computers, printers, and translators may, by necessity, succumb to political pressures in order to receive additional funding necessary for its continued function").

[594] Michael Fleshman, *Human Rights Move Up on Africa's Agenda: New African Court to Promote Rule of Law, End Impunity for Rights Violators*, AFR. RENEWAL (July 2004) (noting, inter alia, the "emergence of an independent, effective and adequately financed court" could "bring an end to official impunity and 'stimulate positive changes throughout Africa'").

[595] *See* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 14.

[596] *Id.* at art. 13.

serve as judges on the African Court.[597] To make sure that only qualified individuals are selected to serve as judges on the African Court, each Member State's government should work with its national bar associations/law societies to source qualified candidates for the Court.[598]

Perhaps more important is the fact that those who are successfully elected to serve as judges must function as officers of a continental tribunal and not as representatives of their country of origin.[599] If, in deciding cases, judges favor or give deference to the interests of their country of origin, justice can be corrupted and the system of protecting human rights in the continent rendered totally dysfunctional.[600]

f. Interpreting the Court's Jurisdiction and Mandate

How well the judges of the African Court interpret "the [Court's] mandate and jurisdiction,"[601] it is argued, will have a significant impact on the effectiveness of the Court in protecting human and peoples' rights in Africa.[602] If, for example, the Court adopts an innovative approach to the interpretation of its mandate and jurisdiction that takes cognizance of recent developments in international law, especially international human rights law, it could emerge as a leader among the various regional and international institutions that are dedicated to the protection of human rights.[603] Perhaps, more importantly, the African Court could use its interpretive powers to help African States bring their national laws, particularly those dealing with or affecting human and peoples' rights, into conformity with the provisions of international human

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[597] *See* Udombana, *supra* note 494, at 82–84 (noting, inter alia, the process through which judges must be elected to serve on the African Court).

[598] *Id.*

[599] *Id.*

[600] *Id.*

[601] *Id.* at 102.

[602] *Id.* at 86–95

[603] *See generally id.* at 101.

rights instruments.[604] Along these lines, the work of the African Court could significantly enrich national constitutional and other laws and improve human rights on the continent.[605]

How the Court interprets, for example, Articles 34(6) and 5(3) of the African Court Protocol could determine the extent to which members of civil society (i.e., individuals) and their organizations (e.g., NGOs) could have effective access to the Court.[606] The Court's most important objective should be to work with all relevant stakeholders to enhance the protection of human rights on the continent. It should not allow itself to be distracted by unnecessary formalities and technicalities that can significantly impair and/or paralyze its effectiveness as the protector of human rights on the continent. In the end, it is critical that a court whose *raison d'être* is to advance the protection of human rights in Africa cannot perform that job effectively if it is not accessible to the people it is supposed to serve and protect.[607]

g. Enforcing the Court's Judgments

Article 30 of the African Court Protocol states that "[t]he States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution."[608] But, will African governments enforce the Court's judgments, especially if they believe that doing so would not be in their best interest? Udombana has argued that "[h]istorically, there has been an open resistance by African States to complying with binding orders of international courts."[609] As evidenced by the African backlash

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604 *See generally id.* at 102, 106–107.

605 *Id.*

606 *Id.*

607 *See generally id.* at 108–109.

608 *See* AFRICAN COURT PROTOCOL, *supra* note 33, at art. 30.

609 In 2016, South Africa and Burundi announced their intention to withdraw from the ICC. In making the announcement, South Africa said that its decision was based on its belief that the country was "hindered" by

against the International Criminal Court (ICC), African governments have usually been quite guarded about international courts, particularly those that they feel are dominated by the West. For example, when The Gambia, under the leadership of President Yahya Jammeh, announced its decision to withdraw from the ICC, Sheriff Bojang, the country's information minister stated as follows: "The ICC, despite being called international criminal court, is in fact an international Caucasian court for the prosecution and humiliation of people of [color], especially Africans."[610] In fact, some observers in the continent have gone as far as calling the ICC a tool of Western

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various parts of the Rome Statute, including especially the part that "compels South Africa to arrest persons who may enjoy diplomatic immunity under customary international law, who are wanted by the ICC for genocide, crimes against humanity, war crimes, to surrender such persons to the International Criminal Court." *See* Milena Veselinovic & Madison Park, *South Africa Announces Its Withdrawal from ICC*, CNN WORLD (Oct. 21, 2016, 8:12 AM), https://www.cnn.com/2016/10/21/africa/south-africa-withdraws-icc/index.html. *See also Press Release by the GCB: South Africa's Withdrawal from the ICC*, DEREBUS (Feb. 1, 2017), http://www.derebus.org.za/press-release-gcb-south-africas-withdrawal-icc/ (examining the implications, on the protection of human rights in Africa, of South Africa's decision to withdraw from the ICC). "GCB" stands for the General Council of the Bar of South Africa. The GCB originally issued the press release on October 28, 2016. Nevertheless, after a South African court ruled that the decision of the government to withdraw from the ICC was unconstitutional because the executive had not first obtained the approval of Parliament, the government reversed course and revoked the decision to withdraw from the ICC. *See* Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html.

[610] *See* Simon Allison, *African Revolt Threatens International Criminal Court's Legitimacy*, GUARDIAN (Oct. 27, 2016, 10:32 AM), https://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia (noting, inter alia, that many Africans believe that the ICC is targeting Africans; also mentioning the decision by The Gambia, Burundi, and South Africa to withdraw from the Rome Statute).

imperialism, designed to oppress Africans and subvert governance in the continent.[611]

Some of this guarded approach to international tribunals, of course, can be traced directly to the concerns of opportunistic African political elites about being held accountable for their misdeeds, which include the massive abuse of human rights.[612] For example, when Burundi officially withdrew from the ICC, human rights NGOs and individuals in the country argued that "[t]he decision to withdraw Burundi from the Rome Statute comes at a time when the machine continues to kill with impunity in Burundi."[613] The machine was a reference to the government of President Pierre Nkurunziza, whose decision to change the constitution to secure a third term in office unleashed a bloody uprising that "claimed between 500 and 2,000 lives"[614] and forced "more than 400,000 Burundians"[615] to flee abroad, creating fears

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[611] *See* Habeeb Kolabe, *Is the ICC a Western Imperialist Tool Against Africa?*, SWALIAFR (Dec. 29, 2016), http://blog.swaliafrica.com/is-the-icc-a-western-imperialist-tool-against-africa/; *see also* Matt Killingsworth, *International Criminal Court Is Not Just for Hunting Africans*, CONVERSATION (Sept. 12, 2013, 9:43 AM), https://theconversation.com/international-criminal-court-is-not-just-for-hunting-africans-18072.

[612] Kenneth Roth, *Africa Attacks the International Criminal Court,* THE N.Y. REV. OF BOOKS (Feb. 6, 2014), https://www.nybooks.com/articles/2014/02/06/africa-attacks-international-criminal-court/ (noting, inter alia, that "African leaders, many of whom have their own reasons to dislike a precedent of holding heads of state to account for their crimes, have been particularly receptive to [the view that the ICC's] "exclusive focus on African crimes is unfair, a modern form of colonialism."

[613] *See Burundi Becomes First Nation to Leave International Criminal Court*, GUARDIAN (Oct. 27, 2017), https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court.

[614] *Id*.

[615] *Id*.

that the ICC would launch an investigation and possibly hold several politicians, including Nkurunziza, accountable for the violence.[616]

Since the UDHR in 1948, international law, particularly, international human rights law, has assumed a very important place in the struggle to protect human rights around the world, including in African countries.[617] Despite the skepticism expressed by some African political elites regarding the role of international courts in the protection of human and peoples' rights, as well as the resolution of interstate conflicts, in the continent, international courts, such as the ICJ, have, during the last several decades, adjudicated important cases involving African States as parties.[618] In doing so, international courts have contributed significantly to the development of "far reaching norms and principles of international law."[619] In fact, many African countries have looked up to the ICJ as a court of last resort to resolve various conflicts and provide them with advisory opinions.[620] Through these adjudications, the ICJ has contributed significantly to the development of international law and has helped many African countries develop an appreciation for the

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[616] *See International Criminal Court Probes Burundi "Crimes Against Humanity*," BBC NEWS (Nov. 9, 2017), https://www.bbc.com/news/world-africa-41932291 (noting that Burundi officially withdrew from the ICC after "accusing the international court of deliberating targeting Africans for prosecution").

[617] *See* Hurst Hannum, *The UDHR in National and International Law*, GA. J. INT'L & COMP. L., 287, 313 (1995) (noting, inter alia, that the Universal Declaration of Human Rights is the foundation of modern international law, particularly international human rights law).

[618] *See* Udombana, *supra* note 494, at 104.

[619] *Id.*

[620] The following African countries have all resorted to the ICJ's jurisdiction to seek resolution of disputes involving them and one or more other African States: Botswana, Burkina Faso, Burundi, Cameroon, Chad, Congo, Ethiopia, Guinea (Conakry), Guinea-Bissau, Liberia, Libya, Mail, Namibia, Nigeria, Rwanda, Senegal, South Africa, Tunisia, Uganda, and Western Sahara. *See Judgments, Advisory Opinions and Orders*, 1946–2018, INT'L CT. OF JUSTICE, https://www.icj-cij.org/en/decisions/all/2015/2018/asc (last visited Dec. 18, 2018). *See also* T. O. ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW 74 (Richard Akinjide, 2d ed. 1988) (detailing, inter alia, judgments, opinions and orders of the International Court of Justice between April 1, 1946 and March 31, 1971).

critical role played by international law in the resolution of interstate conflicts.[621]

As many of them have done with the ICJ decisions, it is hoped that African States will "act in good faith with respect to the decisions of the African Human Rights Court."[622] The effective protection of human rights in Africa requires that (1) African States voluntarily accept and respect the authority of the African Court; (2) Africans, regardless of their country of citizenship, have confidence in the ability of the African Court to deliver justice to victims of human rights violations; (3) the authority of the African Court be accepted and respected by all Member States and their citizens; and (4) Member States use the rulings of the African Court to improve their national laws and enhance the protection of human rights.

VI. THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

A. INTRODUCTION

The African Commission was created by the Banjul Charter[623] and empowered "to promote human and peoples' rights and ensure their protection in Africa."[624] Specifically, the African Commission was supposed to "collect documents," carry out research "on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and

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621 *See* J. Patrick Kelly, *The Changing Process of International Law and the Role of the World Court*, 11 MICH. J. INT'L L. 129, 130 (1989) (examining, inter alia, the International Court of Justice (also called the World Court) in the development of international law); A. Peter Mutharika, *The Role of International Law in the Twenty-First Century: An African Perspective*, 18 FORDHAM INT'L L. J. 1706, 1713–1714 (1994) (examining, inter alia, the influence of the ICJ in Africa).

622 *See* Udombana, *supra* note 494, at 104.

623 *African Charter on Human and Peoples' Rights* (Banjul Charter), AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on October 21, 1986, http://www.achpr.org/instruments/achpr/ (last visited Dec. 18, 2018).

624 *See id*. at art. 30.

peoples' rights," as well as "[i]nterpret all the provisions of the present Charter at the request of a State [P]arty, an institution of the OAU or an African Organization recognized by the OAU."[625]

The African Commission was inaugurated on November 2, 1987[626] and consists of "eleven members from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience."[627] Each member of the African Commission is elected to serve a term of six years and is "eligible for re-election."[628] Nevertheless, "the term of office of four of the members elected at the first election shall terminate after two years and the term of office of three others, at the end of four years."[629]

All members of the African Commission are selected by "secret ballot by the Assembly of Heads of State and Government,[630] from a list of persons nominated by the States Parties to the present Charter."[631] Individuals nominated to serve on the African Commission must be "African personalities of the highest

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[625] *See id*. at art. 45.

[626] The African Commission's Rules of Procedure were adopted in 1988 during its second Ordinary Session, which was held in Dakar, Senegal, from February 2 to 13, 1988. The Rules were subsequently amended during the African Commission's eighteenth Ordinary Session, which was held in Praia, Cabo Verde, from October 2 to 11, 1995. When the African Court on Human and Peoples' Rights was established, the African Commission developed and adopted new Rules of Procedure—these were approved by the African Commission during its 47th Ordinary Session, which was held in Banjul, The Gambia, from May 12 to 26, 2010. These new Rules entered into force on August 18, 2010.

[627] *See* Banjul Charter, *supra* note 93, at art. 31.

[628] *Id.* at art. 36.

[629] *Id.*

[630] That is, the OAU Assembly of Heads of State and Government. Since the demise of the OAU and its replacement by the AU, the job of electing Commissioners has passed on to the AU Assembly of Heads of State and Government. *See generally* Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN ST. L. REV. 681 (2004).

[631] *See id*. Banjul Charter, *supra* note 93, at art. 33.

reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights."[632] In nominating individuals to serve on the African Commission, States Parties are to grant "particular consideration . . . to persons having legal experience."[633] Each Commissioner is expected and required to "serve in their personal capacity."[634] The African Commission is not allowed to have within its ranks at any one time, "more than one national of the same [African State]."[635]

The African Commission's functions can be grouped into three important categories: (1) to *promote* human and peoples' rights;[636] (2) to *protect* human and peoples' rights;[637] and to *interpret* all the provisions of the Banjul Charter.[638] With respect to promotion, the African Commission is empowered to "collect documents, undertake studies" and carryout research on "African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, [and] encourage national and local institutions concerned with human and peoples' rights."[639] In addition to performing the role of promoting human and peoples' rights, the Banjul Charter is also required "[t]o formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations."[640] Finally, the African Commission is required to "[c]o-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights."[641]

During the last several years, the African Commission, in accordance with Article 45(1), has undertaken missions to several African countries to "monitor and assess the situation of refugees,

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632 Banjul Charter, *supra* note 93, at art. 31(1).
633 *Id.*
634 *See id.* at art. 31(2).
635 *See id.* at art. 32.
636 *See id.* at art. 45(1).
637 *See id.* at art. 45(2).
638 *See id.* at art. 45(3).
639 *See id.* at art. 45(1)(a).
640 *See id.* at art. 45(1)(b).
641 *See id.* at art. 45(1)(c).

returnees, and displaced persons."[642] The African Commission also cooperated with several international organizations, including UNESCO, the International Commission of Jurists, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, and the International Observatory of Prisons to cosponsor a number of seminars and international conferences.[643] For example, the African Commission cosponsored conferences/workshops in Lisbon, Portugal, November 17–18, 1997 (workshop on the improvement of the regional human rights systems); Kadoma, Zimbabwe, November 24–28, 1997 (International Conference on Community Work)—with Penal Reform International; Addis Ababa, Ethiopia, December 8–12, 1997 (meeting of government experts on the establishment of an African Human and Peoples' Rights Court); Harare, Zimbabwe, January 12–14, 1998 (the African contexts of the rights of the child)—with CODESRIA, Redd Barna-Zimbabwe and the Center for Family Research of the University of Cambridge; Banjul, The Gambia, January 26–28, 1998 (Working Group on additional protocol to the African Charter on Women's Rights)—with the African Center for Democracy and Human Rights Studies and the International Commission of Jurists; Dakar, Senegal, February 16–18, 1998 (International Conference on HIV/AIDS in African Prisons)—with the International Observatory of Prisons (OIP); and Abidjan, Côte d'Ivoire, March 9–12, 1998 (Regional Seminar on Economic, Social and Cultural Rights).[644]

The second major function of the African Commission is to "[i]nterpret all the provisions of the [Banjul Charter]" anytime a

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[642] *See* Udombana, *supra* note 494, at 6; *see also O.A.U. Mission to Angola, DR Congo, Tanzania, and Zambia*, OAU (Apr. 28, 1999), https://m.reliefweb.int/report/47578 (detailing the objective of the OAU mission to several African countries, which was to "assess the situation on the ground and determine to what extent the Organization of African Unity can assist these countries, which are affected by [the] exodus of thousands of refugees as a result of the on-going war in D.R.C.).

[643] *See, e.g.*, Fatsah Ouguergouz, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA 521 (2003) (examining, inter alia, some of the conferences sponsored by the African Commission to examine ways to improve the human rights situation in Africa).

[644] *Id.*

request is made to the African Commission to do so by "a State [P]arty, an institution of the OAU, or an African Organization recognized by the OAU."[645] The Banjul Charter provides the African Commission specific advice on how to carry out its interpretive duties. According to Article 60, "[t]he Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights"[646] and other relevant international human rights instruments.[647] In addition to performing its interpretive duties, "in light of international human rights law,"[648] the African Commission must also:

> [T]ake into consideration, as subsidiary measures to determine the principles of law, other general or specialized international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.[649]

It is important to note that while the African Commission may take into consideration African customary law, it must do so only if such law is "consistent with international norms on human and peoples' rights."[650] If the African Commission takes this role seriously, it could significantly improve the legal and institutional

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645 *See* Banjul Charter, *supra* note 93, at art. 45(3).

646 *See id.* at art. 60.

647 These other international human rights instruments include the Charter of the United Nations, the Charter of the OAU, the UDHR, as well as "other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members." *See id*.

648 Udombana, *supra* note 494, at 65–66.

649 *See* Banjul Charter, *supra* note 93, at art. 61.

650 *Id.*

environment for the recognition and protection of human rights on the continent by making certain that international law, particularly international human rights law, serves as an important interpretive tool for human rights laws on the continent.

Finally, the African Commission is empowered with a protective mandate to "[e]nsure the protection of human and peoples' rights under the conditions laid down by the [Banjul] Charter."[651] The performance of the protective mandate is based on communications (i.e., complaints) received from Member States, as well as those from other parties, as long as the latter relate "to human and peoples' rights."[652] These other parties that can submit communications to the Banjul Charter include individuals and NGOs.[653] After the African Commission has received a communication from a State Party or other source, the Commission is required to prepare "a report stating the facts and its findings"[654] and this report is to be transmitted to the "States concerned and communicated to the Assembly of Heads of State and Government."[655] At this point, the fate of the report is left entirely in the hands and caprices of the Heads of State and Government.

B. CONSTRAINTS TO THE AFRICAN COMMISSION'S EFFECTIVENESS

Although the Banjul Charter is endowed with broad powers to promote and protect human rights, as well as interpret the provisions of the Banjul Charter,[656] the Commission suffers from several structural problems that constrain its ability to perform its functions effectively. In addition to the fact that it does not have "any enforcement power or remedial authority,"[657] the African

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651 *See id.* at art. 45(2).

652 *See id.* at art. 56.

653 *See id.* at arts. 47–51. *See also Communications*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, http://www.achpr.org/communications/ (last visited Feb. 18, 2021).

654 *See* Banjul Charter, *supra* note 93, at art. 52.

655 *See id.*

656 *See id.* at art. 45(1)–(3).

657 *See* Udombana, *supra* note 494, at 66.

Commission is "handicapped by confidentiality clauses that restrict public access to, and awareness of, the Commission's work."[658]

It has been argued that at the time that the African Commission was created, many political elites did not believe that the continent was ready for a continental or "supranational judicial institution"[659] and, as a consequence, the African Commission was established, not as a full-fledged court but a "quasi-judicial supervisory body."[660] Kéba Mbaye, who prepared the background notes that were used by the experts chosen to work on the draft of the African Charter, stated that "[t]he establishment of a Human Rights Court to redress cases of violation of human rights [was] not included in the Draft Charter" because it was "thought premature to do so at this stage."[661] He went on to state that "the idea [was] a good and useful one which could be introduced in [the] future by means of an additional protocol to the Charter."[662] Hence, the African Commission was never expected to function as a judicial body capable of rendering or issuing legally-binding findings or decisions.[663]

There are other issues—the African Commission is unable to function independently and perform its functions without political

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658 *Id.*

659 *See* Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights*, *1994–2004*, 101 AM. J. INT'L L. 1, 2 (2007).

660 *See* Viljoen & Louw, *supra* note 659, at 2. *See also* the introductory notes to the African Charter on Human and Peoples' Rights made by Kéba Mbaye. The notes were prepared by Mbaye for the Meeting of Experts in Dakar, Senegal, which took place from November 28 to December 8, 1979. The experts were appointed under a decision of the Assembly of Heads of State and Government at the sixteenth session in Monrovia, Liberia. Mbaye's comments formed part of the background notes ("travaux préparatoires") for the African Charter. The comments are reprinted in HUMAN RIGHTS LAW IN AFRICA 1999, at 65 (Christof Heyns ed., 2002).

661 HUMAN RIGHTS LAW IN AFRICA 1999, *supra* note 660, at 65.

662 *Id.*

663 *Id.*

influence because of its chronic lack of resources.[664] And, of course, there is the problem of access—that communications must meet onerous requirements before they are considered by the African Commission makes it extremely difficult for many individuals to bring communications before it.

1. Constraints to Access to the African Commission by Individuals

One of the most important functions of the African Commission is to protect "human and peoples' rights" on the continent and to do so "under conditions laid down by the [Banjul] Charter."[665] But, what are these "conditions laid down by the [Banjul] Charter"?[666] For example, in order for the African Commission to accept and examine communications from private individuals, they (i.e., the communications) must fulfill the requirements listed in Article 56.[667] Communications, other than those emanating from States Parties, that are sent to the African Commission, will only be entertained if (1) the names of the authors are clearly indicated, even if the authors "request" or seek "anonymity";[668] (2) the communications "[a]re compatible with the Charter of the [OAU] or the Banjul [Charter]";[669] (3) the complaints or communications "[a]re not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity";[670] (4) the communications are not based exclusively on media reports;[671] (5) the communications are transmitted to the African Commission only after local remedies have been fully exhausted;[672] (6) the communications are submitted

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664 *See* Udombana, *supra* note 494, at 66 (noting, inter alia, that the lack of resources is contributing to a loss of independence by the African Commission).

665 *See* Banjul Charter, *supra* note 93, at art. 45(2).

666 *Id.*

667 *See id.* at art. 56(1)–(7).

668 *See id.* at art. 56(1).

669 *See id.* at art. 56(2).

670 *See id.* at art. 56(3).

671 *See id.* at art. 56(4).

672 *See id.* at art. 56(5).

to the African Commission "within a reasonable period from the time local remedies are exhausted";[673] and (7) the communications "[d]o not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the [OAU] or the provisions of the [Banjul] Charter."[674]

These requirements, coupled with the fact that the African Commission can exclude a communication by a "simple majority"[675] vote, provide the African Commission with significant discretion to determine which communications to accept and consider.[676] Given the fact that the African Commission is not adequately shielded from political manipulation or influence, granting it such wide discretion must be considered a major problem for the protection of human rights in the continent.

2. The African Commission Lacks Independent Enforcement Power

It has been argued that the OAU Heads of State and Government, afraid that the African Commission could later challenge their authority in their respective States, were not eager to set up a *continental judicial institution* that was adequately empowered to issue rulings and decisions that could infringe on the sovereignty of African States or the ability of national political leaders to control what happens within their territorial boundaries. Instead, African Heads of State and Government "envisaged" an institution whose exclusive function was to *promote* and not *protect* human rights.[677] As argued by Claude E. Welch, Jr., "the OAU heads of state were reluctant to grant the [African Commission] a significant role in protecting (rather than promoting) human

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673 *See id.* at art. 56(6).

674 *See id.* at art. 56(7).

675 *See id.* at art. 55(2).

676 *See id*.

677 *See* Claude E. Welch, Jr., *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 49 (1992).

rights."[678] In fact, the Banjul Charter "does not challenge the basic powers of heads of state: governments are only to 'allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the [Banjul] Charter.'"[679]

In order to ensure that the Banjul Charter was signed and ratified by enough States for it to enter into force, only minimal obligations were imposed on States Parties.[680] For example, the Banjul Charter does not explicitly require that each State Party submit reports that show the extent to which it is making efforts to give effect to the Charter.[681] Instead, the Charter merely requires that "[e]ach [S]tate [P]arty shall undertake to submit every two years, . . . a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the [Banjul] Charter."[682] In addition, nowhere in the Charter is it indicated who or what body or institution is to receive the reports, analyze them and take action.[683] It has been argued that while the Charter "leaves obscure what the African Commission should do with petitions [sent to it] and how it should enforce its findings,"[684] the "vagueness [has] offered the Commission an opportunity to define itself."[685] Nevertheless, such vagueness has also "placed profound limitations on the range of possible action"[686] that the African Commission can take.

In addition to the fact that the African Commission's findings "are not legally binding, and the [African] Commission issues 'recommendations' to [S]tate [P]arties rather than 'orders,'"[687] it is not empowered to "award damages, restitution or reparations."[688]

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678 *See id.*
679 *See id*. *See also* Banjul Charter, *supra* note 93, at art. 26.
680 *See generally* Banjul Charter, *supra* note 93.
681 *Id.*
682 *See id.* at art. 62.
683 *See generally id.*
684 *See* Welch, *supra* note 677, at 49.
685 *Id.*
686 *Id.*
687 *See* Viljoen & Louw, *supra* note 659, at 2.
688 *See* Udombana, *supra* note 494, at 67.

Also, the African Commission does not have the power to "condemn" or punish a recalcitrant government or "offending State"—it can only "give its views or make recommendations to Governments."[689] The African Commission, in its present state, has very limited powers and, as a result, there has been a tendency for Member States to ignore or totally disregard the African Commission's "recommendations, orders, and pronouncements."[690] In fact, in its Eleventh Annual Activity Report, the Commission noted that the "non-compliance by some States [P]arties with the Commission's recommendations affects its credibility and may partly explain that fewer complaints are submitted to it."[691]

It has been argued that after the African Commission has made a finding on a communication or complaint, the "African Charter and the Rules of Procedure of the African Commission do not deal with the fate of [such a communication]."[692] As argued by Viljoen and Louw, the African Commission "also does not have any follow-up mechanism or policy in place to monitor state compliance with its recommendations."[693] As argued by Eno:

> Unlike other regional and global human rights bodies, the [African] Commission has not developed any follow-up mechanism to ensure implementation of its recommendations. When the OAU(sic) Assembly adopts the Commission's Annual Report, the Commission publishes the report and makes no effort to see that the recommendations contained therein are implemented. This has been very frustrating, especially for the victims who have to pursue the execution of the decisions on their own. Because there is no pressure from the Commission, states

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689 *See* Banjul Charter, *supra* note 93, at art. 45(1)(a).

690 Udombana, *supra* note 494, at 67.

691 *Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights 1997–1998*, 22nd–23rd Ordinary Session, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, OAU Doc. DOC/OS/43 (XXIII), ¶ 38, https://archives.au.int/handle/123456789/2048.

692 Viljoen & Louw, *supra* note 659, at 3.

693 *Id.*

> have tended to turn a blind eye to the recommendations and a deaf ear to the victims' pleas for compliance.[694]

In a 2007 law review article, Frans Viljoen and Lirette Louw studied compliance by States Parties to the recommendations of the African Commission and concluded that "the most important factors predictive of compliance are political, rather than legal" and that "[t]he only factor relating to the treaty body itself that shows a significant link to improved compliance is its follow-up activities."[695] Viljoen and Louw added that the results of their investigation provided supporting evidence to "arguments for a fully developed and effectively functional follow-up mechanism in the secretariat of the Commission, the consistent integration of follow-up activities into the Commission's mandate, and the appointment of a special rapporteur on follow-up."[696]

On November 29, 2006, at its 40th Ordinary Session in Banjul, The Gambia, the African Commission adopted a resolution on the importance of the implementation of its recommendations by States Parties.[697] In that resolution, the African Commission called on all States Parties "to respect without delay the recommendations of the [African] Commission"[698] and to inform the African Commission of the "measures taken and/or the obstacles in implementing the recommendations of the African Commission within a maximum period of ninety (90) days starting from the date of notification of the recommendations."[699]

No case better illustrates the fragrant disregard of the jurisdiction and recommendations of the African Commission than that of the Nigerian environmental and human rights activist and

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694 *See* Robert Eno, *The Place of the African Commission in the New African Dispensation*, 11 AFR. SEC. STUD. 63, 67 (2002).

695 Viljoen & Louw, *supra* note 659, at 32.

696 *Id.*

697 *Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, ACHPR Res. 97 (XXXX) 06 (Nov. 29, 2006).

698 *Id.* ¶ 2.

699 *Id.* ¶ 4.

leader of the Movement for the Survival of the Ogoni Peoples (MOSOP), Ken Saro-Wiwa, and eight of his fellow Ogonis.[700] Saro-Wiwa and eight other Ogoni human rights activists were sentenced to death by a Special Tribunal for Civil Disturbances, established under the Sani Abacha-led military government.[701] With regard to the case of Saro-Wiwa and his fellow human rights activists, the African Commission received communications from several NGOs, including International Pen, the Nigerian Constitutional Rights Project (CRP),[702] Civil Liberties Organization, and Interights.[703]

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[700] *See, e.g.*, Charles Hoff, *Nigeria Executes 9 Activists; World Outraged*, CNN WORLD NEWS (Nov. 10, 1995), http://www.cnn.com/WORLD/9511/nigeria/ (last visited Dec. 20, 2018) (noting the execution, by Nigeria's military government, of environmental activist and playwright Ken Saro-Wiwa, and other Ogoni human rights campaigners, despite appeals from various international actors for clemency).

[701] Sani Abacha overthrew the transitional government of Chief Ernest Shonekan on November 17, 1993, and ruled Nigeria until his death in office in June 1998. *See also* OLAYIWOLA ABEGUNRIN, NIGERIAN FOREIGN POLICY UNDER MILITARY RULE 1966–1999 145 (Praeger Publishers 2003) (examining, inter alia, international reactions to the hanging, by the Nigerian military government, of human rights activist, Ken Saro-Wiwa, and his Ogoni compatriots). The tribunal that sentenced Saro-Wiwa and his fellow Ogoni activists to death was established by the September 1994 Special Edit titled "Instrument Constituting the Tribunal for the Trial of Offences under the Civil Disturbances (Special Tribunal) Decree 1987." *See* MARY KATE SIMMONS, UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION: YEARBOOK 1995 513 (1996).

[702] The Constitutional Rights Project (Nigeria) is a non-governmental organization, established in Nigeria to "promote respect for human rights and the rule of law in Nigeria." *See Constitutional Rights Project Nigeria*, SOURCEWATCH, https://www.sourcewatch.org/index.php/Constitutional_Rights_Project_Nigeria (last visited Feb. 18, 2021).

[703] *See* International Pen, Constitutional Rights Project, Interights on Behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998), https://www.refworld.org/cases,ACHPR,3ae6b6123.html (last visited Feb. 18, 2021) [hereinafter *International Pen*]. The communications (137/94, 139/94, 154/96, and 161/97) were subsequently joined because they all concerned the same subject matter—the arrest, detention, trial, and subsequent sentence of Saro-Wiwa and his compatriots to death by a Special Tribunal for Civil Disturbances.

Communications 137/94 and 139/94 were submitted to the African Commission in 1994 before the trial of Saro-Wiwa and the other Ogonis began.[704] The two communications "alleged that Mr. Saro-Wiwa had been detained because of his political work in relation to MOSOP."[705] In February 1995, the trial of Saro-Wiwa and his fellow Ogoni human rights activists began "before a tribunal established under the Civil Disturbances Act"[706] and, in June 1995, the Constitutional Rights Project sent the African Commission "a supplement to its communication, alleging irregularities in the conduct of the trial itself: harassment of defense counsel, a military officer's presence at what should have been confidential meetings between defendants and their counsel, bribery of witnesses, and evidence of bias on the part of the tribunal members themselves."[707]

On October 30 and 31, 1995, Ken Saro-Wiwa and eight of the codefendants were sentenced to death by the Special Tribunal for Civil Disturbances.[708] Shortly after the death sentences were handed down, the Constitutional Rights Project sent the African Commission "an emergency supplement to its communication on 2nd November 1995, asking the African Commission to adopt provisional measures to prevent the executions."[709] Subsequently, the Secretariat of the African Commission "faxed a Note Verbale"[710] to the Nigerian Ministry of Foreign Affairs "invoking

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[704] The communications were sent by the International Pen and the Constitutional Rights Project. *See International Pen*, *supra* note 703.

[705] *See International Pen*, *supra* note 703, ¶ 3.

[706] *See id.* ¶ 5. The defendants were accused of inciting "members of MOSOP to murder four rival Ogoni leaders." *See also id*. ¶ 4.

[707] *See id.* ¶ 6.

[708] *See id.* ¶ 7. Codefendants Saturday Dobee, Felix Nuate, Nordu Eawo, Paul Levura, Daniel Gbokoo, Barinem Kiobel, John Kpunien, and Baribor Bera were sentenced to death. The others were acquitted. *See id*.

[709] *See id.*

[710] The "*note verbale*" is "a written official communication used in correspondence among States or between States and international organizations." The *note verbale* is usually "kept in the third person singular ('The Foreign Ministry of . . . presents its compliments to the Embassy of . . .") and is not signed." The *note verbale* is used in diplomatic circles to

interim measures under revised Rule 111 of the Commission's Rules and Procedures."[711]

In the Note Verbale, the African Commission "pointed out that as the case of Mr. Saro-Wiwa and the others was already before the Commission, and the government of Nigeria had invited the Commission to undertake a mission to the country, during which mission the communication would be discussed, the executions should be delayed until the Commission had discussed the case with the Nigerian authorities."[712] The Government of Nigeria, however, did not respond to the African Commission's correspondences before proceeding with the executions.[713]

On November 7, 1995, Nigeria's Provisional Ruling Council confirmed the death sentences handed out to Saro-Wiwa and his fellow defendants and three days later, on November 10, 1995, all the accused persons were executed in secret at a prison in Port Harcourt.[714] In carrying out the executions, the Nigerian government had ignored or disregarded all the correspondences sent by the African Commission and the latter's jurisdiction over this important human rights case.[715]

On October 31, 1998, the African Commission issued its final decision in the case of Ken Saro-Wiwa and his codefendants.[716] The African Commission held that there had (1) "been a violation of Articles 5 and 6 in relation Ken Saro-Wiwa's detention in 1993 and

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"raise or field questions or to communicate notification or reply to the *note verbale* sent from the other party." *See* Hyun-jin Park, *Sovereignty over Dokdo as Interpreted and Evaluated from the Korean-Japanese Exchanges of Notes Verbales (1952–1965)*, *in* CHINESE (TAIWAN) YEARBOOK OF INT'L L. & AFFS. 47, 51 (2017).

711 *See International Pen*, *supra* note 703, ¶ 8. The *note verbale* was also sent to the Secretary-General of the OAU, the Special Advisor (Legal) to the Head of State, in the Nigerian Ministry of Justice, and the Nigerian High Commission in The Gambia, where the African Commission is located.

712 *See id*.

713 *See id.* ¶ 9.

714 *See id.* ¶ 10.

715 *See generally id*.

716 *See id*.

his treatment in detention in 1994 and 1995"; (2) "been a violation of Article 6 in relation to the detention of all the victims under the State Security (Detention of Persons) Act of 1984 and State Security (Detention of Persons) Amended Decree No. 14 (1994)."[717] The African Commission imposed an obligation on the government of Nigeria to annul these decrees.[718] The African Commission also reiterated "its decision on communication 87/93[719] that there [had] been a violation of Article 7(1)(d)[720] and with regard to the establishment of the Civil Disturbances Tribunal"[721] and that "in ignoring this decision, Nigeria [had violated] Article 1[722] of the [Banjul] Charter."[723] Finally, the African Commission held that the Nigerian government had violated Articles 4 and 7(1)(a), (b), (c), and (d) in relation to the conduct of the trial and execution of the victims"; that there was "a violation of Articles 9(2), 10(1) and 11, 26, 16"[724] and that "ignoring its obligations to institute provisional measures, Nigeria [had] violated Article 1" of the Banjul Charter.[725]

Another indication of the extent to which African States are disregarding their obligations under the Banjul Charter and hence, are ignoring the African Commission's jurisdiction, is their lackluster approach to filing the reports required of them under

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717 *See id.* at holding.

718 *Id.*

719 87/93 Constitutional Rights Project (in respect of Zamani Lakwot and 6 Others) v. Nigeria, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS (Mar. 22, 1995), http://hrlibrary.umn.edu/africa/comcases/Comm87-93.pdf.

720 *International Pen*, *supra* note 703, at holding; *see* Banjul Charter, *supra* note 93, at art. 7(1) (article 7(1) of the Banjul Charter states as follows: "Every individual has a right to have his cause heard" and this includes "(d) the right to be tried within a reasonable time by an impartial court or tribunal.").

721 *See International Pen*, *supra* note 703, at holding.

722 *See* Banjul Charter, *supra* note 93, at art. 1 (article 1 of the Banjul Charter states that "[t]he Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislation or other measures to give effect to them.").

723 *See International Pen*, *supra* note 703, at holding.

724 *See id.*

725 *See id*.

Article 62.[726] The reporting system is supposed to keep the African Commission informed of the efforts that States Parties are making to give effect to the "rights and freedoms recognized and guaranteed by the [Banjul] Charter."[727] In other words, the reporting system under Article 62, if adhered to, can actually enhance the recognition and protection of human and peoples' rights in the continent. Unfortunately, over the years, many States Parties have failed to provide the African Commission with the necessary reports.[728] As of 2018, for example, while 12 States "have submitted all their Reports (and presented or will present at [the] next Ordinary Session),"[729] as many as "[twenty] States" are late by at least one Report, sixteen States by three or more Reports, and six States have not submitted any Reports at all.

3. The African Commission Lacks Openness and Transparency in Its Operations

Openness and transparency are very important for any institution that serves the public. For a continental institution, such as the African Commission, openness and transparency in the conduct of its business can help (i) minimize actual political interference, or the appearance of it, in its activities; (ii) reduce corruption and other forms of political manipulation; (iii) help stakeholders throughout the continent understand and appreciate how the African Commission arrives at its decisions and why; and (iv) minimize the distrust that some stakeholders, especially those who are likely to get an unfavorable decision from the African Commission. Transparency will help these individuals understand

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[726] According to Article 62 of the Banjul Charter, "[e]ach [S]tate [P]arty shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter." *See* Banjul Charter, *supra* note 93, at art. 62.

[727] *See id*.

[728] *See International Pen*, *supra* note 703, at holding.

[729] *See State Reports and Concluding Observations*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, https://www.achpr.org/statereportsandconcludingobservations (last visited Feb. 18, 2021).

how the decisions were made. Free and voluntary acceptance, by the people, of the African Commission as part of the collection of institutions that safeguards human and peoples' rights on the continent is very important if this institution is to make a significant impact on the protection of human and peoples' rights in Africa. While such voluntary acceptance is critical, it is unlikely to take place if the African Commission continues to maintain secrecy in its operations.

Openness and transparency, as they relate to the African Commission should be understood as "the availability and accessibility of relevant information about the functioning of the [African Commission]."[730] It has been argued that "transparency is said to require that 'holders of public office should be as open as possible about all decisions and actions they take.'"[731] Regardless of how transparency is defined, it is generally agreed that "transparent decisions must be clear, integrated into a broader context, logical and rational, accessible, truthful and accurate, open (involve stakeholders), and accountable."[732] In addition, especially for an institution such as the African Commission, "[a] transparent decision record should provide enough information to allow an interested person to 'verify claims made' or otherwise reconstruct both the process and rationale for the decision."[733]

Governmental and other national institutions that serve the public in African countries are notorious for having extremely high levels of corruption, as well as their inability or unwillingness to

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[730] John Gerring & Strom C. Thacker, *Political Institutions and Corruption: The Role of Unitarism and Parliamentarism*, 34 BRIT. J. POL. SCI. 295, 316 (2004).

[731] Deidre Curtin & Albert Jacob Meijer, *Does Transparency Strengthen Legitimacy?*, 11 INFO. POLITY 109 (2006) (quoting N. LORD, FIRST REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE, cm 2850, HMSO (1995)).

[732] *See* Christina H. Drew & Timothy L. Nyerges, *Transparency of Environmental Decision Making: A Case Study of Soil Cleanup Inside the Hanford 100 Area*, 7 J. RISK RES. 33, 36 (2004).

[733] *Id.* at 36 (citing LAURIE GARRETT, BETRAYAL OF TRUST: THE COLLAPSE OF GLOBAL PUBLIC HEALTH (2000)).

serve the public.[734] In fact, in many African countries, civil servants are known "to act arbitrarily and capriciously"[735] when it comes to the distribution or allocation of public services, "favoring those who pay them bribes."[736] In these African economies, openness and transparency in government communication, for example, can serve at the minimum, two important purposes. The first purpose is "to ensure that public service providers respect both the positive and negative rights of individuals."[737] In addition, "[t]his instrumental justification for transparency of public services comes close to Bentham's principle for good governance: 'The more strictly we are watched, the better we behave.'"[738] The second purpose "relates more directly to democracy theory, which values participation by individuals in the decisions that affect them."[739]

Of course, "[t]ransparency is the literal value of accountability, the idea that an accountable bureaucrat and organization must explain or account for his actions."[740] Perhaps, more importantly, especially for the African Commission, "[t]ransparency is most important as an instrument for assessing organizational performance, a key requirement for all other dimensions of accountability."[741]

As mentioned briefly earlier, transparency and openness represent an important and critical element of a trustworthy government or public institution. Where a public institution undertakes its activities in an open and transparent manner, "such an

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[734] *See, e.g.*, JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS 37–80 (2010) (examining, inter alia, the pervasiveness of corruption in the African countries).

[735] John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 1017 (2013).

[736] *Id.*

[737] *See* Lindsay Stirton & Martin Lodge, *Transparency Mechanisms: Building Publicness into Public Services*, 28 J. L. & SOC'Y 471, 476 (2001).

[738] *Id.*

[739] *Id.*

[740] *See* Jonathan G. S. Koppell, *Pathologies of Accountability: ICCAN and the Challenge of "Multiple Accountabilities Disorder,"* 65 PUB. ADMIN. REV. 94, 96 (2005).

[741] *Id.*

approach is likely to garner significant support for [the institution]."[742] More specifically, benefits from open and transparent communication practices by a public institution include "increased public support, increased understanding by the public of [the institution's] actions, increased trust, increased compliance with [the institution's] rules and regulations, an increased ability for the [institution] to accomplish its [sic] purpose and stronger democracy."[743]

In order for the African Commission to achieve transparency and openness in its operations, it "must adopt practices that promote open information sharing."[744] Such practices should include, at the very minimum, efforts to improve and enhance the Commission's relationships with the publics that it serves "through responding to public needs, seeking and incorporating feedback and getting information out to the public through a variety of channels."[745] Of great significance for the African Commission is that openness and transparency can minimize the fear that its decisions are the outcome of or result from "undue political . . . influence because the [African Commission's decision-making] process is open to the public."[746] As argued by Fairbanks, Plowman, and Rawlins, openness and transparency in communication, especially by public institutions and governmental agencies, produces in citizens and other stakeholders, "a feeling of trust in [one's] government [or public institution] and the ability to realize a comfort in understanding that [one is] being treated equally with others and that the government [or public institution] is working in [one's] best interest."[747] Such increased trust in the African Commission can significantly improve the chances that victims of human rights violations will seek justice at the hands of the African Commission.

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[742] *See* Mbaku, *supra* note 735, at 1018.

[743] Jenille Fairbanks et al., *Transparency in Government Communication*, 7 J. PUB. AFF. 23, 33 (2007).

[744] *See id.* at 33.

[745] *See id*. Some of these channels include regularly scheduled press conferences and press releases, a website on which it provides the public with critical and timely information about its operations, etc.

[746] *See id.* at 28.

[747] *See id.* at 28–29.

For African countries, improving the trust that individuals have for their public institutions is very important, especially given the fact that since independence, governance in many countries throughout the continent has been pervaded by political opportunism, opacity in government communication, high levels of corruption, and impunity.[748] As a consequence, many Africans have come to view public institutions, including even those at the regional or continental level, as designed primarily to exploit them and maximize the interests of politically dominant elites and groups.[749] For the African Commission, then, more openness and transparency will enhance the ability of its stakeholders to understand how it functions, including how it makes its decisions and why, as well as show how relevant the institution is to the protection of their rights. That should significantly improve the people's trust in the institution and perhaps, more importantly, enhance the African Commission's legitimacy.

If the African Commission is interested in significantly improving its legitimacy and making itself relevant to the struggle against impunity and the protection of human rights in the continent, it must consider the following: First, in all its operations, it should adopt a policy that values "open, honest and timely" communication with all of its relevant stakeholders. The African Commission must "avoid the manipulation of information, a process that has become part of the survival strategy of many authoritarian regimes [including their various agencies] in the continent."[750] Second, all persons who communicate or interact with the public on behalf of the African Commission must adopt "practices that promote open information sharing."[751] Third, the African Commission, while taking note of issues of privacy, especially with respect to victims of human rights violations, should work closely with its commissioners, as well as other staff members, to "create an

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748 *See generally* MBAKU, *supra* note 734 (noting, inter alia, the pervasiveness of corruption in post-independence African countries).

749 *See id.*

750 *See* Fairbanks et al., *supra* note 743, at 33.

751 *Id.*

organizational structure that supports [and enhances openness] and transparency."[752]

Finally, all individuals who communicate on behalf of the African Commission should be provided with enough resources (e.g., access to time, staff, and financial resources) so that they can perform their functions and carry out their responsibilities fully and effectively.[753] Of course, it is important to take note of the fact that while openness and transparency are important and desirable traits of an effective, viable and democratic public institution, the organization (here, the African Commission) must be careful not to violate the privacy rights of citizens. While it is important that the African Commission be empowered and its communicators provided with necessary tools to enhance openness and transparency in their activities or operations, these individuals should be legally constrained in order to make certain that they or their activities do not violate the privacy rights of Africans—that is, the people they are supposed to serve.

Unfortunately, the opacity imposed on the African Commission by the Banjul Charter has contributed significantly to the Commission's impotence—according to Article 59(1) of the Banjul Charter, "[a]ll measures taken within the provisions of the present [Chapter] *shall remain confidential* until such a time as the *Assembly of Heads of State and Government shall otherwise decide*."[754] In addition to the fact that the Banjul Charter imposes opacity on the African Commission's activities and operations, it also grants a highly political and historically opportunistic group—the Assembly of Heads of State and Government—the discretion to determine "whether to publicize a human rights violation on the part of an African State."[755] In other words, the Banjul Charter is trusting people, who themselves, are most likely to be violators of human rights (i.e., African Heads of State and Government), to be the guardians of human rights in the continent.

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752 *Id.* at 34.
753 *See id.* at 32.
754 Banjul Charter, *supra* note 93, at art. 59(1) (emphasis added).
755 Udombana, *supra* note 494, at 69.

Claude E. Welch, Jr., argues, for example, that "[w]idespread abuses of human rights have occurred, and continue to occur" in Africa and many presidents have been found complicit in these human rights violations.[756] Historically, slavery, in particular, and the atrocities of colonialism, in general, have been two of the most important forms of assault on human and peoples' rights in Africa.[757] Nevertheless, the abuse of "individual and collective rights" in the continent continue to this day; and, as argued by Welch, the "[h]armful effects of the periods of slavery, partition, and colonial rule have yet to be totally overcome."[758] In addition to the fact that post-colonial governments in Africa, "unchecked by civil society,"[759] have become major threats to human rights, some of them (e.g., the Hutu-dominated government of Rwanda in 1994; Omar al-Bashir's regime in Sudan) have waged war "on groups of their citizens, based on ethnic or ideological differences, or on simple lusts for power."[760] In fact, throughout the continent, "[c]orrupt, power-hungry leaders remain intransigently in office, having hijacked or ignored popular pressures for free, competitive, and democratic elections."[761] Unfortunately, it is these opportunistic, corrupt, and recalcitrant heads of state that the Banjul

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[756] *See* WELCH, *supra* note 123, at 3.

[757] *See id.* For a discussion on slavery in African, see PAUL E. LOVEJOY, TRANSFORMATIONS IN SLAVERY: A HISTORY OF SLAVERY IN AFRICA 1 (examining, inter alia, the role of Islam in slavery in Africa from the fifteenth to the nineteenth centuries). *See also* SLAVERY IN AFRICA: HISTORICAL AND ANTHROPOLOGICAL PERSPECTIVES (Suzanne Miers & Igor Kopytoff eds., 1977) (presenting a series of essays that examine slavery in Africa as instrument of marginalization and the degradation of the welfare of Africans). For a discussion on atrocities of colonialism, see ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1998) (examining King Leopold's atrocities against Congolese peoples during the mid-nineteenth and early twentieth Centuries).

[758] *See* WELCH, *supra* note 123, at 3

[759] *See id.*

[760] *See id.*

[761] *See id.* at 3–4.

Charter has entrusted with the job of promoting and enhancing the protection of human rights on the continent.[762]

According to Article 58(1) of the Banjul Charter, the African Commission need not consult the OAU Assembly of Heads of State and Government unless it has determined that the complaint in question has revealed "the existence of a series of serious or massive violations of human and peoples' rights."[763] If Articles 59(1) and 58(1) are read together, the extremely restrictive nature of these provisions becomes quite evident. In fact, according to Article 58(1), it is only after the Commission has determined that there is "a serious or massive violations of human and peoples' rights" that the Commission "may then request the [African] Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations."[764]

Since its inauguration on November 2, 1987 in Addis Ababa, Ethiopia, the African Commission has interpreted Article 59 of the Banjul Charter in an extremely restrictive manner and, as a result, it has conducted most of its business "in secret, insulated from public scrutiny and awareness."[765] In fact, it was not until 1994 that the African Commission first made public its communications and decisions.[766] As argued by Odinkalu and Christensen, "[t]he decision of the [African] Commission in 1994 to [finally] publicize the outcome of its consideration of non-state communications, including its views and recommendations following such consideration, was a watershed in its development."[767] It was only

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[762] These individuals are expected to supervise the institutions, such as the African Commission, charged with protecting human and peoples' rights on the continent through their membership in the Assembly of Heads of State and Government. In addition to the fact that all members of the African Commission are to be elected by the Assembly of Heads of State and Government, the Commission must perform any task "entrusted to it by the Assembly." *See* Banjul Charter, *supra* note 93.

[763] Banjul Charter, *supra* note 93, at art. 58(1).

[764] *Id.* at art. 58(2).

[765] Udombana, *supra* note 494, at 70.

[766] *See* Chidi Anselm Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples' Rights: The Development of Its Non-State Communication Procedures*, 20 HUM. RTS. Q. 235, 238 (1998).

[767] *Id.* at 278.

at this time that scholars and other interested parties were able to examine and critique the "quality of the [African] Commission's reasoning and decision making" with respect to substantive and procedural issues.[768]

The inability of the African Commission to carry out its operations in an open and transparent manner did not go unnoticed by stakeholders, including NGOs, human rights activists, and other Africans. For example, during her campaign for President of the Republic of Liberia in 1997, candidate Ellen Johnson Sirleaf, "spoke the minds of countless Africans"[769] when she declared as follows:

> [The Commission] is generally unknown and invisible; it is regarded with suspicion by those who do not know of it; and 'as seen from the eyes of a casual observer,' it is not performing. I don't know of any cases that you [the Commission] have resolved related to any of the major human rights problems recently affecting our continent.[770]

Then candidate for President of Liberia, Sirleaf's proclamation speaks to the failure of the African Commission to maintain an open and transparent approach to its activities and to keep the public fully informed of its proceedings. It has been argued that "[p]ublicity and freedom of information play an important role in the effective promotion and protection of human rights."[771] In order to improve the political environment for the protection of human rights in the continent, "[i]ndividuals, non-governmental organizations (NGOs) and inter-governmental organizations need reliable information to

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[768] *Id. See also Seventh Annual Activity Report of the African Commission, 1993–1994*, *Thirtieth Ordinary Session, 13th-15th June, 1994 Tunis, Tunisia,* U. OF MINN. HUM. RIGHTS LIBR., http://hrlibrary.umn.edu/africa/ACHPR2.htm (last visited Feb. 18, 2021).

[769] *See* Udombana, *supra* note 494, at 70.

[770] *See* FUND FOR PEACE, PROCEEDINGS OF THE CONFERENCE ON THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, JUNE 24–26, 1991, 27 (1991).

[771] Magnus Killander, *Confidentiality Versus Publicity: Interpreting Article 59 of the African Charter on Human and Peoples' Rights*, 6 AFR. HUM. RIGHTS L.J. 572, 572 (2006).

put pressures on [their] governments,"[772] as well as inform international human rights activists of the state of human rights in the continent. With respect to the African Commission, publicity, which can be enhanced significantly by openness and transparency in the African Commission's operations, can help significantly improve the visibility of the Commission and its activities.

According to Article 45(1)(a) of the Banjul Charter, one of the functions of the African Commission is to "disseminate information" through organizing "seminars, symposia and conferences,"[773] as well as provide the public with the results of its activities, especially those involving the violation of human rights. Nevertheless, since Sirleaf, who went on to become President of the Republic of Liberia, made that statement about opacity in the African Commission, the latter has made significant efforts to make the results of its proceedings more accessible to the public.[774]

For example, in the African Commission's Second Activity Report, the African Commission indicated that it had so far settled ten cases but went on to state that "[t]he decisions for the time being, remain confidential in conformity with Article 59 of the Charter on Human and Peoples' Rights."[775] In the African Commission's Sixth Annual Activity Report, which was adopted by the Assembly of Heads of State and Government in 1993, the African Commission mentioned that "[i]n accordance with [A]rticle 59 of the African [Banjul] Charter, the details of . . . communications [on Protective Activities] are contained in a confidential Annex."[776] Nevertheless, after several NGOs that had been meeting prior to the Commission's 14th session in December 1993, made a request to the African Commission regarding the "confidential Annex," copies of the latter

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772 *Id.*

773 Banjul Charter, *supra* note 93, at art. 45(1)(a).

774 *See* Killander, *supra* note 771, at 578.

775 *Second Activity Report of the African Commission on Human and Peoples' Rights*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, June 13–14, 1989, ¶ J(b)(31), http://www.achpr.org/activity-reports/2/ (last visited on Dec. 26, 2018).

776 *Chapter Six: Sixth Annual Activity Report of the African Commission 1992–1993*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, ¶ 29, https://www.achpr.org/activityreports/viewall?id=6.

were given to the NGOs.[777] Henceforth, and starting with the African Commission's Seventh Annual Report, which was adopted by the Assembly of Heads of State and Government in 1994,[778] the African Commission has included, in all its annual reports, the decisions that it has taken with regard to communications, a process that has significantly improved its outreach to the publics that it serves.[779]

Nevertheless, when the Assembly of Heads of State and Government adopted the Twentieth Report of the African Commission in June 2006, the Executive Council authorized publication of the Report and the Annexes, however, with the exception of the Commission's decision on Zimbabwe. Specifically, the Executive Council declared as follows:

> 1. ADOPTS and, in conformity with Article 59 [of] the African Charter on Human and Peoples' Rights (African Charter), AUTHORIZES the publication of the 20th Activity Report of the African Commission on Human and Peoples' Rights (ACHPR) and the Annexes with the exception of decision 245 on Zimbabwe;
>
> 2. INVITES Zimbabwe to communicate to the ACHPR, within two (2) months following the adoption of this decision, its observations on the said decision, and ACHPR to submit a report thereon at the next Ordinary Session of the Executive Council;
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> 3. ALSO INVITES Member States to communicate within two (2) months following the reception of ACHPR notification, their observations on the decisions that

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[777] *See* Killander, *supra* note 771, at 578.

[778] *Chapter Seven: Seventh Annual Activity Report of the African Commission 1993–1994,* AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, https://www.achpr.org/activityreports/viewall?id=7.

[779] *Id.* at Annex VI.

> ACHPR is to submit to the Executive Council and /or the Assembly . . . .[780]

At least one scholar questions why the Executive Council of the AU is talking of a right to respond, given the fact that States "are encouraged to participate [with the African Commission] in the process leading up to a decision and their position on admissibility and merits are recorded in the decision taken by the Commission."[781]

In adopting the 19th Activity Report of the African Commission on Human and Peoples' Rights, the Assembly of Heads of State and Government authorized the publication of the Report and its annexes, but exempted the publication of "Resolutions on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe."[782] The Assembly also called upon the African Commission "to ensure that in the future it enlists the responses of all States to its Resolutions and Decisions before submitting them to the Executive Council and/or the Assembly for consideration."[783]

As a consequence of the decision taken by the Assembly of Heads of State and Government on the African Commission's Nineteenth Activity Report, the Commission included, in its next activity report (i.e., the Twentieth Activity Report), "resolutions on

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[780] DECISION ON THE ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR), AFR. UNION, 2006, Doc. EX.CL/Dec. 310(IX), https://archives.au.int/bitstream/handle/123456789/4885/EX%20CL%20Dec%20310%20(IX)%20_E.PDF?sequence=1.

[781] *See* Killander, *supra* note 771, at 579.

[782] Assembly of the African Union, Decision on the 19th Activity Report of the African Commission on Human and Peoples' Rights, Jan. 24, 2006 ¶ 1. *See also* Zimbabwe Human Rights NGO Forum v. Zimbabwe, No. 245/02, AFR. COMM'N ON HUM. PEOPLES' RIGHTS (May 15, 2006).

[783] Assembly of the African Union, *supra* note 782, ¶ 3.

Ethiopia, Sudan, Uganda and Zimbabwe together with . . . lengthy responses from these states."[784]

In Annex II, titled "Report of the Brainstorming Meeting on the African Commission,"[785] a report was made of discussions on "the status, the mandate and independence of the [African Commission]."[786] The discussions produced the following challenges:

> a) incompatibility of Members of the [African Commission] in the context of Articles 31 and 38 of the African Charter;
>
> b) Some current Members of the [African Commission] hold official positions in their respective State, thereby creating a perception of lack of independence.
>
> c) The effect of Assembly/AU/Decision 101(VI) on the preparation and publication of the Annual Activity reports under [A]rticles 59 (1) and (3) in relation to the mandate of the [African Commission] under Article 45.[787]

The discussions also produced the following additional challenges to the functioning of the African Commission:

- Constraints arising out of the insufficiency of resources that the African Union provides to the [African Commission] for the discharging of its mandate under Article 41 of the Charter.

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[784] Killander, *supra* note 771, at 580. *See also* EXECUTIVE COUNCIL OF THE AFRICAN UNION, *NINTH ORDINARY SESSION*, JUNE 25–29, 2006, BANJUL, THE GAMBIA, REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, AFR. UNION, Doc. EX.CL/279(IX), https://www.achpr.org/activityreports/viewall?id=20.

[785] Report of the African Commission on Human and Peoples' Rights, *supra* note 782, at 23 (Annex II).

[786] *Id.* at 26 (Item 1).

[787] *Id.* at 26 (Item 1(13)(a)–(c)).

- Some State[s] Parties have accused the [African Commission] of being too dependent on donor funds thereby affecting its independence and credibility.

- The [African Commission] considers that the decision adopted by the Assembly of Heads of State and Government of the AU during the Khartoum Summit needs to be revisited, bearing in mind its impact on the publication of its decisions and resolutions under the terms of Article 59(1) of the Charter, and the independence of the [African Commission].

- The current number of Members of the [African Commission] is insufficient to adequately implement its mandate.[788]

The Report then went on to make recommendations on how to improve and "safeguard the independence and impartiality of [the] [African Commission]."[789] The following recommendations were made:

> a) In order to safeguard the independence and impartiality of ACHPR [African Commission], State Parties should comply strictly to the AU Eligibility criteria on the nomination of candidates and election of members of the ACHPR, and not elect candidates holding portfolios and positions that might impede their independence as Members of the ACHPR.
>
> b) The AU criteria shall apply to members of the ACHPR, whose status shall change after their election.

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788 *Id.* at 26.
789 *Id.* at 27.

> c) The AU should provide adequate funding to the ACHPR for it to successfully discharge its mandate.
>
> d) Extra budgetary resources allocated to the ACHPR for its activities should be channeled through the African Union Commission.
>
> e) The number of members of the ACHPR should be increased from 11 to between 15 or 18 in order to enable the institution efficiently discharge its mandate.
>
> f) The ACHPR should attend the budgetary meetings of the AU in order to present and defend its budget.
>
> g) The AU Commission should ensure that the ACHPR takes part effectively in the meetings of the policy organs of the AU bearing in mind the AHG/AU 2003 decision in Maputo recognized its status as an organ of the AU.
>
> h) The ACHPR should submit to the AU Commission its opinion on the interpretation of Article 59(1) of the Charter concerning the publications of its reports.
>
> i) The ACHPR requests that the Executive Council of Ministers recommends the AHG/AU to revisit its decision adopted in Khartoum as far as it concerns activities of the ACHPR that do not fall within the scope of protection mandate of the ACHPR.[790]

In the *Declaration of Principles on Freedom of Expression in Africa* (Declaration of Principles), adopted by the African Commission at its 32nd Session, in October 2002, in Banjul, The Gambia,[791] it was stated that "[p]ublic bodies hold information not

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[790] *Id.* at 27 (Annex II).

[791] *See Declaration of Principles on Freedom of Expression in Africa*, *African Commission on Human and Peoples' Rights, 32nd Session, October 17–23, 2002: Banjul, The Gambia*, U. OF MINN. HUM. RIGHTS LIBR., http://hrlibrary.umn.edu/achpr/expressionfreedomdec.html.

for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law."[792] Although the expression "public bodies" is not defined, it is apparent from the way the expression is used throughout the text of the Declaration of Principles that it refers to entities that serve the public. Under such a definition, both the African Commission and States Parties to the Banjul Charters can be considered public bodies and hence, are "custodians of the public good"[793]—the public has the right to access the information that is in the possession of these public bodies, subject, of course, "to clearly defined rules established by law."[794] The public will need that information for at least two important and interrelated reasons: first, to check on the activities of those who serve in these public institutions, and second, to determine the services that are provided by these institutions and the quality of those services—that is, to determine the extent to which these institutions are performing their functions. The ability of citizens to check on the exercise of government and/or public power is "critical for the maintenance of the rule of law."[795]

Unfortunately, some States have been trying to weaken the African Commission, "curtail its powers,"[796] and reduce its capacity to interpret the Banjul Charter, as well as promote and protect human and peoples' rights in the continent. Since transitions toward democratic governance re-emerged in Africa in the early 1990s, many African countries have introduced new "freedom-of-

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[792] *Id.* ¶ IV.

[793] *Id.*

[794] *Id.*

[795] John Mukum Mbaku, *Providing a Foundation for Wealth Creation and Development in Africa: The Role of the Rule of Law*, 38 BROOK. J. INT'L L. 959, 995 (2013). As argued by Pina, Torres and Royo, "[m]ore information delivered in a more timely fashion to citizens is expected to increase the transparency of government and to empower citizens to monitor government performance more closely." Vincente Pina, Lourdes Torres & Sonia Royo, *Are ICTs Improving Transparency and Accountability in the EU Regional and Local Government? An Empirical Study*, 85 PUB. ADMIN. 449, 450 (2007).

[796] *See* Killander, *supra* note 771, at 580.

information" laws.[797] During the last several decades, as many countries in the continent have made efforts to transition to democratic governance systems, armed with separation of powers and an independent judiciary, it has become evident that the deepening and institutionalization of democracy in these countries requires openness and transparency in government communication. As mentioned earlier, openness and transparency in government communication implies that citizens are able to have effective access to government information, subject, of course, to necessary protections for the individual's rights of privacy.

As more African countries transition to democratic governance systems and adopt transparent and more open approaches to communication, Africans are not likely to expect any less from continental public institutions, such as the African Commission. In *The Mauritius Plan of Action, 1996*, the African Commission stated that "[t]he lack of informative documentation on the work of the African Commission is a problem which needs to be solved urgently."[798] Unfortunately, as of 2018, the situation has not

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[797] For example, Nigeria enacted a Freedom of Information Act May 28, 2011, which was signed as an expansion of Nigeria's constitution. *See* CONSTITUTION OF NIGERIA (1999), § 39(1) (providing every person the right of freedom of expression, including the freedom to hold opinions and to receive and impart ideas and information without interference). *See also Access to Information Act, 2005*, GOV'T OF THE REPUBLIC OF UGANDA (July 19, 2005). It is important to take cognizance of transitions to democratic governance that began in Africa during the colonial period when indigenous groups launched what, in some colonies, were violent demonstrations for the departure of the European colonizers and subsequently, the independence of their territories. As argued by Mbaku and Ihonvbere, "the popular agitations that began in the continent in the late 1980s and resulted in the collapse of many authoritarian regimes, were actually a continuation of the struggle started during the colonial period." *See* John Mukum Mbaku & Julius O. Ihonvbere, *Introduction: Issues in Africa's Political Adjustment in the "New" Global Era*, *in* THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE 1, 8 (John Mukum Mbaku & Julius O. Ihonvbere eds. 2003).

[798] *The Mauritius Plan of Action 1996*, U. OF MINN. HUM. RIGHTS LIBR., http://hrlibrary.umn.edu/africa/mauritius-plan.html.

significantly improved.[799] Hence, it is important that as Africans engage in efforts to fight impunity and improve the environment for the protection of human rights, all public agencies and institutions, including those at the continental level, be fully clothed with openness and transparency, especially as relates to their activities on behalf of the public.

VII. THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: HAS IT IMPROVED HUMAN RIGHTS IN AFRICA?

Since the early 1990s, there have been many developments in Africa that have significantly improved the environment for the promotion and protection of human and peoples' rights. First, was the demise of the racially-based apartheid system in South Africa and the subsequent introduction of a non-racial dispensation in the country, undergirded by a progressive constitution.[800] Second, many of the continent's dictatorships were dismantled in favor of more

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[799] *See The Big Question: What Is the Biggest Impediment to Democratic Governance in Sub-Saharan Africa?*, NAT'L ENDOWMENT FOR DEMOCRACY (Aug. 6, 2019), https://www.ned.org/big-question-biggest-impediment-democratic-governance-sub-saharan-africa/ (noting, inter alia, the demand, by Africans, for more transparency in their institutions).

[800] In addition to the fact that post-apartheid South Africa created, in 1996, what "is considered one of the most progressive constitutions in the world," the country also has a strong governing process, which is undergirded by separation of powers with checks and balances, including an independent judiciary and a very robust and politically active civil society. *See, e.g.*, JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 55 (2018). *See also* HENDRICK J. KOTZÉ, THE WORKING DRAFT OF SOUTH AFRICA'S 1996 CONSTITUTION: ELITE AND PUBLIC ATTITUDES TO THE "OPTIONS" (1996) (providing, inter alia, an overview of the South Africa post-apartheid constitution). Chapter 2 of the Constitution of the Republic of South Africa, 1996, contains the Bill of Rights. *See* S. AFR. CONST., First Amendment Act of 1997, ch. 2.

democratic political dispensations.[801] Third, many countries adopted constitutions that either acknowledge or incorporate provisions of international human rights instruments.[802] Fourth, when the Rome Statute of the International Criminal Court ("Rome Statute") was adopted on July 17, 1998 at Rome, Italy, a significant number of its supporters were African States.[803] It has been argued that the impetus to the overwhelming support of the Rome Statute by African countries was the pervasiveness of impunity in the continent generally and the Rwandan Genocide, in particular.[804]

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[801] For example, there were transitions from military dictatorships to electoral democracies in Ghana, Nigeria, Togo, and Bénin Republic. Note, however, the collapse of some authoritarian regimes was not accompanied by a transition to democracy. *See* Michael Bratton, *Deciphering Africa's Divergent Transitions*, 112 POL. SCI. Q. 67, 69–93 (1997). For example, in the Democratic Republic of Congo, the collapse of Mobutu Sesse Seko's authoritarian regime did not lead to a transition to a stable democratic system. In fact, since 1997, when Mobutu was ousted by Laurent-Désiré Kabila, the country has not been able to provide itself with a stable and fully functioning democratic system. *See* William Reno, *Congo: From State Collapse to 'Absolutism,' to State Failure*, 27 THIRD WORLD Q. 43, 48–52 (2006).

[802] For example, the Constitution of the Bénin Republic reaffirms the country's "attachment to the principles of democracy and human rights as they have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948, by the African Charter on Human and Peoples' Rights adopted in 1981 . . . ." CONSTITUTION OF THE REPUBLIC OF BÉNIN Dec. 2, 1990, pmbl.

[803] Kurt Mills, *"Bashir Is Dividing Us": Africa and the International Criminal Court*, 34 HUM. RTS. Q. 404, 405 (2012) (noting, inter alia, that the first country to sign the Rome Statute was Senegal and that shortly after that, many African countries also signed the Rome Statute).

[804] The genocide in Rwanda, which took place in the Spring of 1994, was orchestrated and carried out by the Hutu-dominated government and resulted in the deaths of nearly one million Tutsi and their Hutu sympathizers. *See generally* LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE (2006) (examining, inter alia, the events leading to the Rwandan Genocide and the genocide itself).

Fifth, the successful trial and conviction of former dictators Charles Taylor[805] and Hissène Habré[806] have given hope to victims of human rights violations that they too may one day be able to get justice and that those African leaders who commit atrocities against their fellow citizens will no longer be able to escape accountability. Finally, African States, working through the OAU, adopted the Banjul Charter at the OAU's 18th Assembly in June 1981 in Nairobi, Kenya.[807] The Banjul Charter came into effect on October 21, 1986.[808] The job of oversight and interpretation of the Banjul Charter was given to the African Commission on Human and Peoples' Rights.[809] Below, we take a look at how effective the Banjul Charter has been in creating a culture of respect for, and promotion and protection of human rights in Africa.

The Banjul Charter, according to its Preamble, was designed "to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa."[810] It has been argued, however, that the Banjul Charter has some "normative flaws" that make it difficult for the Charter to function effectively as a legal instrument for the protection of human rights in the continent.[811] Patrick-Patel argues that while the Banjul Charter has a "strong emphasis on social,

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[805] *See* THE LAW REPORTS OF THE SPECIAL COURT FOR SIERRA LEONE: VOL. III: PROSECUTOR V. CHARLES GHANKAY TAYLOR (THE TAYLOR CASE) (Charles Chernor Jalloh & Simon Meisenberg eds. 2015) (examining, inter alia, the trial and conviction of former Liberian dictator Charles Taylor by the Special Court for Sierra Leone).

[806] *See generally* CELESTE HICKS, THE TRIAL OF HISSÈNE HABRÉ: HOW THE PEOPLE OF CHAD BROUGHT A TYRANT TO JUSTICE (2018) (detailing the trial and conviction of former Chadian dictator Hissène Habré by Extraordinary African Chambers within the Courts of Senegal).

[807] *See* Banjul Charter, *supra* note 93.

[808] *See id.*

[809] *See id.*

[810] *Id.* at pmbl.

[811] Lucinda Patrick-Patel, *The African Charter on Human and Peoples' Rights: How Effective Is This Legal Instrument in Shaping a Continental Human Rights Culture in Africa?*, LE PETIT JURISTE (Dec. 21, 2014) https://www.lepetitjuriste.fr/droit-compare/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/.

economic and cultural rights," its coverage of "civil and political rights" is "inadequate."[812] Heyns states that "[t]he civil and political rights recognized in the African [Banjul] Charter are in many ways similar to those recognized in other international [human rights] instruments, and these rights have in practical terms received most of the attention of the African Commission."[813]

The Banjul Charter recognizes a series of rights as "individual rights" and these are: equality before the law and equal protection of the law;[814] freedom from discrimination;[815] inviolability of the human person and the right to life;[816] dignity of the human being and prohibition of torture, cruel, inhuman or degrading punishment;[817] right to liberty and to the security of his person;[818] the right to a fair trial;[819] freedom of conscience;[820] right to receive information and to express and disseminate one's opinion;[821] freedom of association;[822] right to assemble freely with others;[823] freedom of movement;[824] right to freely participate in the political system;[825] and right to property.[826]

Heyns notes that the Banjul Charter makes "no explicit reference in the Charter to a right to privacy; the right against forced labor is not mentioned by name; and the right to a fair trial and the right of political participation are given scant protection in

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812 *Id.*
813 Heyns, *supra* note 630, at 686–87.
814 Banjul Charter, *supra* note 93, at art. 3.
815 *Id.* at art. 2.
816 *Id.* at art. 4.
817 *Id.* at art. 5.
818 *Id.* at art. 6.
819 *Id.* at art. 7.
820 *Id.* at art. 8.
821 *Id.* at art. 9.
822 *Id.* at art. 10.
823 *Id.* at art. 11.
824 *Id.* at art. 12.
825 *Id.* at art. 13.
826 *Id.* at art. 14.

comparison to international standards."[827] The Banjul Charter's coverage of gender issues has also come under attack as wholly inadequate and not likely to contribute significantly, especially to the protection of women and children.[828] For example, no article is devoted entirely to the protection of women or children.[829] Instead, the protection of the rights of women and children is inserted into an article that deals with the family.[830] According to Article 18(3), "[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."[831]

Lumping together the protection of the rights of women and children "in an article that deals with the family," argues Heyns, "re-enforces outdated stereotypes about the proper place and role of women in society and has been partially responsible for the drive to adopt the Protocol to the African Charter on the Rights of Women in Africa."[832] In addition, the Banjul Charter does not provide "general guidelines on how Charter rights should be limited"[833] and this is a serious shortcoming because "[a] society in which rights cannot be limited will be ungovernable, but it is essential that appropriate human rights norms be set for the limitations."[834]

Finally, there is the problem with so-called "claw-back clauses."[835] As argued by Ebow Bondzie-Simpson, "[a] claw-back

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827 Heyns, *supra* note 630, at 687. Heyns notes that the Banjul Charter does not make explicit reference to "the right to a public hearing, the right to interpretation, the right against self-incrimination, and the right against double jeopardy." The African Commission, nevertheless, has interpreted the Banjul Charter "protection to encompass some of these rights." *Id*. at n.45.

828 *See generally id.*

829 Banjul Charter, *supra* note 93, at art. 18(1)–(4).

830 *Id.* at art. 18(3).

831 *Id.*

832 Heyns, *supra* note 630, at 687–88.

833 *Id.* at 688.

834 *Id.* Heyns does note that some articles of the Banjul Charter, which set out "specific and political rights do contain limiting provisions applicable to those particular rights." *Id*. at 688.

835 *Id.*

clause is one which permits a state, in its almost unbounded discretion, to restrict its treaty obligations or rights guaranteed by [the] African Charter."[836] Claw-back clauses, argues Bondzie-Simpson, must be distinguished from "derogation clauses which also permit the temporary suspension of treaty obligations."[837] While derogation clauses are temporary and are usually invoked only in situations of public emergencies, "claw-back clauses may be applied even in normal [or non-emergency] situations, so long as national law is passed to that effect."[838] It is also important to note that while derogation clauses provide for the suspension of "only certain—but not all—obligations and rights,"[839] claw-back clauses are not subjected to such limitations.

Today, many African countries have not yet incorporated the fundamental rights and freedoms enshrined in various international human rights instruments into their constitutions and made them part of national law. As a consequence, the various international human rights instruments "do not automatically confer justiciable rights in national courts."[840] In these countries, national law continues to have primacy, even in situations that deal with the violation of human rights.[841] Thus, it is possible for rights protected by international human rights instruments (including the African [Banjul] Charter) to be violated in an African country with impunity. As argued by Makau Matua, "the most serious flaw in the African Charter concerns its 'clawback' clauses, which permeate the African Charter and permit African states to restrict basic human rights to

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836 Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples' Rights*, 31 HOW. L. J. 643, 660 (1988).

837 *Id.*

838 *Id.*

839 *Id.* at 660–61.

840 Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L. L. 103, 108 (2002).

841 *Id.* at 151–152.

the maximum extent allowed by domestic law."[842] In addition, argues Mutua,

> [t]hese clauses are especially significant because domestic laws in Africa date from the colonial period and are therefore highly repressive and draconian. The postcolonial state, like its predecessor, impermissibly and contrary to international human rights standards, restricts most civil and political rights, particularly those pertaining to political participation, free expression, association and assembly, movement, and conscience.[843]

Consider, for example, the Banjul Charter's Article 9(2), which states as follows: "Every individual shall have the right to express and disseminate his opinions within the law."[844] This is an example of a claw-back clause—the right in question is only recognized to the extent that "such a right is not infringed upon by national law."[845] Heyns has argued that if this interpretation is correct, then "the claw-back clauses would obviously undermine the whole idea of international supervision of domestic law and practices and render the [Banjul] Charter meaningless in respect to the rights involved."[846] In addition, argues Heyns, "[d]omestic law will, in those cases, have to be measured according to domestic standards—a senseless exercise."[847]

The African Commission has held, in the context of claw-back clauses, that "provisions in articles that allow rights to be limited 'in accordance with law,' should be understood to require such limitations to be done in terms of domestic legal provisions, which comply with international human rights standards."[848] In

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[842] Makau Mutua, *The Construction of the African Human Rights System: Prospects and Pitfalls*, *in* REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 143, 146 (Samantha Power & Graham Allison eds., 2000).

[843] *Id.* at 146.

[844] Banjul Charter, *supra* note 93, at art. 9(2).

[845] Heyns, *supra* note 630, at 688.

[846] *Id.*

[847] *Id.*

[848] *Id.* at 689.

Communications 105/93–128/94–130/94–152/96: Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria, the African Commission held that

> [t]o allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.[849]

It is argued that "[t]hrough this innovative interpretation, the Commission has gone a long way towards curing one of the most troublesome inherent deficiencies in the [Banjul] Charter."[850] Nevertheless, to most of the Banjul Charter's stakeholders, particularly those who have not had the opportunity to be exposed to the African Commission's interpretive approach, the Charter "will continue to appear to condone infringements of human rights norms as long as it is done through domestic law."[851]

A lot still has to be done to improve the effectiveness of the system for the recognition and protection of human rights in Africa. First, the key to significantly improving the environment for the protection of human rights in Africa lies in making certain that "international human rights standards must always prevail over contradictory national law."[852] With respect to the African [Banjul] Charter, "[a]ny limitation on the rights of the Charter must be in

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[849] *105/93–128/94–130/94–152/96: Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria,* AFR. COMM'N ON HUM. & PEOPLES' RIGHTS (Oct. 31, 1998) http://www.achpr.org/communications/decision/105.93-128.94-130.94-152.96/ (last visited Dec. 30, 2018), at ¶ 66.

[850] Heyns, *supra* note 630, at 689.

[851] *Id.*

[852] *African Human Rights System*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV., https://globalfreedomofexpression.columbia.edu/law-standards-2/african-human-rights-system/ (last visited Apr. 7, 2021).

conformity with the provisions of the Charter."[853] Second, the majority of countries in the continent must voluntarily accept and respect international human rights instruments and the role that they play in advancing the creation of a domestic institutional environment that respects and protects human rights. Third, a significant number of African countries must make certain that there exists, within their jurisdictions, "[a]n adequate level of compliance with human rights norms."[854]

Fourth, while a regional human rights system, such as the Banjul Charter, is very important and critical to the protection of human rights in Africa, the building blocks of an effective regional human rights system are actually "[w]orking national human rights systems."[855] Without a culture of respect for human rights norms within the majority of African countries, the national or domestic courts "are not effective in implementing these norms,"[856] and it is unlikely that any regional or continental human rights system would succeed in protecting the rights of Africans. As has been argued by some human rights scholars, there must be political will within each African country to establish and maintain an effective domestic human rights system in order for the regional system to work.[857]

Fifth, the regional human rights system as embodied in the African Charter, must be seen as the "primary body through which peer pressure"[858] can be put on States Parties to live up to the ideals of the African Charter; especially regarding the protection of human rights. States Parties are responsible for selecting Commissioners to serve on the African Commission and judges to serve on the African Court.[859] Thus, African countries must take this job seriously and make sure that the process is not politicized and that only individuals

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853 *Id.* ¶ 66.
854 Heyns, *supra* note 630, at 700.
855 *Id.*
856 *Id.*
857 *See id.* at 701.
858 *See id.*
859 *See id.*

who possess the necessary skills[860] to perform the job of a commissioner or judge are selected.

Sixth, availability of adequate financial resources is often a source of insecurity for many human rights organizations. Without financial independence, the entities—in the case of the African Commission, States Parties—that provide the necessary financial resources for the human rights organization can have significant influence on the organization and manipulate its activities and the outcome of its deliberations.

Seventh, openness and transparency in the organization's communication is very important for its effectiveness. For the African Commission, it is important that its "decisions and resolutions" be made available to all stakeholders.[861] Although "[p]eer pressure can change behavior by inducing shame, or if that does not work, by mobilizing stronger forms of sanctions against states,"[862] this is only possible when and if "there is sufficient publicity."[863] The responsibility to make certain that the African Commission operates in an open and transparent manner lies, not just with the Commission alone, but also with civil society and their organizations in all States Parties, as well as the governments of the States Parties.[864]

Eighth, there must be an effective mechanism through which recalcitrant and non-performing States Parties—that is, those that do not adhere to the provisions of the Banjul Charter—can be disciplined. For example, in order for "shame or peer pressure" to be mobilized effectively against recalcitrant States Parties, there must exist proper links—for example, trade, travel, as well as cultural and educational exchanges, and diplomatic contacts and communication—between States Parties; otherwise, it would not be

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860 *See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights*, AFR. COMM'N ON HUM. & PEOPLES' RIGHTS, at art. 11(1), (June 10, 1998), http://hrlibrary.umn.edu/instree/protocol-africancourt.pdf.

861 *See, e.g.*, Heyns, *supra* note 630, at 701.

862 *Id.*

863 *Id.*

864 *Id.*

possible to effectively and fully impose sanctions to force change in the behavior of States Parties.[865]

Finally, "[t]he independence, creativity, and wisdom of those who run the [human rights] system are absolutely crucial"[866] to the process of enhancing the protection of human rights on the continent. With respect to the African Commission, these individuals include the "Commissioners (and judges) and the staff of the Commission (and Court), as well as the officials of the regional organization."[867]

Heyns has argued that rather than continue to create additional organizations and mechanisms for the protection of human rights in the continent, efforts should be directed at "getting the mechanism created by the African Charter, the African Commission, to function properly."[868] Heyns states further that while "[i]n themselves all of these mechanisms could be a viable starting point [for bringing about an effective mechanism for the protection of human rights in the continent], . . . the current proliferation of mechanisms means that there is a lack of focus of resources and effort, with the result that none of them might be in a position to make any difference."[869] Along these lines, those who are genuinely interested in promoting and protecting human rights in Africa should devote their efforts, not into creating new mechanisms, but into strengthening the African Charter, the African Commission, and the African Court, so that they can serve effectively as mechanisms for the promotion and protection of human rights on the continent.

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865 *Id.*
866 *Id.*
867 *Id.*
868 *Id.*
869 *Id.* at 702.

VIII. IMMUNITY FOR AFRICAN LEADERS AND THE PROTECTION OF HUMAN RIGHTS IN THE CONTINENT

A. INTRODUCTION

An important and "fundamental tenet of modern constitutionalism and an offshoot of its core principle of constitutional supremacy is that nobody, regardless of his [or her] status, is above the law."[870] Fombad and Nwauche argue that the very concept of "constitutionalism proceeds from an assumption of human fallibility, the corrupting influence of power and the need to limit it."[871] This is the element of the rule of law generally referred to as the "supremacy of law."[872] Within such a legal and judicial system, "the law is superior, applies equally, is known and predictable, and is administered through a separation of powers."[873] Most importantly, "[t]he law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power."[874] Thus, the law treats all citizens, regardless of their political and economic standing as beings "who are bound to obey and act in accordance with the law."[875]

Due to the fact that the decolonization project in many colonies in Africa was "undertaken reluctantly and opportunistically,"[876] there was a failure to "fully and effectively transform the critical domains—that is, the political, administrative, and judicial foundations of the state"[877] and produce more effective institutional

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[870] Charles Manga Fombad & Enyinna Nwauche, *Africa's Imperial Presidents: Immunity, Impunity and Accountability*, 5 AFR. J. LEGAL STUD. 91, 93 (2012).

[871] *Id.* at 93.

[872] Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT'L L. 293, 296 (2009).

[873] *Id.* at 301.

[874] *Id.* at 302.

[875] Fombad & Nwauche, *supra* note 870, at 93.

[876] JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 8 (2018).

[877] *Id.*

arrangements for post-independence governance. As a consequence, many of the new countries that emerged from European colonialism in the 1950s and 1960s in Africa failed to "design [and adopt] constitutions that promote constitutionalism by incorporating most of the core elements of modern constitutionalism such as separation of powers, judicial independence and Bill of Rights."[878] Since the early 1990s, many African countries have either revised their constitutions or adopted new ones in an effort to promote constitutionalism and constitutional government.[879]

On December 17, 2010, Tunisian street vendor Tarek el-Tayeb Mohamed Bouazizi set himself on fire to protest his humiliation by government regulators.[880] His self-immolation provided the impetus for the Tunisian Revolution that led to the ousting of dictator Zine el-Abidine Ben Ali on January 14, 2011.[881] Bouazizi's death also inspired the wider Arab Spring, which resulted in the ouster of many autocratic regimes in various countries in North Africa and the

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[878] Fombad & Nwauche, *supra* note 870, at 93.

[879] New or revised constitutions were produced in Nigeria (1999, to introduce a new post-military government); Cameroon (1996, to introduce the separation of powers); Republic of South Africa (1996, to bring to an end the racially-based apartheid system and introduce a non-racial democratic system); Zambia (1991, to bring to an end one-party rule and introduce multi-party politics); Ghana (1992, to bring to an end military rule and introduce democratic governance); and Kenya (2010, to introduce separation of powers, with an independent judiciary, as well devolve powers to the regions); and Côte d'Ivoire (2016, to introduce a new citizenship law).

[880] *See Mohamed Bouazizi, Tunisian Street Vendor and Protestor*, ENCYCLOPEDIA BRITANNICA (Mar. 25, 2019), https://www.britannica.com/biography/Mohamed-Bouazizi.

[881] *See id.*

Middle East.[882] By the end of 2011, autocratic leaders in Egypt,[883] Libya,[884] and Tunisia[885] had been ousted.

During the last three decades, African countries have made efforts to improve their national governance systems. These institutional reforms have included the provision of new or revised constitutions. Unfortunately, many of these new or updated instruments, like Cameroon's 1996 constitution,[886] pay only "lip service to separation of powers."[887] As argued by Fombad and Nwauche, many of these new constitutions, especially in the Francophone African countries, have not been able to effectively constrain political elites, allowing them to continue to act above the

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[882] *See* Thessa Lageman, *Mohamed Bouazizi: Was the Arab Spring Worth Dying For?*, ALJAZEERA (Jan. 3, 2016), https://www.aljazeera.com/news/2015/12/mohamed-bouazizi-arab-spring-worth-dying-151228093743375.html.

[883] *See generally* WAEL GHONIM, REVOLUTION 2.0: THE POWER OF THE PEOPLE IS GREATER THAN THE PEOPLE IN POWER: A MEMOIR (2012) (examining, inter alia, the revolution that ousted Egyptian dictator Hosni Mubarak in 2011).

[884] *See generally* ALISON PARGETER, LIBYA: THE RISE AND FALL OF QADAFFI (2012) (examining, inter alia, Qadaffi's rise to power and his violent fall in 2011).

[885] *See generally* THE MAKING OF THE TUNISIAN REVOLUTION: CONTEXTS, ARCHITECTS, PROSPECTS (Nouri Gana ed. 2013) (presenting a series of essays that examines the Tunisian Revolution and the demise of the regime of dictator Ben Ali).

[886] The Constitution of the Republic of Cameroon 1996 is officially known as "Law No. 96–06 of 18 January 1996 to amend the Constitution of 2 June 1972." Although this constitution made allowance for the separation of powers, with an independent judiciary, Article 37(3) grants the President of the Republic the power to guarantee the independence of the judiciary. *See id*. at art. 37(3). Fombad argues that the reality in Cameroon is that the President of the Republic continues to "appoint, transfer, dismiss, suspend and can interfere with the so-called judicial power with no constitutional provisions to control and ensure that this is done in a fair, rational, objective and predictable manner." Charles Manga Fombad, *Judicial Power in Cameroon's Amended Constitution of 18 January 1996*, 9 LESOTHO L.J. 1, 9 (1996).

[887] Fombad & Nwauche, *supra* note 870, at 93.

law.[888] In addition to the fact that many African countries still have "overbearing and 'imperial' presidents [that] continue to reign and dominate the legislature as well as to control the judiciary,"[889] governance systems in these countries also do not have "traditional checks and balances,"[890] such as strong, robust, and politically active civil societies, a free press, and truly independent judiciaries.[891]

Despite the significant constitutional reforms that have taken place in many countries on the continent, "[t]he imbalance in power among the three branches of government"[892] has emerged as a major challenge to governance, especially since it has a significant negative impact on the independence of the judiciary. Given the fact that the judiciary in these countries is often called upon to adjudicate disputes emanating from elections, as well as situations involving political and bureaucratic corruption, and various forms of abuse of power, it is very important that the judiciary be independent from the other branches of government. Fombad and Nwauche argue that "[e]xecutive lawlessness has become very common in countries such as Cameroon, DR Congo, Ethiopia, Eritrea, Nigeria[,] and Zimbabwe."[893] In these countries human rights are routinely violated with impunity.[894]

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[888] *Id.*

[889] *Id.*

[890] *Id.*

[891] *See generally Constitutional Coups*, *supra* note 72, at 181 (arguing, inter alia, that "a robust civil society is critical for the maintenance of a fully functioning democratic system").

[892] Fombad & Nwauche, *supra* note 870, at 93.

[893] *Id.*

[894] For example, in Cameroon in late 2016, teachers and lawyers in the Anglophone Regions engaged in peaceful demonstrations against the Francophone-dominated central government because of the latter's efforts to destroy Anglo-Saxon institutions, and then impose the French language and institutions (including French Civil law) on the Anglophones. The central government responded with extreme violence by killing Anglophones and burning down their villages. In fact, the international press has referred to the activities of government security forces in the Anglophone Regions as genocide. *See, e.g.*, Zongo, *supra* note 279.

What has been the source of this executive political dominance and abuse of power? First, there is the "hegemonic influence of . . . dominant [political] parties, which are often effectively controlled by the president and a small inner circle of cohorts."[895] Second, throughout many countries in the continent national constitutions have not been able to effectively constrain political elites, including executives, making it possible for presidents to commit atrocities against citizens with impunity.[896] Third, several African presidents have been granted immunity from prosecution for crimes committed while in office, allowing them to escape being held accountable for their crimes.[897] For example, in 2008, Cameroon amended its constitution to allow incumbent President of the Republic, Paul Biya, to run for another term in office, and to grant him immunity from prosecution for crimes committed while in office.[898] The relevant section of the constitution is Article 53(3) which states as follows: "*Les actes accomplis par le président de la République . . .*

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[895] Fombad & Nwauche, *supra* note 870, at 94. For example, in Cameroon, the ruling party, the Cameroon People's Democratic Movement (CPDM), which came into being in 1966 as the Cameroon National Union (CNU) and changed its name to the CPDM in 1985, has dominated governance in Cameroon since 1966. Even after multiparty politics returned to the country in 1990 and many opposition parties emerged to challenge the CPDM's hegemonic control of the political system, the CPDM, which is headed by President of the Republic, Paul Biya, has remained in firm control of the National Assembly. After the 2013 legislative elections, the distribution of seats in the 180-seat lower chamber of the Parliament of Cameroon—the National Assembly (*l'Assemblée nationale*) are as follows: CPDM (142); eight opposition parties (34); and 4 seats are vacant. The next legislative election is scheduled for 2019. *See Republic of Cameroon, Election for Assemblée [n]ationale (Cameroonian National Assembly)*, ELECTION GUIDE: DEMOCRACY ASSISTANCE & ELECTIONS NEWS (Sept. 30, 2013), http://www.electionguide.org/elections/id/557/.

[896] Fombad & Nwauche, *supra* note 870, at 94.

[897] *Id.*; *see also* H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-authoritarian Africa*, 35 HASTINGS CONST. L. Q. 761 (2008).

[898] *Constitutional Coups*, *supra* note 72, at 157.

sont couverts par l'immunité et ne sauraient engager sa responsabilité à l'issue de son mandat."[899]

Finally, the constitutions of many African countries, particularly those of the Francophone countries, have conferred "extensive powers"[900] on presidents, and in "the absence of effective checks on the exercise of these powers,"[901] it has become extremely difficult for these countries to deepen their democracies and entrench a "culture of constitutionalism."[902] As a consequence, the violation of human rights remains a major governance challenge in many countries throughout the continent.

Except for a few countries, such as South Africa and Ghana,[903] many of the constitutions that African countries adopted in the post-

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[899] *Loi nº 2008–1 du 14 avril 2008 modifiant et complétant certaines dispositions de la loi nº 96–6 du 18 janvier 1996 portant révision de la Constitution du 2 juin 1972 (Law No. 2008–1 of 14 April 2008 to amend and supplement some provisions of Law No. 96–6 of 18 January 1996 to amend the Constitution of 2 June 1972),* art. 53(3) (Apr. 21, 2008) http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_202302.pdf. The article says that "Acts committed by the President of the Republic . . . shall be covered by immunity and he shall not be held accountable for them after the end of his mandate." *Id.*

[900] Fombad & Nwauche, *supra* note 870, at 94.

[901] *Id.*

[902] *Id.*

[903] Both the South African and Ghanaian governance systems have shown a significant level of resilience. With respect to South Africa, the courts have shown a significant level of independence, ruling against the government in several cases. For example, when the government of President Jacob Zuma withdrew the country from the Rome Statute of the International Criminal Court (ICC), the North Gauteng High Court ruled that the withdrawal had been unconstitutional since it was undertaken without prior parliamentary approval. *See South Africa Court Rules Against ICC Pullout Plan*, FRANCE 24 (Feb. 22, 2017), https://www.france24.com/en/20170222-south-africa-court-rules-against-icc-pullout-plan. After the ruling, the government complied with the court decision and revoked their withdrawal from the ICC. *See* Norimitsu Onishi, *South Africa Reverses*

1990s period have not been able to fully constrain national leaders, especially Presidents. As a consequence, many Presidents in these countries "still consider themselves above the law"[904] and act accordingly. Unless Africans can get rid of these presidential immunities and provide themselves with institutional arrangements that adequately constrain civil servants and political elites, impunity, and consequently the abuse of human rights, will remain a major problem for the continent.

B. THE UNCONSTRAINED PRESIDENT AND HUMAN RIGHTS IN AFRICA

In the early years of the American Republic, the founders considered the legislature as the most "dangerous branch" of government and the one most likely to trample on the rights of citizens.[905] As a consequence, the founding fathers introduced bicameralism as one of the most important ways to check on the exercise of government power.[906] At independence, many African

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Withdrawal from International Criminal Court, N.Y. TIMES (Mar. 8, 2017), https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html. With respect to Ghana, the country has enjoyed peaceful and constitutional regime changes since the end of military rule and the transition to democracy in 1993. For example, in the country's presidential election in December 2016, incumbent President John Dramani Mahama lost to opposition candidate, Nana Akufo-Addo. Unlike presidential candidates in countries, such as Kenya and The Gambia, President Mahama accepted his loss and allowed the transition to proceed. Perhaps, more important is the fact that President Mahama asked his supporters not to engage in violent protest but to accept the loss and allow the transition to proceed smoothly and peacefully. *See* John Mukum Mbaku, *The Ghanaian Elections: 2016*, BROOKINGS INST. (Dec. 15, 2016), https://www.brookings.edu/blog/africa-in-focus/2016/12/15/the-ghanaian-elections-2016/. Of course, the governance situation in both Ghana and South Africa is not ideal—corruption remains a problem in both countries. Perhaps, more important is the fact that the abuse of human rights remains a major governance problem for both countries.

[904] Fombad & Nwauche, *supra* note 870, at 94.

[905] Judith A. Best, *Fundamental Rights and the Structure of Government*, *in* THE FRAMERS & FUNDAMENTAL RIGHTS 37, 48 (1992).

[906] MBAKU, *supra* note 800, at 139.

countries adopted constitutions that created imperial presidencies.[907] As argued by Mbaku, "these were executive branches with relatively unchecked power, which effectively turned the presidency into a monarchy—with relatively weak legislative assemblies."[908] Thus, in many African countries "the dangerous branch of government was the executive because it had absolute control over the legislature and the judiciary—some scholars call these presidencies 'reinforced' and they are characterized by extraordinary abuses of power."[909]

Since the early 1990s, many African countries have engaged in institutional reforms to improve their governance systems. These reforms have included revising or amending their constitutions or creating new ones. Many of these countries now have constitutions that provide for the separation of powers with three separate branches of government—executive, legislative and judicial. Nevertheless, as argued by Mbaku, "in many of these countries, the separation of powers is simply an abstract constitutional construct that does not have any practical application."[910] The reality in many of these countries is that "the executive dominates and controls the other two branches"[911] of government. The institutional reforms that have taken place in the African countries since the early 1990s were supposed to deal with the continent's extremely "powerful, domineering[,] and overbearing" presidencies.[912]

In developed and advanced democracies,[913] the constitution grants the president "the sole repository of executive power to ensure that there is no confusion as to who bears ultimate responsibility for executive decisions."[914] In these countries, there exist "strong checks and balances," which are reinforced by "a history, culture, custom and tradition of constitutionalism[,] and

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907 *See, e.g.*, Prempeh, *supra* note 897.
908 MBAKU, *supra* note 800, at 139.
909 *Id.*; *see also* LeVine, *supra* note 179.
910 MBAKU, *supra* note 800, at 137.
911 *Id.*
912 Fombad & Nwauche, *supra* note 870, at 95.
913 For example, the United States and France.
914 Fombad & Nwauche, *supra* note 870, at 95.

respect for the rule of law."[915] Such an institutional setup ensures that the executive branch "does not overshadow and dominate other branches of government."[916] These advanced democracies developed checks and balances, as well as a culture of adherence to the rule of law, over many years.[917] In addition to the fact that many African countries do not have "a history or long practice of constitutionalism to back the Constitution, the written text remains the basis for any form of control that needs to be exercised to check the abuse of the enormous powers that these constitutions confer on presidents."[918]

These extremely powerful African presidents "rule and reign supreme directly or indirectly through other members of the executive branch and the ruling party which they control, and sometimes, even express disdain for the Constitution."[919] As argued by LeVine, in many African countries a constitution "became simply another instrument of rule if not discarded altogether"[920] and that "[m]any a replacement was simply octroyé, 'handed down from on high,' or cobbled together by a compliant constitution-making conference or convention, and then adopted by a 'controlled plebiscite.'"[921]

Although many of Africa's constitutions currently provide some form of separation of powers, which, as in the Constitution of

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[915] *Id.* Some of these checks include an independent judiciary, a bicameral legislature. In the United States, for example, the national legislature is made up of the Senate and the House of Representatives, with each chamber exercising an absolute veto over legislation enacted by the other. *See* Best, *supra* note 905.

[916] Fombad & Nwauche, *supra* note 870, at 95.

[917] *Id.*

[918] *Id.*

[919] *Id.*

[920] LeVine, *supra* note 179, at 188.

[921] *Id.* Fombad and Nwauche note that, in 2006, Jacob Zuma, who later became President of the Republic of South Africa (May 9, 2009 to Feb. 14, 2018), declared that "the ANC [the ruling party] is more important than even the Constitution of the country." *See* Fombad & Nwauche, *supra* note 870, at 5 n.9. *See also DA: Zille: The Retreat of Constitutionalism*, POLITY (July 22, 2008), http://www.polity.org.za/article/da-zille-the-retreat-of-constitutionalism-22072008-2008-07-22.

the Republic of Kenya [922] and the Constitution of the Republic of South Africa,[923] allows for some level of check over executive abuse of power, most of the continent's Francophone countries remain saddled with de Gaulle's constitutional model—that of the French Fifth Republic.[924] The Gaullist constitutional model, adopted by all former French colonies in sub-Saharan Africa, except Guinea, provides for "an overbearing president who dominates the legislature and controls the judiciary."[925]

An example of this executive control of the other branches of government can be found in the Constitution of the Republic of Cameroon, which states in Article 37(2) that "[j]udicial power shall be independent of the executive and legislative powers."[926] Nevertheless, in paragraph 3 of the same Article, the President of the Republic is granted the power to guarantee the independence of the judiciary—"[t]he President of the Republic shall guarantee the independence of judicial power."[927] This indicates, without question, that the judiciary and the executive are not co-equal branches of government. Although the Francophone African countries also participated in the institutional and constitutional reform exercises that pervaded African countries in the aftermath of the Cold War and made efforts to reform their Gaullist constitutional model, the imperial presidency remains a critical part of the governance architecture of these countries. These imperial presidencies remain a threat to governance generally and to the protection of human rights in particular.

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[922] *See* Hanibal Goitom, *National Parliaments: Kenya*, L. LIBR. OF CONG. 1 (Feb. 2017), https://www.loc.gov/law/help/national-parliaments/pdf/kenya.pdf.

[923] *See Who We Are*, PARLIAMENT OF THE REPUBLIC OF S. AFR., https://www.parliament.gov.za/who-we-are (last visited Mar. 2, 2021); Fombad & Nwauche, *supra* note 870, at 95.

[924] *See Who We Are*, *supra* note 923; *see also* Fombad & Nwauche, *supra* note 870, at 95.

[925] Fombad & Nwauche, *supra* note 870, at 96.

[926] CONSTITUTION OF THE REPUBLIC OF CAMEROON, Jan. 18, 1996, art. 37(2) (amended 2008).

[927] *Id.* at art. 37(3).

1. Presidential Immunities and Human Rights Protection in Africa

In modern Africa, the functions and powers of the president are defined and delineated by the constitution. As in other sovereign states, the African president is empowered by the constitution as the "sole repository of executive power."[928] It is argued that given the "huge and exacting nature of [presidential] responsibilities, most [African] constitutions have granted [the president] immunity in absolute or qualified form to enable him to discharge his duties with as much freedom as possible."[929] First, if a president is subject to being sued while he or she is in office, it is argued, the adjudication process can emerge as "a serious distraction of the president's attention to his public duties."[930] Second, the "fear of attracting liability,"[931] argue some legal and constitutional scholars, may force the president to shy away from fully exercising his or her discretion, and hence, he or she may not be able to perform his or her public duties fully and effectively.[932]

Third, immunity is expected or intended to protect not just the president personally but also the "dignity of the office."[933] Fourth, given the fact that the president makes decisions "on matters that are far-reaching, sensitive and sometimes likely to arouse intense feelings,"[934] it is "in the public interest"[935] and to the benefit of the country as a whole that the president can act in "a confident, skillful and decisive manner without the fear that a disgruntled citizen may sue him."[936] But, can immunity allow the president to perform his official duties without being distracted by the fear of being sued and dragged to court and do so without placing the same president above the law? For, if the president considers himself or herself above the

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928 Fombad & Nwauche, *supra* note 870, at 10.
929 *Id.*
930 *Id.*
931 *Id.*
932 *See id.*
933 *Id.*
934 *Id.*
935 *Id.*
936 *Id.*

law, he or she may engage in activities that violate the rights of citizens. In the following section, we shall examine some presidential immunities in African constitutions and see the extent to which these may be contributing to human rights violations in the continent.

2. Absolute Immunity Provisions in African Constitutions and Human Rights

The "absolute immunity clauses" in African constitutions grant the president or the country's executive "absolute immunity from both civil and criminal proceedings."[937] Consider, for example, §50(1) of the Constitution of the Kingdom of Lesotho:

> Whilst any person holds the office of King, he shall be entitled to immunity from suit and legal process in any civil cause in respect of all things done or omitted to be done by him in his private capacity and to immunity from criminal proceedings in respect of all things done or omitted to be done by him either in his official capacity or in his private capacity.[938]

Under the Constitution of the Kingdom of Lesotho, the king cannot be held legally accountable for his acts or omissions, whether undertaken in his private or public capacity.[939] The Constitution of the Kingdom of Swaziland also provides another example of absolute immunity.[940] According to Article 11, "The King and *iNgwenyama* shall be immune from (a) suit or legal process in any cause in respect of all things done or omitted to be done by him; and

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[937] *Id.* at 11.

[938] CONSTITUTION OF LESOTHO (1993), art. 50(1) (amended 2004).

[939] *Id.* at art. 50(1)–(5).

[940] CONSTITUTION OF THE KINGDOM OF SWAZILAND (2005), art. 11. In 2018, King Mswati III renamed the country "the Kingdom of eSwatini." *See* BBC, *Swaziland King Renames Country the Kingdom of eSwatini*, BBC NEWS, April 19, 2018, https://www.bbc.com/news/world-africa-43821512.

(b) being summoned to appear as a witness in any civil or criminal proceeding."[941]

Fombad has argued that despite the constitutional reforms that took place in the Kingdom of Swaziland in 2005, which produced a new constitution that "contains many progressive ideas,"[942] the same constitution has retained "many of the features that have drawn international attention to the excesses of the absolute and authoritarian powers of the Swazi King."[943] Thus, "[d]espite [the new constitution's] veneer of constitutionalism and constitutional legitimacy, the new Constitution does little to protect the Swazis against the excesses of the authoritarian tendencies and practices of [the] King and his officials."[944] Contrary to popular expectations, the 2005 Constitution of Swaziland did not bring about a democratic order to the country, nor did it establish a "functioning constitutional monarchy;"[945] instead, the kingdom remains saddled with a governance system in which the king retains absolute and unchecked power. Also, the Swazi constitution provides what appears to be a separation of powers.[946] In reality, however, the king wields enormous powers and "clearly controls and dominates the executive, the legislature[,] and the judiciary."[947] For example, the constitution allows the king to appoint the prime minister and

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[941] *Id.* The "iNgwenyama" is the title of the male ruler or King of Eswatini. *See* MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM 45 (1996).

[942] Charles Manga Fombad, *The Swaziland Constitution of 2005: Can Absolutism Be Reconciled with Modern Constitutionalism?*, 23 S. AFR. J. HUM. RIGHTS 93, 93 (2007).

[943] *Id.*

[944] *Id.*

[945] *Id.*

[946] Chapter VI (§§ 64–78) of the Swazi Constitution deals with executive powers; Chapter VII (§§ 79–131) deals with the legislature; and Chapter VIII (§§ 138–161) deals with judiciary power. *See* CONSTITUTION OF THE KINGDOM OF SWAZILAND (2005).

[947] Fombad & Nwauche, *supra* note 870, at 105.

cabinet ministers,[948] many of the members of parliament,[949] officers of the judiciary,[950] and other senior members of the bureaucracy.[951]

Although the constitution requires that the king consult his advisory council before he appoints the prime minister, the constitution does not state his absolute power in clear and unambiguous terms. Instead, it states in § 65(4) that, "where the King is required by the Constitution to exercise any function after consultation with any person or authority, the King may or may not exercise that function following that consultation."[952] The king is, in reality, not under any obligation either to consult anybody or authority or, if he consults, to act on any advice received.[953]

Unlike the Swazi Kingdom, the Kingdom of Lesotho is a constitutional monarchy. According to § 44(1) of the Kingdom of Lesotho constitution, "there shall be a King of Lesotho who shall be a constitutional monarch and Head of State."[954] As explained by Fombad and Nwauche, the King of Lesotho, as a constitutional monarch, is less likely than the Swazi King "to engage in any activities that could incur liability."[955] According to Human Rights Watch:

> Swaziland, ruled by absolute monarch King Mswati III since 1986, continued to repress political dissent and disregard human rights and rule of law principles in 2016. Political parties remain banned, as they have been since 1973; the independence of the judiciary is severely compromised; and repressive laws continued to be used to

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948 CONSTITUTION OF THE KINGDOM OF SWAZILAND (2005), art. 11.

949 *Id.* at art. 4(3), 95(1)(b).

950 *Id.* at art. 153(1).

951 S*ee id.* (§ 188(2) for the appointment of ambassadors; § 191(5) for the appointment of the army commander and other commanders; § 190(4) for the appointment of the commissioner of correctional services; § 161(2) for the appointment of the Director of Public Prosecutions and § 207(2) for the appointment of the Auditor-General).

952 *Id.* at art. 65(4).

953 *Id.*

954 CONSTITUTION OF LESOTHO (1993), § 44(1).

955 Fombad & Nwauche, *supra* note 870, at 102.

> target critics of the government and the king despite the 2005 Swaziland Constitution guaranteeing basic rights.[956]

3. Qualified Presidential Immunities

Several African constitutions, particularly those of the continent's Anglophone countries, contain clauses that provide qualified presidential immunities for criminal liability. An example can be found in the Constitution of Botswana:

> Whilst any person holds or performs the functions of the office of President[,] no criminal proceedings shall be instituted or continued against him or her in respect of anything done or omitted to be done by him or her[,] either in his or her official capacity or in his or her private capacity.[957]

Legal and constitutional scholars have argued that this provision is so broad that it could allow a sitting president "to get away with serious crimes committed whilst in office,"[958] including "crimes committed in order to prolong his stay in power."[959] This is a very important point, especially when one considers the fact that throughout the continent, in countries such as Algeria,[960]

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[956] *Swaziland: Events of 2016*, HUM. RIGHTS WATCH, https://www.hrw.org/world-report/2017/country-chapters/swaziland (last visited on Jan. 2, 2018).

[957] CONSTITUTION OF BOTSWANA Sept. 30, 1966, § 41(1) (amended 2006).

[958] Fombad & Nwauche, *supra* note 870, at 103.

[959] *Id.*

[960] In 2008, the Algerian parliament approved a constitutional amendment, which abolished presidential term limits and allowed President Abdelaziz Bouteflika to run for a third term in office. *See Algeria Deputies Scrap Term Limit*, BBC NEWS (Nov. 12, 2008, 3:07 PM), http://news.bbc.co.uk/2/hi/africa/7724635.stm.

Burundi,[961] Cameroon,[962] Democratic Republic of Congo,[963] Republic of Congo,[964] The Gambia,[965] Rwanda,[966] and Uganda,[967]

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[961] In 2018, Burundians approved a new constitution that ushered in changes allowing President Pierre Nkurunziza to remain in office until 2034. *See Burundi Approves New Constitution Extending Presidential Term Limit*, REUTERS (May 21, 2018, 11:26 AM), https://www.reuters.com/article/us-burundi-politics/burundi-approves-new-constitution-extending-presidential-term-limit-idUSKCN1IM1QG.

[962] In 2008, Cameroon's National Assembly approved a constitutional amendment clearing the way for President Paul Biya to run for a third term in office. *See Cameroon Assembly Clears Way for Biya Third Term*, REUTERS (Apr. 10, 2008, 1:08 PM), https://www.reuters.com/article/idUSL10840480.

[963] The president of the Democratic Republic of Congo, Joseph Kabila, was supposed to leave office at the end of his second term in December of 2016. However, he managed to postpone the elections that were supposed to choose a replacement for him. The elections were supposed to be held on November 27, 2016, but Kabila managed to postpone them until December 2018, allowing him to serve an unconstitutional term of two years. *See generally* John Mukum Mbaku, *The Postponed DRC elections: Behind the Tumultuous Politics*, BROOKINGS INST. (Nov. 18, 2016), https://www.brookings.edu/blog/africa-in-focus/2016/11/18/the-postponed-drc-elections-behind-the-tumultuous-politics/; John Mukum Mbaku, *What Is at Stake in the DRC Presidential Election?*, BROOKINGS INST. (Aug. 29, 2018), https://www.brookings.edu/blog/africa-in-focus/2018/08/29/what-is-at-stake-for-the-drc-presidential-election/. The postponed elections were finally held on December 30, 2018 without the participation of Kabila as a candidate for the presidency. *See* William Clowes & Ignatius Ssuuna, *Congo Votes for Successor to Kabila in Long-Delayed Election*, BLOOMBERG NEWS (Dec. 30, 2018, 2:09 AM), https://www.bloomberg.com/news/articles/2018-12-30/congo-votes-for-successor-to-kabila-in-long-delayed-election.

[964] In 2015, Congolese voters approved a constitutional amendment that cleared the way for President Denis Sassou Nguesso to run for a third consecutive term in office. *See* Philon Bondenga, *Congo Votes by Landslide to Allow Third Presidential Term*, REUTERS (Oct. 27, 2015, 3:13 AM), https://www.reuters.com/article/us-congo-politics-idUSKCN0SL0JW20151027.

incumbent presidents have gone to extraordinary lengths to prolong their stay in power.

In some African constitutions, presidents are constitutionally shielded from criminal prosecutions. Nevertheless, these immunities are usually not broad-based, but qualified to exempt certain criminal activities. For example, Article 127(1) of the Constitution of Angola states that "[t]he President of the Republic shall not be liable for actions [taken] in the exercise of his functions, except in the event of subordination, treason, and the crimes defined in this Constitution as imprescriptible and ineligible for amnesty."[968] Thus, while the president is granted immunity for crimes committed while in office, that immunity does not extend to impeachable offenses.[969] Similarly, Chapter Nine of Kenya's 2010

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[965] After he lost the presidential election in December of 2016, incumbent President Yahya Jammeh refused to leave office. *See* Alpha Kamara, *Gambian President Creates Crisis of Democracy by Refusing to Step Down After Election Defeat*, WASH. TIMES (Dec. 13, 2016), https://www.washingtontimes.com/news/2016/dec/13/yahya-jammeh-gambia-president-refuses-to-leave-aft/. He was eventually chased out by the Economic Community of West African States (ECOWAS). *See* Kevin Seiff, *Gambia's President Agrees to Step Down, Following Threat of Military Intervention*, WASH. POST (Jan. 17, 2017), https://www.washingtonpost.com/world/africa/gambias-president-refuses-to-step-down-defying-regional-military-intervention/2017/01/20/098a0782-de94-11e6-8902610fe486791c_story.html?noredirect=on&utm_term=.6bd15e73be5c.

[966] In 2015, the people of Rwanda approved a constitutional amendment allowing incumbent president, Paul Kagame, to run for a third term; he will most likely remain in office until 2034. *See Rwandan President Paul Kagame to Run for Third Term in 2017*, GUARDIAN (Jan. 1, 2016, 4:42 AM), https://www.theguardian.com/world/2016/jan/01/rwanda-paul-kagame-third-term-office-constitutional-changes.

[967] In 2017, the Ugandan Parliament passed a law changing the constitution, allowing President Yoweri Museveni to extend his rule. *See* Elias Biryabarema, *Ugandan Parliament Passes Law Allowing Museveni to Seek Reelection*, REUTERS (Dec. 20, 2017, 5:47 AM), https://www.reuters.com/article/us-uganda-politics/ugandan-parliament-passes-law-allowing-museveni-to-seek-re-election-idUSKBN1EE17D.

[968] CONSTITUTION OF THE REPUBLIC OF ANGOLA Jan. 21, 2010, art. 127 (1).

[969] *See* Fombad & Nwauche, *supra* note 870, at 103.

constitution,[970] which deals with "The Executive," provides protections for the president from legal proceedings. However, §143(4) of Chapter Nine states: "The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."[971]

Kenya's qualified presidential immunity is important, especially for understanding the extent to which a Kenyan president can shield himself or herself from criminal prosecution for violations of rights protected under international human rights treaties, such as the ICCPR[972] and the ICESCR.[973] Within the qualified presidential immunities provided by the Kenyan constitution, a Kenyan president who violates a right protected by an international human rights instrument, such as the ICCPR or the ICESCR, can still be prosecuted and brought to justice for those crimes.[974] Thus, in the case of Kenya's presidential immunities, the key to ensuring the protection of human rights is to make sure that the country accedes to and becomes a State Party to the various international human rights instruments.

While the Constitution of the Republic of Zambia grants the President immunity from criminal prosecution for any crimes committed while in office, it also grants the National Assembly the authority to lift that immunity if it determines that it is in the "interests of the State" to do so.[975] Although the Zambian Parliament

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[970] CONSTITUTION art.129–58, 4 (2010) (Kenya).

[971] *Id.*at art. 143(4).

[972] Kenya ratified the ICCPR on May 1, 1972. *See* UN TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN.

[973] Kenya ratified the ICESPR on May 1, 1972. *Id.*

[974] CONSTITUTION art. 143(4) (2010) (Kenya).

[975] CONST. OF ZAMBIA (1996) § 43(2)–(3). On July 16, 2002, the Zambian Parliament voted to lift the presidential immunity granted to former president Frederick Chiluba so that he could be prosecuted for corruption. A Zambian court later ruled that Parliament had acted within its powers when it voted to strip Chiluba of the presidential immunity, which he had enjoyed during his ten years in office. *See Chiluba Stripped of Presidential Immunity*, MAIL & GUARDIAN (Jan. 1, 2002), https://mg.co.za/article/2002-01-01-chiluba-stripped-of-presidential-immunity.

was able to lift the immunity of their ex-president, Frederick Chiluba, so that he could be prosecuted for corruption, the problem with these types of qualified immunities is that in countries, such as Cameroon, where the president's party controls parliament, such immunity may not be lifted to allow the prosecution of either a sitting or ex-president.[976] Of course, a president who is afraid that his immunity would be lifted after he leaves office might do everything in his power to remain in power.[977]

Although the Constitution of Angola grants qualified immunity to presidents and ex-presidents, that immunity does not apply to former presidents "who have been removed from office for reasons of criminal liability."[978] The Constitution of the Republic of Ghana only allows an ex-president to be subjected to criminal or civil proceedings for crimes committed while in office within three years after the person ceases to be President of the country.[979]

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[976] In Cameroon, President Paul Biya's party, the Cameroon People's Democratic Movement (CPDM), has controlled the National Assembly since it came into existence in 1966. *See* Ibrahim Mouiche, *Multipartyism and 'Big Man' Democracy in Cameroon, 1990–2011*, *in* FRACTURES AND RECONNECTIONS: CIVIC ACTION AND THE REDEFINITION OF AFRICAN POLITICAL AND ECONOMIC SPACES: STUDIES IN HONOR OF PIET J. J. KONINGS 217, 221 (J. Abbink ed., 2012).

[977] It has been argued that incumbent African presidents, such as Paul Biya of Cameroon, are afraid to leave office for fear of being prosecuted for their past criminal activities. *See Is There Life after the Presidency?*, BBC NEWS (June 3, 2005, 3:21 PM), http://news.bbc.co.uk/2/hi/africa/4607269.stm.

[978] CONSTITUTION OF THE REPUBLIC OF ANGOLA Jan. 21, 2010, § 133(3). The conditions under which a president can be removed from office are listed and elaborated in § 129.

[979] CONSTITUTION OF THE REPUBLIC OF GHANA (1992) (amended 1996), § 57(6). This limited window ignores the fact that many African countries may not have the necessary resources and the capacity to fully investigate and uncover the full range of the former president's criminal activities. In fact, many former presidents may still continue to have significant impact on the political system. Hence, many victims of the president's crimes may be afraid to come forward and report his criminal activities for fear of retribution.

Although many African constitutions clearly elaborate the terms under which a president may be prosecuted for crimes committed while in office, these terms are still subject to interpretation by the courts. Such judicial interpretation, illustrated by the Nigerian case of *Fawehinmi v. Inspector General of Police*,[980] can create or provoke significant levels of controversy. In *Fawehinmi*, the Supreme Court of Nigeria held that the immunity provided by § 308(1)(a) of the Constitution of Nigeria to the President of the Federal Republic of Nigeria and other specified officials did not prevent or preclude the investigation made against the president or any other official.[981] The Supreme Court made clear, however, that in investigating such a complaint, individuals who are protected by the constitution's immunity provisions could not be questioned until they had left office.[982]

4. Presidential Immunities and Human Rights

Although one can argue that it is reasonable to shield a sitting president from the vexations of politically motivated legal actions, all of which may interfere with his or her ability to perform constitutionally mandated or assigned functions, there may be serious problems with presidential immunities, especially when they relate to violations of human rights. First, it is argued that an individual who is directly involved or complicit in the commission of atrocities against his own people should not be allowed to remain in office; furthermore, if the individual left office, the individual should not be allowed to escape prosecution for his criminal activities.[983] After all, supremacy of law should be the defining characteristic of the legal architecture of a civilized society. Within such a system, no one, not even the president, the head of state and government, or other high-ranking officials should be above the law. Without such an approach to presidential immunity, there is a very high likelihood that many African presidents, granted immunity by their national constitutions, will commit atrocities against their citizens and escape being held accountable for these crimes. Within

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980 Fombad & Nwauche, *supra* note 870, at 102.
981 *Id.*
982 *Id.*
983 *See generally id.*

such a legal architecture, the violations of human rights will continue unabated.

Second, a president who was a criminal before he came to office is likely to continue his criminal activities; especially if the constitution grants him immunity from prosecution. In addition, he may not be interested in using his time in office to deepen, strengthen, and institutionalize the country's democracy. In fact, such an immunized president may seek ways[984] to remain in office indefinitely so that he could either continue to benefit from the immunity granted by the constitution or effectively change the law to escape all liability from prosecution.

For example, in 2008, Paul Biya, who has been the President of the Republic of Cameroon since 1982 and whose party—the Cameroon People's Democratic Movement (CPDM)—controls the National Assembly, had the constitution changed to immunize himself from all crimes committed by himself while in office.[985]

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[984] For example, he may change the constitution in order to prolong his tenure in office. *See id.* at 103.

[985] *See* CONSTITUTION OF THE REPUBLIC OF CAMEROON Jan. 18, 1996, § 53. This section states that "[a]cts committed by the President of the Republic . . . shall be covered by immunity and he shall not be accountable for them after the exercise of his functions." Thus, as far as the national law in Cameroon is concerned, Biya will never be held accountable for the atrocities that he and his security forces committed against the people of the country's Anglophone Regions, especially given the Amended African Court of Justice and Human Rights Statute's immunity clause, which states that "[n]o charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office." *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, AFR. UNION (June 27, 2014), at art. 46(A) (bis Immunities), https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights. According to Article 11 of the Amended African Court of Justice and Human Rights Statute, the "[p]rotocol and the [s]tatute annexed to it shall enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) [m]ember [s]tates." *See id*. at art.

Then, there is Jacob Zuma, former president of South Africa who was elected in May 2009. Before he became president, there were allegations of corruption labelled against him; however, those charges were "withdrawn by the National Prosecuting Authority under dubious circumstances."[986] As president, Zuma was embroiled in corruption scandals involving the Nkandla[987] and Gupta affairs.[988] Ultimately, Zuma was forced out of power on February 14, 2018.[989] His regime was pervaded by high levels of corruption and is said to have cost the South African economy an

11(1). As of January 3, 2019, only eleven states had signed the Protocol but none had yet ratified and deposited their instruments; hence, the Protocol has not yet entered into force. Thus, a president like Paul Biya, whose national constitution has granted him immunity from criminal prosecution for crimes committed during his tenure in office and who is not likely to be prosecuted by the African Court of Justice and Human Rights because the Article 46A immunity clause, would have to be prosecuted by the International Criminal Court or a specially constituted court, as was the case with Chad's former president, Hissène Habré.

[986] Fombad & Nwauche, *supra* note 870, at 103.

[987] The Nkandla case involved allegations that then President Zuma had corruptly used state funds to refurbish his private home outside the municipality of Nkandla. *See* Economic Freedom Fighters v. Speaker of the National Assembly and Others, CCT 143/15, Judgment (Constitutional Court of South Africa, 2016); Democratic Alliance v. Speaker of the National Assembly and Others, CCT 171/15, Judgment (Constitutional Court of South Africa, 2016).

[988] The Gupta Affair involved accusations that the South African state, under President Zuma, had been captured by the powerful Gupta family business empire. The allegations of state capture were investigated by South Africa's Public Protector, Thuli Madonseli. Her report was released in 2016. PUBLIC PROTECTOR SOUTH AFRICA, STATE OF CAPTURE (Rep. No. 6 of 2016/17, 2016); *See also* John Mukum Mbaku, *Rule of Law, State Capture, and Human Development in Africa*, 33 AM. U. INT'L L. REV. 771 (2018).

[989] *South Africa's Jacob Zuma Resigns After Pressure from Party*, BBC NEWS (Feb. 15, 2018), https://www.bbc.com/news/world-africa-43066443.

estimated one trillion South African Rand (about U.S. $83 billion).[990]

Finally, a president who considers himself above the law because of the immunities granted to him by the constitution may use his time in office and the absolute power granted to him to make it extremely difficult for him to be prosecuted after he leaves office. For example, he may bribe, intimidate, or use security forces to kill potential witnesses against them. In addition, the president may use the power granted him to change the constitution and remain in power indefinitely. This action would effectively foreclose any chance that he would be held accountable for his criminal activities. Even if a president does not die in office and eventually retires, it might be impossible to effectively prosecute him for his crimes.[991] In addition to the fact that many of the people who could possibly testify against him may have died or left the jurisdiction, either through voluntary or involuntary exile, they may no longer have an accurate and reliable account of the events as they unfolded many years ago. While records, especially those accumulated by NGOs and private citizens during the president's tenure, may help prosecutors reconstruct events as they occurred when the crimes were committed, they would not be enough to fully eliminate the doubts created by the lack of accurate and reliable eye-witness testimony; memory lapses, which are bound to occur in the case of crimes committed during a tenure of many decades in power, are likely to complicate or even frustrate post-tenure prosecutions.

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[990] *See* Lisa Steyn, *Budget 2018 Is Zuma's Costly Legacy*, MAIL & GUARDIAN (Feb. 23, 2018), https://mg.co.za/article/2018-02-23-budget-2018-is-zumas-costly-legacy.

[991] Paul Biya of Cameroon has been in power since 1982 and just recently secured another seven-year term in office. Cameroon held another presidential election on October 7, 2018, despite the fact that the international community declared that the elections were neither free nor fair, the country's Constitutional Council declared incumbent Paul Biya as the winner. That "win" extended his 36-year rule over Cameroon by seven years. *See* Neil Munshi, *Paul Biya Declared Winner of Cameroon's Disputed Presidential Poll*, FIN. TIMES (Oct. 22, 2018), https://www.ft.com/content/81903ce8-d5d6-11e8-a854-33d6f82e62f8.

Presidential immunities limit the scope of accountability of presidents and frustrate the promotion and protection of human rights in Africa; but, can the courts intervene and minimize or curb presidential impunity? In most African countries, it is often the case that "finding presidents liable for wrongful acts or omissions committed in office is not something that African judges will easily do."[992] Evidence shows that this problem exists, even in countries such as Botswana, that are considered to have fully effective democratic systems undergirded by independent judiciaries.[993]

Take, for example, the case *Motswaledi v. Botswana Democratic Party and Others*.[994] A split in the ruling–Botswana Democratic Party (BDP) led to Ian Khama, the President of the BDP and President of Botswana, suspending the membership of the BDP's Secretary-General.[995] The President's decision to suspend the party's Secretary-General effectively prevented the latter from running for a position in Parliament; a process that "tilted the balance between competing factions within the party in favor of the President's faction."[996] When the Secretary-General challenged the legality of the action taken by the President to suspend the Secretary-General of the BDP, the President successfully relied on § 41(1) of the Constitution of Botswana, which states that:

> Whilst any person holds or performs the functions of the office of President no criminal proceedings shall be instituted or continued against him or her in respect of anything done or omitted to be done by him or her either in his or her official capacity or in his or her private capacity and no civil proceedings shall be instituted or continued in respect of which relief is claimed against him or her in

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992 Fombad & Nwauche, *supra* note 870, at 103.

993 *See id.*

994 *See* Motswaledi v. Botswana Democratic Party and Others, (2009) 2 BLR 284 (CA).

995 Fombad & Nwauche, *supra* note 870, at 13.

996 *Id.*

> respect of anything done or omitted to be done in his or her private capacity.[997]

In this case, the President of Botswana was using the immunity granted him by the constitution to "unfairly neutrali[z]e political opponents and violate the spirit of the Constitution which all presidents take an oath to defend and protect."[998] Fombad and Nwauche argue that this practice is quite common in the continent.[999] As indicated by the Botswana case, once the conduct of a president "comes within the scope of the immunity, whether it be absolute or qualified immunity, the president's motive is irrelevant; the immunity operates as a complete bar to the action."[1000] These presidential immunities effectively "override the president's permanent and fundamental duty as a citizen to act within the law"[1001]—that is, immunities place some officials above the law and allow them to act with impunity.

In many countries, including those in Africa, the president is the chief law enforcer and the individual responsible for protecting and upholding the constitution. To successfully carry out this function, the president must lead by example; hence, he cannot and should not place himself above or outside the law. While it can be argued that the president should be forgiven in the case where he acted outside the law in an effort to protect national interests, he must bear the full force of the law if he acted in his personal capacity and was doing so to generate benefits for himself. Unfortunately, such an approach is not likely to be useful, especially given the fact that it may be difficult to determine with a significant level of certainty when the president is acting on behalf of the country and when he is acting in his personal capacity and for his own benefit.

But, could the problem of presidential abuse of power be resolved through impeachment? The impeachment option is only available if it is made possible by the national constitution. First, many African constitutions, like that of Botswana, do not have

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997 CONSTITUTION OF BOTSWANA Sept. 30, 1966, § 41(1).
998 Fombad & Nwauche, *supra* note 870, at 104.
999 *See id.*
1000 *Id.*
1001 *Id.*

impeachment provisions.[1002] Second, even if the national constitution has impeachment provisions, it is not likely that the legislature would carry through with impeaching the president, especially considering the fact that in many of these countries, the president and his party control the legislature. Finally, the ground for impeaching the president as provided for in the constitution may be extremely narrow; for example, Article 53(1) of the Constitution of the Republic of Cameroon limits the impeachment of the president to treason.[1003]

5. Impeachment Proceedings Against African Heads of State as a Way to Deal with Presidential Abuse of Power

It has been suggested that in the African countries in which national constitutions grant presidents immunity from criminal and civil prosecution for crimes they commit while in office, impeachment proceedings can be used to prevent such officials from abusing their powers. As argued by Fombad and Nwauche, "[i]mpeachment proceedings potentially provide the most potent method of punishing abuse of office under modern African constitutions."[1004] In most of the Francophone African constitutions, impeachment is the only way through which presidents can be held accountable for crimes they commit while in office. Nevertheless, in most of these constitutions a president can only be impeached for treason, and impeachment proceedings are usually undertaken by a special court of impeachment. Some of these countries refer to this special court as the High Court of Justice.[1005]

[1002] *See generally* CONSTITUTION OF BOTSWANA Sept. 30, 1966.

[1003] CONSTITUTION OF THE REPUBLIC OF CAMEROON Jan. 18, 1996, at § 53(1).

[1004] Fombad & Nwauche, *supra* note 870, at 106.

[1005] According to Article 53(1) of the Cameroonian Constitution, "[t]he Court of Impeachment shall have jurisdiction, in respect of acts committed in the exercise of their functions, to try the President of the Republic for high treason. . . ." CONSTITUTION OF THE REPUBLIC OF CAMEROON Jan. 18, 1996, art. 53(1) (amended 2008). In Chad, the Court of

Unlike the constitutions of Gabon and Cameroon, those of other Francophone countries provide more elaborate provisions. For example, the Constitution of Burkina Faso provides that, in addition to treason, the president can also be removed from office for any violations of the constitution that involve misappropriating public funds.[1006] The Constitution of the Republic of Chad also provides for the removal from office of the President of the Republic for treason.[1007] Specifically, the constitution states that "The President is only responsible for acts accomplished in the exercise of his functions in case of high treason."[1008] The constitution then goes on to define those crimes that fall within the single crime of "high treason."[1009] These include acts "infringing the republican form, the uniqueness and secularity of the State, the sovereignty, the independence and the integrity of the national territory. . ."; the preceding acts are considered the crimes which collectively form the single crime of "treason."[1010] In addition, a president can be removed from office for "grave and blatant violations of the rights of Man, the misappropriation of public funds, bribery, extortion, drug trafficking and the introduction of toxic or dangerous wastes,

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Impeachment is called the High Court of Justice and consists of ten Deputies, two members of the Constitutional Council, and three members of the Supreme Court. *See* CONSTITUTION DE LA RÉPUBLIQUE DU TCHAD Apr. 4, 1996, art. 171–72 (Chad). *See also* CONSTITUTION DE LA REPUBLIQUE GABONAISE Mar. 26, 1991, art. 78 (GABON).

[1006] According to Article 138 of the Constitution of Burkina Faso, "The High Court of Justice is competent to take cognizance of the acts committed by the President of Faso in the exercise of his functions and constituting high treason, of infringing the Constitution or of misappropriation of public funds." The High Court of Justice is a specially constituted court to judge public officials and, according to Article 137, is "composed of Deputies that the National Assembly elects after each general renewal, as well as the magistrates designated by the President of the Court of Cassation." *See* CONSTITUTION DU BURKINA FASO June 11, 1991, art. 137–38.

[1007] CONSTITUTION DE LA RÉPUBLIQUE DU TCHAD Apr. 4, 1996, art. 173 (Chad).

[1008] *Id.*

[1009] *Id.*

[1010] *Id.*

for their transit, deposit or storage on the national territory"—these crimes are also associated with high treason.[1011]

Impeachment proceedings in Anglophone and other non-Francophone constitutions are usually more elaborate than those in Francophone constitutions. Acts for which a president can be impeached include: (1) "crimes of treason and espionage";[1012] (2) "crimes of subordination, fraudulent conversion of public money, and corruption";[1013] (3) abuse of office, willful violation of the oath of allegiance or the President's oath of office, or willful violation of any provision of the constitution; (4) any conduct that "brings or is likely to bring the office of the President into contempt or disrepute";[1014] (5) the president conducts himself in a manner "prejudicial or inimical to the economy or the security of the State";[1015] (6) "where there are serious reasons for believing that the President has committed a crime under national or international law";[1016] and (7) "gross misconduct."[1017]

Note that the Constitution of the Republic of Kenya, which was ratified in 2010, provides more generous grounds for impeaching and removing the president from office. First, the president can be impeached "where there are serious reasons for believing that" the president has committed a crime under national or international law.[1018] Including acts that are crimes under international law is very important because a Kenyan president can be held accountable for human rights violations that may not qualify as crimes under

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[1011] *Id*.

[1012] CONSTITUTION OF THE REPUBLIC OF ANGOLA Jan. 21, 2010, art. 129.

[1013] *Id*.

[1014] CONSTITUTION OF THE REPUBLIC OF THE GAMBIA Jan. 16, 1997, art. 67.

[1015] CONSTITUTION OF THE REPUBLIC OF GHANA (1992) (amended 1996), art. 69(1)(b)(ii).

[1016] CONSTITUTION art. 145(1)(b) (2010) (Kenya).

[1017] *Id*. at art. 145(1)(c); *see also* S. AFR. CONST., First Amendment Act of 1997, art. 89(1)(b).

[1018] CONSTITUTION OF THE REPUBLIC OF KENYA, Aug. 27, 2010, art. 145(1)(b).

Kenyan law but are violations of provisions of international human rights instruments.

Under the Constitution of the United Republic of Tanzania, it is an impeachable crime for the President of the United Republic to commit "acts which generally violate [the] Constitution or [the] law concerning the ethics of public leaders" or "acts which contravene the conditions concerning the registration of political parties specified in Article 20(2) of [the] Constitution."[1019] Once the National Assembly of the United Republic of Tanzania "passes the motion to constitute a Special Committee of Inquiry" to investigate "charges brought" against the President, "the President shall be deemed to be out of office."[1020] The Constitution of the Republic of Chad also requires that any president under impeachment proceedings should be temporarily suspended from performing his official functions. It states, at Article 175, that "The President of the Republic and the members of the Government are suspended from their functions in case of impeachment."[1021] In Tanzania, as is the case in several other Anglophone African countries, a supermajority of two thirds of all the members of Parliament is required for the impeachment of the President.[1022]

Article 107 of the Ugandan constitution lists most of the crimes mentioned above as impeachable offenses which could result in the removal of a president from office.[1023] In the last several years, Uganda's president has been accused of a number of crimes covered under Article 107, such as embezzlement and frequent violations of the Constitution of Uganda. Some of these constitutional violations include changing the constitution to prolong his presidential term, regularly harassing opposition party members, and election rigging.

[1019] CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA Apr. 26, 1977, art. 46A(2)(a)–(b).

[1020] *Id.* at art. 46A(5).

[1021] CONSTITUTION DE LA RÉPUBLIQUE DU TCHAD Apr. 4, 1996, art. 175 (Chad).

[1022] CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA Apr. 26, 1977, art. 46A(3)(b).

[1023] CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. 107.

Despite all this, the president has yet to be impeached for any of the above offenses.[1024]

Scholars of law and economics have identified several factors to explain why countries with elaborate impeachment provisions in their constitutions, such as Uganda, have failed to utilize them to remove from office recalcitrant and ineffective presidents. This includes those presidents who have clearly committed impeachable offenses. First, as is the case in other countries around the world, impeachment is a political process rather than a legal process. In Africa, where most political systems are poorly developed and are still in their embryonic stages, these countries are yet to provide themselves with the type of democratic institutions that can undertake a credible and effective impeachment process. Without legislatures that are fully independent of the executive and which are supported by a robust and politically active civil society, it is not likely that the impeachment provisions made possible by the constitution can be utilized to remove a president who has committed impeachable offenses from office.

Fombad and Nwauche argue that "the progressive institutionalization of dominant parties"[1025] make impeachment of presidents either very difficult or virtually impossible. Many of these constitutions previously imposed term limits as a way to

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[1024] *See, e.g.*, Emmanuel Mutaizibwa *Uganda: Temples of Injustice*, ALJAZEERA (Dec. 11, 2013, 10:42 AM), https://www.aljazeera.com/programmes/africainvestigates/2014/12/uganda-temples-injustice-20141291351722462 8.html; Ssemujju Ibrahim Nganda, *Corruption Endemic in Uganda*, GUARDIAN (Mar. 13, 2009, 8:48 AM), https://www.theguardian.com/katine/2009/mar/13/corruption-endemic-in-uganda; *Uganda: Undermined*, Global Witness, Briefing Paper (June 5, 2017) https://www.globalwitness.org/en-gb/campaigns/oil-gas-and-mining/uganda-undermined/?gclid=EAIaIQobChMI-6677Lbc3wIVxh6tBh1Z6whiEAMYASAAEgLWlPD_BwE; *Uganda Is the Worst Place in East Africa for Bribery*, ECONOMIST (Sept. 6, 2012), http://country.eiu.com/article.aspx?articleid=1579517542&Country=Uganda&topic.

[1025] Fombad & Nwauche, *supra* note 870, at 108.

provide for the regular "alternation of power."[1026] However, most have since removed these limits and opened the way "for life presidents and impunity." [1027]

Second, even where countries have not removed term limits through opportunistic constitutional amendments, a country's political domination by a single, highly entrenched political party and its inability to provide viable opposition political parties means that the outgoing imperial president is likely to be replaced by another one.[1028] Under such conditions, impunity will continue and there is no likelihood that impeachment proceedings will be used to remove a president who commits impeachable offenses. Nor will any effort be made to prosecute a former president for crimes committed while in office even if the constitution allows for such prosecutions to take place.[1029]

Zambia and Malawi present rare exceptions—in these countries, incoming presidents from the same political party as the outgoing presidents have attempted "to hold their predecessor

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[1026] *Id*. During the last few years, presidents have successfully carried out constitutional amendments to eliminate term limits, ignored term limits, or have simply not held elections. Some countries, such as The Gambia, Ethiopia, Lesotho, and Morocco have never introduced presidential term limits. *See* Cheryl Hendricks & Gabriel Ngah Kiven, *Presidential Term Limits: Slippery Slope Back to Authoritarianism in Africa*, THE CONVERSATION (May 17, 2018, 8:44 AM), https://theconversation.com/presidential-term-limits-slippery-slope-back-to-authoritarianism-in-africa-96796.

[1027] Fombad & Nwauche, *supra* note 870, at 108.

[1028] *Id.* Consider the fact that in Cameroon, for example, the ruling Cameroon People's Democratic Movement (CPDM) has dominated politics in the country since 1966; in Uganda, the National Resistance Movement has dominated politics in the country since 1986; in Rwanda, the Rwandan Patriotic Front has dominated national politics since 1994, just to name a few.

[1029] *See* Fombad & Nwauche, *supra* note 870, at 108.

accountable for their misdeeds in power."[1030] However, the continent has tended towards incoming presidents not holding their predecessors accountable for their crimes in office out of fear that they too might have to be dragged into court under similar circumstances when they eventually leave office. Some scholars have termed this a culture of "scratch my back, I scratch your back," which they believe will ensure that "present and future African strong men can continue to be as tyrannical, corrupt, repressive[,] and incompetent as ever and can expect to get away with it."[1031] Two important developments make this gloomy assessment not as gloomy as it appears: The first one *is the expanding reach* of international law, as embodied in the ICC's efforts to prosecute individuals, including African officials, who commit international crimes; the embrace by the international community, including the AU of the R2P doctrine; and the successful efforts by many African States to either incorporate provisions of international human rights instruments directly into their constitutions or require that domestic courts must recognize or consider international law (including international human rights law) when interpreting the domestic constitution.[1032] In fact, the successful prosecution of the former

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[1030] *Id.*; *see also* David Smith, *Former Zambian President Faces Jail in Unprecedented Corruption Trial*, GUARDIAN (Aug. 13, 2009, 10:24 AM) https://www.theguardian.com/world/2009/aug/13/zambia-frederick-chiluba-corruption-trial (stating that Frederick Chiluba is believed to be the first African leader prosecuted in his own country for embezzling public funds); *Malawi Ex-President, Joyce Banda, Wanted by Police over $250m Corruption Case*, AFRICANEWS (July 31, 2017) http://www.africanews.com/2017/07/31/malawi-ex-president-joyce-banda-wanted-by-police-over-250m-corruption/ (indicating the investigation of former president, Joyce Banda, for alleged involvement in corruption schemes while in office).

[1031] Fombad & Nwauche, *supra* note 870, at 108.

[1032] *Id.* For example, the Constitution of the Republic of South Africa, 1996, states that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum—(b) must consider international law." S. AFR. CONST., First Amendment Act of 1997, art. 39(1)(b). In the Constitution of Bénin Republic, it is stated as follows: "WE, THE BÉNINESE PEOPLE Reaffirm our attachment to the principles of democracy and human rights as they

presidents of Liberia[1033] and Chad [1034] proved to Africans that it is possible to overcome various institutional impediments and bring

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have been defined by the Charter of the United Nations of 1945 and the Universal Declaration of Human Rights of 1948, by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Bénin on January 20, 1986 and whose provisions make up an integral part of this present Constitution and of Bénisese law and have a value superior to the internal law . . . ." Bénin, hence, has created, from various international human rights instruments, rights that are justiciable in Béninese courts. *See* CONSTITUTION OF THE REPUBLIC OF BÉNIN Dec. 2, 1990, pmbl.

[1033] Charles Taylor, former president of Liberia, was tried before the Special Court for Sierra Leone and convicted on eleven charges arising from war crimes, crimes against humanity, and other serious violations of international humanitarian law, committed from November 30, 1998, to January 18, 2002, during the course of the civil war in Sierra Leone. *See* Owen Bowcott & Monica Mark, *Charles Taylor Found Guilty of Abetting Sierra Leone War Crimes*, THE GUARDIAN (Apr. 26, 2012), https://www.theguardian.com/world/2012/apr/26/charles-taylor-guilty-war-crimes. The Special Court for Sierra Leone was established in 2002 as the result of a request to the UN in 2000 by the Government of Sierra Leone, which was seeking a special court to address the atrocities and serious crimes against civilians and UN peacekeepers committed during the country's civil war, which lasted from 1991 to 2002. *See The Residual Special Court for Sierra Leone and the SCSL Public Archives, Freetown and the Hague,* RESIDUAL SPECIAL CT. FOR SIERRA LEONE, http://www.rscsl.org/ (last visited on Feb. 21, 2021). *See also* Agreement for and Statute of the Special Court for Sierra Leone, U.N. SCOR, U.N. DOC. S/2002/246 (Jan. 16, 2002).

[1034] The Extraordinary African Chambers in the Senegal Court System tried and convicted Hissène Habré, former president of the Republic of Chad, for international crimes committed between June 7, 1982, and December 1, 1990, the period during which he was in office as president of Chad. Habré was found guilty of crimes against humanity, summary execution, torture, and rape. Ruth Maclean, *Chad's Hissène Habré Found Guilty of Crimes Against Humanity*, GUARDIAN (May 30, 2016, 1:22 PM), https://www.theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal. Habré's trial started on July 20, 2015, and a verdict was delivered on May 30, 2016. The Extraordinary African Chambers was a tribunal established under an agreement between

presidents and other public officials who abuse their powers to justice.

The second development is that robust and politically active civil societies are emerging in many countries throughout the continent and functioning as important checks on the exercise of government power. In countries such as Burkina Faso and South Africa, civil societies and their organizations have become important constraints to government impunity. For example, it was protests by civil society groups that prevented former Burkinabè president, Blaise Compaoré, from unconstitutionally extending his tenure.[1035] With respect to post-apartheid South Africa, when the government of President Jacob Zuma took unilateral action without parliamentary approval—as required by the constitution—to withdraw from the ICC, it was a civil society organization[1036] that

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the AU and Senegal to adjudicate international crimes that were committed in Chad from June 7, 1982, to December 1, 1990. *Id*. This is the period during which Hissène Habré was president of the Republic of Chad. The court was authorized by the Statute of the Extraordinary African Chambers. *See Relatif au Statut des Chambres Africaines Extraordinaires pour la Poursuite des Crimes Internationaux Commis au Tchad durant la Periode du 7 Juin 1982 au 1er décembre 1990* [Statute of the Extraordinary African Chambers within the Senegalese judicial system for the prosecution of international crimes committed on the territory of the Republic of Chad during the period from 7 June 1982 to 1 December 1990], http://www.chambresafricaines.org/pdf/Avenant-Statut%20CAE-Habre.pdf.

[1035] *See* John Mukum Mbaku, *Burkina Faso Protests Extending Presidential Term Limits*, BROOKINGS INST., (Oct. 30, 2014), https://www.brookings.edu/blog/africa-in-focus/2014/10/30/burkina-faso-protests-extending-presidential-term-limits/.

[1036] The legal action was initiated in 2016 by the Democratic Alliance (DA), an opposition political party, after the African National Congress (ANC)-led government under Zuma moved to withdraw the country from the Rome Statute. The DA argued that the action to withdraw the country from the Rome Statute was not constitutional because the South African Parliament was not consulted as required by the country's constitution. *See* Christopher Torchia, *South African Court Blocks Government's International Criminal Court Withdrawal Bid*, INDEPENDENT (Feb. 22, 2017, 7:45 PM), https://www.independent.co.uk/news/world/africa

brought legal action which eventually forced the government to abandon the effort to take the country out of the Rome Statute.[1037]

C. ENDING IMPUNITY FOR THE ABUSE AND MISUSE OF PRESIDENTIAL POWERS IN AFRICA

In virtually all the African colonies, the people and their leaders approached decolonization and independence "without taking cognizance of the dangers posed by unconstrained government."[1038] Two particular areas of the decolonization process not given appropriate consideration were constitution making and the transformation of the critical domains—specifically, the political, administrative, and judicial foundations of the state. Constitution making was top-down, elite driven, and nonparticipatory. Hence, it produced institutional arrangements that failed to fully and effectively constrain civil servants and political elites and prevent them from acting with impunity.[1039] Among the political elites not adequately constrained by the laws and institutions that African countries adopted upon independence was the president. In fact, in the Francophone countries, independence and post-independence laws and institutions established imperial presidencies with significant powers. These presidencies would eventually come to dominate the other branches of government and allow those who served in them to commit atrocities against their fellow citizens with impunity.[1040]

Without effective mechanisms to check the exercise of presidential power, the individuals who captured the presidency in these countries were able to engage in various activities (e.g.,

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/international-criminal-court-icc-withdrawal-south-africa-racist-jacob-zuma-president-a7594346.html. *See* Democratic All. v. Minister of Int'l Rels. & Cooperation, 2017 (3) SA 212 (GP), (S. Afr.), http://www.saflii.org/za/cases/ZAGPPHC/2017/53.html.

[1037] Robbie Gramer, *South African Court Tells Government It Can't Withdraw from the ICC*, FOREIGN POL'Y (Feb. 22, 2017, 2:47 PM), https://foreignpolicy.com/2017/02/22/south-african-court-tells-government-it-cant-withdraw-from-the-icc/.

[1038] MBAKU, *supra* note 41, at 9.

[1039] *See, e.g.*, *id.* at 8–14.

[1040] *See, e.g.*, *id.* at 9–14; *see also* Prempeh, *supra* note 897.

corruption) to enrich themselves, their families, and their benefactors.[1041] They proceeded to strengthen their political positions by destroying their opposition and manipulating the constitution and electoral laws to remain in power indefinitely.[1042] There was fear that, if they lost their political positions, the political elite would not only lose the wealth they had illegally accumulated over the years, but could also lose their lives. Thus, in countries such

[1041] *See, e.g.*, MBAKU, *supra* note 734 (examining, inter alia, the pervasiveness of corruption in African countries).

[1042] For example, Félix Houphouët-Boigny, first president of Côte d'Ivoire, remained in office from independence in 1960 until his death on December 7, 1993. *See, e.g.*, FRÉDÉRIC GRAH MEL, FÉLIX HOUPHOUËT-BOIGNY: LA FIN ET LA SUITE (2010). Mobutu Sese Seko seized control of the government of the then Zaire (now Democratic Republic of Congo) in 1965 and established a totalitarian regime until he was forced out of office in May 1997 by Laurent-Désiré Kabila and his Alliance of Democratic Forces for the Liberation of Congo-Zaire (*Alliance des Forces démocratiques pour la Libération du Congo-Zaire*). *See, e.g.*, JEAN-LOUIS PETA IKAMBANA, MOBUTU'S TOTALITARIAN POLITICAL SYSTEM: AN AFROCENTRIC ANALYSIS (2007). Paul Biya took over as President of the Republic of Cameroon from Ahmadou Ahidjo, the country's first president, in November 1982, and remains the country's executive to this day. *See, e.g.*, POST-COLONIAL CAMEROON: POLITICS, ECONOMY, AND SOCIETY (Joseph Takougang & Julius A. Amin eds., 2018).

as Cameroon,[1043] Uganda,[1044] and Burundi,[1045] these imperial presidents not only became increasingly "paranoid and

[1043] In Cameroon, incumbent President of the Republic, Paul Biya, who has been in power since 1982, has used extreme violence to deal with anyone who has attempted to change the status quo, including even individuals who have used peaceful means to challenge his hegemonic control of the political system. Julius Agbor & John Mukum Mbaku, *The Problem of Political Transitions in Africa: The Cameroon Question,* BROOKINGS INST. (Oct. 9, 2012), https://www.brookings.edu/opinions/the-problem-of-political-transitions-in-africa-the-cameroon-question/. In fact, in late 2016, when Anglophone teachers and lawyers took to the streets to peacefully protest the marginalization of the Anglophones by the Francophone-dominated central government, Biya responded with extreme violence—his security forces invaded the Anglophone Regions and killed many protesters and burned their villages. *See* Siobhán O'Grady, *Cameroon Is Spiraling Further into Violence*, WASH. POST (Oct. 26, 2018, 12:59 AM), https://www.washingtonpost.com/world/2018/10/26/cameroon-is-spiraling-further-into-violence/?utm_term=.694ff7332d7b.

[1044] In Uganda, President Yoweri Museveni, who has been in power since 1986, has used violence, intimidation and oppression of opposition politicians, corruption, and manipulation of constitutional amendment processes, to remain in power indefinitely. *See* Justin Willis, Gabrielle Lynch, & Nic Cheeseman, *After Mugabe, All Eyes Are on Uganda's Museveni: How Long Can He Cling to Power?*, QUARTZ AFR. (Nov. 23, 2017), https://qz.com/africa/1136979/after-mugabe-all-eyes-are-on-ugandas-museveni-how-long-can-he-cling-to-power/.

[1045] In Burundi in 2015, President Pierre Nkurunziza, who had been president since 2005, was nominated by his political party, the National Council for the Defense of Democracy-Forces for the Defense of Democracy (CNDD-FDD), for a third term in office. There was wide agreement throughout Burundi that President Nkurunziza had served his mandate and was constitutionally barred from standing for another term in office. Protests followed the announcement of his intention to run for president again. Many people were killed by government forces and amidst a boycott of the election by the opposition; Nkurunziza won the July 2015 presidential election. *Burundi Elections: Pierre Nkurunziza Wins Third Term*, BBC NEWS (July 24, 2015), https://www.bbc.com/news/world-africa-33658796. On May 21, 2018, a new constitution was approved, effectively allowing Nkurunziza to remain in office until 2034. Eric Oteng,

oppressive,"[1046] but they also began to devote virtually all of their time and their countries' national resources to regime survival while neglecting critical issues (e.g., poverty alleviation and economic development).[1047]

In order to deal with presidential impunity and greatly enhance the protection of human rights, each African country must provide itself with institutional arrangements undergirded by the rule of law. These are institutional mechanisms that can adequately constrain civil servants and political elites, prevent the elites from committing crimes with impunity, and further make it much more difficult for elites to entrench themselves once they are in power. First, each country must establish a governing process characterized by "a separation of powers, with effective checks and balances."[1048]

Burundi's Controversial Referendum Set for May 17, AFR. NEWS (Mar. 18, 2018), https://www.africanews.com/2018/03/18/burundi-s-controversial-referendum-to-take-place-on-may-17/. Nevertheless, Nkurunziza announced on June 7, 2018 that he will leave office after the 2020 election. Desire Nimubona, *Burundi President Pierre Nkurunziza Pledges to Step Down in 2020*, BLOOMBERG (June 7, 2018, 8:44 AM), https://www.bloomberg.com/news/articles/2018-06-07/burundi-president-pierre-nkurunziza-pledges-to-step-down-in-2020. It is possible, of course, that he might follow Joseph Kabila's example and postpone the elections indefinitely to allow him to remain in power. Kabila was supposed to leave office as President of the Democratic Republic of Congo after presidential elections at the end of 2016. *Joseph Kabila Says He Will Not Run Again in Congo*, ECONOMIST (Aug. 9, 2018), https://www.economist.com/middle-east-and-africa/2018/08/09/joseph-kabila-says-he-will-not-run-again-in-congo. However, he postponed the elections for two years and was able to unconstitutionally remain in office for that period of time. *Id*.

[1046] Fombad & Nwauche, *supra* note 870, at 108.

[1047] As argued by John Mukum Mbaku, "[p]re-occupation with crisis management and political survival at all cost has made it very difficult for many post-independence governments in Africa to place appropriate emphasis on economic and human development, the elimination of poverty and deprivation, protection of the environment and the nation's environmental resources, and the improvement of the quality of life for historically marginalized groups and communities, especially women and children, as well as rural peasants." JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA 96–97 (2004).

[1048] *See* MBAKU, *supra* note 800, at 60.

Within such a governing process, the structure of government must reflect that division of labor. For example, there should be "a strong bicameral legislature to counter the powers of the presidency"[1049]—this should prevent the eventual emergence of an imperial presidency, which could become a significant threat to peace and security. Specifically, the people should use the national constitution to create separate branches of government—executive, legislative, and judicial—define each branch's powers, and impose limits on the exercise of those powers.[1050]

Given the tendency of many African presidents to use the judiciary as a tool to undermine their political opponents and enhance their ability to remain in power indefinitely, it is critical that the judiciary be truly independent of the other branches of the government. The judiciary must be independent enough to be able to "confront other branches of the federal government or the states"[1051] and adjudicate cases without undue political influence. At the very minimum, the judiciary must have "security of tenure," financial security free from "arbitrary interference by the Executive in a manner that could affect judicial independence," "institutional independence with respect to the judicial function . . . ," and "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function."[1052]

Second, there must be a robust civil society—one that is politically active and capable of effectively checking the exercise of presidential power. For example, a politically active civil society that works with the country's independent judiciary can frustrate

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[1049] *See id.*

[1050] *See id.* at 61.

[1051] Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 ME. L. REV. 21, 44 (1997).

[1052] Valente v. The Queen [1985] 2 S.C.R. 673, 675–76, 712 (Can.). This is the Canadian Supreme Court case that set the minimum requirements for judicial independence in Canada. South Africa's highest court, the Constitutional Court, in its ruling in *De Lange v. Smuts*, adopted the Canadian Supreme Court's standard for judicial independence. *See* De Lange v. Smuts 1998 (3) SA 785 (CC) (S. Afr.); *see also* Van Rooyen v. The State 2002 (5) SA 24 (CC), at ¶ 18 (S. Afr.) (emphasizing the independence of the courts).

efforts by a president to entrench himself or engage in activities that violate human and peoples' rights.[1053] In South Africa, for example, the media was very important in making possible the investigation of the Zuma government for the possibility that it had been corruptly captured by business interests.[1054]

Fourth, the scope of presidential powers and presidential immunities must be severely limited constitutionally. Legal scholars have argued that in order to effectively "curb the pervasive abuse of [presidential] powers that has continued under the post 1990 constitutional dispensations,"[1055] each African country needs to reexamine at least three aspects of presidential powers. The first one is to regulate the power of presidential appointments.[1056] As argued by Fombad and Nwauche, "[s]pecific criteria must be laid down to ensure that all presidential appointments, especially for senior positions in the military, the public service and the judiciary are informed by clearly defined objective criteria based on experience, expertise and qualifications . . . ."[1057] In addition to the fact that such constraints will limit the ability of the president to entrench himself, they will also minimize the ability of the president to bring into government individuals who are likely to help him violate the rights of citizens with impunity. Along these lines, public or semi-public commissions, whose job it is to recommend candidates for

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[1053] For example, it was civil society and one of its organizations—the political party called the Democratic Alliance (DA)—that brought legal action against the Jacob Zuma government when the latter acted unconstitutionally to withdraw the country from the Rome Statute. Through this process, the DA was able to stop efforts by Zuma and his government to act outside the law. *See, e.g.*, Merrit Kennedy, *Court Blocks South Africa's Withdrawal from International Criminal Court*, NPR (Feb. 22, 2017, 11:35 AM), https://www.npr.org/sections/thetwo-way/2017/02/22/516620190/court-blocks-south-africas-withdrawal-from-international-criminal-court.

[1054] *See, e.g.*, Tshidi Madia, *State Capture Inquiry: How We Got Here*, NEWS24 (Aug. 20, 2018), https://www.news24.com/Analysis/state-capture-inquiry-how-we-got-to-this-point-20180820.

[1055] Fombad & Nwauche, *supra* note 870, at 106.

[1056] *Id.*

[1057] *Id.*

appointment by the president to positions in the government,[1058] must be sufficiently independent to minimize manipulation by the president.[1059] The president must be effectively prevented from politicizing the appointment process and putting into office his political supporters instead of individuals who are qualified to perform the jobs or functions in question.

The second aspect of presidential power that must be curbed is to rid the country of the imperial presidency. The excessive concentration of power in the presidency is antithetical to the practice of constitutionalism and constitutional government and must not be allowed to continue. Each country must use the constitutional design process to decentralize power away from the center, and instead, favor sub-national units by establishing some form of federalism. The latter form of government is very important, especially in complex multiethnic countries, such as Cameroon, Nigeria, Kenya, Sudan, Ethiopia, and South Africa.[1060] In addition, the Francophone countries, virtually all of which accepted de Gaulle's constitution,[1061] and hence, must overcome the Gallic preoccupation with centralization of political powers and establish sub-national governments that provide local communities with the opportunity and wherewithal to choose their own leaders and manage their own affairs.

The third issue that these countries must deal with is to prevent presidents from manipulating the constitution to extend their constitutional mandates. In the post-1990 period, many countries in Africa adopted new constitutions that imposed term limits on the presidency.[1062] This constitutional innovation was supposed to help

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[1058] *Id. For* example, Higher Council of Magistracy in and the Francophone countries and the Judicial Service Commission in the Anglophone countries.

[1059] *Id.*

[1060] *See, e.g.*, MBAKU, *supra* note 800; *see also* MWANGI S. KIMENYI, ETHNIC DIVERSITY, LIBERTY AND THE STATE: THE AFRICAN DILEMMA (1997) (arguing, inter alia, that federalism can more effectively manage and accommodate ethnocultural diversity in the African countries).

[1061] That is, the Constitution of the French Fifth Republic or French Constitution of Oct. 4, 1958.

[1062] Fombad & Nwauche, *supra* note 870, at 107.

these countries deepen and institutionalize their democracies. Unfortunately, because of relatively weak amendment procedures in the constitutions of many of these countries, their presidents were able to easily amend national constitutions to eliminate term limits and prolong their mandates.[1063] The problem in many African countries today is that the mechanism provided for amending the constitution is one which can easily be manipulated by the president to eliminate any constraints on him, including term limits. As argued by constitutional scholar, Jon Elster, there needs to be a balance struck between "rigidity and flexibility."[1064] This can be achieved through many ways—the constitutional drafters can impose on the people the condition that the constitution can only be changed by a given qualified majority.[1065] For example, South Africa's post-apartheid constitution mandates that any bill put forth to amend the constitution must be supported by at least 75% of the National Assembly and at least six of the country's nine provinces.[1066] In Cameroon, on the other hand, the constitution can be amended by

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[1063] For example, presidents in Algeria, Cameroon, Burundi, Republic of Congo, Tunisia, Uganda, and several other countries were able to change their constitutions to get rid of term limits and continue to remain in power. *See generally* Takudzwa Hillary Chiwanza, *African Presidents and Their Love for Changing the Constitutions*, AFR. EXPONENT (Oct. 10, 2017), https://www.africanexponent.com/post/8604-african-presdidents-are-always-chaging-their-constitutions; Isaac Mufumba, *Presidents Who Amended Constitution to Stay in Power*, DAILY MONITOR (Sept. 18, 2017), https://www.monitor.co.ug/Magazines/PeoplePower/Presidents-who-amended-constitution-to-stay-in-power/689844-4099104-qj5n58z/index.html; Tonny Onyulo, *How these African Leaders Subvert Democracy to Cling to Power for Life*, USA TODAY (Oct. 23, 2017, 9:17 AM), https://www.usatoday.com/story/news/world/2017/10/23/haging-african-leaders-cling-power-through-corruption-constitutional-changes-and-fraudulent-election/771984001/.

[1064] Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 470 (1991).

[1065] *Id.*

[1066] *See* S. AFR. CONST., 1996, art. 74(a)–(b).

Parliament alone.[1067] This is why Paul Biya, the country's president, was able to easily convince a National Assembly controlled by his political party—the CPDM—to amend the constitution in 2008 and grant him a third term in office, as well as immunity for any crimes that he might commit while in office.[1068]

Constitutional drafters could impose what Elster refers to as a "cooling device" or period, which would require that two successive legislatures or parliaments approve any amendments to the constitution.[1069] According to Elster, "delays [in the amendment process] protect society against itself, by forcing passionate majorities, whether simple or qualified, to cool down and reconsider."[1070] In addition, as provided in the Constitution of the Republic of South Africa, all bills put forth to amend the constitution can only be considered successful if they have been approved by the Parliament and also by the assemblies of the states or provinces.[1071] Drafters may also choose to place the responsibility to amend the constitution in the hands of specially constituted or convened assemblies, such as the Sovereign National Conference that was common in West Africa during the prodemocracy uprisings of the late-to-mid-1990s.[1072]

With respect to presidential immunity, one can argue that this is a necessary constitutional tool to enhance the ability of the president to perform his or her public functions without fear of being dragged to court, either while they are in office or afterwards. Supporters of immunity for presidents in Africa argue that

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[1067] *See* CONSTITUTION OF THE REPUBLIC OF CAMEROON Jan. 18, 1996, art. 63(1)–(2) (amended 2008). According to Article 63(1), "[a]mendments to the Constitution may be proposed either by the President of the Republic or by Parliament" and according to Article 63(2), "[t]he amendment shall be adopted by an absolute majority of the members of Parliament."

[1068] *See id*. at art. 6(2) & 53(3).

[1069] Elster, *supra* note 1064, at 470.

[1070] *Id.*

[1071] S. AFR. CONST., 1996, art. 74.

[1072] *See generally* Pearl T. Robinson, *The National Conference Phenomenon in Francophone Africa*, 36 COMP. STUD. IN SOC'Y & HIST. 575, 575–610 (1994).

"[p]rosecuting sitting heads of state . . . undermines stability."[1073] Nevertheless, those who argue that African presidents should be granted immunity with respect to both civil and criminal proceedings, also say that that immunity should not be allowed to "become a license for abuse of powers"[1074] and engagement in behaviors or acts that violate human rights. Supporters of presidential immunities further add that certain exemptions should be made and these include:

> i) Crimes or wrongs committed before the president assumed office. To reduce the risk of corrupt leadership, the presidential office should be reserved [only] for those who have a clean record and not those who want to use the office to escape liability for their past misdeeds.
>
> ii) Any private act that amounts to abuse of the official position for private ends as well as any act that violates the spirit of the Constitution.
>
> iii) Immunity should be limited only to those acts, whether private or official that are in *bona fide* exercise of the presidential duties. Courts should have the discretion to deny immunity where they come to the conclusion that the action will not materially affect the president's ability to defend his interests, nor significantly harm national interests or interfere with the proper discharge of his duties.[1075]

[1073] Sofia Christensen, *Should African Presidents Have Immunity from Prosecution?*, VOA NEWS (June 1, 2017, 11:30 PM), https://www.voanews.com/a/african-president-immunity-from-prosecution/3883794.html.

[1074] Fombad & Nwauche, *supra* note 870, at 107.

[1075] *Id*. at 18. Fombad and Nwauche argue that had these principles been followed in Botswana, the country's Court of Appeal would not have ruled in favor of the President of Botswana and allowed him to use presidential immunity to oust his political rivals. *See* Motswaledi v. Botswana Democratic Party and Others, 2 BLR 284 CA (2009).

It has also been suggested that "civil recovery action,"[1076] such as that which was used to recover the public funds illegally appropriated by former African presidents, such as Nigerian dictator, Sani Abacha, and Zambian president, Frederick Chiluba, could be a solution.[1077] In addition to the fact that this approach allows the country to recover funds that have been looted by the president and, hence, deprive him of the opportunity to enjoy the fruits of his illegal activities, it can also serve to deter presidential corruption. Given the fact that this is not a criminal process, the burden of proof is lower and hence, may be much easier to accomplish. Nevertheless, success will require the cooperation of the international community, especially since most African presidents who rob their state treasuries usually hide their ill-gotten gains in foreign banks.[1078] Successful recovery of public funds stolen by former African presidents should contribute, not just to development in the continent, as these funds can be used to invest in growth-supporting infrastructures, but can also help in the continent's fight against corruption.[1079]

In the post-independence period, many African presidents have used the "principle of sovereignty and non-interference in the domestic affairs of states, enshrined in both the Charter of the United Nations and that of the OAU,"[1080] to abuse the power of their public positions with impunity. Nevertheless, beginning with the UDHR on December 10, 1948, the international community has imposed constraints on the ability of States and national governments to act

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[1076] Fombad & Nwauche, *supra* note 870, at 108.

[1077] *See* John Hatchard, *Strengthening Presidential Accountability:* Attorney General of Zambia v. Meer Care & Desai & Others, 5 J. COMMONWEALTH L. & LEGAL EDU. 69 (2007).

[1078] *See* John Mukum Mbaku, *International Law and the Fight Against Bureaucratic Corruption in Africa*, 33 ARIZ. J. INT'L & COMP. L. 661, 750 (2016) (emphasizing, inter alia, the importance of international cooperation to the fight against corruption in Africa).

[1079] *See id*. (examining, inter alia, the importance of recovering of Africa's stolen assets to poverty alleviation efforts and development in the continent).

[1080] Fombad & Nwauche, *supra* note 870, at 111.

without regard to the rights of their citizens.[1081] What the UDHR and subsequent international human rights instruments[1082] did was to lay down minimum standards of human rights protection. International human rights instruments have been supplemented by regional instruments, which deal with human rights protection in specific regions of the world.[1083] The Banjul Charter was adopted on June 27, 1981 and entered into force on October 21, 1986.[1084] The Banjul Charter established the African Commission and charged the commission with protecting and promoting human and peoples' rights in Africa, in addition to interpreting the Banjul Charter.

Many African countries have voluntarily signed and ratified various international human rights treaties. By doing so, they have accepted certain obligations with respect to the protection and promotion of human rights. In addition, during the last several decades many regional and international frameworks have emerged to pressure African political leaders to "conform to certain constitutional standards of governance,"[1085] which include "[d]emocracy, good governance, respect for the rule of law and respect for human rights."[1086]

Unlike its predecessor, the OAU, the AU can intervene in member states under Article 4(h) of its Constitutive Act in respect to "grave circumstances," which include "war crimes, genocide[,] and crimes against humanity."[1087] In addition, Article 4(o) of the Constitutive Act rejects "impunity and political assassination."[1088] Article 4(p) also condemns and rejects "unconstitutional changes of governments."[1089] These provisions give the AU the legal authority to prevent abuse of presidential power, for example, through

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[1081] *See* G.A Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[1082] For example, the ICCPR and the ICESCR.

[1083] Fombad & Nwauche, *supra* note 870, at 109.

[1084] *See* Banjul Charter, *supra* note 93.

[1085] Fombad & Nwauche, *supra* note 870, at 112.

[1086] *Id.*

[1087] AU Constitutive Act, art. 4(h).

[1088] *Id*. at art. 4(o).

[1089] *Id*. at art. 4(p).

attempts by presidents to use violence, including the commission of atrocities against their fellow citizens, to prolong the president's stay in power.[1090] Unfortunately, in the past, the AU has not been as eager to intervene or condemn powerful countries such as Egypt, as it has smaller countries like The Gambia[1091] and Comoros,[1092] which have inferior militaries. In 2008, the AU ordered intervention in the Comoros to restore democracy after a coup d'état but refrained from taking action in Egypt after the military overthrew the democratically elected Mohamed Morsi on July 3, 2013.[1093] Although the AU suspended Egypt's membership in the organization and treated Morsi's overthrow as an unconstitutional change of government, no effort was made to ensure the return of the country's democratically elected president to power.[1094] In fact, the AU-imposed suspension was lifted after general elections to

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[1090] *See* Solomon Ayele Dersso, *The AU on Egypt: Between a Rock and a Hard Place?*, INST. FOR SEC. STUD. (June 6, 2014), https://issafrica.org/iss-today/the-au-on-egypt-between-a-rock-and-a-hard-place (examining, inter alia, the AU's inability to pursue, in Egypt, a policy consistent with its principles, as outlined in its Constitutive Act).

[1091] When then President of The Gambia, Yahya Jammeh lost the Dec. 1, 2016, presidential election to opposition candidate, Adama Barrow. Jammeh refused to leave office and allow for a peaceful transition. Local, regional, and international organizations condemned President Jammeh's actions. The AU did not just condemn Jammeh's decision not to relinquish power but supported the decision of the Economic Community of West African States (ECOWAS) to use all means necessary, including military force, to respect the will of the people of The Gambia. *See Constitutional Coups*, *supra* note 72, at 167–74.

[1092] *See* Simon Massey & Bruce Baker, *Comoros: External Involvement in a Small Island State*, Chatham House, Programme Paper AFP 2009/1, July 2009, (examining, inter alia, AU intervention in the Comoros); Paul D. Williams, *The African Union's Peace Operations: A Comparative Analysis*, 2 AFR. SEC. 97, 105 (2009) (examining, inter alia, the AU's intervention efforts to restore democracy in the Comoros).

[1093] *See* David D. Kirkpatrick, *Army Ousts Egypt's President; Morsi Is Taken into Military Custody*, N.Y. TIMES (July 3, 2013), https://www.nytimes.com/2013/07/04/world/middleeast/egypt.html.

[1094] *See* Dersso, *supra* note 1090.

elect a new government in Egypt.[1095] The AU never applied Article 25(4) of the African Charter on Democracy, Elections and Governance, which mandates that "the perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State."[1096] General Abdel Fattah el-Sisi, the president Egyptians elected in the aftermath of the military coup was actually involved in the military overthrow of Mohamed Morsi.[1097] The el-Sisi regime should have been sanctioned and seen as an illegitimate government according to the principles adopted by the AU to guard against unconstitutional changes of government.[1098]

When the AU adopted Article 4(h), it "became the first international organization to formally recognize the principle that the international community has a responsibility to intervene in crisis situations if the state is failing to protect its population."[1099] It was not until 2005 that the Member States of the UN accepted the R2P principle as a norm of international law.[1100] In 2006, the UN Security Council, in Resolution S/RES/1674, reaffirmed the provisions of key paragraphs 138 and 139 of the 2005 World Summit Outcome Document, which deals with and defines the scope of the R2P principle.[1101] As discussed earlier, the primary purpose of and impetus to intervention, including military intervention, without the consent and acquiescence of the State, is considered "legitimate in extreme cases when major harm to civilians is occurring or imminently apprehended and the state in question is unable or unwilling to end the harm or is itself the

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[1095] *See AU Ends Egypt, Guinea Bissau Suspension After Elections*, REUTERS (June 17, 2014, 12:58 PM), https://af.reuters.com/article/guineaBissauNews/idAFL5N0OY55720140617.

[1096] AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE, art. 25(7) (2007), http://archive.ipu.org/idd-E/afr_charter.pdf.

[1097] *See AU Ends Egypt*, *supra* note 1095.

[1098] *See Constitutional Coups, supra* note 72, at 161.

[1099] Fombad & Nwauche, *supra* note 870, at 113. The Constitutive Act of the African Union was adopted in 2000 and entered into force in 2001.

[1100] *See* G.A. Res. 60/1, at 30 (Sept. 16, 2005).

[1101] S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

perpetrator of the harm."[1102] Additional legal support for this type of intervention is evident in several other international legal documents, including, provisions of various human rights instruments, Chapter VII of the UN Charter, UDHR, Convention on the Prevention and Punishment of the Crime of Genocide, Rome Statute of the International Criminal Court, and The Geneva Conventions of 1949, and their Additional Protocols on International Humanitarian Law.[1103]

It is important that the R2P principle is seen as an effort by international law to ensure the practice of good governance; the protection of human rights in every State; the accountability of each government to its people and its constitution; the minimization of government impunity; and the promotion and facilitation of human development. Within R2P, a president can no longer violate the human rights of his fellow citizens and expect to escape liability for the abuse of power.[1104]

African judiciaries, particularly those in Kenya and South Africa, are gradually asserting their independence and making judicial rulings that challenge the hegemony of their imperial presidencies. However, many judiciaries across the continent are still very weak and subservient to the executive. In these countries, it is unlikely that national courts would prosecute a sitting president for any crimes that he commits. Nevertheless, there is growing interest within the international community to bring to justice any political leaders whose abuse of power constitutes international crimes.[1105]

Generally, it is argued that international customary law "accords serving presidents absolute immunity from any civil or criminal liability for public or private acts done while they are in office."[1106] For example, in the case concerning *Arrest Warrant of 11 April, 2000, (Democratic Republic of Congo v. Belgium)*

[1102] Fombad & Nwauche, *supra* note 870, at 114.
[1103] *Id.*
[1104] *Id.*
[1105] *Id.*
[1106] *Id.*

(Merits),[1107] the ICJ held that the Kingdom of Belgium had violated its legal obligation towards the Democratic Republic of Congo "in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law."[1108]

Nevertheless, international law may make exceptions in certain circumstances. If a president has committed what constitutes international crimes—specifically, genocide, crimes against humanity, and war crimes—international law may provide avenues for the trial of such an individual. First, a president who has committed an international crime may be prosecuted and brought to justice in an international tribunal if "the text of the treaty establishing the international tribunal so provides."[1109] This was the case with former Liberian President, Charles Taylor, who was accused of committing international crimes in Sierra Leone during the country's civil war. He was subsequently prosecuted by the Special Court for Sierra Leone (SCSL).[1110] The SCSL was established by the Statute of the Special Court for Sierra Leone,[1111] which was an agreement between the UN and the Government of Sierra Leone pursuant to UN Security Council Resolution 1315 of August 14, 2000.[1112] Article 1 of the Statute defines the competence of the SCSL:

> The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of

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[1107] Democratic Republic of Congo v. Belgium, Case No. I.C.J. 2002 I.C.J. 3; 41 I.L.M. 536, Warrant of Arrest (Apr. 11, 2000*)*.

[1108] *Id*.

[1109] Fombad & Nwauche, *supra* note 870, at 114.

[1110] *Id.*

[1111] *See The Trial of Charles Taylor Before the Special Court for Sierra Leone: The Appeal Judgment*, OPEN SOC'Y JUST. INITIATIVE (Sept. 2013), https://www.justiceinitiative.org/uploads/4faa81cc-80b2-4444-817b-31b3c47f0530/charles-taylor-appeal-brief-20130924_0.pdf [hereinafter *The Trial of Charles Taylor*].

[1112] S.C. Res. 1315, (Aug. 14, 2000), https://www.refworld.org/docid/3b00f27814.html.

> international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.[1113]

Second, a president can be tried by the domestic courts of a foreign country if that court has quasi-universal or universal jurisdiction over "such international crimes making it unlikely that a claim to absolute immunity will suffice."[1114] These two important international legal processes can help minimize "impunity [in Africa] and promote good governance and respect for the rule of law in [the continent]."[1115] The SCSL was a special court designed specifically to prosecute international crimes committed in the territory of Sierra Leone during the period of November 30, 1996 to January 18, 2002.[1116] Nevertheless, the ICC, which was established by the Rome Statute of the International Criminal Court,[1117] is a permanent court and is the appropriate tribunal to prosecute individuals, including presidents, who commit international crimes. According to Article 27(1) of the Rome Statute:

> This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in

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[1113] STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE art. 1(1) (Aug. 14, 2000), http://www.rscsl.org/Documents/scsl-statute.pdf.

[1114] Fombad & Nwauche, *supra* note 870, at 115.

[1115] *Id.*

[1116] *See, e.g.*, *The Trial of Charles Taylor*, *supra* note 1111.

[1117] The Rome Statute was adopted at a diplomatic conference in Rome, Italy, on July 17, 1998, and entered into force on July 1, 2002. Rome Statute of the International Criminal Court., July 17,1998, U.N. Doc. A/COMF. 183/9, 37 I.L.M. 1002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

> and of itself, constitute a ground for reduction of sentence.[1118]

In addition, Article 27(2) of the Rome Statute also deals with the issue of immunities. It states as follows: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[1119] Thus, immunities granted African presidents and other officials by their constitutions will not prevent the ICC from exercising jurisdiction over them should they commit or be involved in the commission of international crimes.

Nevertheless, we have already seen, in the indictment by the ICC of Sudanese President Omar Hassan al-Bashir,[1120] that the ICC does not have independent arrest powers. Instead, it must rely on the cooperation of States Parties to effect the arrest of indicted individuals and send them to the ICC. The ICC's prosecutor has accused several States Parties, including Jordan, Uganda, and Chad, "of undermining the tribunal's 'reputation and credibility' by refusing to arrest Sudan's president to face charges of genocide in his county's Darfur region."[1121] When President al-Bashir made a special visit to South Africa in 2015 to attend the AU summit, the ICC asked the government of South Africa to arrest him and send

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[1118] *Id.* at art. 27(1).

[1119] *Id.* at art. 27(2).

[1120] The ICC issued the first warrant for the arrest of President al-Bashir on Mar. 4, 2009 and the second one on July 12, 2010. He was charged with various crimes associated with his military's activities in the Darfur Region of Sudan between 2003 and 2008. *See* The Prosecutor v. Omar Hassan Ahmad al-Bashir, ICC–02/05–01/09, Decision on the Prosecution's Application for a Warrant of Arrest, (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF.

[1121] *International Court: Failure to Arrest Sudan's President Undermines Us*, TIMES OF ISRAEL, ¶ 1, (Dec. 13, 2017, 8:28AM), https://www.timesofisrael.com/international-court-failure-to-arrest-sudans-president-undermines-us/. President al-Bashir has travelled to these countries, but none of them has made any efforts to arrest him and send him to the ICC to face justice.

him to The Hague to stand trial.[1122] Nevertheless, South African authorities refused to effect the arrest and argued that "international law granting immunity for sitting heads of state prevented it from arresting al-Bashir and conflicted with the Rome Statute's obligations to arrest and surrender him to the ICC."[1123] The ICC, however, held that South Africa was wrong and stated that the "customary international law provision of immunity that South Africa [had] relied on has been superseded by the UNSC Resolution 1593 (2005) that referred Darfur to the ICC."[1124] In addition, the ICC judges argued that Resolution 1593 has "effectively place[d] Sudan in the same legal position as a [S]tate [P]arty to the Rome Statute,"[1125] and hence, as a sitting head of state under the Rome Statute, al-Bashir could be held responsible for crimes committed in his individual capacity.[1126]

Of course, the ICC process is supposed to supplement and not replace national legal systems, and hence, it is expected to operate based on or "pursuant to the principle of complementarity."[1127] Thus, if an African country's legal system has the will and the capacity to fully and effectively prosecute individuals accused of committing international crimes, the ICC should not move to take jurisdiction over the situations.[1128] As of 2019, thirty-three African States have ratified or acceded to the Rome Statute, and hence, have

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[1122] *See* Adam Taylor, *Why So Many African Leaders Hate the International Criminal Court*, WASH. POST (July 15, 2015, 2:11PM), https://www.washingtonpost.com/news/worldviews/wp/2015/06/15/why-so-many-african-leaders-hate-the-international-criminal-court/?utm_term=.4710be332ee3.

[1123] Allan Ngari, *The Real Problem Behind South Africa's Refusal to Arrest al-Bashir*, INST. FOR SEC. STUD., ¶ 6, (July 10, 2017), https://issafrica.org/iss-today/the-real-problem-behind-south-africas-refusal-to-arrest-al-bashir.

[1124] *Id.* ¶ 7.

[1125] *Id.*

[1126] *Id.*

[1127] Fombad & Nwauche, *supra* note 870, at 115.

[1128] *Id.*

consented to the jurisdiction of the ICC.[1129] Burundi, which ratified the Rome Statute on September 21, 2004, notified the UN of its intention to withdraw from the Rome Statute on October 27, 2016, and its withdrawal became effective on October 27, 2017.[1130] Both South Africa and The Gambia also notified the UN of their intention to withdraw from the Rome Statute, but have since rescinded their notices, and hence, are still States Parties to the ICC.[1131]

Despite the fact that the relationship between the ICC, AU, and several African countries has soured significantly because of the indictment, by the ICC, of African leaders, such as al-Bashir of Sudan, Uhuru Kenyatta of Kenya, and his then Vice President, William Ruto, the international tribunal remains an important legal mechanism for the fight against impunity in Africa. As argued by some legal scholars, "the possibility of ICC proceedings for gross human rights violations remains a formidable threat that African politicians can no longer ignore."[1132] With respect to the complementarity principle, the ICC is expected to act only in situations where national courts are either unable or unwilling to hold accountable those individuals who are alleged to have committed international crimes or engaged in serious violations of human rights.[1133]

The employment of what has come to be known as universal jurisdiction can "dispense[] with the need to establish any territorial or physical link between the accused and the state asserting jurisdiction."[1134] The AU has acknowledged that universal jurisdiction is a principle of international law. In the *Decision on the*

[1129] *See The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icccpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

[1130] *See Burundi: Situation in the Republic of Burundi*, INT'L CRIM. CT., https://www.icc-cpi.int/burundi.

[1131] *See, e.g.*, Franck Kuwonu, *ICC: Beyond the Threats of Withdrawal*, AFR. RENEWAL (May–July 2017), https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal.

[1132] Fombad & Nwauche, *supra* note 870, at 116.

[1133] *Id.*

[1134] *Id.*

Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, the AU states that

> [t]he Assembly, RECOGNIZING that universal jurisdiction is a principle of International Law whose purpose is to ensure that individuals who commit grave offenses such as war crimes and crimes against humanity do not do so with impunity and are brought to justice, which is in line with Article 4(h) of the Constitutive Act of the African Union.[1135]

The AU concludes that "[t]he abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of States and their ability to conduct international relations."[1136] The Assembly requested that a moratorium should be imposed "on the execution of those warrants until all the legal and political issues have been exhaustively discussed between the African Union, the European Union and the United Nations."[1137]

Some scholars have argued that, although there is potential for abuse of universal jurisdiction, they question the AU's decision to intervene, especially given the fact that universal jurisdiction is actually based on various international treaties, which many African countries have voluntarily signed and ratified.[1138] These include, for example, the Geneva Conventions (which establish the standards of international law for humanitarian treatment in war); the Convention on the Prevention and Punishment of the Crime of Genocide; and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.[1139]

Many African countries overwhelmingly supported the establishment of the ICC because they believed that government impunity had become a major constraint to peace and security in the

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[1135] AU Doc. Assembly/AU/Dec. 199(XI), (June 30–July 1, 2008).
[1136] *Id.* ¶¶ 3 & 5(iii).
[1137] *Id.* ¶. 8.
[1138] Fombad & Nwauche, *supra* note 870, at 117.
[1139] *Id.*

continent.[1140] In fact, in the aftermath of the failure of OAU to prevent the atrocities that comprised the Rwandan Genocide, many Africans, especially human rights activists, recognized the need to support the establishment of an international criminal court with jurisdiction over international crimes committed in the continent.[1141] The inclusion of Article 4(h) in the Constitutive Act of the African Union supports the argument that the AU recognizes the problem of impunity and is interested in dealing with it.[1142] Hence, it is argued that the only possible explanation for the AU's attack of universal jurisdiction and its opposition to the ICC is that both the ICC and universal jurisdiction represent a major threat to many of the continent's entrenched dictators.[1143]

IX. CONCLUSION AND POLICY RECOMMENDATIONS

In the aftermath of the end of the Cold War and the demise of apartheid in South Africa, there arose, throughout many African countries, grassroots efforts to fight the violation of human rights, presidential abuse of power, and government impunity. These efforts, including those by the international community, have made it much more difficult for African leaders, including presidents, to hide "behind sovereignty, non-intervention or constitutional immunities to abuse the exorbitant powers that they often arrogate to themselves"[1144] and violate the rights of their fellow citizens. Nevertheless, African countries and the international community need to take concrete steps to eliminate government impunity and put in place institutional and legal structures that can effectively minimize the chances that government officials will engage in

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[1140] *Id.*

[1141] Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN REL. BACKGROUNDER, https://www.cfr.org/backgrounder/role-international-criminal-court (last updated Feb. 23, 2021).

[1142] Fombad & Nwauche, *supra* note 870, at 117.

[1143] *See generally Constitutional Coups*, *supra* note 72.

[1144] Fombad & Nwauche, *supra* note 870, at 117.

activities that violate human rights and threaten international peace and security.

First, all African countries must revisit the issue of presidential immunities. Granted, "[p]residential immunities of a clearly defined and limited scope are necessary for the proper discharge of the onerous duties that are bestowed on [African] leaders."[1145] Nevertheless, such grant of immunity must be balanced well enough to minimize impunity and ensure that presidents are accountable to the constitution and the people. Of course, in countries with poorly drafted constitutions, or those whose institutional arrangements do not provide for effective checks on the exercise of government power, presidential abuse of power is likely to remain rampant. This brings us to the second issue that virtually all African countries have to revisit—constitution making and state reconstruction. Through a participatory and inclusive constitution-making process, each African country can provide itself with institutional arrangements characterized by true separation of powers with checks and balances, including an independent judiciary and a "strong bicameral legislature to counter the powers of the presidency."[1146] A robust and politically active civil society, as well as strong civil society organizations, such as a free press and viable opposition political parties, can also help check on the exercise of government power and minimize impunity and the abuse of presidential privileges.

Third, national judiciaries, which are gradually rising up to assert their independence, should use the powers granted to them by their constitutions to interpret the constitution, as well as to determine the constitutionality of laws, including customary law, to strike down laws (and this includes customary laws) that are not in conformity with provisions of international human rights and international humanitarian law. Independent and progressive judiciaries, such as the Tanzanian High Court and the Supreme Court of Zimbabwe, are already delivering rulings that positively

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[1145] *Id.*

[1146] JOHN MUKUM MBAKU, PROTECTING MINORITY RIGHTS IN AFRICAN COUNTRIES: A CONSTITUTIONAL POLITICAL ECONOMY APPROACH 60 (2018).

impact the promotion and protection of human rights in the continent.[1147]

Fourth, international law has an important role to play in the fight against impunity and human rights abuses in Africa. The international community has established many systems to combat impunity and significantly improve government accountability in countries, such as those in Africa, which have relatively weak institutions. In addition to the adoption of the principle of R2P, the international community has also established an international tribunal—the ICC—and empowered it to prosecute all persons, including those in Africa, alleged to have committed international crimes.[1148] Despite the ICC's rocky start with respect to Africa, it remains an important international legal mechanism for the fight against impunity in the African continent and other parts of the world. As argued by Fombad and Nwauche, "[i]n spite of the contradictory and sometimes confusing position taken both by the AU and individual African states with respect to the ICC, the latter remains a formidable tool to combat abuse of presidential power and impunity in Africa."[1149]

Fifth, the AU's framework for promoting democracy and protecting human rights in Africa allows the organization to intervene in member states where international crimes are committed. Unlike the OAU, which turned a blind eye to atrocities committed against citizens in many countries throughout the continent, the AU is expected to be more proactive and act with "vigor and determination"[1150] in order to prevent presidential excesses. Hopefully, with pressure from grassroots organizations in the continent, as well as from the international community, the AU can meet the obligations imposed on it by its Constitutive Act.

Sixth, there is growing interest throughout the continent to institutionalize human rights constitutionalism. At the minimum, this process involves four important issues, which include the

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[1147] *See* Ephrahim v. Pastory, 87 I.L.R. 106 (Tanz. High Ct. 1990); *see also Catholic Comm'n for Justice and Peace* (Zim. Sup. Ct. 1993).

[1148] *See generally* Rome Statute, *supra* note 1117.

[1149] Fombad & Nwauche, *supra* note 870, at 118.

[1150] *Id.*

centrality of human rights—their recognition, promotion, and protection—in the structure of each African country's constitution; each country must have a Bill of Rights which recognizes and provides effective protections for the rights of citizens and incorporates provisions of international human rights instruments; each African constitution must provide for a truly independent judiciary and empower it to enforce the Bill of Rights; and each African country must educate its citizens on human rights and help create, within the country, a culture of respect for human rights.

Finally, the additional pro-human rights structures that are being created, especially in Africa, represent warnings to Africa's political leaders that they will be held accountable for all the crimes that they commit while in office. Within the continent, institutions such as the African Commission and the African Court of Justice and Human Rights, are expected to serve as important constraints to impunity and the abuse of presidential powers. While these structures may never totally eliminate "presidential abuse of powers, especially in the form of corruption and violence against political opponents,"[1151] African presidents and other political leaders have been put on notice that there is a very strong likelihood, that should they engage in human rights abuses or commit other atrocities against their fellow citizens, they will be held accountable.

[1151] *Id.*