JURISDICTIONAL RESTRAINT: RESCUING THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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The African Court on Human and Peoples' Rights, the continental human rights court in Africa, is struggling. Many African states have yet to ratify the protocol that established the Court; and those that have, have begun to withdraw their declarations to allow individuals and nongovernmental organizations (NGOs) to bring cases against them before the Court. The Court's expanding jurisdiction is part of the problem. Despite being an international court, the Court seems to operate as an appellate domestic court—overturning domestic courts' decisions and nullifying enacted state laws. This Note argues that lasting human rights protection in Africa requires an African court of a more defined jurisdiction. In doing so, this Note unpacks two schools of thought—opportunity structure theory and neoliberalism—which endorse the expansion of the Court's jurisdiction and highlights the deficiencies in their arguments. Importantly, this Note questions the overreliance on legal means as solutions to the African human rights crises and provides alternative means of assessing and addressing the crises.

* J.D. Candidate 2025, Columbia Law School. I thank my colleagues at the Institute for Human Rights and Development in Africa (IHRDA), whose work and insights inspire this Note; Professor Lori F. Damrosch for her supervision and feedback; and the staff of the *Columbia Law Review* for their excellent editorial assistance. This Note is dedicated to Mariame Camara, whose resilience and sense of purpose remain a source of hope.

INTRODUCTION

The African Court on Human and Peoples' Rights ("African Court" or "Court") has been expanding its de jure jurisdiction, which limits its role as a subsidiary to the national courts,[1] to effectively become the de facto appellate court to domestic courts within African states.[2] The African Court reverses domestic courts' decisions and nullifies national legislations.[3] This is extraordinary for an international court, subverting the principles of subsidiarity[4] and margin of appreciation.[5] The

1. Generally, international courts are considered subsidiaries to national courts. See infra text accompanying notes 22–23. In *Prince v. South Africa*, the African Commission stated that "the margin of appreciation doctrine informs the African Charter." No. 255/02, Judgment, Afr. Comm'n H.P.R., ¶ 50–51 (Dec. 7, 2004), https://achpr.au.int/en/decisions-communications/garreth-anver-prince-south-africa-25502 (on file with the *Columbia Law Review*). The concept of margin of appreciation, a corollary of subsidiarity, seeks to give states primacy on executing human rights norms within their borders. Id. ¶ 37.

2. Sègnonna Horace Adjolohoun, Jurisdictional Fiction? A Dialectical Scrutiny of the Appellate Competence of the African Court on Human and Peoples' Rights, 6 J. Compar. L. Afr., no. 2, 2019, at 1, 6 [hereinafter Adjolohoun, Jurisdictional Fiction] ("[W]hile it is not granted appellate jurisdiction *de jure* or by statute, the African Court assumes such competence *de facto* albeit on a normative basis.").

3. See infra section I.A.

4. See Principle of Subsidiarity, EUR-Lex, https://eur-lex.europa.eu/EN/legal-content/glossary/principle-of-subsidiarity.html [https://perma.cc/GGH2-LWMA] (last visited Dec. 25, 2023) ("[Subsidiarity] aims to ensure that decisions are taken at the closest possible level to the citizen . . . ."). The idea is expressed in Article 56(5) of the African Charter on Human and Peoples' Rights, which requires that a plaintiff "exhaust[] local remedies" before taking their complaint to international courts. See African Charter on Human and Peoples' Rights art. 56, ¶ 5, opened for signature June 27, 1981, 21 I.L.M. 58, 66 (entered into force Oct. 21, 1986) [hereinafter, Banjul Charter].

5. See *Prince*, No. 255/02, Afr. Comm'n H.P.R., ¶ 37 (defining "margin of appreciation" as "a discretion that a state's authority is allowed in the implementation and application of domestic human rights norms and standards").

ramifications of the Court's modus operandi threaten its own existence and the welfare of the developing human rights system in Africa.[6]

The adverse consequences are already evident. In 2020, Côte d'Ivoire and Benin joined Rwanda and Tanzania in withdrawing their declarations under Article 34(6) ("Optional Declaration") of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("Protocol on the African Court"),[7] which grants individuals and NGOs direct access to the Court to sue African states that have ratified the African Charter on Human and Peoples' Rights ("Banjul Charter").[8] The withdrawing states cited the Court's jurisdictional expansion as the reason for their withdrawal.[9]

In general, the Court is experiencing a decline in its reputation on the continent.[10] African states are either ignoring its judgments[11] or, increasingly, challenging its competence.[12] This state of disrepute is concerning for the Court's future. To use Alexander Hamilton's remark about the American judiciary long ago, the Court has neither the purse nor the sword to make African states abide by its decisions.[13] Nevertheless, two conceptual frameworks have been offered to justify the Court's behavior. The first follows the neoliberal, globalist outlook.[14] According to

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6. See infra note 320 and accompanying text.

7. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 34(6), Assembly of Heads of State and Government, Thirty-Fourth Ordinary Session (June 10, 1998), https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and [https://perma.cc/5VJM-3JJU] [hereinafter Protocol on the African Court] ("[T]he State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol."); Rep. of the Afr. Ct. H.P.R., at 2, EX.CL/1323(XL) (2022) [hereinafter 2021 Report] (listing Benin, Côte d'Ivoire, Rwanda, and Tanzania as the four withdrawing states).

8. See Banjul Charter, supra note 4.

9. See infra notes 37–43 and accompanying text.

10. The Court's 2022 activity report shows that African states have complied with less than ten percent of its decisions. Rep. of the Afr. Ct. H.P.R., at 24, EX.CL/1409(XLII) (2023) [hereinafter 2022 Report].

11. Id. annex 2, at 4 (showing that Tanzania refused to comply with the Court's order because "[t]he order seeks to overturn the decision of the Court of Appeal of Tanzania").

12. Out of the thirty-three African states that have ratified the Protocol on the African Court, twelve deposited their declarations under Article 34(6). See Declarations, Afr. Ct. on Hum. & Peoples' Rts., https://www.african-court.org/wpafc/declarations/ [https://perma.cc/KUR5-HDBG] (last visited Dec. 25, 2023). Out of the twelve, four (Benin, Côte d'Ivoire, Rwanda, and Tanzania) withdrew their declarations between 2016 and 2020. See id.

13. The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The African Court is an international court, by virtue that it was established through "an international convention adopted by 54 Members States of the African Union, which itself is an international and intergovernmental organisation." See Adjolohoun, Jurisdictional Fiction, supra note 2, at 7. The African Court, therefore, does not belong to the internal apparatus of any single African State.

14. See infra section II.A.

this view, an African court of an expansive jurisdiction helps to harmonize the distinct domestic laws within African states, widening the private sector, to facilitate Africans' participation in the global market.[15] In an increasingly globalized world, according to the neoliberals, market forces, not states, should dictate people's lives.[16] The second view—the opportunity structure theory—justifies the expansion on the grounds that the Court's checks on the powers of African states positively contribute to the prodemocratic movements on the continent.[17] Under this framework, the Court is portrayed as a "fulcrum" of social and political mobilization[18]—its broad jurisdiction increasingly clashing against the sovereignties of African states.

This Note argues that neither of these views are advisable. As the remaining eight states signed to the Optional Declaration threaten to withdraw their declarations,[19] and twenty-two others refuse to ratify the Protocol on the African Court,[20] the Court should resort to a more defined jurisdiction, refraining from political questions not entailed therein. It should be a consensus builder, not the impetus for African states to abandon the progress that has been made in the realm of human rights in Africa, leading to the Court's own demise.[21] This Note thus contributes to

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15. See Christopher Hartmann, Postneoliberal Public Health Care Reforms: Neoliberalism, Social Medicine, and Persistent Health Inequalities in Latin America, 106 Am. J. Pub. Health 2145, 2145 (2016) ("Neoliberalism typically refers to minimal government intervention, laissez-faire market policies, and individualism over collectivism and has been adopted by—and pressed upon—the majority of national governments and global development institutions." (footnote omitted)).

16. See Quinn Slobodian, Globalists: The End of Empire and the Birth of Neoliberalism 1 (2018) (noting that by the end of the twentieth century, neoliberalists saw market forces and "the global economy" as main drivers of the international order); Kathomi Gatwiri, Julians Amboko & Darius Okolla, The Implications of Neoliberalism on African Economies, Health Outcomes and Wellbeing: A Conceptual Argument, 18 Soc. Theory & Health 86, 90 (2020) ("[N]eoliberal ideology adopts the language of freedom and choice, increased foreign investments, and open markets and trade to progress policies that lead to privatisation of basic needs . . . .").

17. See infra section II.C.

18. See James Thuo Gathii & Jacquelene Wangui Mwangi, The African Court of Human and Peoples' Rights as an Opportunity Structure, *in* The Performance of Africa's International Courts 211, 213 (James Thuo Gathii ed. 2020) ("[T]he African Court becomes a fulcrum through which grassroots movements and individuals can collectively mobilize, organize, promote, and advance their causes."); Olabisi D. Akinkugbe, *Houngue Éric Noudehouenou v. Republic of Benin*, 115 Am. J. Int'l L. 281, 285 (2021) (discussing how "opposition politicians" are mobilizing the African Court against their governments).

19. See 2022 Report, supra note 10, ¶ 7 tbl.2 (showing the remaining countries under the Optional Declaration: Burkina Faso, Gambia, Ghana, Guinea-Bissau, Malawi, Mali, Niger, and Tunisia). The 2021 Report noted that "States against which the Court has rendered a judgment . . . threaten to withdraw their Article 34(6) Declaration." See 2021 Report, supra note 7, at 20.

20. See 2022 Report, supra note 10, at 25 ("Twenty-two (22) [African Union] Member States are yet to ratify the Protocol . . . .").

21. See infra note 320 and accompanying text.

the literature on the African human rights system by exposing the deficiencies in the arguments for the Court's jurisdictional expansion and proposing a path forward to preserve the Court amidst its current precarious position on the continent.

Part I provides an overview of the historical and normative underpinnings of the Court's current position. Part II describes the motivations and the processes that led to the Court's creation, against the backdrop of colonialism and the Cold War. Part III offers some solutions for the future of the Court and the African human rights system, suggesting a broader approach to rights protections that contemplates national legal fora and customary procedures.

I. HOW DID WE GET HERE?

This Part outlines the ways in which the Court arrived at its current position of disrepute. Section I.A will show some recent examples of the Court expanding its jurisdiction through its reversals of domestic courts' decisions and its nullifications of national legislations. Section I.B will explain the ensuing backlash against the Court's jurisdictional expansion. Section I.C places the African human rights system in the larger context of Africa's colonial past, to make sense of its contemporary challenges. Section I.D outlines the considerations that led to the Court's creation and the warnings that were ignored.

A. *The African Court's Encroachment on Domestic Courts' Jurisdictions*

The Court has claimed that it prefers to refrain from interfering in African states' domestic affairs.[22] "Referral to international courts," says the Court, "is a subsidiary remedy compared to remedies available locally within States."[23] But the Court's rulings have tended to suggest a lack of fidelity to this principle. In *Thomas v. Tanzania*, a criminal defendant sued Tanzania under the Optional Declaration after he had been convicted and

22. See Onyachi v. Tanzania, No. 003/2015, Judgment, Afr. Ct. H.P.R., ¶ 49(5) (Sept. 28, 2017), https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/637/595/5f5637595474d057190288.pdf (on file with the *Columbia Law Review*) (noting that plaintiffs must "exhaust[] local remedies," in cases where access to such remedies would not be "unduly prolonged," before they can file their cases to the Court); Abubakari v. Tanzania, No. 007/2013, Judgment, Afr. Ct. H.P.R., ¶ 40(5) (June 3, 2016), https://caselaw.ihrda.org/en/entity/lkp2rcmhynovs9osa89z4cxr?file=16137364800711ahvtshzoqj.pdf&page=2 (on file with the *Columbia Law Review*) (same); Tanganyika L. Soc'y v. Tanzania, No. 009/2011 and 011/2011, Judgment, Afr. Ct. H.P.R., ¶ 80.1 (June 14, 2013), https://www.african-court.org/cpmt/storage/app/uploads/public/62b/c18/48a/62bc1848a3912905722263.pdf (on file with the *Columbia Law Review*) (same).

23. Konaté v. Burkina Faso, 004/2013, Judgment, Afr. Ct. H.P.R., ¶ 78 (Dec. 5, 2014), https://www.african-court.org/cpmt/storage/app/uploads/public/633/40b/e27/63340be2743c3757080189.pdf (on file with the *Columbia Law Review*).

sentenced domestically.[24] In *Abubakari v. Tanzania*, the Court was tasked with reviewing Tanzania's Court of Appeals' judgment.[25] Similarly, in *Onyango v. Tanzania*, the question before the Court was the legitimacy of Tanzania's trial court's judgment that had been appealed twice in Tanzania's courts of appeals.[26] In *Thomas*, as in *Onyango*, the plaintiffs had standing to bring their cases against Tanzania,[27] but they failed to invoke any human rights instrument to which Tanzania was a signatory.[28] In other words, the Court did not have the material jurisdiction to hear their cases. Relying on the jurisprudence of the African Commission on Human and Peoples' Rights ("African Commission") and the European Court of Human Rights (ECtHR), the Court reasoned that, because the "rights allegedly violated are protected by the Charter," it could hear the case (even though the plaintiffs had not invoked the Charter).[29] Proceeding thus, the Court overturned the judgments of Tanzania's domestic courts in all three cases.[30]

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24. See No. 005/2013, Judgment, Afr. Ct. H.P.R., ¶ 3 (Nov. 20, 2015), https://www.african-court.org/cpmt/storage/app/uploads/public/62b/2e5/16e/62b2e516e0fbb807792095.pdf (on file with the *Columbia Law Review*).

25. See *Abubakari*, No. 007/2013, Afr. Ct. H.P.R., ¶ 3 ("The Annex comprised a copy of the Judgment of the Court of Appeal of Tanzania in Criminal Appeal No. 48 of 2004 . . . .").

26. See No. 006/2016, Judgment, Afr. Ct. H.P.R., ¶ 20 (Afr. Ct. H.P.R., Mar. 18, 2016), https://www.african-court.org/cpmt/storage/app/uploads/public/631/861/003/631861003c494661666119.pdf (on file with the *Columbia Law Review*) ("Applications have proceeded all the way to the Court of Appeal twice, both times without success.").

27. Because Tanzania was a signatory to the Optional Declaration, the plaintiff was allowed to bring the case against it. But the Optional Declaration merely grants a procedural right—the right to sue one's government before the Court—not a substantive right.

28. *Onyango*, No. 006/2016, Afr. Ct. H.P.R., ¶ 52 ("[T]he Applicants have merely cited ongoing cases against [Tanzania] within the national judicial system and have made no attempt to even mention the Protocol. . . .); *Thomas*, No. 005/2013, Afr. Ct. H.P.R., ¶ 38 ("The Respondent contends that the Applicant's citation of Articles 5 and 34(6) of the Protocol and Rule 33 of the Rules of Court to invoke the jurisdiction of the Court is not proper as these articles only provide him standing before the Court.").

29. See *Thomas*, No. 005/2013, Afr. Ct. H.P.R., ¶¶ 45, 116–118.

30. *Abubakari*, No. 007/2013, Afr. Ct. H.P.R., ¶ 242; see also *Onyango*, No. 006/2016, Afr. Ct. H.P.R., ¶ 193; *Thomas*, No. 005/2013, Afr. Ct. H.P.R., ¶ 161. In a series of cases, the Court maintained jurisdiction to review national laws and effectively called for their nullification. See Ass'n Pour le Progrès et la Défense des Droits des Femmes Maliennes v. Mali, No. 046/2016, Judgment, Afr. Ct. H.P.R., ¶ 130 (May 11, 2018), https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/215/dbc/5f5215dbcd90b917144785.pdf (on file with the *Columbia Law Review*); Tanganyika L. Soc'y v. Tanzania, 009/2011 and 011/2011, Judgment, Afr. Ct. H.P.R., ¶ 126 (June 14, 2013), https://www.african-court.org/cpmt/storage/app/uploads/public/633/449/e0e/633449e0e1666269181785.pdf (on file with the *Columbia Law Review*); see also Konaté v. Burkina Faso, No. 004/2013, Judgment, Afr. Ct. H.P.R., ¶ 176 (June 3, 2016), https://www.african-court.org/cpmt/storage/app/uploads/public/62b/c03/0b7/62bc030b73208119164258.pdf (on file with the *Columbia Law Review*). In reviewing and nullifying national laws, the African Court

B. *Backlash Against the African Court's Encroachment on Domestic Courts' Jurisdictions*

The Court's encroachment on domestic courts' jurisdictions was a subtext of Benin's withdrawal of its Optional Declaration in 2020. In *Ajavon v. Benin*, a Beninois man was convicted of trafficking cocaine into Benin.[31] He was sentenced to a term of twenty years in prison and fined five million CFA francs.[32] Amidst the appeal process, Ajavon brought a case against Benin under the Optional Declaration and asked the Court, inter alia, to stay the judgment of the Beninois court and have Benin pay him over five hundred billion CFA francs for moral and economic damages.[33] Benin replied that the case had not been resolved at home—Ajavon had not exhausted local remedies[34]—so the Court could not hear the case.[35]

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plays a role of a quasi-legislature, despite being composed of unelected judges who are removed from the scrutiny of the people whose lives it shapes.

31. See Ajavon v. Benin, No. 013/2017, Judgment, Afr. Ct. H.P.R., ¶¶ 3–8 (Mar. 29, 2019), https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/9ee/1f3/5f59ee1f3010d110121716.pdf (on file with the *Columbia Law Review*) (asserting that Ajavon and his employees imported eighteen kilograms of "pure cocaine" into Benin).

32. See id. ¶ 8.

33. See id. ¶ 17, ¶ 25.

34. "[E]xhausting local remedies" is one of the seven prerequisites for admitting a case to the African Court (and the African Commission). See Banjul Charter, supra note 4, ¶ 56(5). But the African Commission's jurisprudence has made some important exceptions to this rule. See, e.g., Afr. Inst. Hum. Rts. Dev. v. Guinea, No. 249/2002, Judgment, Afr. Comm'n H.P.R., ¶ 34 (Dec. 7, 2004), http://hrlibrary.law.umn.edu/africa/comcases/Comm249-2002.pdf (on file with the *Columbia Law Review*) (waiving the exhaustion of local remedies requirement because the plaintiffs were too numerous); Purohit v. Gambia, No. 241/2001, Judgment, Afr. Comm'n H.P.R., ¶ 37 (May 29, 2003), https://caselaw.ihrda.org/entity/4t3ozl7fs99?file=1555500420242kukm7jcwond.pdf&page=1 (on file with the *Columbia Law Review*) (exempting an indigent plaintiff from exhausting local remedies); Soc. Econ. Rts. Action Ctr. v. Nigeria, No. 155/96, Judgment, Afr. Comm'n H.P.R., ¶ 37 (Oct. 27, 2001), https://caselaw.ihrda.org/entity/ys82x4w7gcn?file (on file with the *Columbia Law Review*) (exempting the exhaustion of local remedies requirement where rights claimed are not "provided for in domestic law"); Jawara v. Gambia, No. 147/95 and 149/96, Judgment, Afr. Comm'n H.P.R., ¶ 36 (May 11, 2000), https://caselaw.ihrda.org/entity/e40rz60vzqmhi2y9zncwpzaor?file (on file with the *Columbia Law Review*) (exempting the plaintiff from exhausting local remedies because it was dangerous for him to return to his country); Media Rts. Agenda v. Nigeria, No. 105/93, 128/94, 130/94 and 152/96, Judgment, Afr. Comm'n H.P.R., ¶ 82 (Oct. 31, 1998), https://caselaw.ihrda.org/en/entity/rdz28a0ywtl21781bwitl0udi/references?page=8 (on file with the *Columbia Law Review*) (stating that plaintiffs are not required to exhaust local remedies when the domestic legislature has ousted the jurisdiction of the national courts); Free Legal Assistance Grp. v. Zaire, No. 25/89, 47/90, 56/91, and 100/93, Judgment, Afr. Comm'n H.P.R., ¶ 5 (Oct. 11, 1995), https://caselaw.ihrda.org/entity/s4i80a2g88ijcnz75yngynwmi?file=1530706502464k1hyuqb15xtkui8mh7fn1m7vi.pdf&page=2 (on file with the *Columbia Law Review*) (exempting plaintiffs of "massive violation of human rights" from exhausting local remedies). Finally, Article 56(5) of the Banjul Charter also waives the exhaustion of local remedies requirement for plaintiffs whose cases have been "unduly prolonged" in domestic legal fora. See Banjul Charter, supra note 4, art. 56, ¶ 5.

35. *Ajavon*, No. 013/2017, Afr. Ct. H.P.R., ¶ 79.

The Court rejected Benin's argument and overruled the decision of the Beninois domestic trial court.[36] The decision was consequential: Benin withdrew its Optional Declaration, closing the avenue for future Beninois litigants to directly bring cases to the Court.[37]

This sort of backlash is not unique to the African Court.[38] While some scholars have refrained from confining the phenomenon to nondemocratic governments,[39] others have not.[40] This Note does not debate the fact that African states lag on many important democracy metrics.[41] The nondemocratic nature of African states, however, is an insufficient explanation for the recent withdrawals.[42] For one, that explanation overlooks the African Court's own malfeasance: The Court's interference in national affairs, beyond its jurisdiction, was a catalyst for the recent withdrawals.[43]

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36. See id. ¶ 292.

37. See Sègnonna Horace Adjolohoun, A Crisis of Design and Judicial Practice? Curbing State Disengagement from the African Court on Human and Peoples' Rights, 20 Afr. Hum. Rts. L.J., no. 1, 2020, at 1, 14–15 [hereinafter Adjolohoun, Crisis] (showing that Benin challenged the Court's order in *Ajavon* and subsequently withdrew its declaration on the grounds that the order was "in breach of its sovereignty"); Benin: Withdrawal of Individuals Right to Refer Cases to the African Court a Dangerous Setback in the Protection of Human Rights, Amnesty Int'l (Apr. 24, 2020), https://www.amnesty.org/en/latest/news/2020/04/benin-le-retrait-aux-individus-du-droit-de-saisir-la-cour-africaine-est-un-recul-dangereux/ [https://perma.cc/P7D6-SHSD] (discussing the significance of Benin's withdraw for human rights protection in the country).

38. See Ximena Soley & Silvia Steininger, Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights, 14 Int'l J.L. Context 237, 243 (2018) (detailing similar backlashes against the Inter-American Court of Human Rights).

39. Id. at 242 ("[T]his phenomenon is not only restricted to autocratic states.").

40. See Gathii & Mwangi, supra note 18, at 222 (arguing that "Tanzania's withdrawal . . . is consistent with the authoritarian regime of the country's current President").

41. See The State of Democracy in Africa, Int'l IDEA, https://www.idea.int/gsod/2023/chapters/africa/ [https://perma.cc/AHE3-Y47Y] (last visited Aug. 7, 2024) (showing that only South Africa and Tunisia are ranked in the top fifty countries on the question of rights); Dominique E. Uwizeyimana, Democracy and Pretend Democracies in Africa: Myths of African Democracies, 16 Law Democracy & Dev. 139, 154 (2012) ("[W]hile there are a small number of *fully democratic* states in the post-colonial era, most African states claiming to be democratic are in fact *pretend democracies*.").

42. See Gathii & Mwangi, supra note 18, at 222 ("Tanzania, Rwanda, Benin and Coôte d'Ivoire's withdrawal of the optional declarations . . . are in part the result of the effectiveness with which litigants brought pressure and unwelcome scrutiny to bear on their governments.").

43. See Adjolohoun, Crisis, supra note 37, at 12 (stating that Benin withdrew its declaration because the African Court was interfering with the jurisdictions of its national courts (paraphrasing Withdrawal of Benin from the ACHPR—Statement by the Minister of Justice and Litigation, Gov't Republic Benin (Apr. 28, 2020), https://www.gouv.bj/article/635/retrait-benin-cadhp—declaration-ministre-justice-legislation/ [https://perma.cc/EZ9L-8URS])); infra notes 259–262 and accompanying text.

Second, under the leadership of the African Union (AU), African states have been creating instruments and institutions to protect human rights (the rights of women,[44] children,[45] the disabled,[46] and senior citizens[47]), schemes of conflict resolution,[48] democratic governance,[49] and international courts.[50] The Banjul Charter, from which these instruments draw their roots,[51] "uniquely recognizes collective rights, individual duties[,] and third generation rights,"[52] including the "right to development."[53] These initiatives, in different stages of ratification and

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44. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 2, ¶ 2, Assembly of the Union, Second Ordinary Session (July 11, 2003), https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf [https://perma.cc/VCY8-ULJ5] [hereinafter Maputo Protocol] (asserting that the statute's goal is to eliminate discriminatory social and cultural practices that adversely affect women).

45. African Charter on the Rights and Welfare of the Child, art. 32, opened for signature July 1, 1990, Assembly of Heads of State and Government, Twenty-Sixth Ordinary Session (entered into force Nov. 29, 1999), https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf [https://perma.cc/DF8B-T7JT] [hereinafter Charter on the Welfare of the Child] (establishing the African Committee of Experts on the Rights and Welfare of the Child to administer the Statute).

46. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, Assembly of the Union, Thirtieth Ordinary Session (Jan. 29, 2018), https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf [https://perma.cc/E4G8-JJYB].

47. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons, Assembly of the Union, Sixth Ordinary Session (Jan. 31, 2016), https://au.int/sites/default/files/treaties/36438-treaty-0051_-_protocol_on_the_rights_of_older_persons_e.pdf [https://perma.cc/BLF2-D36B] [hereinafter Protocol on the Rights of Old Persons].

48. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Assembly of the African Union, First Ordinary Session (July 9, 2002), https://au.int/sites/default/files/treaties/37293-treaty-0024_-_protocol_relating_to_the_establishment_of_the_peace_and_security_council_of_the_african_union_e.pdf [https://perma.cc/HJ4V-CYM6] [hereinafter Protocol on Peace and Security]; Constitutif Act of African Union, Assembly of Heads of States and Government, Thirty-Sixth Ordinary Session (July 11, 2000), https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf [https://perma.cc/4ZJA-E5Q8] [hereinafter Constitutif Act].

49. African Charter on Democracy, Elections and Governance art. 23, Assembly of the Union, Eighth Ordinary Session (Jan. 30, 2007) https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf [https://perma.cc/CE9J-QFCH] [hereinafter Charter on Democracy].

50. Protocol on the African Court, supra note 7, at 1 (establishing the African Court).

51. See Banjul Charter, supra note 4, art. 66 ("Special protocols or agreements may, if necessary, supplement the provisions of the present Charter.").

52. Moussa Samb, Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union, 15 Ann. Sur. Int'l & Compar. L. 61, 62 (2009).

53. See Banjul Charter, supra note 4, art. 22, ¶ 2 ("States shall have the duty, individually or collectively, to ensure the exercise of the right to development."); Samb, supra note 52, at 72 ("The 'right to development' is considered as a specific African contribution to the international human rights discourse.").

effectiveness, show that the above antidemocratic narrative may be too simple an explanation for the withdrawals. How can African states, the great many of whom are nondemocratic (and hence despise scrutiny),[54] draw more attention to themselves by legislating a series of expansive human rights treaties?[55]

Of course, the existence of these mechanisms is by no means a sufficient answer to the African human rights crises. Indeed, Professor Nsongurua J. Udombana maintains that so long as sovereignty remains the central fixture of the African political imagination, African human rights treaties are likely to amount to no more than empty promises.[56] Professor Gina Bekker goes further in her critique, arguing that the AU structured the Banjul Charter to safeguard the interests of African states.[57] These scholars have a point. African leaders, worried about neocolonialism,[58] made "non-interference" a core principle of African states' sovereignties following their independence.[59] Udombana also correctly observed that the African Commission's deficiencies impeded it from doing anything

54. Democracy and the rule of law are considered to be interlinked, the latter being "fundamental in advancing" the former. See Rule of Law and Democracy: Addressing the Gap Between Policies and Practices, UN (2012), https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices [https://perma.cc/G4FP-UD4U].

55. The question is especially relevant for Benin because Benin has been a proponent of the Charter and the human rights instruments that have come from it. Its constitution integrates the Charter. See Constitution de la République du Bénin [Benin Constitution] Dec. 2, 1990, tit. II, art. 7 (Benin) (stating the rights in the Charter are integral to Benin's constitution). Benin was also the second country, after Lesotho, to ratify the Protocol on the Rights of Old Persons, a protocol that has not been uniquely popular among African states. See Protocol on the Rights of Old Persons, supra note 47.

56. See Nsongurua J. Udombana, Can the Leopard Change Its Spots? The African Union Treaty and Human Rights, 17 Am. U. Int'l L. Rev. 1177, 1178-86 (2002) ("There has been little progress in the real enjoyment of fundamental rights and freedoms by Africans, despite the numerous treaties, resolutions, and declarations executed by the OAU in recent memory.").

57. See Gina Bekker, The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States, 51 J. Afr. L. 151, 171 (2007) ("Given the preoccupation of African states with the principle of sovereignty and non-interference, it is hardly surprising that when they did capitulate to external pressure in relation to the creation of an African human rights mechanism, they were . . . concerned with sovereignty and the maintenance of the status quo . . . .").

58. See A. Bolaji Akinyemi, The Organization of African Unity and the Concept of Non-Interference in Internal Affairs of Member States, 46 Brit. Y.B. Int'l L. 393, 394 (1973) (showing that the intent to "resist . . . neo-colonialism in all its forms including political and economic intervention" was embedded in African international coalition-building (quoting the working paper tabled by Ethiopia)).

59. See Constitutif Act, supra note 48, art. 4 § g (stating that the AU will function by the principle of "non-interference by any Member State in the internal affairs of another").

beyond merely promoting human rights (as opposed to protecting them).[60]

But these arguments seem to rest on the assumption that, because African states are simultaneously the legislators, enforcers, and violators of human rights in Africa, there can be little hope for an alternative future. That assumption is not entirely consistent with the views of those around the time of the African Court's creation; the Court was viewed by many human rights advocates as "a step in the right direction."[61] Second, as explained below, human rights violations in Africa tend to be more diffused—occurring both vertically and horizontally—and often, they are part of deep-seated social and cultural practices against which political will and litigation are not always effective.[62]

Third, viewed in the proper chronology, African human rights institutions have steadily improved over time—from the Commission of Mediation, Conciliation and Arbitration (CMCA),[63] to the African Commission, to the African Court. Indeed, the Court was created to "enhance the efficiency of the African Commission."[64] Unlike the African Commission,[65] the Court has both contentious and advisory jurisdictions; the former allows it to preside over any case against a defendant African state that has ratified the Banjul Charter and other prerequisite instruments.[66] The Court's decisions under its contentious jurisdiction are

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60. See Nsongurua J. Udombana, Toward the African Court on Human and Peoples' Rights: Better Late Than Never, 3 Yale Hum. Rts. & Dev. L.J. 45, 67 (2000) [hereinafter Udombana, Toward the African Court].

61. See id. at 47 ("[N]othing short of an African Human Rights Court will effectively protect the human rights guaranteed in the Banjul Charter."); Michael Fleshman, Human Rights Move up on Africa's Agenda, Afr. Renewal (July 2004), https://www.un.org/africarenewal/magazine/july-2004/human-rights-move-africas-agenda [https://perma.cc/Z9YE-GSMV] (summarizing the positive reactions of a variety of human rights experts to the establishment of the African Court on Human and People's Rights).

62. See infra section II.D.

63. Protocol of the Commission of Mediation, Conciliation and Arbitration, art. XIX, Assembly of Heads of State and Government, Third Ordinary Session (July 17, 1964), https://archives.au.int/bitstream/handle/123456789/2616/charter%20of%20the%20organization%20of%20African%20Unity_E.pdf?sequence=1&isAllowed=y [https://perma.cc/7NG8-JW38] [hereinafter CMCA] ("Member States pledge to settle all disputes among themselves by peaceful means and, to this end decide to establish a Commission of Mediation, Conciliation and Arbitration . . . .").

64. See Protocol on the African Court, supra note 7, at 1.

65. See Banjul Charter, supra note 4, art. 45 (stating, inter alia, that the African Commission is "to formulate and lay down[] principles and rules . . . upon which African Governments may base their legislations").

66. The ratification of the listed instruments provides the African Court the material, personal, and temporal jurisdiction over the defendant state and the legal issue at hand. See Protocol on the African Court, supra note 7, art. 3. As for temporal jurisdiction, the African Court generally cannot preside over cases that took place before it was created. When the effect of a case continues after the Court's creation, however, the Court is permitted to preside over the case. This is the *continuous violation* doctrine. See Afr. Comm'n Hum. &

binding on defendant African states.[67] The African Commission investigates and produces reports on the implementation of African Court's decisions for the AU Assembly of Heads of States.[68]

Lastly, African states' commitment to human rights protection extends beyond the contours of Africa. From the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[69] to the International Covenant on Civil and Political Rights (ICCPR),[70] African states have been receptive to the growth of human rights protections within Africa and abroad. They were proponents of the Rome Statute of the International Criminal Court from the very beginning.[71] Senegal was the first country in the world to ratify the Rome Statute.[72] To date, African states remain the largest regional block to have ratified the Rome Statute.[73]

Peoples' Rts. v. Kenya, 006/2012, Judgment, Afr. Ct. H.P.R. ¶¶ 64–66 (2017), https://minorityrights.org/app/uploads/2024/01/final-mrg-merits-submissions-pdf.pdf [https://perma.cc/3RLA-HZHW]; Tanganyika L. Soc'y v. Tanzania, 009/2011 and 011/2011, Judgment, Afr. Ct. H.P.R., ¶ 84 (June 14, 2013), https://afchpr-commentary.uwazi.io/en/document/gt0cgvz5hveu3di?page=2 [https://perma.cc/9H3L-AGEB].

67. See Protocol on the African Court, supra note 7, art. 30 ("The 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.").

68. See id. art. 31 ("The Court shall submit to each regular session of the Assembly, a report on its work during the previous year.").

69. See G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979); State and Non-State Parties to CEDAW, IWRAW Asia Pac., https://cedaw.iwraw-ap.org/cedaw/state-and-non-state-parties-to-cedaw/ [https://perma.cc/3BTK-ZC9J] (last visited Oct. 15, 2023) (showing that Somalia and Sudan remain the only two African countries that have not ratified CEDAW).

70. See G.A. Res. 2200A(XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); International and Regional Treaties Aimed at the Abolition of the Death Penalty, La Peine de Mort Dans le Monde [The Death Penalty Across the World], https://www.peinedemort.org/traite/recherche? [https://perma.cc/V6AL-TLYU] (last visited Jan. 2, 2024) (showing that fifty-four African states have ratified ICCPR).

71. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544; Hassan Jallow & Fatou Bensouda, International Criminal Law in an African Context, *in* African Guide to International Criminal Justice 15, 41 (Max du Plessis ed. 2008) ("African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalised.").

72. Jallow & Bensouda, supra note 71, at 43.

73. See The States Parties to the Rome Statute, ICC, https://asp.icc-cpi.int/states-parties [https://perma.cc/3G9L-6FYL] (last visited Aug. 7, 2024). There have been some disagreements between the ICC and African states in recent years. See Isaac Kaledzi, Africa's Fractured Relationship With the ICC, Made for Minds (July 17, 2023), https://www.dw.com/en/africas-fractured-relationship-with-the-icc/a-66257611# [https://perma.cc/4S2M-S5UJ] (discussing the ICC's fraught relationship with some African states).

C. *Colonialism and the Cold War in Africa*

These important initiatives, however, have not corresponded to a significant amelioration of human rights in Africa. African states continue to score poorly on human rights indexes, despite the many human rights instruments they have ratified in the last forty years.[74] This Note offers no simple explanation to this paradox. It suggests, however, that by broadening the temporal and contextual frames of analysis on the issue, it may be possible to diagnose the sources of the crisis and perhaps find a path forward.

An indispensable element of this analysis is colonialism, the process of European empires expanding into Africa (and other parts of the world).[75] Colonialism adversely affected both traditional African institutions and those that emerged post-independence.[76] Philosopher Georg Wilhelm Friedrich Hegel's assertion that Africans had not attained "consciousness," and therefore did not have history,[77] encapsulated the colonial attitude towards traditional African institutions. Indeed, it was under the guise of "civilization" that Leopold II of Belgium committed his historic crime against the people of the Congo.[78] The late legal

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74. See World Just. Project, Rule of Law Index 2023, at 24–25, 31 (2023), https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2023.pdf [https://perma.cc/EB33-8PZQ] (showing African states' ratings relative to those of other countries).

75. See Tsenay Serequeberhan, The Critique of Eurocentrism and the Practice of African Philosophy, *in* Postcolonial African Philosophy: A Critical Reader 141, 144 (Emmanuel Chukwudi Eze ed., 1997) (defining colonialism); Colonial Presence in Africa, Facing Hist. & Ourselves, https://www.facinghistory.org/resource-library/colonial-presence-africa [https://perma.cc/FM7H-SGDT] (last updated July 22, 2022) (showing a map of all the African states that were colonized).

76. See Clara Neupert-Wentz & Carl Müller-Crepon, Traditional Institutions in Africa: Past and Present, 12 Pol. Sci. Rsch. & Methods 267, 270–71 (2023) ("European colonial rule constituted the most rampant and continent-wide external shock to indigenous institutions."); Nathan J. Robinson, A Quick Reminder of Why Colonialism Was Bad, Current Affs. (Sept. 14, 2017), https://www.currentaffairs.org/2017/09/a-quick-reminder-of-why-colonialism-was-bad [https://perma.cc/J9CC-H4E4].

77. See Georg Wilhelm Friedrich Hegel, The Philosophy of History 110–11 (J. Sibree trans., Batoche Books Kitchener ed. 2001) ("In Negro life the characteristic point is the fact that consciousness has not yet attained to the realization of any substantial objective existence . . . ."). For a synthesis of Hegel's view of Africa and its role in world history, see generally Ronald Kuykendall, Hegel and Africa: An Evaluation of the Treatment of Africa in *The Philosophy of History*, 4 J. Black Stud. 571 (1993).

78. See Dean Pavlakis, The Crime of the Congo: A Question of Genocide in the Congo Free State, 1885–1908, *in* 2 The Cambridge World History of Genocide 585, 602–03 (2023) (estimating that between 3.4 and 13 million Congolese people died under Leopold's reign in the Congo); Adam Hochschild, Leopold II: King of Belgium, Britannica (Oct. 9, 2023), https://www.britannica.com/biography/Leopold-II-king-of-Belgium [https://perma.cc/3V9B-HG9F] (stating that Leopold presented himself as a "philanthropist eager to bring the benefits of Christianity, Western Civilization" to native African people). For a more thorough treatment of Leopold II's atrocities in the Congo, see

philosopher, Peter Fitzpatrick, maintained that one of the lasting consequences of colonialism in Africa was that African "traditional law [lost its] substantive identity in its subordination to the capitalist mode of production."[79] Regarded as inferior to European institutions, African traditional laws were primarily used by Europeans to "control the African population or to advance [their] segregationist policy."[80] As such, traditional African laws experienced extensive changes as a result of their contact with Europe.[81]

This history informed the creation of the Organization of African Unity (OAU), the predecessor to the AU, in 1963.[82] The OAU was designed to be a bulwark against the reinstatement of colonialism: to make real the "heroic struggles" of the African people for their political, dignitary, and economic emancipations.[83] Institutions like the Court, which emerged later, were asked to consider the "historical tradition and values of African civilization" in their interpretations of the governing laws of the continent—the Banjul Charter in particular.[84] They were not to minimize them as the Europeans had done to traditional African laws centuries prior.[85]

The salience of this guiding principle could not be overstated. During the Cold War, Western democracies sabotaged African states' efforts to build political and economic alliances on the continent that extended

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generally Adam Hochschild, King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa (1999) (portraying King Leopold's violent control over Congo).

79. See Peter Fitzpatrick, Traditionalism and Traditional Law, 28 J. Afr. L. 20, 22 (1984).

80. See Thandabantu Nhlapo, Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously, 13 Third World Legal Stud. 49, 49 (1993). See generally Richard Morrock, Heritage of Strife: The Effects of Colonialist "Divide and Rule" Strategy Upon the Colonized Peoples, 37 Sci. & Soc'y 129 (1973) (discussing strategies used by colonial powers to control their colonies).

81. See Nhlapo, supra note 80, at 53 ("[I]ndigenous law has undergone profound changes through various kinds of interaction with European culture and with both the colonial and apartheid states.").

82. See About the African Union, Afr. Union, https://au.int/en/overview# [https://perma.cc/QM5C-38YR] (last visited Dec. 27, 2023) (listing "rid[ding] the continent of the remaining vestiges of colonisation" among the "main objectives" of the OAU).

83. See Constitutif Act, supra note 48, at 2; P. Mweti Munya, The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation, 19 B.C. Third World L.J. 537, 541 (1999) ("There was a consensus that regional cooperation and unity were crucial if the vast resources of Africa were to be utilized for the prosperity of the continent and its people." (citing P. Olisanwuche Esedebe, Pan-Africanism: The Idea and Movement, 1776–1991, at 165–91 (2d ed. 1994)).

84. The following provisions from the Banjul Charter and the Charter on the Welfare of the Child all emphasize the need for appreciating the African context. See Banjul Charter, supra note 4, at 2, art. 29.7, art. 45, ¶ 1 (a)–(b), art. 61; Charter on the Welfare of the Child, supra note 45, at 7, art. 11, ¶ 2(c), art. 46.

85. See Nhlapo, supra note 80, at 49 (discussing colonial powers' manipulation of African traditional laws for their own ends).

beyond their roles as proxies.[86] The CIA spent millions of dollars in covert operations to oust Patrice Lumumba, the anticolonial leader of the Congo.[87] France engaged in plots to topple then-President Sekou Touré's government in Guinea.[88] Portuguese troops were in Guinea-Bissau (then Portuguese Guinea) trying to quell the country's call for independence.[89] Many independence leaders in Africa were assassinated by their countries' ex-colonial rulers.[90] These violent tactics frustrated the democratization process in Africa.[91] Journalist Victoria Brittain has argued that the loss of these early African leaders "crippled each of their countries, and the African continent."[92]

Colonialism, thus, did not dissipate after the independence of African states; instead, it morphed into what the French philosopher Jean-Paul Sartre termed neocolonialism: the continual deprivation of African states

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86. Throughout the Cold War, the United States and the Soviet Union pulled African states into their respective ideological camps by meddling in their national political processes, buying votes for leaders who aligned with them and overthrowing those who did not. These tactics led to intra-state violence—termed "proxy wars"—between factions vying to fill the power vacuums in many newly independent African states. See Proxy Wars During the Cold War: Africa, Atomic Heritage Found. (Aug. 24, 2018), https://ahf.nuclearmuseum.org/ahf/history/proxy-wars-during-cold-war-africa/ [https://perma.cc/ZV47-9NPJ] (providing context for the proxy wars in Angola, the Congo, Namibia, Ogaden (modern-day Somalia), and South Africa).

87. David Robarge, CIA's Covert Operations in the Congo, 1960–1968: Insights From Newly Declassified Documents, Stud. Intel., Sept. 2014, at 1, 1–3 ("The [CIA's] activities included contacts with oppositionists who were working to oust Lumumba with parliamentary action; payments to army commander Mobutu . . . and 'black' broadcasts from a radio . . . to encourage a revolt against Lumumba.").

88. Elizabeth Schmidt, The Historical Roots of Guinea's Latest Coup, Wash. Post (Sept. 21, 2021), https://www.washingtonpost.com/outlook/2021/09/21/historical-roots-guineas-latest-coup/ (on file with the *Columbia Law Review*) (stating that "France engaged in successive plots to overthrow the Guinean president" shortly after the country's independence); Guinea Reports Invasion from Sea by Portuguese, N.Y. Times, Nov. 23, 1970, at 1, https://www.nytimes.com/1970/11/23/archives/guinea-reports-invasion-from-sea-by-portuguese-lisbon-denies-charge.html (on file with the *Columbia Law Review*) ("President Sékou Touré of Guinea said today that Portuguese forces had invaded his West African nation.").

89. See CIA, The Guerrilla War in Portuguese Guinea, Weekly Summary Special Report 1 (Dec. 20, 1968), https://www.cia.gov/readingroom/docs/CIA-RDP79-00927A006800030003-4.pdf [https://perma.cc/F4UQ-8T8D] (providing background on Portuguese military involvement in Guinea at the time); Schmidt, supra note 88.

90. Victoria Brittain, Africa: A Continent Drenched in the Blood of Revolutionary Heroes, The Guardian (Jan. 17, 2011), https://www.theguardian.com/global-development/poverty-matters/2011/jan/17/lumumba-50th-anniversary-african-leaders-assassinations [https://perma.cc/Y2M3-NKRT] ("Between 1961 and 1973, six African independence leaders were assassinated by their ex-colonial rulers . . . .").

91. One of the consequences of this, as Professor Elizabeth Schmidt observed in the Guinean context, was the distrust of political oppositions. This, in turn, paved the way to the single-party state paradigm that became common in many African countries after their independence. See Schmidt, supra note 88.

92. See Brittain, supra note 90.

to keep them reliant on the old empires.[93] In the Cold War context, the largesse African states sought to develop their nascent countries were conditioned on their political alignments with their former-colonizers-turned-democracies or the Soviet Union and its satellite states.[94] For example, when Guinea became independent in 1958,[95] France halted all development projects in the country.[96] Cuba provided Guinea with the assistance it needed to train its first military.[97]

But whether they called themselves democracies, socialists, or communists, African states did not blindly adopt these political philosophies: They considered them in the context of their domestic cultural, economic, and political situations. For example, Modibo Keita, Mali's first President, noted that even though Mali was inspired by the "socialist construction," it did not "adopt its materialist philosophy" because Mali was a Muslim country.[98] African leaders' reservations to adopt Western political ideologies wholeheartedly were born of the fact that Africa was dealing with a different material reality than the West during

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93. See Kwame Nkrumah, Neo-Colonialism: The Last Stage of Imperialism, at ix (1965) ("The essence of neocolonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside."); Jean-Paul Sartre, Colonialism and Neocolonialism 109 (1964) (arguing that neocolonialism consisted of "buying the new masters, the bourgeoisie of the new countries, as classic colonialism bought the chiefs, the emirs, the sorcerers").

94. See Jeffrey James Byrne, The Cold War in Africa, *in* The Routledge Handbook of the Cold War 149, 154 (2014) ("Numerous governments manipulated the liberation movements to serve their own ends or indirectly attack regional rivals, while others buckled to Western pressure to withhold their support in the name of stability."); Mohamed Saliou Camara, From Military Politization to Militarization of Power in Guinea-Conakry, 28 J. Pol. & Mil. Socio. 311, 320 (2000) (detailing Fidel Castro's assistance to Guinea in the first decade after its independence from France).

95. Eric Pace, Ahmed Sékou Touré, a Radical Hero, N.Y. Times, Mar. 28, 1984, at A6, https://www.nytimes.com/1984/03/28/obituaries/ahmed-sekou-toure-a-radical-hero.html (on file with the *Columbia Law Review*) (discussing the circumstances around Guinea's independence).

96. See Byrne, supra note 94, at 152 (detailing the retaliations that Guinea and Ghana faced following their independence).

97. See id. ("[T]he Eisenhower administration alienated Ghana and Guinea by declining to provide development economic assistance, thereby providing an opportunity for the Soviet Union to step in with alternative offers."); Camara, supra note 94, at 319–20 ("Touré turned to Fidel Castro of Cuba for the training of a large number of Guinean youth destined to form the mighty National Militia."). Guinea, under Sekou Touré, was considered a socialist country. See Rajen Harshe, Guinea Under Sekou Toure, Econ. & Pol. Wkly., Apr. 14, 1984, at 624, 624 ("[Touré] moved with a conviction that socialism is compatible with traditional African Communalism.").

98. Francis G. Snyder, The Political Thought of Modibo Keita, 5 J. Mod. Afr. Stud. 79, 86 (1967). Keita, like Touré, despite his socialist outlook, did not see any contradictions between workers and owners of industries in Africa; their contentions lay "between European colonialism and the African people[]." See id. at 82. Sekou Touré was of similar view because "class," as a system of social stratification, was in its embryonic stages in the immediate aftermath of independence in Guinea. See Harshe, supra note 97, at 624.

the Cold War. Africans believed that they needed to achieve similar levels of material prosperity as other nations to be of equal standing.[99] The great need for the "mythical value" of "factory chimn[ies]"[100] made African leaders think hard about internal economic development, as they played their proxy roles in the ideological war between the United States and the Soviet Union.[101]

The emerging international institutions on the continent, as noted above, were equally expected to appreciate the "African context" in their functions.[102] The current strife between the African Court and African states is emblematic of the Court's deviation from this principle.

D. *On the Road to the African Court*

The OAU was moved by both endogenous and exogenous pressures to put in place an African Human Rights system following the adoption of the Charter for the Organization of African Unity.[103] Internally, Uganda's war with Tanzania created a massive refugee crisis for South Sudan.[104] Algeria and Morocco were fighting over their "unresolved colonial-era land dispute[s]" in the vacuum left by France.[105] Civilian protests for necessities were deadly.[106] Remnants of colonialism, evident in apartheid

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99. See K.M. Barbour, Industrialisation in West Africa—the Need for Sub-Regional Groupings Within an Integrated Economic Community, 10 J. Mod. Afr. Stud. 357, 357 (1972).

100. See id. (quoting Pierre Moussa, the President of the Commission of the Economic and Monetary Community of Central Africa).

101. Id. The development-centric logic of many African states during the Cold War can be summarized as follows: If the disagreement between democratic free market capitalism and communism was due, in great part, to their diverging proscriptions for material production and distribution, African states could not effectively participate in that ideological war without their own equivalent means of production—i.e., industry. This Note juxtaposes "democratic free market capitalism" with "communism" because, like the notion of "separation of powers," "free market" is an indispensable element of liberal democracy. See Reginald Ezetah, The Right to Democracy: A Qualitative Inquiry, 22 Brook. J. Int'l L. 495, 498–99 (1997).

102. See supra notes 83–84 and accompanying text.

103. Organization of African Unity Charter, opened for signature May 25, 1963, 479 U.N.T.S. 39 (entered into force Sept. 13, 1963) [hereinafter OAU Charter].

104. See Charles Thomas, Uganda–Tanzania War, Oxford Rsch. Encycs. (Jan. 28, 2022), https://oxfordre.com/africanhistory/display/10.1093/acrefore/9780190277734.001.0001/acrefore-9780190277734-e-1040 (on file with the *Columbia Law Review*) (detailing the war between Uganda and Tanzania); see also South Sudan–Uganda Relations, Accord (Dec. 23, 2015), https://www.accord.org.za/conflict-trends/south-sudan-uganda-relations/ [https://perma.cc/F978-YWSK] (outlining the historical relationship between South Sudan and Uganda, born of the former's refugee crisis).

105. Ilhem Rachidi, Morocco and Algeria: A Long Rivalry, Carnegie Endowment for Int'l Peace (May 3, 2022), https://carnegieendowment.org/sada/87055 [https://perma.cc/2HQL-8XUP].

106. Carey Winfrey, After Liberia's Costly Rioting, Great Soul-Searching, N.Y. Times, May 30, 1979, at A2, https://www.nytimes.com/1979/05/30/archives/after-liberias-costly-

in South Africa and the subjugation of people to European racism and exploitation in the yet-to-be-independent African states, was inescapable.[107] The Law of Lagos, from the African Conference on the Rule of Law in 1961, declared that "fundamental human rights . . . should be written and entrenched in the Constitutions of all [African] countries."[108] The Conference on African Legal Process and the Individual in 1971 equally contemplated the ways in which law could be used as a tool for safeguarding human rights in both intrastate and international fora in Africa.[109]

Externally, "[H]aving outlived their purpose as proxies during the Cold War era, [African states] came under fresh scrutiny, with the protection of human rights increasingly being mandated as a pre-condition for the granting of Western development aid."[110] The Vienna Declaration and Programme of Action (Vienna Declaration), from the World Conference on Human Rights in Vienna in 1993, called on the world "to promote and protect all human rights and fundamental freedoms."[111] It also emphasized the need for regional and subregional human rights protection mechanisms.[112] Despite the universality of human rights principles, the Vienna Declaration recognized that "national and regional particularities and various historical, cultural and religious backgrounds" matter.[113] The IMF also adopted the language of human rights in its approach to the poor countries of the world: "If one looks below the surface, all of the IMF's activities contribute directly or indirectly to . . . fostering human rights."[114] In the new international order, acquiescence to human rights principles was the way for the emerging

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rioting-great-soulsearching-personally.html (on file with the *Columbia Law Review*) (discussing the deadly protest in Liberia).

107. The apartheid regime in South Africa became effective in 1948 and it was not abolished until 1994. See AUHRM Project Focus Area: The Apartheid, Afr. Union, https://au.int/en/auhrm-project-focus-area-apartheid [https://perma.cc/3EFY-T398] (last visited Oct. 27, 2023). Regarding independence, a substantial number of African countries remained colonized well into the 1970s. See Alistair Boddy-Evans, African Countries' Independence Dates, ThoughtCo. (Jan. 25, 2020), https://www.thoughtco.com/chronological-list-of-african-independence-4070467 [https://perma.cc/6EFY-JJET] (last updated July 17, 2024) (listing African states, their independence dates, and former colonizers).

108. See Int'l Comm'n of Jurists, African Conference on the Rule of Law: A Report on the Proceedings of the Conference 9 (1961), https://icj2.wpenginepowered.com/wp-content/uploads/1961/06/Africa-African-Conference-Rule-of-Law-conference-report-1961-eng.pdf [https://perma.cc/B6H5-J8N4].

109. U.N. Econ. Comm'n for Africa, Report of the Conference of African Jurists on African Legal Process and the Individual, ¶ 5, U.N. Doc. E/CN.14/521 (July 5, 1971).

110. See Bekker, supra note 57, at 159.

111. See World Conference on Human Rights, Vienna Declaration and Programme of Action, ¶ 5, U.N. Doc. A/CONF.157/23 (June 25, 1993).

112. Id. ¶ 37.

113. Id. ¶ 5.

114. Sérgio Pereira Leite, Human Rights and the IMF, Fin. & Dev., Dec. 2001, at 45, 46.

African states to have standing in the community of states, even if they lacked the means to effectively carry out those ideals.

The question of *how* African states would utilize legal structures to protect the people on the continent did not have an easy answer. Before the first judges of the Court sat for duty in 2006, there preceded decades-long debates about rights adjudication on the continent.[115] Article 19 of the OAU Charter established the CMCA, an organ that was tasked with resolving disputes between African states.[116] The CMCA was not a court.[117] African states were wary of litigation. "Traditional African dispute settlement places a premium on improving relations between the parties on the basis of equity, good conscience, and fair play, rather than on strict legality."[118] The significant difference between the CMCA and the African Commission is that, whereas the CMCA had jurisdiction over "disputes between States only,"[119] the African Commission can oversee both disputes arising between states and human rights violations intrastate.[120]

But whether between states or people, "The African system 'is one of forgiveness, conciliation and open truth, not legal friction or technicality.'"[121] The establishment of the African Court—its broad jurisdiction, procedure, and the binding nature of its judgment—was a departure from the traditional notions of rights and dispute resolutions in Africa. The zero-sum nature of litigation abrogated the traditional practices of consensus building and amicable dispute resolution for the adversarial procedures common to the legal systems of the West.[122]

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115. See Scott Lyons, The African Court on Human and Peoples' Rights, Am. Soc'y of Int'l L. (Sept. 19, 2006), https://www.asil.org/insights/volume/10/issue/24/african-court-human-and-peoples-rights [https://perma.cc/7Q4U-YUB4] (discussing the inauspicious beginnings of the processes that led to the creation of the African Court); Why the African Court Should Matter to You, Amnesty Int'l, https://www.amnesty.org/en/latest/campaigns/2023/06/why-the-african-court-should-matter-to-you/ [https://perma.cc/FFE4-5JGE] (providing a general summary on the African Court—its history, composition, and function); infra text accompanying notes 130–134.

116. See OAU Charter, supra note 103, art. 19 ("Member States pledge to settle all disputes among themselves by peaceful means and, to this end decide to establish a Commission of Mediation, Conciliation and Arbitration . . . .").

117. See CMCA, supra note 63, art. XII–XXXI (outlining the responsibilities of the CMCA, which involved the investigation and mediation of disputes amongst Member States).

118. Nsongurua J. Udombana, An African Human Rights Court and an African Union Court: A Needful Duality or Needless Duplication? 28 Brook. J. Int'l L. 811, 818 (2003) [hereinafter Udombana, A Needful Duality].

119. See CMCA, supra note 63, art. XII.

120. See Banjul Charter, supra note 4, art. 45–47 (detailing the mandate of the African Commission and the kinds of complaints that can be brought before it).

121. See Udombana, A Needful Duality, supra note 118, at 818 (citing A. L. Ciroma, Time for Soul-Searching, Daily Times (Nigeria) (Aug. 23, 1979)).

122. See Udombana, Toward the African Court, supra note 60, at 74 ("[African states'] tendency had been to shy away from litigation, preferring forms of dispute settlement considered more 'African.'").

The creation of the African Court also placed the AU, which was already struggling to maintain the Commission, in an even greater financial bind. The AU "inherited an empty treasury from the OAU."[123] "[D]ue to financial problems . . . several projects of the Commission had to be suspended."[124] The UN, European Community, and governments of Scandinavian countries, like Sweden and Denmark, have been the funders of many of the Commission's projects.[125] The Commission has also depended on the generosity of private organizations and nongovernmental international institutions to function.[126]

In the first ten years of its existence, the AU did not have a headquarters of its own. China funded its two-hundred-million-dollar headquarters in Ethiopia in 2012.[127] To date, the AU is substantially dependent on foreign donations to meet its budgetary needs. In 2017, African states managed to contribute only 27% of AU's annual budget.[128] The rest of the budget was provided by donors.[129]

In light of these material and structural challenges, many observers of the African human rights system expressed concerns about the need to create the African Court.[130] Why create the African Court when the African Commission was barely operational? The former Commissioner, Moleleki D. Mokama, lamented: "I am personally not eager on starting a court at this stage. I would rather get the Commission to be more aggressive and establish itself first before we move into the court . . . ."[131] Scholars expressed similar apprehensions: Udombana maintained in 2004 that "no

123. Udombana, A Needful Duality, supra note 118, at 862 ("The AU, for example, has inherited an empty treasury from the OAU and its finances are predictably dry.").

124. Rep. of the Afr. Comm'n H.P.R., ¶ 32, AHG/Res 250(XXXII) (1996) [hereinafter 1996 Report].

125. See Rep. of the Afr. Comm'n H.P.R., ¶ 18, AHG/Res. 207(XXVIII) (1992) (listing African Commission's external sources of funding).

126. See 1996 Report, supra note 124, ¶ 33 ("The Raoul Wallenberg Institute continued to finance the promotional activities of the Commission, including missions undertaken by Commissioners and the publishing of the Commission's Review.").

127. African Union Opens Chinese-Funded HQ in Ethiopia, BBC News (Jan. 28, 2012), https://www.bbc.com/news/world-africa-16770932 [https://perma.cc/ADH7-NGUM].

128. Kesa Pharatlhatlhe & Jan Vanheukelom, ECDPM, Financing the African Union on Mindsets and Money 3 (2019), https://ecdpm.org/application/files/7216/6074/7083/DP240-Financing-the-African-Union-on-mindsets-and-money.pdf [https://perma.cc/7QCT-FXTC].

129. Id. In 2021, the AU member states' contributions to the AU's budget were only marginally better from 2017: 32%. See PSC Rep., AU Financial Independence: Still a Long Way to Go (Mar. 24, 2021), https://issafrica.org/pscreport/psc-insights/au-financial-independence-still-a-long-way-to-go [https://perma.cc/2WG9-7BEQ].

130. See Udombana, Toward the African Court, supra note 60, at 75 ("Human rights groups and NGOs were also divided on the timing and desirability of a human rights court under the Charter.").

131. See id. at 75 (citing Interview with Hon. Justice Mokama, Gambia (Apr. 9, 1993)).

new international court should be created without first ascertaining if the existing institutions could better perform their duties."[132]

Despite these warnings, the African Court was established.

II. WHY EXPANDING THE AFRICAN COURT'S JURISDICTION IS A BAD IDEA

This Part details the adverse consequences of the African Court's jurisdictional expansion and exposes the shortcomings of its justifications. Section II.A explains the ways in which the neoliberal theory of the free market was used to frustrate the sovereignties of African states. Section II.B discusses the way in which the African Court's jurisdictional expansion deviates from the normative goals that it was created to meet. Section II.C examines the opportunity structure theory as a basis for justifying the African Court's jurisdictional expansion and highlights its shortcomings. Section II.D focuses on a common oversight of the neoliberals and the opportunity structure theorists, paying special attention to horizontal violations of human rights in Africa.

A. *Neoliberalism and Its Restraint of African States*

The Protocol on the African Court came into force in 2004.[133] Fifteen years prior, the Berlin Wall was hammered down,[134] following which scholar Francis Fukuyama declared the "end of history,"[135] and the Washington Consensus formulated the laissez-faire economic policies that the World Bank and IMF administered in poor countries around the world.[136] That was the end of the Cold War—the triumph of liberal democracy, a system of governance "based on the doctrines of separation of powers and free market economy."[137] The result was the suppression of

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132. See Udombana, A Needful Duality, supra note 118, at 817.

133. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Afr. Union, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and [https://perma.cc/6EHN-Q78Y] (last visited Aug. 28, 2024) (showing that the Protocol on the African Court came into force on January 25, 2004).

134. See What Was the Berlin Wall and How Did It Fall?, IWM, https://www.iwm.org.uk/history/what-was-the-berlin-wall-and-how-did-it-fall [https://perma.cc/RZ48-WFHA] (last visited Dec. 28, 2023) (showing that the Berlin Wall fell on Nov. 9, 1989).

135. See Francis Fukuyama, The End of History?, Nat'l Int., Summer 1989, at 3, 4 ("[W]e may be witnessing . . . the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.").

136. See Belinda Archibong, Brahima Sangafowa Coulibaly & Ngozi Okonjo-Iweala, How Have the Washington Consensus Reforms Affected Economic Performance in Sub-Saharan Africa?, Brookings (Feb. 19, 2021), https://www.brookings.edu/articles/how-have-the-washington-consensus-reforms-affected-economic-performance-in-sub-saharan-africa/ [https://perma.cc/ECU9-ZX4S].

137. See Ezetah, supra note 101, 498–99.

"state" for the promotion of the market as the primary facilitator of human interactions.[138] In the words of Professor Ludwig von Mises, "[F]or the liberal, the world does not end at the borders of the state. . . . [W]hatever significance national boundaries have is only incidental and subordinate."[139] The absence of the state, however, did not mean the absence of law. Central to the neoliberal project was the melding of the "invisible hand" of the market with the "visible hand" of the law.[140]

In Africa, the language of economic development and the rule of law became inseparable.[141] But African states were constrained in their capacities to shape their national laws; their conceptions of national laws inherently conflicted with libertarian universalism.[142] In 2001, the IMF argued that "[m]aking globalization work in Africa is one of the most urgent tasks facing the region's policymakers."[143] This belief became a policy imperative for the IMF.[144] In a recent report, ActionAid revealed that the IMF and the World Bank called for strong privatization of public resources in Africa; they coerced African states to actively stifle their public sectors through salary freezes, layoffs, and other austerity-based measures within their borders.[145] Humanitarian organizations, like the UN, played their roles in calling for the adoption of these measures in Africa.[146] An important proposal in the Vienna Declaration was for the least developed

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138. See Slobodian, supra note 16, at 1 (arguing that the triumph of the free market ideology relegated politics to the "passive tense" and promoted the "global economy" as the primary actor).

139. See Ludwig von Mises, Liberalism: In the Classical Tradition 148 (Ralph Raico trans., Found. for Econ. Educ. 1985) (1927).

140. See Slobodian, supra note 16, at 7 ("The common starting point of the neoliberal economic theory is the insight that in any well-functioning market economy the 'invisible hand' of market competition must by necessity be complemented by the 'visible hand' of the law." (internal quotation marks omitted) (quoting E.U. Petersmann, International Economic Theory and International Economic Law: On the Tasks of a Legal Theory of International Economic Order, *in* The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory (R. St. J. Macdonald & Douglas M. Johnston eds., 1984))).

141. See Joseph M. Isanga, Rule of Law and African Development, 42 N.C. J. Int'l L. 729, 731 (2017) ("Africa's economic growth needs to be premised on the intrinsic and inseparable relationship and synergy between rule of law and sustainable economic growth . . . .").

142. See von Mises, supra note 139 and accompanying text.

143. G.E. Gondwe, Making Globalization Work in Africa, Fin. & Dev., Dec. 2001, at 31, 31.

144. Id.

145. See ActionAid, Fifty Years of Failure: The International Monetary Fund, Debt and Austerity in Africa 13 (2023) ("80[%] of countries were advised to cut or freeze the percentage of GDP spent on wage bills even though most started from a very low base . . . .").

146. See Frank Louis Kwaku Ohemeng, Getting the State Right: Think Tanks and the Dissemination of New Public Management Ideas in Ghana, 43 J. Mod. Afr. Stud. 443, 443–44 (2008) (stating that the United Nations and other international organizations served as the "main vehicles" for implementing the "[New Public Management] gospel" in the world).

countries, a great number of which were in Africa, to commit to "economic reforms."[147]

Professor Frank Louis Kwaku Ohemeng has detailed the ways in which neoliberal think tanks proliferated and influenced Ghana's national policies in the 1990s.[148] Much has been written about the ways in which NGOs increasingly undermined the sovereignties of African states following the Cold War.[149] A common objective of these endeavors was the "denationalization" of constitutional laws in Africa.[150] Professor Joseph M. Isanga's assertion that Africa's underdevelopment was a result of its lack of rule of law, was predicated on the notion that African states were not restrained enough.[151] In that vein, Economist Nick Curott maintained that the rule of law "provid[es] the framework for protecting private property and individual freedom, creates the stability and predictability in economic affairs necessary to promote entrepreneurship, saving and investment, and capital formation."[152] African states' primary function in this paradigm was to facilitate their constituents' participation in the global market.

The neoliberal proposal of availing newly independent African states to the global market, despite their lack of comparative infrastructures to their ex-colonizers, was a recipe for disaster. As understood by Fred L. Block, "a world order in which the flow of goods and capital is determined largely by market forces will maximize the advantages for the countr[ies] with the highest level of technical development and with the most enterprising and strongest firms."[153] African states, emerging from colonialism and severely lacking in industrial infrastructure, could only be

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147. See World Conference on Human Rights, supra note 111, ¶ 9 ("The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.").

148. See Ohemeng, supra note 146, at 454–61 (examining the ways in which think tanks influenced Ghana's developing policies).

149. See, e.g., Joseph Hanlon, Mozambique: Who Calls the Shots 1 (1991) (demonstrating the ways in which Mozambique was "recolonized" through foreign aids, multinational and nongovernmental organizations following its independence in 1975); Julie Hearn, African NGOs: The New Compradors? 38 Dev. & Change 987, 1095 (2007) (stating many African states "are experiencing levels of Northern intervention not seen since colonialism").

150. See Charles Manga Fombad, Internationalization of Constitutional Law and Constitutionalism in Africa, 60 Am. J. Compar. L. 439, 439–40 (2012) (arguing for globalization because common problems "require common solutions").

151. See Isanga, supra note 141, at 734 ("Law can only function as a tool of development if it . . . 'impos[es] meaningful restraints on government actors . . . .'" (quoting R.P. Peerenboom, China's Long March Toward Rule of Law 128 (2002))).

152. See N.A. Curott, Foreign Aid, the Rule of Law, and Economic Development in Africa, 11 U. Bots. L.J. 3, 14 (2010).

153. Fred L. Block, The Origins of International Economic Disorder: A Study of United States International Monetary Policy from World War II to the Present 3 (1977).

exploited by the old empires in such a system. This was President Keita's concern, and one of the reasons for his attempt—along with President Touré and President N'Krumah—to create the Ghana-Guinea-Mali Union right after the independence of their respective countries.[154]

In a 2016 publication, *Neoliberalism: Oversold?*, the basis of this fear came to light.[155] The IMF came out against its own laissez-faire policies, which the likes of Isanga had promoted as the cure to Africa's sufferings. It concluded that, rather than promoting development, "both openness and austerity are associated with increasing income inequality," which "sets up an adverse feedback loop."[156] The solution? It suggested that "*policymakers should be more open to redistribution*."[157] The tangible values of this critical self-assessment by the IMF are not likely to be felt immediately in Africa. That is because, whereas this publication calls for a greater assertion of states in determining the welfare of those within their borders, the formative literature of the African human rights system called for the minimization of states, internationalization of national law, on the grounds that "common problems" require "universal solutions."[158]

As such, African states' membership to the plethora of international treaties limits their ability to draft legislations tailored to their countries' needs. Political theorist Jon Elster has termed the problem *downstream constraints*: external considerations that impede the ratification of a new law.[159] In Adem Kassie Abebe's simple logic, the more international treaties a country ratifies, the more the country limits its "constitution-making power."[160] The constraint has been a thorny problem for African states. In fact, *Tanganyika Law Society v. Tanzania*, the first case that the

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154. Following their independence, Ghana, Guinea, and Mali began to combine their resources in order to build an economic bloc, the like of the European Community, in West Africa. See O.O. Olubomehin, The Ghana–Guinea–Mali Union (1958–1964): An Experiment in Regional Cooperation, 8 Afr. J. Int'l Aff. & Dev., no. 1, 2003, at 7, 9 ("[T]he formation of the Ghana–Guinea–Mali Union was motivated by the external influence of the European Economic Community (ECC) established in 1957, and the United Nations agencies such as Economic Commission for Africa (E.C.A) founded in 1958."); see also Munya, supra note 83, at 541 (highlighting the general understanding amongst African states that they needed to have regional cooperation for the "prosperity of the continent").

155. Jonathan D. Ostry, Prakash Loungani & Davide Furceri, Neoliberalism: Oversold?, Fin. & Dev., June 2016, at 38.

156. Id. at 40.

157. Id. at 41 (emphasis added).

158. See Fombad, supra note 150, at 440 ("The progressive internationalization of constitutional law appears to be an attempt to adopt universal solutions to some of the common problems we face today.").

159. See Jon Elster, Forces and Mechanisms in the Constitution-Making Process, 45 Duke L.J. 364, 373 (1995) ("Downstream constraints are created by the need for ratification of the document the assembly produces.").

160. See Adem Kassie Abebe, Taming Regressive Constitutional Amendments: The African Court as a Continental (Super) Constitutional Court, 17 Int'l J. Const. L. 89, 94 (2019) ("[I]nternational treaties that a relevant country has ratified theoretically provide certain substantive limits on the constitution-making power.").

Court decided on its merits, was about the conflict between Tanzania's Constitution, the Banjul Charter, and the ICCPR.[161]

B. *The Structural and Normative Concerns Around the African Court's Jurisdictional Expansion*

The Court's material jurisdiction is broader than those of its counterparts in Europe and in the Americas. Unlike the ECtHR and the Inter-American Court of Human Rights (IACHR),[162] the African Court's jurisdiction extends to "*any . . . relevant Human Rights instrument ratified by the States concerned.*"[163] Equally concerning, the Court has been borrowing its jurisprudence from abroad.[164] An empirical study conducted by Martin Lolle Christensen revealed that 69% of the Court's judgments on the merits between 2013 and 2020 referenced external sources.[165] In many cases, the African Court has made no distinction between foreign sources of law and relevant African human rights instruments. In *Abubakari v. Tanzania*, for example, the African Court relied on the ECtHR's and IACHR's precedents[166] to affirm the right to a fair trial for the plaintiff.[167]

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161. See No. 009/2011 and 011/2011, Judgment, Afr. Ct. H.P.R., ¶ 76 (June 14, 2013), https://afchpr-commentary.uwazi.io/en/document/gt0cgvz5hveu3di [https://perma.cc/37TX-B6QQ] ("Declare that the Respondent is in violation of Articles 2 and 13(1) of the African Charter on Human and Peoples' Rights and Articles 3 and 25 of the ICCPR (International Covenant on Civil and Political Rights) . . . .").

162. The jurisdictions of the IACHR and ECtHR only extend to the interpretation of their respective conventions. See Organization of American States, American Convention on Human Rights art. 62, ¶ 3, Nov. 22, 1969, 1144 U.N.T.S. 123 ("The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention . . . ."); European Convention on Human Rights art. 32, ¶ 1, Nov. 4, 1950, C.E.T.S. No. 5 ("The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols . . . .").

163. Protocol on the African Court, supra note 7, art. 3, ¶ 1 (emphasis added).

164. See Martin Lolle Christensen, In Someone Else's Words: Judicial Borrowing and the Semantic Authority of the African Court of Human and Peoples' Rights, 36 Leiden J. Int'l L. 1049, 1050 & tbl.1 (2023) [hereinafter Christensen, In Someone Else's Words] (discussing the ways in which the Court is building its jurisprudence on ECtHR's and IACHR's precedents).

165. Id. at 1058. In a data set of 206 external references, 133 referred to ECtHR precedents, 49 to IACHR precedents, 16 to ICJ precedents, and 7 to ICC precedents. Id.

166. See No. 007/2013, Judgment, Afr. Ct. H.P.R., ¶ 158 & n.20 (June 3, 2016), https://caselaw.ihrda.org/en/entity/lkp2rcmhynovs9osa89z4cxr?file=16137364800711ahvtshzoqj.pdf&page=2 (on file with the *Columbia Law Review*) (citing Pélissier v. Fr., App. No. 25444/94, ¶ 52 (Mar. 25, 1999), https://hudoc.echr.coe.int/eng?i=001-58226 (on file with the *Columbia Law Review*)); Balta v. Turk., App. No. 48628/12, ¶ 37 (June 23, 2015), https://hudoc.echr.coe.int/eng?i=001-155375 (on file with the *Columbia Law Review*); Neptune v. Haiti, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 102–109 (May 6, 2008).

167. No. 007/2013, Afr. Ct. H.P.R., ¶ 158; id. ¶ 193 & n.24 (citing B.V. v. Neth., App. No. 14448/88, ¶ 33 (Oct. 27, 1993), https://hudoc.echr.coe.int/eng?i=001-57850 (on file with the *Columbia Law Review*) (holding that the judge violated the principle of equality of arms between the parties by relying only on evidence adduced by the prosecution)).

In *Konaté v. Burkina Faso*, the Court cited to the European Convention on the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the Optional Protocol to the ICCPR to affirm the principle of subsidiarity,[168] even though that principle is in the Banjul Charter.[169] These instances of judicial borrowing are not always innocuous. Christensen notes that the Court summarily adopted the principle of *non bis in idem* ("double jeopardy") from the ICCPR to make its ruling in *Ajavon*, one of the cases that led to Benin's withdrawal of its Optional Declaration.[170]

By relying on external sources of law to determine cases brought before it, the Court undermines the established legal apparatus it was created to uphold, similar to Europe's subversion of African traditional laws in the pre-independence era.[171] The Court was created to do the exact opposite.[172] Additionally, in borrowing from more established courts, rather than developing its own jurisprudence, the Court fails to appreciate its own limitations and those of African states relative to those of other international courts and states. Professors Eric Posner and John C. Yoo have noted that "the European courts are more like domestic courts than international courts."[173] The ECtHR, unlike the African Court, has a greater influence on its member states[174] because those states "share a legislative body, a bureaucracy, and a decades-long commitment to political unity."[175] Those countries also enjoy a greater level of affluence and autonomy than the African states.[176]

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168. No. 004/2013, Judgment, Afr. Ct. H.P.R., ¶ 78 & n.5 (Dec. 5, 2014), https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf [https://perma.cc/WU8T-JF44].

169. See Banjul Charter, supra note 4, art. 56, ¶ 5.

170. See Christensen, In Someone Else's Words, supra note 164, at 1067 ("[T]he African Court borrows from the ECtHR's understanding of *non bis in idem* in *Grande Stevens and Others v. Italy* . . . .").

171. See supra section I.C.

172. See Charter on the Welfare of the Child, supra note 45, pmbl. 7, art. 11, ¶ 2(c) (discussing the significance of African values in interpreting and implementing the protocol); Banjul Charter, supra note 4, art. 29, ¶ 7, art. 61 (discussing the individual's duty to "strengthen positive African cultural values" as the Charter protects the individual's rights).

173. See Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 Calif. L. Rev. 1, 55 (2005).

174. See Shai Dothan, The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights, 42 Fordham Int'l L.J. 765, 770 (2019) ("The ECHR easily ranks as one of the most influential international courts in history.").

175. See Posner & Yoo, supra note 173, at 66.

176. See supra section I.C.

The significance of these differences is evident in the ECtHR's access to material support and its success relative to the African Court.[177] The ECtHR's budget for 2023 was €76,816,700.[178] The African Court's operating budget in 2022 was $11,911,668, 11% of which came from "[i]nternational [p]artners."[179] In 2017, the EU wrote a €1.8 million grant to support human rights institutions in Africa.[180] In 2018, the ECtHR issued 2,738 judgments on the merits.[181] In the six years between 2013 and 2019, the African Court managed to issue only thirty such judgments.[182] Although some scholars have attributed the African Court's low turnout of decisions to the difficulty of accessing the Court,[183] a more likely reason is that the Court is ineffective.[184] Since 2006, the Court has managed to resolve only 59% of the cases that have been brought under its contentious jurisdiction (198 out of 338 cases).[185] Greater access to the Court, therefore, is not likely to lead to a greater turn out of decisions—if anything, it might bring the Court to a grinding halt. Despite these warnings, the Court does not seem to have any plan to deviate from its current mode of operation anytime soon.[186]

C. *Opportunity Structure Theory: Practical?*

The expansion of the Court's jurisdiction, despite its corollary diminishing effects on the Court's reputation and effectiveness, has been

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177. See Dothan, supra note 174, at 770 (stating that ECtHR's success influenced the creation of the Court).

178. Eur. Ct. H.R., ECHR Budget, https://www.echr.coe.int/documents/d/echr/Budget_ENG# [https://perma.cc/9FU9-D8JB] (last visited Nov. 9, 2023).

179. 2022 Report, supra note 10, ¶ 38.

180. See EU Provides Support to Strengthen the African Human Rights System, European Union External Actions (Jan. 11, 2017), https://www.eeas.europa.eu/node/18459_en [https://perma.cc/5B2M-WG6J] (last visited Sept. 7, 2024) ("[I]n the wake of the 12th AU-EU Human Rights Dialogue, the EU signed a €1.8 million grant contract with the Pan-African Parliament (PAP).").

181. James L. Cavallaro & Jamie O'Connell, When Prosecution Is Not Enough: How the International Criminal Court Can Prevent Atrocity and Advance Accountability by Emulating Regional Human Rights Institutions, 45 Yale J. Int'l L. 1, 31 (2020) (providing details on ECtHR's budget, docket, and accomplishments relative to IACHR and the African Court).

182. Id.

183. See, e.g., Christensen, In Someone Else's Words, supra note 164, at 1058 ("[F]ew cases have been brought before the African Court due to problems of access and the lack of state parties signing up to the Court.").

184. But cf. Gathii & Mwangi, supra note 18, at 216 (arguing that the African Court has a "permissive interpretation of the requirement to exhaust local remedies").

185. See About Us, African Ct. on Hum. & People's Rts., https://www.african-court.org/wpafc/ [https://perma.cc/649Y-GTCL].

186. Strategic Plan 2021–2025, ¶ 16, Afr. Ct. on Hum. & People's Rights (2021), https://www.african-court.org/wpafc/wp-content/uploads/2021/06/ACtHPR-Strategic-Plan-2021-2025-Deepening-Trust-in-The-African-Court.pdf [https://perma.cc/NY83-S48G] [hereinafter 2021–2025 Strategic Plan] ("Here, the court will build on such mechanisms like . . . the European and Inter-American Human Rights Courts.").

celebrated by some scholars. James Thuo Gathii and Jacquelene Wangui Mwangi have praised the African Court (and other subregional courts) for being a legal opportunity structure in which individuals and groups can use "litigation as an additional point of leverage vis-à-vis their government."[187] But like the sub-regional courts on the Continent, the Court does not have jurisdiction over political questions, especially those arising under domestic elections.[188] Nevertheless, as Olabisi D. Akinkugbe notes, there has been a "growing mobilization of the African Court by opposition politicians as an alternative forum for engaging in political warfare against repressive national governments and for mobilizing social movements."[189]

Proponents of the Court's disregard for institutional neutrality in political matters justify their stance on the grounds that the Court contributes to the democratization process of the defendant states brought before it.[190] Undergirding this position is an attempt to challenge the result-oriented approach—measuring the Court's success based on African states' compliance to its decisions—that Western observers use to criticize the Court.[191] To Gathii and Mwangi, the alternative to the result-oriented approach is to consider the role of the Court in the greater pro-democratic movement against dictatorial leaders in Africa.[192] They argue that the recent "withdrawals very well indicate that the African Court is a victim of its success."[193] In that vein, Tom Ginsburg states that African human rights courts are "playing a role in continental justice simply by staying open."[194]

This Note maintains, on the contrary, that the recent withdrawals are evidence that the African Court might not be open much longer if it continues to overstep its jurisdiction. Furthermore, whatever truth Ginsburg's summary contains, it does not seem to resonate with the people who go before the African Court to safeguard their rights. According to

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187. Gathii & Mwangi, supra note 18, at 213.

188. See Akinkugbe, supra note 18, at 285 ("Like its sister subregional courts, the African Court does not have jurisdiction to review election disputes arising out of political processes in its member states.").

189. Id. at 286.

190. See Gathii & Mwangi, supra note 18, at 233 ("These three cases [were] brought by opposition politicians or civil society groups involved in democratization processes in the respective countries."); see also Akinkugbe, supra note 18, at 285 ("The openness of Africa's regional and subregional courts to these sorts of disputes enhances the wider sociopolitical opportunities of pro-democracy activists and civil society.").

191. See Akinkugbe, supra note 18, at 281–87 (describing the circumstances that justify judging the African regional and subregional courts by alternative metrics).

192. Gathii & Mwangi, supra note 18, 233.

193. See id. at 222.

194. Tom Ginsburg, The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change, at xxv, xxviii, 115 Am. J. Int'l L. 777, 780 (2021) (reviewing James Thuo Gathii, The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change (2021)).

the African Court Coalition, one of the civil service organizations that lobbied for the creation of the African Court,[195] "implementation of the Court's judgments is the central measure of its efficacy."[196] NGOs and other litigants want a functioning African Court; they want its judgments to translate into tangible results. Following the African Court's decision in *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes v. Mali*,[197] for example, the Institute for Human Rights and Development in Africa (IHRDA) organized public dialogues in Mali to ensure that the country had a plan to amend its family code.[198] For NGOs like the IHRDA, there are important interests in the African Court maintaining a functional relationship with African states—for, absent this relationship, they lose an essential avenue to voice their grievances and receive remedies for them.

The opportunity structure theory equally contributes to the Court's inefficacy by encouraging people to add frivolous cases to the Court's already backlogged docket. For proponents of opportunity structure theory, winning is usually not the objective of litigation; the goal is to "encourage other litigants to sue."[199] Thus, in *Falana v. African Union*,[200] a Nigerian lawyer sued the AU for permitting African states to be signatories to the Optional Declaration before they could be directly sued by

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195. See Background & Structure, Afr. Ct. Coal., https://www.africancourtcoalition.org/background-structure/ [https://perma.cc/M8DC-UJM5] (last visited Nov. 9, 2023) ("[T]he Coalition . . . advocate[s] for an effective and independent African Court on Human and Peoples' Rights in order to provide redress to victims of human rights violations and strengthen the human rights protection system in Africa.").

196. African Ct. Coal., Booklet on the Implementation of Decisions of the African Court on Human and Peoples' Rights 4 (2d ed. 2021), https://www.africancourtcoalition.org/files/2023/08/ACC-Implementation-Booklet_ENG2021.pdf [https://perma.cc/22SM-3HDC]; Christof Heyns, The African Regional Human Rights System: In Need of Reform?, 2 Afr. Hum. Rts. L.J. 155, 156 (2001) ("The ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people.").

197. No. 046/2016, Judgment, Afr. Ct. H.P.R. (May 11, 2018), https://caselaw.ihrda.org/entity/xzvp9hhehgwjvtq5523ayvi?file=15308823259293nkxicwu89kjjm59eurpory66r.pdf [https://perma.cc/E4US-HNPL].

198. See Bessem Ayuk, Fostering Implementation of Decisions of African Regional Human Rights Mechanisms: IHRDA Organises Public Dialogue on Implementation of African Court's Decision on Mali Family Code Case, IHDRA (Mar. 2, 2023), https://www.ihrda.org/2023/03/fostering-implementation-of-decisions-of-african-regional-human-rights-mechanisms-ihrda-organises-public-dialogue-on-implementation-of-african-courts-decision-on-mali-family-code-case/ [https://perma.cc/ZF4T-T8DK].

199. See Gathii & Mwangi, supra note 18, at 31 ("[B]oth victories and losses in African international courts encourage other litigants to sue.").

200. No. 001/2011, Judgment, Afr. Ct. H.P.R. (June 26, 2012), https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20001-2011-%20Femi%20Falana%20v.%20The%20AU.%20Application%20no.%20001.2011.EN.pdf [https://perma.cc/E9MF-DGWD].

individuals and NGOs in the Court.[201] The Court rightly dismissed the case.[202] But this case is not the only one of its kind that has come before the Court.[203] Fifty-five percent of the complaints in the Court's first five years were without "any legal basis."[204] Worse, due to the Court's limited resources, this litigation tactic is likely to impede the Court from resolving matters that do have merit in a timely manner.[205] In the thirty-three judgments that the Court issued between 2022 and 2023, only three were decided within two years.[206] The rest were decided between three and seven years.[207] Indeed, even if the opportunity structure theory worked the way its proponents propose it does, is three to seven years a reasonable time to resolve human rights problems?

Furthermore, it is unclear whether bypassing domestic political and legal institutions for the Court's judgments is an effective tool for resolving human rights violations. Currently, twenty-two out of the fifty-five countries in Africa have not ratified the Protocol on the Court.[208] It is hard to imagine how more African states will be incentivized to ratify the Protocol on the African Court (and especially the Optional Declaration)

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201. Id. ¶¶ 24–40.

202. See id. ¶ 75.

203. In *Atemnkeng v. African Union*, the plaintiff, like the one in *Falana*, sought for the African Court to nullify Article 34, paragraph 6 of the Protocol on the African Court. See No. 014/2011, Judgment, Afr. Ct. H.P.R., ¶ 1 (Mar. 18, 2013), https://caselaw.ihrda.org/entity/5gt4cf8r1gp3lkd0r6e4jkyb9?file=1613737530106ghq3w1tae4.pdf&page=1 [https://perma.cc/YH4B-K9YU] (stating that the issue at hand was legitimacy of the Article 34(6) of the Protocol on the African Court).

204. Frans Viljoen, Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights, 67 Int'l & Compar. L.Q. 63, 68 (2018) [hereinafter Viljoen, Understanding and Overcoming] ("[N]o fewer than 55[%] of the cases submitted in the first five years have been submitted manifestly without any legal basis.").

205. Of the eleven judges on the African Court, only one—the President—holds her office on a full-time basis. The rest of the judges work on a part-time basis. Welcome to the African Court, Afr. Ct. H.P.R., https://www.african-court.org/wpafc/welcome-to-the-african-court/ [https://perma.cc/2QLA-VQ2J] (last visited Aug. 10, 2024).

206. See ACtHPR Cases, African Ct., https://www.african-court.org/cpmt/decisions [https://perma.cc/6QFQ-DACB] (last visited Dec. 31, 2023) (listing the cases that were brought before the African Court between 2022 and 2023 and the African Court's rulings on those cases).

207. Id.

208. List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of the Union (Feb. 14, 2023) https://au.int/sites/default/files/treaties/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS_0.pdf [https://perma.cc/5tgb-r78c].

considering the Court's propensity to overstep its already expansive jurisdiction.[209]

In practice, the opportunity structure theory is likely to be ineffective. Even when litigants are able to receive favorable judgments from the Court, the remedy they seek remains in the hands of their governments.[210] Professor Frans Viljoen and Lirette Louw have noted that "the most important factors predictive of compliance are political, rather than legal."[211] In bypassing the domestic political and legal processes, however flawed they may be, plaintiffs risk wasting their time, energy, and resources by approaching the African Court.

D. *A Common Oversight of Neoliberalism and Opportunity Structure Theory in the Context of the African Human Rights System*

A common oversight for the opportunity structure and the market-based rule of law theories of the African Court is a problem that philosopher and political economist John Stuart Mill recognized nearly two centuries ago: that suppression of liberty can be both vertical (e.g., a state's oppression of its citizens) and horizontal (e.g., citizens oppressions of other citizens).[212] A similar outlook is important for correctly assessing the African human rights question. Some of the most pressing human rights violations in Africa—slavery,[213] female genital mutilation (FGM),[214]

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209. See Yakaré-Oulé (Nani), Jansen Reventlow & Rosa Curling, The Unique Jurisdiction of the African Court on Human and Peoples' Rights: Protection of Human Rights Beyond the African Charter, 33 Emory Int'l L. Rev. 203, 208–09 (2019) (arguing that an "overly proactive" court may lose the support of Member States).

210. Moreover, the Court has a limited tool to follow-up on the implementation of its decisions. In *Ajavon,* the Court relied on "media reports" to ascertain that Benin complied with its judgment. See 2022 Report, supra note 10, annex 2, at 10.

211. 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. 427, 458 (2007).

212. See J.S. Mill, On Liberty 4 (Elizabeth Rapaport ed., 1978) (1859) ("Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against . . . the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them . . . ."). In writing *On Liberty*, Mill sought to assert the liberties of the individual against both encroaching powers of the state and society at large. See id.

213. See Jean Allain, *Hadijatou Mani Koraou v. Republic of Niger*, Judgment No. ECW/CCJ/JUD/06/08, 103 Am. J. Int'l L. 311–17 (2009) (providing context and the significance of ECOWAS's ruling in *Mani v. Niger*—an antislavery case); Peter Walker, Niger Guilty in Landmark Slavery Case, The Guardian (Oct. 27, 2008), https://www.theguardian.com/world/2008/oct/27/niger-slave-court [https://perma.cc/6VSA-N25M] ("Slavery was officially outlawed in Mauritania in 1981 but some human rights groups estimate up to 20% of the country's 3[million] people are still enslaved.").

214. See Ganiyu O. Shakirat, Muhammad A. Alshibshoubi, Eldia Delia, Anam Hamayon & Ian H. Rutkofsky, An Overview of Female Genital Mutilation in Africa: Are the Women Beneficiaries or Victims? 12 Cureus, no. 9, 2020, e10250, at 1, 2, https://pmc.ncbi.nlm.nih.gov/articles/PMC7536110/pdf/cureus-0012-00000010250.pdf

underage marriage[215]—are often part of entrenched cultural practices that African states are often repelled from correcting.[216]

In 2016, Mali was sued for setting girls' and boys' minimum age of maturity at sixteen and eighteen, respectively, in its Family Code.[217] The African Court correctly ruled that the provision in the Family Code violated Mali's international obligations under the Banjul Charter, the Maputo Protocol, the Charter on the Welfare of the Child, and CEDAW—all of which set girls' minimum age of maturity at eighteen.[218] Less known about the case, however, is that before the issue reached the African Court, Mali's National Assembly attempted to amend the Family Code in 2009.[219] The revised Family Code, among other progressive steps, set the minimum age for both genders at eighteen, abolished the death penalty, and outlawed traditional religious marriages.[220] In response, a conservative Muslim populace threatened the Assembly with violence to keep the Family Code the same.[221] The amendment did not come to fruition.

The Gambia undertook a similar step in 2015 by passing the Women's (Amendment) Act, which made FGM punishable by imprisonment and

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[https://perma.cc/UKQ2-PTHQ] (stating that "[80%] or more of the women undergoing FGM are from" six countries in Africa ("Egypt, Ethiopia, Mali, Sudan, Djibouti, and Guinea")); FGM in Africa, Equal. Now, https://equalitynow.org/fgm_in_africa/ [https://perma.cc/MNA7-H4MQ] (last visited Dec. 31, 2023) ("An estimated 55 million girls under the age of 15 in 28 African countries have experienced or are at risk of experiencing FGM . . . .").

215. See Forced and Child Marriage in Africa as a Manifestation of Gender-Based Violence and Inequality, Walk Free (May 28, 2019), https://www.walkfree.org/news/2019/forced-and-child-marriage-in-africa-as-a-manifestation-of-gender-based-violence-and-inequality/ [https://perma.cc/L5KE-GQ9L] ("In Africa, child and forced marriage are often promoted by longstanding religious and sociocultural traditions.").

216. See Shakirat et al., supra note 214, at 2 ("However, despite global and regional propositions towards the eradication of the practice via law and intervention methods, it's quite saddening to realize that the practice is deeply rooted in some cultures, thereby making its eradication difficult regardless of being tagged internationally as an infringement on human rights.").

217. See Ass'n Pour le Progrès et la Défense des Droits des Femmes v. Mali, No. 046/2016, Judgment, Afr. Ct. H.P.R. (May 11, 2018), https://caselaw.ihrda.org/entity/xzvp9hhehgwjvtq5523ayvi?file=15308823259293nkxicwu89kjjm59eurpory66r.pdf [https://perma.cc/497T-NYSZ].

218. See id. ¶ 135 (holding that Mali had violated multiple international treaties).

219. Mali: Far-Reaching Changes Proposed by Legislature in New Family Code, Libr. Cong. (Aug. 19, 2009), https://www.loc.gov/item/global-legal-monitor/2009-08-19/mali-far-reaching-changes-proposed-by-legislature-in-new-family-code/ [https://perma.cc/E65W-S7WA] ("Mali's National Assembly adopted a controversial new Family Code that introduces far-reaching changes to the existing family laws.").

220. Id.

221. Mali: Threats of Violence Greet New Family Code, Integrated Reg'l Info. Networks (Aug. 11, 2009), https://www.refworld.org/docid/4a85177cc.html [https://perma.cc/QLV3-H9QE] (last updated May 31, 2023) ("We will fight with all our resources so that this code is not promulgated or enacted." (internal quotation marks omitted) (quoting Mohamed Kimbiri, Secretary of Mali's highest-ruling Islamic Council)).

fines.[222] The Act was a reinforcement of the country's 2010 Women's Act, which sought to grant women greater protection and equality within the Gambia.[223] Remarkably, both laws were passed under the leadership of Yahya Jammeh, the country's dictator for over two decades.[224] But when President Jammeh was ousted from power in 2017,[225] there was resurgence of conservative movements against the ban on FGM.[226] The Gambia's Supreme Islamic Council issued a *Fatwa*,[227] calling for the repeal of the provisions banning FGM in the Women's (Amendment) Act.[228]

The Islamic Council urged that, because FGM is permissible in Islamic jurisprudence, it should not be banned by the state's secular law.[229] The connection between Islam and FGM is contested.[230] The Council's argument, nevertheless, gained traction in the Gambia. Assembly Member Sulayman Saho proposed the reinstatement of FGM based on "choice."[231] "Banning the act," he argued, "infringes on others' rights."[232] In 2024, a bill was introduced in the Gambia's Parliament to repeal the FGM ban in

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222. Women's (Amendment) Act, § 32A(1)–(2)(b) (Act No. 11/2015) (Gam.) (banning and criminalizing FGM).

223. See Women's Act, ¶¶ 1–3 (Act No. 12/2010) (Gam.) ("The Women's Act . . . is amended as set out in this Act.").

224. See Yahya Jammeh, Trial Int'l (July 29, 2020), https://trialinternational.org/latest-post/yahya-jammeh/ [https://perma.cc/997J-JRRB] (last updated Apr. 4, 2022) (stating that President Jammeh "ruled [the] Gambia unchallenged for 22 years").

225. See Ex-President Yahya Jammeh Leaves the Gambia After Losing Election, BBC (Jan. 22, 2017), https://www.bbc.com/news/world-africa-38706426 [https://perma.cc/NY9A-Y5LD].

226. Sarah Johnson, FGM Ban in the Gambia Under Threat as Calls Grow to Repeal Law, The Guardian (Oct. 11, 2023), https://www.theguardian.com/global-development/2023/oct/11/fgm-ban-in-the-gambia-under-threat-as-calls-grow-to-repeal-law [https://perma.cc/WR74-4JE9].

227. Fatwa on the Ruling on Female Circumcision in Islam (Fatwa No. 003/2023) GSIC (Gam.) (on file with the *Columbia Law Review*) [hereinafter GSIC, Fatwa]. "Fatwa, in Islam, is a formal ruling or interpretation on a point of Islamic law given by a qualified legal scholar . . . ." Fatwa, Encyc. Britannica, https://www.britannica.com/topic/fatwa [https://perma.cc/44HF-694U] (last updated Sept. 29, 2023).

228. See Johnson, supra note 226.

229. See GSIC, Fatwa, supra note 227 ("[T]he Fatwa Committee of the Gambia Supreme Islamic Council calls on the Government of The Gambia to reconsider the Law prohibiting Female Circumcision . . . given that we are Muslims, and the most precious thing we have in this life is our true Religion.").

230. Ibrahim Lethome Asmani & Maryam Sheikh Abdi, De-Linking Female Genital Mutilation/Cutting From Islam 27 (2008), https://www.unfpa.org/sites/default/files/pub-pdf/De-linking%20FGM%20from%20Islam%20final%20report.pdf [https://perma.cc/CB73-6QL2] ("The teachings of Islam provide overwhelming evidence that FGM/C is not a religious practice and that Islam condemns it.").

231. Omar Bah, NAMs Want Law on FGM Repealed, The Standard (Sept. 12, 2023), https://standard.gm/nams-want-law-on-fgm-repealed/ [https://perma.cc/Z82H-CYXU].

232. Id.

the Women's (Amendment) Act.[233] Hon. Almammeh Gibba, one of the bill's sponsors, stated that "[the bill] seeks to uphold religious purity and safeguard cultural norms and values."[234] Fortunately, the bill was referred[235] and later rejected by the Parliament.[236]

These episodes in Mali and the Gambia underscore two points not accounted for by the opportunity structure and neoliberal theorists. First, African people's lives are often structured by many different institutions, among which secular laws and institutions, like courts, are just one type, and not necessarily the most influential.[237] Second, in failing to distinguish between direct and indirect violations of human rights, the two theories obfuscate how rights violations manifest on the ground. The difference between the two categories of rights violations is significant because whereas the correction of direct violations might be a matter of adjusting a government's modus operandi, the correction of indirect violations can be contingent on many factors—including resources and public compliance—that are not always a given for many African states. Notwithstanding this important difference between direct and indirect violations, in *Zongo v. Burkina Faso*, the African Court interpreted Article 1 of the Banjul Charter[238] to hold Burkina Faso (and future defendant African states) liable for both direct and indirect violations of human rights.[239]

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233. Astha Rajvanshi, Gambia's Move to Repeal Female Genital Mutilation Ban Risks Women's Rights Globally, Time (May 23, 2024), https://time.com/6981349/gambia-africa-female-genital-mutilation-fgm-fgc/ [https://perma.cc/2A3H-JQHR].

234. Jankey Ceesay, Pro-FGM Bill Will Return if It Fails at 2nd Reading–Hon Gibba, The Point (Mar. 5, 2024), https://thepoint.gm/africa/gambia/headlines/anti-fgm-bill-will-return-if-it-fails-at-2nd-reading-hon-gibba [https://perma.cc/YS9C-ZAST].

235. Helena Tian, Gambia Lawmakers Refer Bill Reversing 2015 Female Genital Mutilation Ban to National Committee, Jurist News (Mar. 19, 2024), https://www.jurist.org/news/2024/03/gambia-lawmakers-refer-bill-reversing-2015-female-genital-mutilation-ban-to-national-committee/ [https://perma.cc/R2M8-A8X5].

236. Sofia Christensen, Gambia Parliament Rejects Bill to End Ban on Female Genital Mutilation, Reuters (July 15, 2024), https://www.reuters.com/world/africa/gambia-parliament-rejects-bill-unban-female-genital-mutilation-speaker-says-2024-07-15/ (on file with the *Columbia Law Review*).

237. See Muna Ndulo, African Customary Law, Customs, and Women's Rights, 18 Ind. J. Glob. Legal Stud. 87, 87 (2011) (stating that "[t]he national legal system of a typical African state is pluralistic").

238. "The Member States . . . 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." See Banjul Charter, supra note 4, art. 1.

239. See Thomas v Tanzania, No. 005/2013, Judgment, Afr. Ct. H.P.R., ¶ 161(vii) (July 4, 2019), https://africanlii.org/akn/aa-au/judgment/afchpr/2019/63/eng@2019-07-04 [https://perma.cc/5XWR-SNYX]; Zongo v. Burkina Faso, No. 013/2011, Judgment, Afr. Ct. H.P.R., ¶ 199 (Mar. 28, 2014), https://afchpr-commentary.uwazi.io/en/entity/2oaw3sg0y1qkhuxr [https://perma.cc/49BZ-5JPA] ("[T]he Respondent State simultaneously violated article 1 of the Charter, by failing to take appropriate legal measures to guarantee respect for the rights of the Applicants in terms of article 7 of the Charter."); Zim. Hum. Rts. NGO F. v. Zimbabwe, No. 245/02, Judgment, Afr. Comm'n H.P.R., ¶ 215

The Court reached this conclusion by relying on various tests that have been developed under the ECtHR's jurisprudence.[240] The decision, broad, is another evidence of the African Court's lack of appreciation for the African context; it presumes a level of institutional development that is not the reality for many African states. For example, many African states lack the resources to put in place robust police infrastructure that can investigate and arrest violators of human rights.[241] Sub-Saharan Africa is worse off than any other region of the world on this score.[242] Nigeria, the most populated country in Africa, has only 219 police officers for every hundred thousand people.[243]

Similarly, the great majority of African states are unequipped to resort to litigation as the means of resolving human rights violations. Burkina Faso, the defendant state in *Zongo*, has only one lawyer for every 125,635 people.[244] Its literacy rate is 37% and 22% for men and women, respectively.[245] The data on legal aid services is exceedingly bleak.[246] In light of these deficiencies, the emphasis on litigation as the means of addressing human rights violations in Africa is a faux pas. This Note, therefore, argues (in the following section) that traditional African

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(May 15, 2006), https://caselaw.ihrda.org/entity/ak15hbi38v969bqwqvn78ehfr?page=1&file=1511779553251vvc3hbgvkja7181pvw265hfr.pdf [https://perma.cc/RFN2-RE8Y].

240. See Onyango v. Tanzania, No. 006/2013, Judgment, Afr. Ct. H.P.R., ¶¶ 136–139 nn.6–8 (Mar. 18, 2016), https://afchpr-commentary.uwazi.io/entity/riga1feu1tfq1tt9?file=14744604705799jy4ldxtqqepzaor.pdf&page=1 [https://perma.cc/49Z6-5V73] (citing Cuscani v. United Kingdom, App. No. 32771/1996, Eur. Ct. H.R., (Sept. 24, 2002); Ferrantelli v. Italy, No. 19874/92, Eur. Ct. H.R., (Aug. 7, 1996); Boddaert v. Belgium, No. 12919/1987, Eur. Ct. H.R., (Oct. 12, 1992); Unión Alimentaria Sanders Sa v. Spain, No. 11681/1985, Eur. Ct. H.R., (July 7, 1989)).

241. See Mandooh A. Abdelmottlep, Int'l Police Sci. Ass'n, World Internal Security & Index 11, 30 (2016), https://ipsa-police.org/wp-content/uploads/2023/11/WISPI-Report-2016.pdf [https://perma.cc/4QRW-W2FK] (noting that a lack of security resources leads to a country's inability to investigate internal security abuses). While the correlation between increased police presence and reduced crime rates remains an open question, "there is no argument . . . that the primary function of the police is crime prevention." Id. at 30.

242. Id. at 12, 30.

243. Id. at 25.

244. UN Off. on Drugs and Crime & UN Dev. Programme, Global Study on Legal Aid: Country Profiles 89 (2016) (on file with the *Columbia Law Review*) [hereinafter Global Study on Legal Aid]. Burkina Faso is not an outlier on this score. According to a 2011 UN report, Angola had 570 lawyers per thirteen million people; Burundi had 106 lawyers per nine million people; Central African Republic had thirty-eight lawyers per four million people; Côte d'Ivoire had 420 lawyers per twenty-one million people; Ethiopia had four thousand lawyers per eighty million people; Ghana had five thousand lawyers per twenty-two million people. See UN Off. on Drugs and Crime, Handbook on Improving Access to Legal Aid in Africa 12–13 & tbl. (2011) (on file with the *Columbia Law Review*) [hereinafter Handbook].

245. Global Study on Legal Aid, supra note 244, at 85.

246. Even in a country like Cabo Verde, where there is a relatively large number of attorneys (one lawyer per 2,635 people), there is no available data reporting the number of public defenders. See id. at 100. Ghana has one public defender for every 1,450,000. Id. at 128. South Africa is relatively better, providing one public defender for every 120,000 people. Id. at 168.

procedures must be utilized, along with improvements to the existing domestic legal structures, for effective and efficient rights adjudications on the continent.[247]

III. WHERE DO WE GO FROM HERE?

This Part provides some solutions to the African Court's current predicaments, as well as considerations for the welfare of the African human rights system in the long term. Section III.A discusses the importance of legislation, education, and advocacy in the protection of human rights in Africa. Section III.B calls for the incorporation of traditional languages in African domestic courts, as a means of making them more accessible and reducing plaintiffs' reliance on the African Court. Section III.C proposes that traditional dispute resolution procedures be used as a means of efficiently adjudicating rights disputes in African states where legal infrastructures are lacking. Section III.D proposes that African states take advantage of the mechanisms provided by the Banjul Charter to hold one another accountable for human rights violations on the continent. Lastly, section III.E advances the position that the African Court, young and vulnerable, is better off as a consensus builder for its longevity than an activist court (as the neoliberals and opportunity structure theorists would have it).

A. *Some Fruits of Progressive Legislation, Education, and Advocacy*

The African human rights system, like the countries that are creating it, is still young: Its ideals lie ahead. Positive norm building, however slow or meagerly fruitful, is important for the Court's development. Fortunately, African states have been expanding human rights protection mechanisms on the continent. As detailed above, they have been putting in place various Africa-specific human rights treaties,[248] incorporating rights from the Banjul Charter into their constitutions,[249] and issuing independent national legislations against harmful practices.[250]

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247. See infra section III.A.

248. See Banjul Charter, supra note 4; supra notes 44–52 and accompanying text.

249. See Constitution de la République du Bénin [Benin Constitution], Dec. 2, 1990, art. 7 (Benin) ("The rights and duties proclaimed and guaranteed 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 shall be an integral part of the present Constitution and of Béninese law."); Constitution de la République Gabonaise [Gabon Constitution], Jan. 12, 2011, pmbl. (Gabon) (affirming the human rights within Charter along with those in other international mechanisms); Constitution, May 7, 2010, art. 25 (Guinea), translated in Constitution of May 7, 2010 (Guinea) (Jefri Jay Ruchti ed., Maria del Carmen Gress trans., 2011) ("The State has the duty to assure the diffusion and the teaching of the . . . African Charter of the Rights of Man and of Peoples of 1981 . . . .").

250. See, e.g., Abolition of the Death Penalty in Subsaharan Africa, FIACAT, https://www.fiacat.org/en/our-actions/project-for-the-abolition-of-the-death-penalty-in-subsaharan-africa [https://perma.cc/M34V-S67C] (last visited Jan. 2, 2024) (showing an

International and domestic legislations and educational efforts, highlighting the adverse consequences of harmful practices, have been bearing fruit in the realm of human rights in Africa.[251] "I know it is not Islam," said Mama Jubi about FGM. "I will keep telling others about the consequences of this practice."[252] Before the passage of Gambia's Women's (Amendment) Act, Ms. Jubi used to cut girls, believing, at the time, that it was part of her religion.[253]

In 2021, Sierra Leone abolished the death penalty, becoming the twenty-third African state to do so.[254] The milestone was made possible by decades-long collaborations between local NGOs, the Universal Periodic Report (UPR), the UPR Implementation Voluntary Fund, educational opportunities for the Sierra Leonean population about capital punishment, legal advocacy for death row inmates in domestic legal fora, and lobbying the government for formal abolition.[255] "For us," said Rhiannon Davis, the then-Director of AdvocAid, "it was about using every tool that we had to advocate directly to the government . . . and really show that this request for abolition was not imposed from the outside on Sierra

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NGO's approach to abolishing capital punishment in Sub-Saharan Africa); Laws/Enforcement in Countries Where FGM Is Commonly Practiced, U.S. Dep't of State: Archive (June 27, 2001), https://2001-2009.state.gov/g/wi/rls/rep/9303.htm [https://perma.cc/E8QT-NELV] (showing the various African countries, previously strongholds for FGM, that have enacted laws against FGM).

251. Education, as a means of building human capital beyond the deterrence of bad acts, has been linked to a reduction of FGM as well. "In high- and low-prevalence countries alike, opposition to FGM is highest among girls and women who are educated." UNICEF, The Power of Education to End Female Genital Mutilation 5 (2022) (on file with the *Columbia Law Review*).

252. Johnson, supra note 226.

253. See Johnson, supra note 226. Ms. Jubi's story is not exceptional; there are countless stories about FGM practitioners who become advocates against the practice when they are exposed to information that debunks FGM's religious appeal and underscores its detrimental health consequences for girls and women. See Nuredin Hussen, 'I Gave Up' the Well-Known Woman Who Stopped Practicing Female Genital Mutilation (FGM), UNICEF (Dec. 10, 2021), https://www.unicef.org/ethiopia/stories/i-gave-well-known-woman-who-stopped-practicing-female-genital-mutilation-fgm [https://perma.cc/7V7C-A479] (detailing Amina Abdu's story of going from being an FGM practitioner to becoming an anti-FGM advocate in Ethiopia); Rooting Out FGM in Rural Uganda, UN Women (Feb. 2, 2022), https://www.unwomen.org/en/news-stories/feature-story/2022/02/rooting-out-fgm-in-rural-uganda [https://perma.cc/2j8n-cdly] (detailing Priscilla Nangiro's transition from being an FGM practitioner to an anti-FGM advocate in Uganda).

254. Sierra Leone Becomes 23rd African Country to Abolish the Death Penalty, Death Penalty Info. Ctr. (July 26, 2021), https://deathpenaltyinfo.org/news/sierra-leone-becomes-23rd-african-country-to-abolish-the-death-penalty [https://perma.cc/Z5GX-343Z].

255. Sierra Leone: UN Human Rights Recommendations Help Lead to End of Death Penalty, OHCHR (July 21, 2022), https://www.ohchr.org/en/stories/2022/07/sierra-leone-un-human-rights-recommendations-help-lead-end-death-penalty [https://perma.cc/F8DP-5T5W] (detailing the abolition process of capital punishment in Sierra Leone).

Leone."[256] These examples show that an adequate answer to the African human rights question requires changing minds and policies and investing in appropriate infrastructures.[257] They also show that the amelioration of the African human rights problem is better done through African states than against them.

In contrast, between 2016 and 2020, fourteen capital punishment cases were brought before the Court after they had been tried and appealed in Tanzania.[258] The African Court ordered Tanzania to stay the judgments in all fourteen cases, pending the Court's own decision on the cases.[259] Tanzania refused to comply with the Court's order because, among other things, the order sought to reverse the Court of Appeals of Tanzania,[260] even though that court had determined the pertinent capital punishment statutes to be constitutional.[261] In the end, Tanzania withdrew

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256. Id.

257. Recently, Sierra Leone took a bold step by approving The Prohibition of Child Marriage Bill 2024, rectifying a discrepancy between the country's Child Right Act 2007 (which set the minimum legal age of marriage at 18) and the Registration of Customary Marriage and Divorce Act 2009 (which left marriage of underaged girls to the consent of their families). Prohibition of Child Marriage Act 2024, CLXV Sierra Leone Gazette No. 40 (May 17, 2024) (on file with the *Columbia Law Review*); The Child Right Act, 2007, CXXXVIII Sierra Leone Gazette No. 43 (Sept. 3, 2007) (on file with the *Columbia Law Review*); The Registration of Customary Marriage and Divorce Act 2009, CXL Sierra Leone Gazette No. 5 (Jan. 22, 2009) (on file with the *Columbia Law Review*); Sierra Leone Passes Historic Bill to End Child Marriage, Girls Not Brides (June 26, 2024), https://www.girlsnotbrides.org/articles/sierra-leone-passes-historic-bill-to-end-child-marriage/ [https://perma.cc/9CU5-MNFB]. This progressive policy comes at the heel of the country's Free Quality School Education program, which, as of April 24, 2023, guarantees 13 years of free schooling for all children in the country. Jo Becker, Legal Right to Free Education Grows Globally, Hum. Rts. Watch (May 9, 2023), https://www.hrw.org/news/2023/05/09/legal-right-free-education-grows-globally [https://perma.cc/P63T-P2XP]. The guarantee likely will improve the country's human capital and will be important in the country's fight against harmful practices like child marriage and FGM—there is a strong correlation between low educational attainment and harmful practices against women. See generally UNICEF, Ending Child Marriage: Progress and Prospects (2014), https://data.unicef.org/wp-content/uploads/2015/12/Child-Marriage-Brochure-HR_164.pdf (on file with the *Columbia Law Review*) ("Child brides tend to have low levels of education."); Int'l Ctr. for Rsch. on Women, Leveraging Education to End Female Genital Mutilation/Cutting Worldwide (2016), https://www.icrw.org/wp-content/uploads/2016/12/ICRW-WGF-Leveraging-Education-to-End-FGMC-Worldwide-November-2016-FINAL.pdf (on file with the *Columbia Law Review*) ("[S]tudies have shown a lower prevalence of FGM/C and greater support for the discontinuation of FGM/C among highly educated women compared to those of lower levels of education . . . .").

258. See 2022 Report, supra note 10, annex 2, at 4–8 (listing the names of the pertinent cases, the African Court's orders, and the cases' implementation status).

259. See id. (showing the Court's order to "[r]efrain from executing the death penalty . . . .").

260. See id. (cataloguing Tanzania's response that it could not comply with the Court's orders, in part, because the orders would have overturned the Court of Appeal of Tanzania).

261. The two crimes punishable by death in Tanzania are murder and treason. See Written Laws Act, §§ 39, 40, 197 (Act No. 2/1970) (Tanz.) (on file with the *Columbia Law Review*).

its Optional Declaration.[262] Considering how differently things turned out in Sierra Leone, Tanzania's withdrawal illustrates that requesting the African Court's grandstanding in matters beyond its jurisdiction is less promising than engaging domestic legal and political fora for human rights protections.

B. *Making National Courts More Accessible: African Languages*

This Note argues that litigation is an insufficient means of safeguarding human rights in Africa. Benjamin F. Soares notes that, in the Malian context, many private conflicts are resolved by village heads and religious leaders, very rarely by secular courts.[263] The primary reason for this is that people have preferences for their cultural practices. For example, when asked to denounce FGM in 2019, Fatima Bio, the First Lady of Sierra Leone, responded: "I am a circumcised woman."[264] Saho's argument in the Gambia Parliament, like Ms. Bio's statement, shows that even heads of secular states in Africa can have greater affinity for their cultural and religious practices than for the secular principles undergirding the states they lead.[265]

Furthermore, African courts, national and international, predominantly operate in colonial languages—such as Arabic, English, French, and Portuguese.[266] These languages can be exclusionary, tending, by their effect, to favor members of the community who have had the privilege to go far in school and learned to read and write in those colonial languages.[267] South Africa's Deputy Chief Justice, Mandisa Maya, has been

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262. See Adjolohoun, Crisis, supra note 37, at 9 ("Tanzania's withdrawal came as the conclusion to an incremental contestation process . . . to the African Court exercising both first instance and appellate jurisdiction, and overstepping the authority of apex municipal courts on issues such as nationality and the death penalty . . . ." (footnotes omitted)).

263. See Benjamin F. Soares, The Attempt to Reform Family Law in Mali, 49 Die Welt des Islams 398, 400 (2009) ("Many Malians regularly seek out local leaders such as village heads (*chefs*) and/or religious leaders (Muslim, Christian, 'traditional,' or 'animist') to assist in conflict resolution.").

264. Swahili Buzz, Sierra Leone Interview of the First Lady Fatima Maada Bio With BBC's Zuhura Yunus, YouTube, at 00:36 (June 17, 2019), https://www.youtube.com/watch?v=o98ylWETCno (on file with the *Columbia Law Review*).

265. See supra notes 231–236 and accompanying text. Following the most recent coup in Mali, the new leadership there expelled French nationals from the country and demoted the French language in place of traditional Malian languages. See Shera Avi-Yonah, Mali Demotes French, Language of Its Former Colonizer, in Symbolic Move, Wash. Post (Aug. 3, 2023), https://www.washingtonpost.com/world/2023/08/03/mali-french-new-constitution/ [https://perma.cc/DAN6-PXTT].

266. See 2022 Report, supra note 10, at 12 (showing that the African Court's procedural forms are administered in: Arabic, English, French, and Portuguese).

267. See Salikoko S. Mufwene & Cécile B. Vigouroux, Colonization, Globalization and Language Vitality in Africa: An Introduction, *in* Globalization and Language Vitality: Perspectives From Africa 1, 23 (Cécile B. Vigouroux & Salikoko S. Mufwene eds., 2008) ("The linguistic Westernization of Africa has remained very much contained by its current socioeconomic structure, limited to a small elite socioeconomic class.").

vocal about incorporating more African languages in South African judicial proceedings.[268] Despite the fact that South Africa has eleven official languages, and less than ten percent of its population speak English as their mother tongue, its court proceedings are conducted in English only.[269] Justice Maya has been putting her advocacy into practice by writing multi-lingual opinions.[270] Such efforts should extend to other national courts and legislative bodies, especially in those countries where literacy rates in colonial languages are low. The adage that ignorance of the law is not an excuse becomes a cruel statement when the lawbreaker cannot understand the law.

C. *Broadening Rights Adjudication: Traditional Procedures*

Besides incorporating African languages into existing colonial legal structures, African states should support customary procedures of rights adjudication. This Note insists on customary procedural, and not substantive, law because, often, the latter is the subtext for many of the horizontal violations of rights, especially the rights of children and women.[271] Traditional procedures have many advantages for rights adjudication. Because the adjudication takes place within the community where the plaintiff resides, the proceedings are likely to be less costly (disbanding with filing fees, travel costs, motion writing, and discovery reviews)[272] and there are less likely to be language barriers.[273] Importantly, despite the many scholarly debates about customary law in Africa,[274] its

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268. See Joel Abrams, Justice Maya's Support for African Languages in South Africa's Courts Is a Positive Sign, The Conversation (July 5, 2022), https://theconversation.com/justice-mayas-support-for-african-languages-in-south-africas-courts-is-a-positive-sign-186226 [https://perma.cc/FW6V-9KFD] (discussing Deputy Chief Justice Maya's unprecedented decision to provide her rulings in multiple South African languages).

269. See id.

270. See id.

271. See Maputo Protocol, supra note 44, art. 2, ¶ 2 ("States Parties shall commit themselves to modify . . . traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes . . . ."); Charter on the Welfare of the Child, supra note 45, art. 21, ¶ 1 ("States . . . shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child . . . .").

272. See Handbook, supra note 244, at 12 ("[A]ccess to legal aid by criminal justice claimants is further hindered by cost, distance and technicalities.").

273. Such proceedings are led by heads of communities, who provide guidance to the plaintiff and the rest of their community in their spiritual and political lives. See Soares, supra note 263, at 400.

274. Compare Josiah A.M. Cobbah, African Values and the Human Rights Debate: An African Perspective, 9 Hum. Rts. Q. 309, 328–29 (1987) (advocating for a greater assertion of African notions of human rights), and Terence Ranger, The Invention of Tradition in Colonial Africa, *in* The Invention of Tradition 211, 250 (Eric Hobsbawm & Terence Ranger eds., 2014) ("What were called customary law, customary land-rights . . . were in fact *all* invented by colonial codification."), with Ndulo, supra note 237, at 93 (arguing that the traditionalists' grounds for supporting African "customary legal norms" no longer exist).

identifying feature is its ability to situate a person's rights within the context of the community in which the person resides and the welfare of which the person is responsible.[275] Traditional proceedings, thus, consistent with normative African dispute settlement, tend to be more restorative than retributive.[276]

This was the case in Rwanda. Between 2002 and 2012, twelve thousand community-based courts—Gacaca (Ga-cha-cha) courts—adjudicated 1.2 million cases that arose from the Rwandan Genocide.[277] The judges—"*inyangamgayo*" ('those who detest dishonesty' in Kinyarwanda)[278]—were men and women who were reputed for their integrity in their communities.[279] They established records,[280] tried suspects,[281] and issued sentences.[282] The objective of the Gacaca proceedings was reconciliation: "to restore social harmony by integrating those who had transgressed back into the community."[283] The proceedings were opportunities for families and relatives of victims to learn about their loved ones' deaths.[284] Defendants who "confess[ed] their crimes, show[ed] remorse and ask[ed] for forgiveness in front of their community," received community service orders instead of criminal penalties.[285]

In comparison, the International Criminal Tribunal for Rwanda (ITCR), founded in 1994, issued fifty-five judgments involving seventy-five individuals in eighteen years.[286] The Rwandan domestic state courts tried approximately ten thousand genocide suspects.[287] The great disparity between the Gacaca court's results and those of state courts and ITCR suggests that, had the cases been left entirely in the hands of ITCR and the

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275. See Ndulo, supra note 237, at 90 (asserting that "African customary law emphasizes rights in the context of the community and kinship rights and duties of individuals to their communities").

276. See supra text accompanying note 118.

277. See The Justice and Reconciliation Process in Rwanda, UN (2014), https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Justice%202014.pdf [https://perma.cc/WR77-ZNKE] [hereinafter Justice and Reconciliation] (providing background on the adjudication process of the Rwandan genocide).

278. See Max Rettig, Gacaca: Truth, Justice, and Reconciliation in Postconflict Rwanda?, Afr. Stud. Rev., Dec. 2008, at 25, 25.

279. See id. at 31.

280. See id.

281. See id. at 32.

282. See id. at 31.

283. See Penal Reform Int'l, Eight Years On . . . A Record of Gacaca Monitoring in Rwanda 16 (2010).

284. See Rettig, supra note 278, at 39.

285. See Justice and Reconciliation, supra note 277.

286. Rep. of the Int'l Crim. Tribunal for Rwanda (2015), transmitted by Letter dated 17 November 2015 from the President of the Int'l Crim. Tribunal for Rwanda Addressed to the President of the Security Council, ¶ 6, U.N. Doc S/2015/884 (Nov. 17, 2015) ("The Tribunal completed its substantive work at the trial level in 2012, which includes 55 first-instance judgements involving 75 individuals . . . .").

287. See Justice and Reconciliation, supra note 277.

national courts, it is unlikely that they would have handled them all in a timely manner. Of course, the facts of the Rwandan Genocide are extraordinary, and the Gacaca courts have not escaped criticism.[288] The episode, however, illustrates the roles that traditional processes can play in supplementing the adjudicatory bodies of African states in horizontal violations of human rights.

D. *African States Holding African States Accountable*

African states should do a better job of holding one another accountable. Articles 47, 48, and 49 of the Banjul Charter provide for African states to bring complaints against one another for violations of the Charter.[289] To date, only three such cases—*Democratic Republic of the Congo v. Burundi,*[290] *Sudan v. South Sudan,*[291] and *Djibouti v. Eritrea*[292]—have been brought before the African Commission.[293] All three cases were about international violence. Specifically, one country invading another's territory and harming its citizens.[294] There is neither textual nor jurisprudential evidence to show that the pertinent articles could not be invoked for intrastate human rights violations. Moreover, African states have great stakes in the protection of human rights within other member states. The ramifications of human rights violations, like viruses, do not recognize national boundaries; one country's civil war, for example, can

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288. Susan Thomson, Rwanda's Gacaca Courts, 121 Témoigner 377, 377–78 (2015) (Fr.), ("More critical observers understand the courts to be part and parcel of a top-down Rwandan government-led system of justice and reconciliation that favours retributive over restorative justice.").

289. See Banjul Charter, supra note 4, art. 47–49 (detailing the procedure for states' complaints against one another).

290. No. 227/99, Decision, Afr. Comm'n H.P.R. (May 29, 2003), https://caselaw.ihrda.org/entity/7jmx4b1kun9?file=15555000801018t56n1gujgg.pdf&page=1 [https://perma.cc/4R2E-SZ34].

291. It is speculated that this case was not made public by the Commission because, at the time of its submission, South Sudan had not ratified the Banjul Charter. See Frans Viljoen, A Procedure Likely to Remain Rare in the African System: An Introduction to Inter-State Communications Under the African Human Rights System, Völkerrechtsblog (Apr. 27, 2021), https://voelkerrechtsblog.org/a-procedure-likely-to-remain-rare-in-the-african-system/ [https://perma.cc/G5D5-X82S] [hereinafter Viljoen, Inter-State Communications].

292. No. 478/14, Withdrawn Application, Afr. Comm'n H.P.R. (2022), https://caselaw.ihrda.org/en/entity/aryela69kng?page=1 [https://perma.cc/Q98J-KRTB].

293. Inter-State Cases Under the European Convention on Human Rights Experiences and Current Challenges 27 (2022), https://rm.coe.int/interstate-cases-under-the-echr/1680a5e82c [https://perma.cc/XR9R-DA9V] (listing the cases).

294. *Eritrea*, No. 478/14, Afr. Comm'n H.P.R., ¶ 4 ("Eritrean troops entered into Djiboutian territory without warning and seized Ras Doumeira and Doumeira Island."); *Burundi*, No. 227/99, Afr. Comm'n H.P.R., ¶ 2 ("[The complaint] alleges grave and massive violations of human and peoples' rights committed by the armed forces . . . in the Congolese provinces where there have been rebel activities since 2nd August 1998 . . . .").

become another's refugee crisis.[295] To this end, the decision of any African State to ignore the human rights violations in a neighboring country does not get it off the hook for the ensuing consequences.

Furthermore, African states are better positioned than NGOs and individual victims—given their comparatively vast resources—to quell direct violations of human rights. Following the recent coups in Mali, Burkina Faso, and Guinea, the Economic Community of West African states (ECOWAS) imposed stiff economic sanctions on the three countries.[296] The AU followed suit, suspending Mali and Guinea "from all AU activities and decision-making bodies."[297] While the AU and sub-regional organizations have been diligent about imposing sanctions on defiant states, these measures have struggled to meet their objectives.[298] "[C]omprehensive economic sanctions" against African states adversely affect their citizens as well.[299] Furthermore, Russia's growing interest in African states that have been denouncing ties with their old colonial rulers—to "fight against neo-colonialism"[300]—is likely to further reduce the efficacy of sanctions in the future.[301] Russia is becoming an alternative source of funds to African leaders that was unavailable previously.[302]

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295. See supra notes 103–104 and accompanying text.

296. See ECOWAS Sanctions Guinea, Condemns Mali Over Ivorian Troops, Al Jazeera (Sept. 23, 2022), https://www.aljazeera.com/news/2022/9/23/ecowas-sanctions-guinea-condemns-mali-over-ivorian-troops [https://perma.cc/LY75-PPEG] ("[L]eaders from West Africa's main political and economic bloc agreed to freeze military government members' financial assets and bar them from travelling to other countries in the region.").

297. African Union Suspends Guinea After Coup, As Envoys Arrive for Talks, France 24 (Sept. 10, 2021), https://www.france24.com/en/africa/20210910-african-union-suspends-guinea-after-coup-ousting-cond%C3%A9 [https://perma.cc/8MYV-U4BF] (quoting African Union Political Affairs Peace and Security (@AUC_PAPS), X (Sept. 10, 2021), https://x.com/AUC_PAPS/status/1436278648076636162 [https://perma.cc/T93U-SS6R]).

298. See Moussa Soumahoro, Why Aren't Sanctions Preventing Coups in Africa?, Inst. Sec. Stud. (Nov. 20, 2023), https://issafrica.org/iss-today/why-arent-sanctions-preventing-coups-in-africa [https://perma.cc/2F67-W968] (attempting to ascertain why sanctions have not been successful at preventing coups in Africa).

299. Id.

300. See Vadim Balytnikov, The Fight Against Neo-Colonialism in the Political Discourse of South Africa, Valdai (June 4, 2024), https://valdaiclub.com/a/highlights/the-fight-against-neo-colonialism/ [https://perma.cc/B699-8LNB].

301. Burç Eruygur, Russia 'Pleased' With Restoration, Development of Ties with Africa: Putin, Anadolu Agency (Nov. 2, 2023), https://www.aa.com.tr/en/world/russia-pleased-with-restoration-development-of-ties-with-africa-putin/3041701 [https://perma.cc/4F8J-45G2] (last updated Nov. 3, 2023) (discussing Russia's growing ties with African leaders). Since Burkina Faso's coup in 2022, Russia has reopened its embassy in the country, which had been closed since 1992. Russia Reopens Embassy in Burkina Faso, BBC (Dec. 28, 2023), https://www.bbc.com/news/world-africa-67833215 [https://perma.cc/VD8X-GPHR].

302. Russia in Africa, Afr. Ctr. Strategic Stud., https://africacenter.org/in-focus/russia-in-africa/ [https://perma.cc/RS3Z-ATTJ] (last visited Jan. 13, 2024) (detailing Russia's strategic political and economic investments in Africa).

Some scholars have pointed to the nonintervention principle in Article 4, Section g of the Constitutif Act of the African Union[303] as a barrier for the proposal above.[304] But there is precedent of intervention. For example, in 1978, Tanzania's military intervened in Uganda to quell then-President Idi Amin's murderous spree.[305] In addition, Article 4, Section h of the Act permits the AU to intervene, sua sponte, in its Member States' internal affairs to prevent "war crimes, genocide and crimes against humanity."[306] Article 4, Section j also allows Member States to call on the AU to intervene in their internal affairs when they are unable to "restore peace and security" within their borders.[307] It was under these provisions that the AU created task forces and positively contributed to the peace endeavors in Comoros in 2008, Somalia in 2007, Darfur in 2004, and Burundi in 2003.[308]

E. *The Role of the African Court as the African Human Rights System Develops*

The proposal for African states to hold one another accountable, along with those about broadening human rights legislations, education, and advocacy, necessitate an equally efficient and reliable African Court. Viljoen posited that the prolonged delay in the African Commission's decision in *Burundi* is likely to dissuade African states from bringing future cases under Articles 47, 48, and 49 of the Banjul Charter.[309] The African Court cannot afford to repeat a similar course of action in the future. African states, through the African Charter on Democracy, Elections, and Governance (ACDEG), have been setting community standards for democratic governance among themselves.[310] The African Court can be an

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303. See Constitutif Act, supra note 48, art. 4, § g (requiring "non-interference by any Member State in the internal affairs of another" as a cornerstone of African states' sovereignties).

304. See, e.g., Udombana, Toward the African Court, supra note 60, at 56 (arguing that nonintervention is "regarded as sacrosanct, to which States have rigidly adhered"); see also John Mukum Mbaku, Protecting Human Rights in African Countries: International Law, Domestic Constitutional Interpretation, the Responsibility to Protect, and Presidential Immunities, 16 S.C. J. Int'l. L. & Bus. 1, 12 (2019) ("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.").

305. See U.D. Umozurike & U.O. Umozurike, Tanzania's Intervention in Uganda, 3 Archiv des Völkerrechts 301, 312 (1982) (Ger.) ("The flagrant violation of the rights of Ugandans . . . provided the justification for humanitarian intervention . . . .").

306. See Constitutif Act, supra note 48, art. 4, § h.

307. Id. art. 4, § j (providing "right of Member States to request intervention from the Union in order to restore peace and security").

308. See Christian Wyse, Comment, The African Union's Right of Humanitarian Intervention as Collective Self-Defense, 19 Chi. J. Int'l L. 295, 315–17 (2018) (demonstrating the ways in which the AU was involved in the peacekeeping missions in Somalia, Darfur, and Burundi).

309. See Viljoen, Inter-State Communications, supra note 291.

310. See Charter on Democracy, supra note 49, art. 23. Following the recent coups, the AU adopted a "zero tolerance" stance against unconstitutional change of government. See

important forum for similar norm-setting endeavors in the realm of human rights.

Nicole De Silva has remarked that international courts' socialization practices can be a viable means to gain acceptance and urge compliance (through amicable relations and educational programs) from the states that are sued before them.[311] To its credit, the Court has made socialization—or "sensitization," as it calls it—an important function of its work.[312] The Court's judges travel across the continent encouraging stakeholders within African states to ratify the Protocol on the African Court and deposit their Optional Declarations, meeting with human rights specialists who bring cases before them, and organizing symposia with subregional adjudicatory bodies on the continent.[313] Following Benin's withdrawal, for example, the Court's judges traveled to the country, urging it to reconsider its decision.[314] Human rights practitioners recommend this diplomatic approach as well. Désiré Bigirimana, a human rights advocate at the IHRDA, recommends that the African Court "continue the sensitization activities," despite his frustrations with the inadequacies of the African human rights system.[315]

The African Court's sensitization work is imperative because twenty-two African states have yet to ratify the Protocol on the African Court.[316] Beyond the African states that have ratified the Protocol on the African Court, the African Court is still not as known as it should be, being *the* human rights court in Africa. In 2022, the Court "undertook several activities, aimed at, among other things, raising awareness among stakeholders, about its existence and activities."[317] The Court should prioritize such endeavors to be better known on the continent.[318] To be the African human rights court, the Court will need to be known in Africa.

Finally, the African Court should resist the impulse to get involved in political questions, operate as an appellate court to domestic courts, or

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African Union Vows 'Zero Tolerance' to Undemocratic Change, Voice Am. English News (Feb. 19, 2023), https://www.voanews.com/a/west-african-bloc-maintains-sanctions-on-junta-regimes/6969654.html [https://perma.cc/W38P-KW8T].

311. See Nicole De Silva, International Courts' Socialization Strategies for Actual and Perceived Performance, *in* The Performance of International Courts and Tribunals 288, 288–98 (Theresa Squatrito, Oran Young, Geir Ulfstein & Andreas Føllesdal eds., 2018).

312. See 2021 Report, supra note 7, ¶ 31 (discussing the Court's "capacity building and promotional activities").

313. Id. ¶¶ 40–44.

314. Id. ¶ 37.

315. See Désiré Bigirimana, Restrictions in the Human Rights Protection System in Africa 15 (unpublished manuscript) (on file with the *Columbia Law Review*). Désiré's recommendation is borne of the fact that the African Court needs "to be known and to mobilize more ratifications," in order for it to reach its full potential. Id.

316. See supra note 20.

317. See 2022 Report, supra note 10, at 15, ¶ 40.

318. See 2021–2025 Strategic Plan, supra note 186, at 34–37 (detailing the ways in which the African Court hopes to become more visible on the continent).

serve as a quasi-legislative body (insofar as its willingness to nullify national laws). How can the Court make African states abide by their treaty obligations if the Court does not abide by its own jurisdictional limitations? Two wrongs do not make a right. Furthermore, the Court should make pronouncements only on cases that draw their causes of action from the Banjul Charter and other pertinent African human rights instruments. Otherwise, as Professor Christof Heyns notes, the Court risks creating a "jurisprudential chaos" for itself and undermining the "unique nature of the African Charter."[319] Worse, as the withdrawals demonstrate, insisting on this course will cause the Court to foreclose its vital role in the grand scheme of the African human rights system. That outcome hurts the Court, African states, and victims of human rights violations on the continent.

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The call for an African Court of a more defined jurisdiction is not a consequence of this Note's lack of appreciation for the threats posed to human rights in Africa. On the contrary, the suggestion is grounded on two premises born of necessity. One, the Court cannot compel African states to follow any of its decisions. Kept on the road outlined by the opportunity structure theorists and neoliberals, the Court will "continue[] to face . . . challenges that threaten not only the effective discharge of its mandate, but its very existence."[320] This Note maintains that an African Court that manages to implement only ten percent of its decisions is far better for the growing African human rights system than a nonexistent African Court.[321] Second, there can be no effective human rights litigation in Africa without the collaboration of African states—for human rights violations, no matter where they are litigated, are resolved at home. The Court can only make pronouncements on the merits, or the lack thereof, of plaintiffs' claims against their governments; the remedies plaintiffs seek—legal or equitable—are granted by their governments. Defendant African states, therefore, are always involved in the justice process for their citizens, even when it starts beyond their borders.

CONCLUSION

The African Court is under threat. The very states that fund, staff, and maintain it are walking away from it. The Court's jurisdictional expansion, encroaching on the sovereignties of African states, is a cause of this predicament. The justifications provided by the proponents of its

319. See Christof Heyns, The African Regional Human Rights System: The African Charter, 108 Penn St. L. Rev. 679, 700 (2004).

320. See 2022 Report, supra note 10, at 24, ¶ 84.

321. See 2022 Report, supra note 10, at 24–25, ¶ 85 ("Of the over 200 decisions rendered by the Court, less than 10% have been fully complied with, 18% partially implemented and 75% not implemented at all.").

behavior, ostensibly grand, are not advisable. It is precisely because African states can ignore the Court's judgments and foreclose important avenues for victims to seek redress to the violations of their rights that the Court should tread lightly, resorting to its defined jurisdiction as it strives to hold African states accountable. Litigants want a court that can persuade African states, not one that simply fights with them—especially when the Court is in the wrong. This requires the Court to appreciate and abide by the normative considerations that inspired its creation. The Court, like the African human rights system generally, is still young and, in many respects, vulnerable. The Court's success will hinge on its ability to coexist with, and not against, African states.