

“FIRST, PUT OUT THE HOUSE FIRE”: THE FUTURE OF THE AFRICAN HUMAN RIGHTS SYSTEM

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ABSTRACT

This paper examines current and prospective challenges to the African Human Rights System in a world facing increasingly urgent human rights issues. It traces a bit of the past and present states of the African human rights system and beams a light on its future and how newer human rights challenges might impact its long-term effectiveness. The paper argues that the challenges facing human rights today in global terms provide opportunities for regional human rights systems to consider developing new protective and promotional tools.

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INTRODUCTION

Is the world approaching the end of the age of human rights? Some scholars think the international legal system is either at that juncture presently or may have passed that age already.¹ And a lot of recent global events would suggest that they might be right after all. What could these events mean for the various existing and emerging

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¹ COSTAS DOUZINAS, THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHTS AT THE TURN OF THE CENTURY 371–80 (2000); Samuel Moyn, *A Powerless Companion: Human Rights in the Age of Neoliberalism*, 77 LAW & CONTEMP. PROBS. 147, 151–52 (2014).

regional human rights protection systems? This paper examines these questions in the context of the African Human Rights System. As part of this examination, the paper traces a bit of the past and present states of the African Human Rights System and beams a light on its future and how newer human rights challenges might impact its long-term effectiveness. Moreover, the paper argues that the challenges facing human rights today also provide opportunities for regional systems to consider new protective and promotional tools. Such new tools will enable systems, like Africa's, to articulate effective responses to the contextual factors that drive doubt and resentment. They will also answer recent questions as to whether human rights norms respond effectively to feelings of exclusion or if they are part of the problem to be solved.

I. BACKGROUND

The field of international human rights as understood in our times is currently going through a phase of uncertainty. This has raised concerns in some corners that the world may be approaching a period when human rights' international currency is diminished.² Feelings of political and economic exclusion have forced long-suppressed resentful attitudes to the surface in many parts of the world. There is therefore a sense that human rights are receding while anti-human rights and anti-globalist feelings are gaining ground. These developments pose new challenges to the international human rights protection system, of which the regional human rights mechanisms are an integral part.

The African regional system is one of those regional mechanisms and is as challenged in these times as any of the other regional human rights systems. These systems must confront newer challenges that are critical to contemporary human rights protection in global terms. This paper looks at some of these challenges from the perspective of the African Human Rights System. The paper addresses the following questions: What is the current state of the African human rights protection system? What new challenges does the system face given developments in other regions of the world? Which of these

² See Stephen Hopgood, *The Endtimes of Human Rights*, in *DEBATING THE ENDTIMES OF HUMAN RIGHTS: ACTIVISM AND INSTITUTIONS IN A NEO-WESTPHALIAN WORLD* 11 (Doutje Lettinga & Lars van Troost eds., 2014) ("The endtimes are coming for human rights as effective global norms . . ."); see also Geoff Dancy & Christopher Fariss, *Rescuing Human Rights Law from International Legalism and its Critics*, 39 *HUM. RTS. Q.* 1, 2 (2017) ("The international human rights project everywhere seems in retreat.").

challenges are posed by globalist resentment and “othering” that is happening among Africans and in other societies around the world? How could the African system respond to such existing challenges as terrorism and newer ones like climate migration that are at the core of current domestic political tension in some African countries?

The African Human Rights System is no stranger to crippling challenges, both real and imagined.³ Among the existing regional human rights systems, it was the last to be established even though the continent started thinking about an African human rights protection system much earlier.⁴ This placed it somewhat behind the curve, sometimes giving the impression that the continent was only mimicking earlier established systems and wasn't quite sold on the idea itself. There was widespread skepticism that the continent's political actors possessed the ability to create an effective regional human rights system.⁵

The time that the African system was eventually established coincided with a period when older democracies in the developed regions of the world pursued the human rights agenda as integral elements of their foreign policy objectives and seemingly dragged the African continent along.⁶ These developed states therefore played a huge role in

³ See Andre Mbata B. Mangu, *The Changing Human Rights Landscape in Africa: Organization of African Unity, African Union, New Partnership for Africa's Development and the African Court*, 23 NETH. Q. HUM. RTS. 356, 357–58, 361–62 (2005); Rachel Murray, *Recent Developments in the African Human Rights System*, 8 HUM. RTS. L. REV. 356, 356–76 (2008); N. Barney Pitanya, *Reflections on the African Court on Human and Peoples' Rights*, 4 AFR. HUM. RTS. L.J. 121, 121–29 (2004).

⁴ The American Declaration on the Rights and Duties of Man was adopted in 1948 while the Inter-American Commission was established in 1959. The European Convention on Human Rights and Fundamental Freedoms was passed in 1953; the African Charter on Human and Peoples' Rights was adopted in 1981 while its Commission was established in 1987. See RACHEL MURRAY, HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION 3 (2004) (on meetings prior to the establishment of the African system); see also John Mubangizi, *Some Reflections on Recent and Current Trends in the Promotion and Protection of Human Rights in Africa: The Pains and the Gains*, 6 AFR. HUM. RTS. L.J. 146, 147 (2006). See generally Burns Weston, Robin Ann Lukes & Kelly Hnatt, *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSN'T'L L. 585 (1987).

⁵ MAKAU MUTUA, THE CONSTRUCTION OF THE AFRICAN HUMAN RIGHTS SYSTEM: PROSPECTS AND PITFALLS 143–60 (Samantha Power & Graham Allison eds., 2000).

⁶ See, e.g., James H. Lebovic & Erik Voeten, *The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators*, 46 J. PEACE & RES. 79, 87–88 (2009). See generally STEVEN FINKEL, ANÍBAL PÉREZ-LIÑÁN & MITCHELL SELIGSON, THE EFFECTS OF U.S. FOREIGN ASSISTANCE ON DEMOCRACY BUILDING: RESULTS OF A CROSS-NATIONAL QUANTITATIVE STUDY 1, 59 (USAID, 2006); Clair Apodaca & Michael Stohl, *United States Human Rights Policy and Foreign Assistance*, 43 INT'L STUD. Q. 185, 195 (1999); Eric Neumayer, *Do Human Rights Matter in Bilateral Aid Allocation? A Quantitative Analysis of 21 Donor Countries*, 84 SOC. SCI. Q. 650, 651–52 (2003); David Richards et. al., *Money with a*

getting the African regional system off the ground and continued supporting it for several years thereafter. Besides, given the prevailing ambivalent, and sometimes hostile, attitude towards human rights by many domestic political systems in Africa at that time, there was a sense that the commitment to the cause within these systems was at best pretentious and that African politicians were only willing to play along.⁷

Yet, within the continent's domestic constitutional regimes, there was a significant level of contact with the European Convention on Human Rights, for example, from which these regimes borrowed norms liberally when creating their human rights frameworks.⁸ But it is one thing to enshrine constitutional human rights norms and quite another to assure real protection of the rights contained in those norms. In fact, while those norms remained in the books, African governments were ever-suspicious of the human rights idea and even more so of the social movements that elevated it to the level of a cause worthy of pursuit.⁹

Governments that brooked no opposition, and therefore suppressed political dissent, had substantial reasons to fear the human rights idea that preached democratic norms, including respect for civil liberties and the establishment of open societies. These governments had many political reasons to justify suspicion and hostility to human rights. However, there was also intellectual support for the theory that the African environment may indeed be inhospitable to the practice of

Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries, 45 INT'L STUD. Q. 219, 221 (2001).

⁷ See, e.g., Makau Mutua, *The African Human Rights Court: A Two-Legged Stool?* 21 HUM. RTS. Q. 342, 343 (1999) ("The modern African state, which in many respects is colonial to its core, has been such an egregious human rights violator that skepticism about its ability to create an effective regional human rights system is appropriate."); see also Claude Welch Jr., *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 44 (1992) ("Those African leaders who broke the conspiracy of silence about flagrant, widespread human rights abuses in member states had little positive impact at least initially. 'Hear no evil, speak no evil, see no evil,' typified to a point the views of OAU summit attendees.").

⁸ See, e.g., Christof Heyns, *African Human Rights Law and the European Convention*, 11 S. AFR. J. HUM. RTS. 252, 253 (1995).

⁹ Babafemi Akinrinade, *Human Rights NGOs in Nigeria: Emergence, Governmental Reactions and the Future*, 2 AFR. HUM. RTS. L.J. 110, 125 (2002).

In February 1992, the Vice-President, in an inter-national human rights seminar held in Lagos, expressed concern for the 'activities of certain individuals who would want to tarnish obviously well-intended policies and actions with the paint brush of human rights'. He asked such people to realise that crusading for human rights was 'not a license to lampoon the integrity of fellow citizens.'

Id.; see also Makau Mutua, *Domestic Human Rights Organizations in Africa: Problems and Perspectives*, 22 J. OPINION 30, 31 (1994).

human rights. This support included on the one hand scholars who believed that the concept is un-African.¹⁰ It also comprised on the other those who thought that state formation in Africa did not happen as it did in Europe.¹¹ This meant, therefore, that the European experience offered limited guidance in the African context for conceiving the relationship between the state and the individual that is the very basis of the liberal idea of human rights.

There is evidence of this belief in the early development of the African continent as a regional grouping immediately following the wave of decolonization on the continent from the early to mid-1960s. The 1963 Charter of the Organization of African Unity (“OAU Charter”) spoke very highly of the rights of “peoples” and “states” rather than individual rights. In the preamble to the OAU Charter, it highlighted “the inalienable right of all *peoples* to control their own destiny”; the “legitimate aspirations of the African *peoples*”; “the sovereignty and territorial integrity of *our states*” and their belief that the Universal Declaration of Human Rights and the Charter of the United Nations “provide a solid foundation for peaceful and positive cooperation *among states*.”¹²

Based on these preambular objectives, Okere argued that the protection of human rights was merely peripheral in the scheme of priorities of the OAU initially and that the organization was conceived principally “as a political organization whose abiding . . . preoccupation is the unity of African states.”¹³ Its very name was, in fact, seen as underlining the concern for unity because the Charter recognized “protection of human rights only within the context of promoting African unity.”¹⁴ To the present day, scholars and analysts have struggled to

¹⁰ Josiah M. Cobbah, *African Values and the Human Rights Debate: An African Perspective*, 79 HUM. RTS. Q. 309, 309 (1987) (“There seems to be some consensus . . . that the concept of human rights . . . is historically a Western concept. The more troubling questions . . . pertain to whether contemporary international human rights instruments, given their Western biases, can be said to apply to peoples from non-Western cultures.”).

¹¹ Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT’L L. 339, 342 (1995) (contending that “[t]he development of the state in Africa is so radically different from its European equivalent that the traditional liberal conception of the relationship between the state and the individual is of limited utility in imagining a viable regime of human rights”).

¹² *Charter of the Organization of African Unity* preamble, 1963, 2 I.L.M. 766 (emphasis added).

¹³ B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141, 142 (1984).

¹⁴ *Id.*

understand this singular obsession with the rights of “peoples,” especially since the particular meaning of “peoples” in the OAU context is unclear.¹⁵ And significantly, while “peoples” also featured prominently in the norms of the African Charter on Human and Peoples’ Rights (“the Charter”), the meaning has remained shrouded in controversy. It is unclear whether it means African peoples altogether or the various ethnic, language, and indigenous minority groups that are spread across the entire continent.¹⁶

Apart from the conceptual questions that hung over the African Human Rights System, there were also structural and institutional deficiencies to contend with in those beginnings. The African Commission on Human and Peoples’ Rights (“Commission”) established under the Charter was dismissed as ineffective and a yoke around the continent’s neck.¹⁷ It lacked the resources to provide useful protection for the various human rights abuses that afflicted individuals across the continent.¹⁸ Its agencies therefore depended on foreign donors to underwrite their activities, which gave rise to fears that the Commission’s agenda could be controlled by whomever paid the bills.¹⁹

¹⁵ See Richard Kiwanuka, *The Meaning of “People” in the African Charter on Human and Peoples’ Rights*, 82 AM. J. INT’L L. 80 (1988).

¹⁶ See, e.g., BASIL UGOCHUKWU, OPEOLUWA BADARU & OBIORA OKAFOR, *GROUP RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: CONCEPT, PRAXIS AND PROSPECTS* 102–08 (Manisuli Ssenyonjo ed., 2012).

¹⁷ Makau wa Mutua, *The African Human Rights System in Comparative Perspective*, 3 REV. AFR. COMMISSION HUM. & PEOPLES’ RTS. 5, 11 (1993); see also Chidi Odinkalu, *Analysis of Paralysis and Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights under the African Charter on Human and Peoples’ Rights*, 23 HUM. RTS. Q. 328, 328–29 (2001).

¹⁸ In a 2015 document prepared by the European Union entitled “Action Document for Strengthening the African Human Rights System,” the group noted that AU human rights organs have very weak secretariats and that this could be either because the state parties provide insufficient funds or available resources are not used in the most effective way. See EUROPEAN UNION, ACTION DOCUMENT FOR “STRENGTHENING THE AFRICAN HUMAN RIGHTS SYSTEM,” 1, 5 (2015), https://ec.europa.eu/europeaid/sites/devco/files/annex-2-human-rights_en_0.pdf; see also George W. Mugwanya, *Examination of State Reports by the African Commission: A Critical Appraisal*, 1 AFR. HUM. RTS. L.J. 268, 283 (2001); Sisay A. Yesanew, *Utilising the Promotional Mandate of the African Commission on Human and Peoples’ Rights to Promote Human Rights Education in Africa*, 7 AFR. HUM. RTS. L.J. 191, 191–205 (2007).

¹⁹ The Commission notified that it has received funding support from the African Society of International and Comparative Law, the Danish Centre for Human Rights, European Union, United Nations High Commission for Human Rights and Friedrich Naumann Foundation. See ORG. OF AFR. UNITY, ELEVENTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS 1997-1998, 1, 11–13 (1997-98), http://www.achpr.org/files/activity-reports/11/achpr22and23_actrep11_19971998_eng.pdf; see also Nsongurua Udombana, *Towards an African Court on Human and Peoples’ Rights: Better Late than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45, 72 (2000).

II. CURRENT STATE OF THE AFRICAN HUMAN RIGHTS SYSTEM

Skeptics would be forgiven today were they to assert that the African system for the protection and promotion of human rights has seen better days. The 1990s and early 2000s could be considered the glory days of the system when the continent tapped into the global pre-occupation with spreading the values of human rights and democracy. This period also coincided with the so-called “Third Wave”²⁰ of global democratic expansion following the fall of communism and restoration of constitutional rule in many otherwise dictatorial political environments, a good number of them in Africa where military regimes and single-party states occupied much of the political space.

That human rights were on the front-burner of global governance discourse in those days meant that a broad-based interest was galvanized around protective and promotional mechanisms, such as the African System. By Article 45 of the Charter, the African Commission had protective, promotional, investigative, and interpretive mandates.²¹ Under its protective authority, the Commission can receive complaints of human rights abuse from states against other states, as well as from non-state entities against state parties to the Charter.²² The Commission also had a reporting procedure by which state parties provided information on what they were doing in their respective legal regimes to fulfill their obligations under the Charter. The promotional mandate involved the Commission in educational projects like seminars, research, and other studies.²³

To assist in its work, international donor institutions poured resources into the work of the Commission at the official level while also assisting their engagement with civil society by ensuring that the latter constituency was sufficiently mobilized to participate in the Commission’s work.²⁴ This author was present at two sessions of the

²⁰ See Larry Diamond, *Democracy’s Third Wave Today*, CURRENT HISTORY, Nov. 2011, at 299; Samuel P. Huntington, *Democracy’s Third Wave*, 2 J. DEM. 1, 12 (1991); Samuel P. Huntington, *After Twenty Years: The Future of the Third Wave*, 8 J. DEM. 3, 5 (1997).

²¹ African Charter of Human and Peoples’ Rights, art. 45, June 27, 1982, 21 I.L.M. 58.

²² *Id.* art. 47, 55.

²³ *Id.* art. 62.

²⁴ In the period of November 1987 to April 1988, the Commission adopted Financial Rules and Regulations including a provision regarding additional resources to the contribution of the then OAU in the form of grants, bequests and other donations compatible with the objectives of the Charter. See ORG. OF AFR. UNITY, FIRST ACTIVITY REPORT OF THE AFRICAN COMMISSION ON

Commission in the late 1990s and saw firsthand the level of engagement of the Commission and civil society in those activities. It was also during this period that the Commission developed a repertoire of path-breaking decisions as well as contributed to deepening the understanding of some of the most significant norms contained in the African Charter.

This includes *SERAC v. Nigeria*, a decision on the nature of human rights obligations that state parties to a treaty, such as the African Charter, are to bear and the normative content of the right to a healthy environment.²⁵ In addition, *Jawara v. The Gambia* interpreted the exhaustion of domestic remedies rule and laid the foundation for the application of that principle in the jurisprudence of the Commission.²⁶ There were also other decisions, like the *Katangese Peoples' Congress v. Zaire*, in which the Commission held that it could tamper with the territorial integrity of an African state if it finds evidence that the people in that state had been denied the right to participate in their own government.²⁷ Further, in *Constitutional Rights Project v. Nigeria* (in respect of Zamani Lekwot and others) the Commission clarified its authority to impose interim measures.²⁸ These are by no means the only significant cases laid down by the Commission. They are, however, indicative of the development of the Commission's jurisprudential analysis and the breadth of their impact.

HUMAN AND PEOPLES' RIGHTS, 1, 26 (Apr. 28, 1988), http://www.achpr.org/files/activity-reports/1/achpr12and3_actrep1_1988_eng.pdf; see also ORG. OF AFR. UNITY, SECOND ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 1, 5 (June 1989) [hereinafter SECOND ACTIVITY REPORT], http://www.achpr.org/files/activity-reports/2/achpr45and101_actrep2_1989_eng.pdf (announcing a grant from the United Nations Scientific and Cultural Organization (UNESCO) for publications); ORG. OF AFR. UNITY, 3RD ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 1, 74–75 (Apr. 28, 1990), http://www.achpr.org/files/activity-reports/3/achpr6and7_actrep3_1991_eng.pdf (announcing donations from UNESCO, the United Nations Centre for Human Rights and the Commission of the European Economic Community); ORG. OF AFR. UNITY, FIFTH ACTIVITY REPORT OF THE AFRICAN COMMISSION 1991–1992, 124, 128 (1992), http://www.achpr.org/files/activity-reports/5/achpr10and11_actrep5_19911992_eng.pdf (reporting the commission announced additional grants from UN Centre for Human Rights, the EEC, as well as from the governments of Sweden and Denmark).

²⁵ *SERAC v. Nigeria*, No. 155/96, Decision, African Commission on Human and Peoples' Rights [Afr. Commission H.P.R.], ¶ 52 (2001).

²⁶ *Jawara v. The Gambia*, No. 147/95, Decision, African Commission on Human and Peoples' Rights [Afr. Commission H.P.R.], ¶ 52 (2000).

²⁷ *Katangese Peoples' Cong. v. Zaire*, No. 75/92, Decision, African Commission on Human and Peoples' Rights [Afr. Commission H.P.R.], ¶ 4 (1995).

²⁸ *Constitutional Rights Project v. Nigeria*, No. 87/93, Decision, African Commission on Human and Peoples' Rights [Afr. Commission H.P.R.], ¶ 4 (1999).

Apart from constructing a jurisprudence based on complaints brought before it, the Commission also adopted subsidiary resolutions that developed new ideas, amplified those already contained in the Charter, or clarified them to minimize areas of ambiguity. For example, in 1992 the Commission adopted the Resolution on the Right to Recourse and Fair Trial²⁹ and the Resolution on the Right to Freedom of Association.³⁰ In 1995, it passed the Resolution on Anti-Personnel Land Mines while also playing a catalytic role in the passage of the African Charter on the Welfare of the Child, which entered into force on 29 November 1999.³¹ Along similar lines, the Commission facilitated the passage of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.³²

While it produced these results, the Commission also batted away criticisms, sometimes visceral, about its lack of bite and the substantially closeted nature of its internal procedures.³³ The enforcement system the Commission practiced was described as "ineffectual"³⁴ and "a mixture of impotence, incompetence, ponderous irrelevance and . . . [a]

²⁹ See *Resolution No. 4 on the Right to Recourse and Fair Trial*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS (Mar. 9, 1992), <http://www.achpr.org/sessions/11th/resolutions/4/>.

³⁰ *Resolution No. 5 on the Right to Freedom of Association*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS (Mar. 9, 1992), <http://www.achpr.org/sessions/11th/resolutions/5/>.

³¹ See, e.g., *Resolution on Cooperation between the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child in Africa*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS (May 27, 2009), <http://www.achpr.org/sessions/45th/resolutions/144/>.

³² *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS (July 11, 2003), <http://www.achpr.org/instruments/women-protocol/>.

³³ A former Chair of the Commission once referred to confidential nature of its sessions as a hamstring that removed publicity as one of the main weapons of human rights enforcement. See U. O. Umozurike, *The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness*, 13 ANN. SURV. INT'L & COMP. L. 179, 182 (2007); see also Chidi A. Odinkalu, *The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 359, 368 (1998).

[The] confidentiality principle was undermining the reputation of the Commission and, it was widely felt, of its members as well. In an interview with this author in 1993, one of the then members of the commission described the effect of this provision as 'frustrating' and asserted that the confidentiality provision was inserted into the Charter by the leaders of the OAU 'to protect themselves from undue criticism from outside.'

Id.

³⁴ See Mutua, *supra* note 7, at 363.

lack of independence.”³⁵ The Commission was at times accused of undermining public confidence in its own procedures.³⁶ While purporting to be a human rights protective institution, the Commission was seen as being subservient to the continent’s political configuration. In a good number of cases, African governments simply ignored the Commission’s rulings that they disagreed with.³⁷

For example, during its 22nd Ordinary Session in Banjul, The Gambia, in November 1997, the Commission deliberated on the issue of non-compliance of state parties to its decisions, which it believed was one of the major factors contributing to the erosion of the Commission’s credibility.³⁸ Several years thereafter, the situation did not change much, which led the Commission to adopt a resolution that made sweeping amendment to one of its main contentious procedures.³⁹ Prior to this time, the Commission admitted to having only literally applied Article 59(1) of the Charter which provides that “[a]ll measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.”⁴⁰ However, by this resolution, the Commission opted to include complaints submitted to it and decisions/recommendations on them as part of the annual reports of its activities to the Assembly of Heads of States and Governments in Africa.⁴¹ Whereas before this time, the

³⁵ Joseph Isanga, *The Constitutive Act of the African Union, African Courts and the Protection of Human Rights: A New Dispensation?* 11 SANTA CLARA J. INT’L L. 267, 278–79 (2013) (internal citations omitted).

³⁶ See Udombana, *supra* note 19, at 47.

³⁷ See, e.g., Anne P. Van Der Mei, *The New African Court on Human and Peoples’ Rights: Towards an Effective Protection Mechanism for Africa?*, 18 LEIDEN J. INT’L L. 113, 117 (2005).

³⁸ ORG. OF AFR. UNITY, *supra* note 19, at 6–11.

The Commission considered several proposals for improving the operation of the reporting system and examined a draft amendment of the guidelines on the preparation of the said periodic reports [T]he Commission invited reflection on the reasons for the reduction in the number of communications submitted to it. It also noted that the non-compliance by some States parties with the Commission’s recommendations affects its credibility and may partly explain that fewer complaints are submitted to it.

Id. at 6–11.

³⁹ *Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples’ Rights by State Parties*, AFR. COMM’N ON HUMAN & PEOPLES’ RIGHTS (Nov. 29, 2006), <http://www.achpr.org/sessions/40th/resolutions/97/> [herein after *Resolution*].

⁴⁰ African Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, art. 59 ¶ 1; see also Odinkalu, *supra* note 33, 367–68 (providing a deeper analysis of this provision).

⁴¹ See *Resolution*, *supra* note 39, ¶ 3.

Commission did not publicly disclose this information, this resolution signalled that it was abandoning the confidentiality requirement in relation to its decisions and recommendations.⁴²

The resolution has had little impact on the behaviour of African states. The Commission's 40th Activity Report showed that the situation has not improved much. In this report, the Commission indicated that in separate Communications involving Cote d'Ivoire, Kenya, and Cameroon, the countries involved had yet to implement its recommendations.⁴³ It also stated in that report that the failure of states to provide information on the implementation of the Commission's decisions remained a major source of worry.⁴⁴

The situation was not better in respect of periodic reporting by states under Article 62 of the Charter. In the 40th Activity Report, the Commission stated that only nineteen African states were up to date in their reporting obligations, which are as much a protective strategy as the individual complaints procedure.⁴⁵ State reporting is intended to inform the Commission about strategies parties are implementing to ensure that the objectives of the Charter are met. But according to the 40th Activity Report, two states had an overdue report, seven had two overdue reports, five had three overdue reports, and fourteen states had more than three overdue reports.⁴⁶ Six states, the Commission noted, never submitted any reports.⁴⁷ In summary, the two main procedures by which the African Commission could remedy individual human rights violations on the continent were ineffective because of the recalcitrance and lack of cooperation of the state parties.

Nevertheless, the Commission continued strengthening its capacity to deliver on its protective mandate by developing ancillary mechanisms and procedures outside those of complaints and reporting. It utilized a cocktail of special regimes including Special Rapporteurs, Stand-Alone Committees, Working Groups, and Advisory Committees. Between 1996 and 2011, the Commission established fifteen such

⁴² See Van Der Mei, *supra* note 37, at 117.

⁴³ AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS, 40TH ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 1, 9 (Dec. 2015 – Apr. 2016) [hereinafter 40TH ACTIVITY REPORT], http://www.achpr.org/files/activity-reports/40/actrep40_2016_eng.pdf.

⁴⁴ *Id.* at 14.

⁴⁵ See 40TH ACTIVITY REPORT, *supra* note 43, at 4; see also Rebecca Wright, *Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights*, 24 BERKELEY J. INT'L L. 463, 471 (2006).

⁴⁶ 40TH ACTIVITY REPORT, *supra* note 43, at 4.

⁴⁷ *Id.*

mechanisms comprising five Special Rapporteurs, six Working Groups, two Stand-Alone Committees, and one Advisory Committee.⁴⁸ Each of the mechanisms had a mandate and terms of reference determined by the Commission itself.⁴⁹ For example, the Special Rapporteur on Freedom of Expression and Access to Information⁵⁰ is mandated, among other issues, to analyze national media legislation, policies, and practices within Member States, monitor their compliance with freedom of expression standards, and advise Member States accordingly.

There was nonetheless always that nagging concern that the Commission and its slew of special mechanisms were insufficient to offer human rights victims in Africa the kind of protection they needed. That feeling could also have been exacerbated by persistent comparison of the African Human Rights System to analogous regional systems, such as the European and Inter-American systems where courts overtime superseded commissions as the protective institution.⁵¹ While simply having a court, rather than a commission and a court, may not guarantee effective protection of human rights, the perception was that an adversarial judicial situation was more likely to project a better protective outlook—one with more teeth to bite—than a mere commission that entered only recommendations.⁵² This view, however, significantly departed from the rationale often proffered for why the African System originally settled for a commission rather than a court. The argument was that a conciliatory commission was more in keeping with African attitudes to dispute resolution than was an adversarial institution, such as a court which in most cases created winners and losers.⁵³

Setting up an African Court became something of an obsession of civil society groups on the continent and elsewhere. As Udombana argued, “nothing short of an African Human Rights Court will

⁴⁸ *Special Mechanisms*, AFR. COMM’N ON HUMAN & PEOPLES’ RIGHTS, <http://www.achpr.org/mechanisms/> (last visited Mar 3, 2018).

⁴⁹ *See id.*

⁵⁰ *Special Rapporteur on Freedom of Expression and Access to Information*, AFR. COMM’N ON HUMAN & PEOPLES’ RIGHTS, <http://www.achpr.org/mechanisms/freedom-of-expression/> (last visited Mar. 3, 2018).

⁵¹ *See generally* Weston, Lukes & Hnatt, *supra* note 4.

⁵² Christof Heyns, *A Human Rights Court for Africa*, 22 NETH. Q. HUM. RTS. 325, 325–26 (2004).

⁵³ *See, e.g.*, GINO NALDI, THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE (1999); *see also* Gino J. Naldi & Konstantinos Magliveras, *The Proposed African Court of Human and Peoples’ Rights: Evaluation and Comparison*, 8 AFR J. INT’L & COMP. L. 944, 944 (1996).

effectively protect the human rights guaranteed in the Banjul Charter.”⁵⁴ To Udombana, “without a Court it was impossible to compel violating states to conform to international norms and to provide remedies to victims.”⁵⁵ Bekker on her part alleged that “considerable pressure was brought to bear upon African states by international NGOs and European states to mimic the European and Inter-American human rights systems” in establishing a continent-wide human rights mechanisms, including the Court.⁵⁶

Even the Commission itself pitched into these calls during a seminar it organized in 1992 together with the Raoul Wallenberg Institute on Human Rights and Humanitarian Law. Paragraph 7 of the Conclusions and Recommendations of the seminar stated:

The Seminar considers it advisable that the OAU take initiatives to revise the Charter including the possibility of creating an African Human Rights Court. Such revision should be carried out by the adoption of additional protocols under article 66 of the Charter. The Seminar looks upon such a revision as a move towards strengthening the work of the Commission as well as a response to developments occurring since the adoption of the Charter.⁵⁷

In parallel to the expectation that a court could do a better job of providing protection to Africans whose human rights are abused, there was skepticism that this alone was not ever going to address “sufficiently the normative and structural weaknesses that have plagued the African Human Rights System since its inception.”⁵⁸ Regardless, in June 1998, the Assembly of African Heads of States and Governments passed the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights.⁵⁹ In

⁵⁴ Udombana, *supra* note 19, at 47.

⁵⁵ Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Duplication*, 28 BROOK. J. INT’L L. 811, 826 (2002).

⁵⁶ Gina Bekker, *The African Court on Human and Peoples’ Rights: Safeguarding the Interests of African States*, 51 J. AFR. L. 151, 151 (2007).

⁵⁷ CONCLUSIONS AND RECOMMENDATIONS OF THE SEMINAR ON THE NATIONAL IMPLEMENTATION OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS IN THE INTERNAL LEGAL SYSTEMS IN AFRICA, (Oct. 26–30, 1992), *reprinted in* ORG. OF AFR. UNITY, SIXTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION (1992–1993), http://www.achpr.org/files/activity-reports/6/achpr12and13_actrep6_1993_eng.pdf.

⁵⁸ *See* Mutua, *supra* note 7, at 343. *See generally* Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 BROOK. J. INT’L L. 1, 49 (2004).

⁵⁹ *See* PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLE’S RIGHTS, June 9, 1998, http://www.achpr.org/files/instruments/court-establishment/achpr_instr_proto_court_eng.pdf.

2004, after garnering the prescribed number of ratifications, this protocol came into force.⁶⁰ The Court started sitting in 2006 in Addis Ababa, Ethiopia but moved to its present permanent location in Arusha, Tanzania in August 2007.⁶¹

According to the Court, as of December 31, 2016, only thirty member states of the African Union had ratified the protocol establishing it.⁶² Of this number, only eight had deposited a declaration accepting the competence of the Court to receive cases from individuals and non-governmental organizations.⁶³ From all indications, the Court was not established to replace the Commission but to complement the protective arm of its mandate. As such, the Commission is one of four actors granted automatic access to the procedures of the Court. The others are state parties lodging a petition before the Court, state parties against whom the petition is lodged, and state parties whose nationals are the alleged victims of abuse.⁶⁴ Automatic access was also given to other African intergovernmental institutions, such as the African Union, or regional groups like the Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC).⁶⁵

While it was expected that the Court would make human rights protection on the continent less onerous, this has not been the case judging by the documented experience of the court. Although individuals constitute the largest number of human rights victims in Africa,⁶⁶ the Protocol establishing the Court limits access to its procedures not only to individuals but also non-governmental organizations that could act on

⁶⁰ See Van Der Mei, *supra* note 37 at 119.

⁶¹ See *Welcome to the African Court*, AFR. COURT ON HUMAN AND PEOPLES' RIGHTS, <http://www.african-court.org/en/index.php/12-homepage1/1-welcome-to-the-african-court> (last visited Mar. 26, 2018).

⁶² See AFR. UNION EXEC. COUNCIL, REPORT ON THE ACTIVITIES OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS 30TH SESS., 1, 1 (Jan. 22–27, 2017), http://en.african-court.org/images/Activity%20Reports/AfCHPR_Activity_Report_2016_E.pdf.

⁶³ *Id.* at 2.

⁶⁴ See PROTOCOL, *supra* note 59, art. 5(1)(a)–(d).

⁶⁵ *Id.* art. 5(1)(e); see also INT'L FED'N FOR HUMAN RIGHTS, THE AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS: TOWARDS THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS (Apr. 2010), https://www.fidh.org/IMG/pdf/african_court_guide.pdf.

⁶⁶ Dan Juma, *Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper*, 4 ESSEX HUM. RTS. REV. 1, 5 (2007) (describing individuals as “typical consumers of human rights courts”). Amnesty International says “women, children, ethnic minorities, indigenous groups and migrants . . . are the most vulnerable of all groups” to human rights abuses in Africa. See AMNESTY INT'L, MONITORING AND REPORTING HUMAN RIGHTS VIOLATIONS IN AFRICA: A HANDBOOK FOR COMMUNITY ACTIVISTS 5 (2002) <https://www.amnesty.org/download/Documents/HRELibrary/sec010012002eng.pdf>.

their behalf. Individual and non-governmental access to the Court was allowed under Article 34(6) of the Protocol but only if the respondent member state against whom a case is instituted had followed up its ratification of the Protocol with a separate declaration accepting the competence of the Court to receive cases from individuals and non-governmental organizations.⁶⁷

Many, including officials of the Court,⁶⁸ see this denial of individual and civil society access as a fundamental limitation on its effectiveness. In fact, Juma described it as a situation where the poacher also has the luxury of being the game-keeper.⁶⁹ The denial of access was interpreted as showing “no greater commitment to human rights protection [through the court] than the provisions relating to the African Commission” as well as a “perpetuation of the old [much criticized] dispensation.”⁷⁰ In fact, denying access is seen as offering more protection to state sovereignty than to the rights of individual African victims of human rights abuses.⁷¹ As earlier stated, only thirty out of fifty five African countries have ratified the protocol establishing the court. Worse still, only eight have deposited the declaration allowing individual and NGO access under Article 34(6).⁷² On February 29, 2016, one of these eight states, Rwanda, filed a notice to withdraw its earlier declaration.⁷³

In its January 2017 Activity Report, the court lamented the many challenges that could erode the minimal successes it had already recorded and threaten its effectiveness. It stated in the report that:

One of the major challenges to the effectiveness of the Court in particular and the protection of human rights in Africa as a whole, is

⁶⁷ PROTOCOL, *supra* note 59, art. 5(3).

⁶⁸ *See, e.g.*, JUSTICE SOPHIA A.B. AKUFFO (PRESIDENT OF THE COURT), REPORT OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS ON THE RELEVANT ASPECTS REGARDING THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS IN AFRICA 8 (Nov. 8-9, 2012), http://www.african-court.org/en/images/Other%20Reports/Report_of_the_African_Court_on_Human_and_Peoples_Rights_in_the_Protection_of_Human_Rights_in_Africa_final.pdf (identifying “[the] requirement that for individuals and NGOs to directly bring a claim before the Court, the Respondent State must have made the declaration required under Article 34(6) allowing them to do so” as a major challenge confronting the Court).

⁶⁹ *See* Juma, *supra* note 66, at 1.

⁷⁰ *See* Isanga, *supra* note 35, at 284.

⁷¹ Rebecca Wright, *Finding an Impetus for Institutional Change at the African Court of Human and Peoples' Rights*, 24 BERKELEY J. INT'L L. 463, 463 (2006).

⁷² AFR. UNION EXEC. COUNCIL, *supra* note 62, at 2.

⁷³ *Id.* at 3.

the low level of ratification of the Protocol, and the even lower number of Article 34(6) declarations deposited. Eighteen (18) years after the adoption of the Protocol, it has been ratified by only thirty (30) Members States of the African Union; and of these 30, only eight (8) have deposited the declaration required under Article 34(6) of the Protocol.⁷⁴

As with the Commission, the Court also faced a lack of cooperation from African governments in terms of implementing the court's decisions. In the 2017 report mentioned above, the court referred to four cases that it decided on their merits and ordered reparations during the reporting period.⁷⁵ Only in one of those cases—*Nobert Zongo & Others v. Burkina Faso*—did the government comply with the court's decision to pay reparation.⁷⁶ Zongo was allegedly murdered by the Burkinabe government because of his reporting on the government's impunity.⁷⁷ In the other three cases that were all against the state of Tanzania, the government simply ignored the court.⁷⁸ For some context, the court sits in Arusha, Tanzania!

The court also was concerned by the response of African states to its decisions in relation to provisional measures. In ten cases that the court mentioned in its report on the implementation of these measures (1 for Kenya, 1 for Libya, and 8 for Tanzania), either there was no response from the state concerned or their governments could not provide any answers.⁷⁹ This happened even in those cases where the petitioners took the extra step of alerting the court to the non-compliance with its order. In the eleventh case, which was also against Tanzania, that country told the court that it was consulting “with relevant national stakeholders on how to implement the order.”⁸⁰

The status of the discourse on the African Human Rights System now (at least in relation to the Commission and Court) is such that neither institution has received the necessary degree of cooperation from the same African governments that established them. And it is in their struggle for both relevance and effectiveness that the African Union came up with a separate idea of establishing an African Union Court of

⁷⁴ *Id.* at 20.

⁷⁵ *Id.* at 8.

⁷⁶ *Id.* at 9.

⁷⁷ See Oliver Windridge, *Zongo v. Burkina Faso, Judgment & Judgment on Reparations* (*Afr. Ct. H. P. R.*), 56 I.L.M. 1091 (2017).

⁷⁸ AFR. UNION EXEC. COUNCIL, *supra* note 62, at 8.

⁷⁹ *Id.* at 11–13.

⁸⁰ *Id.* at 12.

Justice that would, in all possibility exercise some mandate over human rights issues.⁸¹ Yet this seems like taking institutional mimicry to a whole new level. The point the continent is making could very well be that if the European Union, which is also a regional political and economic grouping, could have a Union Court and a human rights court, so could Africans.

During their meeting in Libya in September 1999, African leaders concluded that the OAU had become anachronistic as it no longer served the needs and aspirations of the continent.⁸² They decided to replace it with a new entity capable of safeguarding OAU's achievements and promoting the continent's role in the 21st century.⁸³ A year later while meeting in Togo, the leaders adopted the Constitutive Act of the African Union which was then declared in 2001.⁸⁴ The Constitutive Act provided for the establishment of a Court of Justice for the union whose functions and composition were to be determined in a separate protocol.⁸⁵ This court does not have a specific mandate over human rights issues arising on the continent.⁸⁶

For this reason, the decision of the African Union (AU) Assembly in 2004 to merge the functions of the AU Court of Justice with those of the African Court of Human and Peoples' Rights took many observers by surprise. The protocol intended to accomplish the merger was adopted on July 1, 2008.⁸⁷ It replaces the protocols establishing the

⁸¹ See PROTOCOL OF THE COURT OF JUSTICE OF THE AFRICAN UNION (July 11, 2003), <http://www.refworld.org/docid/4937ee0e2.html> (adopted by the 2nd Ordinary Session of the Assembly of the African Union).

⁸² See Sirte Declaration on the African Union, ¶ 5 (1999), www.chr.up.ac.za/chr_old/hr_docs/african/docs/ahsg/ahsg64.doc.

As we prepare to enter the 21st century and cognizant of the challenges that will confront our continent and peoples, we emphasize the imperative need and a high sense of urgency to rekindle the aspirations of our peoples for stronger unity, solidarity and cohesion in a larger community of peoples transcending cultural, ideological, ethnic and national differences.

Id.

⁸³ Konstantinos Magliveras & Gino Naldi, *The African Court of Justice*, 66 HEIDELBERG J. INT'L L. 187, 187 (2006).

⁸⁴ See ORG. OF AFR. UNITY, CONSTITUTIVE ACT OF THE AFRICAN UNION 1, 19 (July 11, 2000), https://au.int/sites/default/files/pages/32020-file-constitutiveact_en.pdf.

⁸⁵ *Id.* art. 18.

⁸⁶ See PROTOCOL, *supra* note 81, art. 19.

⁸⁷ See PROTOCOL ON THE STATUTE OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS (July 1 2008), https://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (adopted by the 11th Ordinary Session of the Assembly of the African Union).

African Court on Human and Peoples' Rights and the African Union Court of Justice (Court of Justice Protocol).⁸⁸ The Court of Justice Protocol provides that the protocol shall, together with the Statute of the Court, come into force thirty days after at least fifteen member states of the AU deposit their instruments of ratification and accession.⁸⁹ As of the time of writing this essay, only six African states—Benin, Burkina Faso, Congo, Liberia, Libya, and Mali—have ratified the Court of Justice Protocol.⁹⁰

Though the fact that it has not received the necessary number of ratifications means the single court is moribund for now, it has attracted significant disapproval, even in that state. The decision to have a single court may have come from concern that the continent had far more institutions than it could effectively support. That would be a valid point. The questions, however, would be: what were the politicians who set up these institutions thinking? At what point did they realize that one more such institution was too many?

These questions are more pertinent given that, rather than improve the existing processes for the protection of human rights on the continent, the merger of the two courts would, in fact, diminish them. As Viljoen and Baimu have argued, the AU Court may not be trusted to pay due attention to human rights issues because this role is not expressly included in its mandate.⁹¹ Similarly, the problem of access that eroded confidence in the Commission and Human Rights Court is also present in the context of a merged court. Unsatisfactory as it is that the Human Rights Court cannot admit individual or civil society cases unless against states that have explicitly declared that such cases can be filed against them, there is less certainty on individual access under the Protocol of the proposed merged court.⁹²

⁸⁸ *Id.* art. 1.

⁸⁹ *Id.* art. 9.

⁹⁰ See *Ratification Status: Protocol on Statute of the African Court of Justice and Human Rights*, COAL. FOR AN EFFECTIVE AFR. COURT ON HUMAN & PEOPLES' RIGHTS (July 12, 2014), http://www.africancourtcoalition.org/index.php?option=com_content&view=article&id=87:ratification-status-protocol-on-the-statute-of-the-african-court-of-justice-and-human-rights&catid=7:african-union&Itemid=12.

⁹¹ Frans Viljoen & Evarist Baimu, *Courts of Africa: Considering the Co-Existence of the African Court on Human and Peoples' Rights and the African Court of Justice*, 22 NETH. Q. HUM. RTS. 241, 244 (2004).

⁹² While art. 30(f) of the Statute of the proposed African Court of Justice and Human Rights grants access to "[i]ndividuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs," access is conditional on Article 8(3) of the Protocol establishing the court which provides that "[a]ny member state may, at the time of signature or when depositing

Apart from continent-wide institutions, such as the Commission and the Court, there are also sub-regional courts in Africa that have had human rights complaints as part of their original mandates or as an addition after their establishment. These include the Economic Community of West African States (ECOWAS) Court of Justice, the East African Community (EAC) Court of Justice, and the Southern African Development Community (SADC) Tribunal.⁹³ This is despite the fact that each of these regional groups had economic integration as its major objective. A 2005 protocol to the treaty establishing ECOWAS not only gave its court jurisdiction to decide cases of human rights violations occurring in member states, but also allowed individuals access to present cases.⁹⁴ The East African Court of Justice does not have an explicit human rights mandate in the instrument establishing it.⁹⁵ However, in a case decided in 2014,⁹⁶ the court stated clearly that it has jurisdiction to interpret the African Charter on Human and Peoples' Rights in the context of its role in ensuring the enforcement of the EAC Treaty.⁹⁷

For its part, the SADC tribunal had jurisdiction up until 2012 to hear cases where an individual's human rights were not protected by the legal system in the home state and after domestic remedies were exhausted.⁹⁸ After the tribunal ruled against Zimbabwe in perhaps its most high-profile case ever, that country lobbied to have the tribunal's human rights mandate suspended first in 2010 and then ultimately

its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30(f) involving a state which has not made such a declaration." See PROTOCOL, *supra* note 87.

⁹³ See Solomon Ebobrah, *Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges*, 17 AFR. J. INT'L & COMP. L. 79 (2009); see also Lucyline Murungi & Jacqui Gallinetti, *The Role of Sub-Regional Courts in the African Human Rights System*, 7 SUR – INT'L J. HUM. RTS. 119 (2010).

⁹⁴ Karen Alter, Laurence Helfer & Jacqueline McAllister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737, 753 (2013).

⁹⁵ Ally Possi, *It's Official: The East African Court of Justice can now Adjudicate Human Rights Cases*, AFRICLAW (Feb. 1, 2016), <https://africlaw.com/2016/02/01/its-official-the-east-african-court-of-justice-can-now-adjudicate-human-rights-cases/>.

⁹⁶ See Democratic Party v. The Secretary General of the EAC (2014) Appeal No. 1.

⁹⁷ See also OPEN SOC'Y JUSTICE INITIATIVE, HUMAN RIGHTS DECISIONS OF THE EAST AFRICAN COURT OF JUSTICE (June 2013), <https://www.opensocietyfoundations.org/sites/default/files/east-african-court-digest-june-2013-20130726.pdf>. See generally Possi, *supra* note 95.

⁹⁸ See Frederick Cowell, *The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction*, 13 HUM. RTS. L. REV. 153, 153 (2013).

terminated in 2012.⁹⁹ Heads of Government of the SADC had agreed with Zimbabwe.¹⁰⁰ The cynical political action of the Heads of Government flew in the face of up to 21 separate protocols of the SADC mentioning the commitment of the community to human rights protection.¹⁰¹ The action also was a clear demonstration that the notion of human rights on the continent would only be tolerated to the extent that it does not interfere with entrenched political interests such as Zimbabwe's commitment to controversial land distribution, which was the basis for the case that Zimbabwe lost.

III. A STRUGGLING SYSTEM AND NEWER CHALLENGES

A lot has changed since the African Human Rights System took institutional shape and more so as it has proceeded on its current fluid, amorphous, and greatly challenged trajectory. The system came to life within a specific epoch and has developed along changing political landscapes and in contexts that have varied considerably over time. The idea of human rights is going through cathartic reformulations. The language is hardly ever coherent anymore. There is also a feeling that human rights can be deployed for a variety of purposes, both good and ill.¹⁰² This outlook is capable of producing doubts and feeding skepticism. Actors educated in particular frames of the human rights concept are being forced to adjust their understandings in line with the shifting, self-interested rationalizations of the states and institutions that educated these actors in the first place.

The message of the 1970s, 1980s, and 1990s was that human rights are good. The motivation of the messengers of human rights, who mostly came from the developed regions of the world, did not matter much at that time. Africans were among the major recipients of this message. Their entire education on the subject is based on this paradigm of the inherent goodness of human rights. Among these messages were

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 155.

¹⁰² For example the claim that “the human rights revolution and the victory of market fundamentalism have been simultaneous,” or that *the* human rights movement progressed the same period as “the neo-liberal version of ‘private’ capitalism, with its now familiar policy prescription of privatization, deregulation, and state retreat from social provision.” Moyn, *supra* note 1, at 147; Susan Marks, *Four Human Rights Myths*, in HUMAN RIGHTS: OLD PROBLEMS, NEW POSSIBILITIES 217 (David Kinley, Wojciech Sadurski & Kevin Walton eds., 2013); *see also* Naomi Klein, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* (2007).

specific nuggets, glorifying certain fundamental practices. These included the message to protect refugees and those running away from social persecution; to treat men and women as equal members of the human family; to treat the prisoner with dignity; to not presume any person suspected of crime guilty until a fair, independent, and impartial trial in court had taken place; and to create systems that protected the weak, poor, and vulnerable.¹⁰³

While this paradigm looked very good on paper, concerns existed that the message masked deeper, less honorable objectives that at times substituted a different framework for understanding what human rights actually meant in practice. A newer paradigm emerged which seemed to privilege and justify human rights violations committed under the guises of international trade and investment.¹⁰⁴ African governments often tapped into these concerns and used them to question the motives of frontline human rights defenders that struggled to hold them to account in the domestic context.¹⁰⁵ Political authorities on the continent over time formed the habit of accusing domestic human rights defenders of using funding from foreign sources to destabilize their societies.¹⁰⁶ In most cases, those allegations were pretextual for suppression and intimidation of the human rights actors.¹⁰⁷

However, more than this, recent developments around the world show that populist and nationalistic resentments are beginning to create skepticism of the human rights message. These developments, in fact, seem to turn the message that human rights are good on its head. Refugees are now being blamed for lost jobs and struggling economies. Immigrants are being targeted and held responsible for stagnant wages to such an extent that significant elections have been won and lost on immigrant fears and the longing for nationalistic insularity.¹⁰⁸ Outside

¹⁰³ See Jerome Shestack, *The Philosophic Foundations of Human Rights*, 20 HUM. RTS. Q. 201, 203 (1998). See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹⁰⁴ See UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (3rd ed. 2002) [hereinafter *THE FUTURE OF HUMAN RIGHTS*]; Upendra Baxi, *Market Fundamentalism: Business Ethics at the Altar of Human Rights*, 5 HUM. RTS. L. REV. 1, 1 (2005).

¹⁰⁵ See *THE FUTURE OF HUMAN RIGHTS*, *supra* note 104.

¹⁰⁶ See Darin Christensen & Jeremy Weinstein, *Defunding Dissent: Restrictions on Aid to NGOs*, 24 J. DEM. 77, 77 (2013).

¹⁰⁷ See Akinrinade, *supra* note 9 (stating that “[later], government attitudes changed as it launched a series of attacks on the groups, portraying them as unpatriotic because they were receiving external funding”).

¹⁰⁸ See May Bulman, *Brexit: People voted to leave EU because they feared immigration, major survey finds*, INDEPENDENT (June 28, 2017), <http://www.independent.co.uk/news/uk/home->

Africa, and as shown in recent elections in the United States, Netherlands, and France, such anti-globalist feelings are feeding the troughs of right-wing politics and victimizing the “other,” some of whom are Africans.¹⁰⁹ Within the continent itself, xenophobia has led to brutal killings of foreigners in South Africa and mass deportations from countries like Libya.¹¹⁰

Now, the African human rights system, schooled in the paradigm of human rights’ inherent goodness, must function in an environment where that understanding is under threat of erosion. So, the first challenge that the African system must confront immediately is that of conceptualization. Is the content and meaning of human rights the same in 2017 as it was in the 1980s and the 1990s? The continent has dictatorial regimes masquerading as democracies in Uganda, Zimbabwe, Rwanda, Angola, Congo Democratic Republic, Burundi, etc.¹¹¹ Apart from these more roguish ones, other states on the continent have their own stories of unrelenting human rights atrocities, like in Nigeria where the extrajudicial incarceration of individuals is becoming the norm for a supposed democratic regime.¹¹²

news/brexit-latest-news-leave-eu-immigration-main-reason-european-union-survey-a7811651.html; Simon Tilford, *Britain, Immigration and Brexit*, INDEPENDENT (Dec. 2015/Jan. 2016), http://www.cer.eu/sites/default/files/bulletin_105_st_article1.pdf (stating that “[i]f Britain votes to leave the EU it will be because of hostility to immigration”); see also Philip Klinkner, *Anti-immigrant views helped Trump win. Will they also cause his undoing?*, CHI. TRIB. (Apr. 18, 2017), <http://www.chicagotribune.com/news/opinion/commentary/ct-trump-supporters-anti-immigrant-20170418-story.html>.

¹⁰⁹ See Klinkner, *supra* note 108; see also Cas Mudde, *Europe’s Center-Right is on the Wrong Track with “Good Populism,”* GUARDIAN (Oct. 30, 2017), <https://www.theguardian.com/commentisfree/2017/oct/30/europe-centre-right-wrong-track-good-populism-nativism>.

¹¹⁰ See, e.g., David Mario Matsinhe, *Africa’s Fear of Itself: The Ideology of Makwerekwere in South Africa*, 32 THIRD WORLD Q. 295, 307 (2011); see Lawani Mikairu, *Another Batch of 258 Nigerians Deported from Libya arrive Lagos Airport*, GUARDIAN (May 12, 2017), <http://www.vanguardngr.com/2017/05/another-batch-258-nigerians-deported-libya-arrive-lagos-airport/>.

¹¹¹ See Jeffrey Gettleman, *Instead of Democracy, Uganda Moves towards Dictatorship Light*, N.Y. TIMES (Feb. 17, 2016), <https://www.nytimes.com/2016/02/18/world/africa/uganda-firmly-under-one-mans-rule-dusts-off-trappings-of-an-election.html>; Tendai Ruben Mbofana, *No Democracy in Zim says Namibia*, ZIMBABWEAN (Aug. 20, 2017), <http://www.thezimbabwean.co/2017/08/countries-zimbabwe-lack-democracy-intimates-namibian-president/>; “Game Over” for Democracy in Rwanda, FREEDOM HOUSE (June 2, 2015), <https://freedomhouse.org/blog/game-over-democracy-rwanda>.

¹¹² See Leon Usigbe & Jacob Segun Olatunji, *Detention with Trial: Makarfi’s PDP blasts FG*, NIGERIAN TRIBUNE (Apr. 13, 2017), <http://www.tribuneonlineng.com/detention-without-trial-makarfis-pdp-blasts-fg/>; see also *Free or charge him, Court orders Nigerian Police chief over suspect detained without trial since 2012*, PREMIUM TIMES (July 6, 2017),

These situations do not mean that the values of human rights are losing their previous resonance on the continent; in fact, some argue quite the contrary.¹¹³ Yet, when African fraternization with illicit power is joined with mixed messaging and sometimes open repudiation of the human rights idea from the spaces, such as the US, where the continent had hitherto sought inspiration, a troubling scenario develops. The mixed messaging and repudiation has intensified recently with the outcome of the United States presidential election in 2016. Where the United States was previously known for championing human rights causes around the world even with its own limitations, the incumbent regime is openly hostile and disdainful of any such commitment. The current US government fraternizes with known dictators and prominent human rights abusers all over the world.¹¹⁴ This is deeply concerning from an African perspective.

The story of the African Human Rights System cannot be told fully without mentioning the role of US government agencies and non-governmental organizations through funding and capacity building. This is against the background that there is limited publicly available information on the funding of the African Commission and the portion of it received from foreign donors. It also is in a context where all the branches of the African human rights system suffer chronic underfunding and lack of political commitment by governments on the continent.¹¹⁵ In its January 2017 report, for example, the court lamented inadequate human and financial resources that affected its work by delaying

<https://www.premiumtimesng.com/news/headlines/236024-free-charge-court-orders-nigeria-police-chief-suspect-detained-without-trial-since-2012.html>.

¹¹³ See Chidi Odinkalu, *Three Decades on, the Protection of Human Rights in Africa Comes of Age?*, AFRICA AT LSE (May 31, 2017), <http://blogs.lse.ac.uk/africaatlse/2017/05/31/three-decades-on-the-protection-of-human-rights-in-africa-comes-of-age/>.

¹¹⁴ See, e.g., David Corn, *Trump Drops "Human Rights" from Top White House Job*, MOTHER JONES (May 3, 2017), <http://www.motherjones.com/politics/2017/05/trump-human-rights-nsc-hall-duterte>; see Sarah Margon, *Trump's Damning Global Retreat on Human Rights*, FOREIGN POLICY (Apr. 6, 2017), <http://foreignpolicy.com/2017/04/06/trumps-damning-global-retreat-on-human-rights/>; Matt Spetalnick, *White House defends Trump's Invitation to Duterte amid Human Rights Criticism*, GLOBAL NEWS (May 2, 2017), <http://globalnews.ca/news/3416027/duterte-trump-invitation/>; Nahal Toosi & Eliana Johnson, *Sources: U.S. considers quitting U.N. Human Rights Council*, GLOBAL POLITICO (Feb. 25, 2017), <http://www.politico.com/story/2017/02/trump-administration-united-nations-human-rights-council-235399>; Tracy Wilkinson, *Human Rights Fade from U.S. Foreign Policy Agenda under Trump*, L.A. TIMES (Apr. 5, 2017), <http://www.latimes.com/nation/la-fg-trump-human-rights-20170405-story.html>.

¹¹⁵ Odinkalu, *supra* note 113.

recruitment of badly needed staff.¹¹⁶ The institutions have therefore relied significantly on foreign donors for the funds that execute their activities.¹¹⁷

Financial information up to May 2015 that the Commission provided in its 38th Activity Report could offer some clue as to the Commission's funding status at each point in time.¹¹⁸ That report said the Commission had prepared a budget of US \$5,922,595.¹¹⁹ Of this, states were to contribute US \$4,970,825 while "partners" would contribute US \$951,770.¹²⁰ As of the time of the report, the Commission claimed to have received US \$326,803.69 from partners but did not state whether it had received any contribution from the state parties.¹²¹ For the subsequent 39th Activity Report, the Commission simply said "[t]he funding status remains the same as reported in July [that is, in the 38th Activity Report]."¹²² This information was repeated verbatim in the 40th Activity Report as well.¹²³ It cannot be ascertained why the information was submitted in this manner. It could mean either that the states had yet to fulfill their funding expectations or that they did, but the Commission could not disclose it in its reports. What is clear, though, is that without support from foreign donors, the work of the various mechanisms of the African human rights system would be gravely impacted.¹²⁴

Apart from conceptual clarity, the African system must also deal with situations outside of or marginal to its original mandate. Since establishment, there has been a spike in international terrorism to which the continent is not immune and is, in many cases, a major victim.¹²⁵

¹¹⁶ Naldi & Magliveras, *supra* note 53, at 944.

¹¹⁷ SECOND ACTIVITY REPORT, *supra* note 24, at 4, 5.

¹¹⁸ See AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS, 39TH ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, 15 (2015) [hereinafter 39TH ACTIVITY REPORT], http://www.achpr.org/files/activity-reports/39/actrep39_2015_eng.pdf.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 19.

¹²³ 40TH ACTIVITY REPORT, *supra* note 43, at 14.

¹²⁴ See MURRAY, *supra* note 4; see also Jeremy Sarkin, *The African Commission on Human and Peoples' Rights and the Future of the African Court of Justice and Human Rights: Comparative Lessons from the European Court of Human Rights*, 18 S. AFR. J. INT'L AFF. 281, 284 (2011).

¹²⁵ Martin Ewi & Kwesi Aning, *Assessing the Role of the African Union in Preventing and Combating Terrorism in Africa: Feature*, 15 AFR. SEC. REV. 32 (2006); Jeremy Levitt, *The Peace and Security Council of the African Union: The Known Unknowns*, 13 TRANSNAT'L & CONTEMP. PROBS. 109 (2003); Princeton Lyman & Stephen Morrison, *The Terrorist Threat in Africa*, 83 FOREIGN AFFS. 75 (2004); Hussein Solomon, *The African State and the Failure of US*

Besides, climate change and climate change migration have emerged, feeding both terrorism and internal political instability in already unstable states. More than these challenges, in Africa as elsewhere, there is a sense that the human rights idea did not deliver the good it promised. For this reason, human rights are being pushed aside as harbingers of prosperity. Instead, the ideas of international trade and investment, which themselves can work in opposition to the welfare of significant segments of society, are being promoted. Having already examined the conceptual challenges that the human rights idea faces in Africa, the rest of this section is devoted to analyzing terrorism, climate change, migration, and the impacts of trade/investment as additional contemporary challenges that the African system must deal with.

As early as 1999, African governments were aware of the dangers of terrorism. That year under the OAU auspices, they adopted the Convention on the Prevention and Combating of Terrorism.¹²⁶ It was not clear what this meant for the works of the Commission and the African Human Rights Court. However, sixteen years after the Convention was passed, the Commission also adopted the Principles and Guidelines for Human and Peoples' Rights while Countering Terrorism in Africa in 2015.¹²⁷ Obviously, a lot changed from when the OAU convention was passed in 1999 and the Commission Guidelines were adopted in 2015. During this time, the subject of terrorism mutated and became more widespread across the continent. While the OAU Convention concerned itself with preventing and combating terrorism on the continent, the Commission's Principles and Guidelines were more focused on how to protect human rights under the African Charter in the context of the fight against terrorism.

The AU has followed up on the OAU's policies and strategies to deal with terrorism. Following the adoption of the Convention and

Counter-Terrorism Initiatives in Africa: The Cases of Nigeria and Mali, 20 S. Afr. J. INT'L AFFS. 427 (2013).

¹²⁶ It is arguable that the adoption of this Convention was accelerated by the almost simultaneous bombings of the United States embassies located in Kenya and Tanzania earlier in 1998. See Kate Pickert, *Worst Embassy Attacks: U.S. Embassies in Tanzania and Kenya*, TIME MAGAZINE (Aug. 7, 1998), http://content.time.com/time/specials/packages/article/0,28804,1842608_1842698_1842652,00.html.

¹²⁷ See *Principles and Guidelines for Human and Peoples Rights while Countering Terrorism in Africa*, AFR. COMM'N ON HUMAN & PEOPLES' RIGHTS, <http://www.achpr.org/mechanisms/human-rights-defenders/Principles-Gudelines/> (last visited Mar. 3, 2018).

succession of the OAU by the AU, the latter convened a High-Level Intergovernmental Meeting in September 2002 in Algiers and subsequently adopted a Plan of Action on the Prevention and Combating of Terrorism.¹²⁸ Integral to implementing this plan was the establishment in 2004 of an African Centre for the Study and Research on Terrorism, which is based in Algiers.¹²⁹ In 2004, the AU Assembly added a Protocol to the Convention which recognized the “growing linkages between terrorism, drug trafficking, transnational organized crimes, money laundering, and the illicit proliferation of small arms and light weapons.”¹³⁰

It is, however, instructive to consider what is missing from these suspected drivers of terrorism on the continent. While terrorist activities have escalated since the initiation of preventative efforts, they are also increasingly being blamed on other causes. Among those causes in recent years is climate change.¹³¹ Not only has climate change intermingled with terrorism, the relationship between both has induced a different and overly pernicious form of forced migration of peoples, especially in the entire African Sahel region.¹³² In recent times, analyses of global and African environmental challenges have shifted towards a closer look at how climate change drives internal migration and conflicts.¹³³ These concerns had been expressed in the early days of global attention to climate change impacts but only in a speculative sense.¹³⁴ As climate change has worsened, examples of forced migration have multiplied. Reports and studies from across the continent indicate that weather

¹²⁸ See AFRICAN UNION, PLAN OF ACTION OF THE AFRICAN UNION HIGH-LEVEL INTER-GOVERNMENTAL MEETING ON THE PREVENTION AND COMBATING OF TERRORISM IN AFRICA 2 (Sept. 11–14, 2002), <http://www.peaceau.org/uploads/au-anti-terrorism-plan-of-action.pdf>.

¹²⁹ See AFR. CTR. FOR THE STUDY & RESEARCH ON TERRORISM, AFRICAN UNION COUNTER-TERRORISM FRAMEWORK ¶ 4, <http://caert.org.dz/official-documents/AU-CT-Framework.pdf> (last visited Mar. 3, 2018).

¹³⁰ *Id.* ¶ 5.

¹³¹ See Thomas F. Homer-Dixon, *On the Threshold: Environmental Changes as Causes of Acute Conflict*, 16 INT’L SEC. 76, 83 (1991). See generally Olakunle M. Folami & Adejoke O. Folami, *Climate Change and Inter-Ethnic Conflict in Nigeria*, 25 PEACE REV. 104, 105 (2013); Tamela Knight, *Climate Change and Violent Conflicts*, 25 PEACE REV. 83, 84 (2013).

¹³² Aaron Sayne, *Climate Adaptation and Conflict in Nigeria*, U.S. INST. OF PEACE 1, 3–4, 8 (June 2011), https://www.usip.org/sites/default/files/Climate_Change_Nigeria.pdf.

¹³³ See, e.g., Oli Brown, Anne Hammill & Robert Mcleman, *Climate Change as the ‘New’ Security Threat: Implications for Africa*, 83 INT’L AFF. 1141, 1141, 1149, 1151 (2007); see also Homer-Dixon, *supra* note 131, at 85.

¹³⁴ Homer-Dixon, *supra* note 131, at 81.

patterns have changed in drastic ways and tend to disrupt long-standing livelihood practices and traditions.

Nigeria is one of the countries currently dealing with this phenomenon and provides the clearest example of how it is manifesting. The country's National Adaptation Strategy and Plan of Action on Climate Change showed patterns of increasing temperatures and infrequent precipitation over several years.¹³⁵ The report concluded that climate change will increase the frequency and intensity of extreme climate hazards, introduce hazards to areas previously free from their impacts, and increase vulnerability when climate-induced hazards exacerbate underlying risk conditions. In addition, the report said that climate change will lead to migration of people from affected areas and to a new class of environmental refugees—people from communities that have been destabilized by climate, or where climate change exacerbates existing land degradation.¹³⁶

The impacts of changing climate patterns are already being felt. The scarcity of water and the shrinking of grazing fields in the desertified northern parts of the country appear to be pushing herders southwards to the grasslands of the savannas and forests.¹³⁷ Ultimately, climate change, when interacting with modern agricultural economics and centuries-old traditions, is exploding historic and contemporary tensions in Nigeria.¹³⁸ While in the past, clashes between the nomadic Fulani cattle herders and Nigerian farmers occurred mostly in the northern parts of the country, in more recent times the herdsman are moving further south to find grazing lands for their herds due to increasing desertification and lack of rain.¹³⁹ This, in turn, has led to confrontations between herders and farmers, the latter group indignant at having their agricultural crops eaten up or destroyed by marauding cattle.¹⁴⁰

¹³⁵ BLDG. NIGERIA'S RESPONSE TO CLIMATE CHANGE, NATIONAL ADAPTATION STRATEGY AND PLAN OF ACTION ON CLIMATE CHANGE FOR NIGERIA 7–14 (Nov. 2011), <http://csdevnet.org/wp-content/uploads/NATIONAL-ADAPTATION-STRATEGY-AND-PLAN-OF-ACTION.pdf>.

¹³⁶ *Id.* at 22.

¹³⁷ Chidi Oguamanam, *How Climate Change is Driving Nigeria's Herdsmen Conflict*, NEWSWEEK (May 13, 2016, 5:43 AM), <http://www.newsweek.com/nigerias-new-security-threat-herdsmen-farmer-conflict-motivated-climate-change-459528>.

¹³⁸ See *Climate Change is Destabilizing Nigeria*, GLOB. ENVTL. SOC'Y (May 12, 2016), <http://go4ges.com/climate-change-is-destabilising-nigeria/>.

¹³⁹ *Id.*

¹⁴⁰ Michael Ike Dibia, *Violent Conflicts Between Nomadic Herders and Farmers in North-Central Nigeria Escalate*, AFRICANEWS (Jan. 14, 2018), <http://www.africanews.com/2018/01/14/violent-conflicts-between-nomadic-herders-and-farmers-in-north-central-nigeria/>.

More than 1,200 people lost their lives in 2014 from these clashes, according to the 2015 report of the *Global Terrorism Index* of the Institute for Economics & Peace.¹⁴¹ This, the report said, made the Fulanis the world's fourth deadliest militant group.¹⁴² The February 2017 massacre of some 300 people in central Benue state and the raid in southern Enugu state in April of the same year, where more than 40 were killed, caused outrage across Nigeria.¹⁴³ Properties were destroyed, and thousands of people forced to flee their homes.¹⁴⁴ This occurrence is by no means limited to Nigeria even if it might have a heightened impact on Nigeria's ethnically charged socio-politics. It is a phenomenon that the entire West Africa region has had to grapple with.¹⁴⁵ It is so widespread and malignant that a governor in one of Nigeria's states believes no one country could solve it.¹⁴⁶ The governor therefore invited the sub-regional ECOWAS grouping to work out a collective response.¹⁴⁷

Lastly, this section discusses the challenges posed by international trade and investment to the peoples of Africa. It is generally thought that if material human conditions in Africa were to improve, the continent would require an expanded share of global trade as well as massive injection of foreign capital through direct investments.¹⁴⁸ However, trade and investment do not always produce positive results. Greider once described the marketplace as "a closet dictator"¹⁴⁹ because foreign investment often brings with it detrimental human rights results

¹⁴¹ See INST. FOR ECON. & PEACE, GLOBAL TERRORISM INDEX 2015 22 (Nov. 2015), <http://economicsandpeace.org/wp-content/uploads/2015/11/2015-Global-Terrorism-Index-Report.pdf>.

¹⁴² *Id.*

¹⁴³ Emeka Mamah et al., *Bloodbath in Enugu as Fulani Herdsmen Kill 40*, VANGUARD (Apr. 26, 2016), <https://www.vanguardngr.com/2016/04/bloodbath-enugu-fulani-herdsmen-kill-40/>.

¹⁴⁴ Oguamanam, *supra* note 137; see also George Okoh, *Herdsmen Attack Benue Community, Kill 10*, THIS DAY (Mar. 12, 2017), <https://www.thisdaylive.com/index.php/2017/03/12/herdsmen-attack-benue-community-kill-10/>.

¹⁴⁵ See, e.g., Abba Gana Shettima & Usman A. Tar, *Farmer-Pastoralist Conflict in West Africa: Exploring the Causes and Consequences*, 1 INFO., SOC'Y & JUST. 163, 170–71 (2008).

¹⁴⁶ See Muhammad Ahmad, *West Africa: Herdsmen-Farmers' Clashes – Governor Seeks Ecowas' Intervention*, ALL AFR. (Apr. 9, 2017), <http://allafrica.com/stories/201704090242.html>.

¹⁴⁷ *Id.*

¹⁴⁸ See Chantal Dupasquier & Patrick N. Osakwe, *Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities*, 17 J. ASIAN ECON. 241, 257–58 (2006); Luiz R. de Mello, Jr., *Foreign Direct Investment in Developing Countries and Growth: A Selective Survey*, 34 J. DEV. STUD. 1, 17 (1997).

¹⁴⁹ William Greider, *The Global Marketplace: A Closet Dictator*, in THE CASE AGAINST FREE TRADE: GATT, NAFTA, AND THE GLOBALIZATION OF CORPORATE POWER 195, 204, 212 (1993).

for the host states.¹⁵⁰ African governments are also beginning to realize that international trade has its limitations and are becoming more circumspect of trade deals.¹⁵¹

Though corporations may require favorable human rights conditions to attract their investments, there may nonetheless be negative impacts that those same investments sometimes bring in their wake.¹⁵² Upendra Baxi has masterfully articulated how corporations, through investment processes, have diluted the prior understanding of international human rights based on the Universal Declaration of Human Rights in favor of a paradigm that privileges corporate interests.¹⁵³ The rights most impacted in this dilution are economic, social, and cultural in nature, including the right to fair working conditions and the right to a clean, healthy environment. There are also collateral impacts on civil and political rights when workers protest maltreatment from corporations. Those workers must confront official repression as governments try to show that, through repression, they are creating a comfortable environment for foreign investments and capital.¹⁵⁴ It has further been argued that if Africans still cannot enjoy effective protection of their rights around the continent, this is probably because of the “unwholesome separation of economic from political rights.”¹⁵⁵

IV. CONCLUSION: THE FUTURE

What do these emerging challenges mean for the African human rights system? First, the system must function against the background of global crises of both conceptualization and practice. The world has

¹⁵⁰ Shannon Lindsey Blanton & Robert Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 J. POLITICS 143, 143 (2007). See generally A. Enisan Akinlo, *Foreign Direct Investment and Growth in Nigeria: An Empirical Investigation*, 26 J. POL'Y MODELING 627, 629 (2004) (discussing potential negative effects on a host country's economy if substantial concessions are made by the host country to transnational corporations).

¹⁵¹ For example, a trade deal disguised as an Economic Partnership Agreement between the European Union and five east African countries was thrown into disarray in 2017 when all but two of the African countries involved back-tracked on it. One of the Presidents involved called some terms in the proposed agreement a “form of colonialism.” Kampala, *Blown off course: A Trade Deal Between the EU and East Africa is in Trouble*, ECONOMIST (May 25, 2017), <http://www.economist.com/news/finance-and-economics/21722684-eus-push-new-trade-deals-africa-caribbean-and-pacific-faces>.

¹⁵² *Id.*

¹⁵³ THE FUTURE OF HUMAN RIGHTS, *supra* note 104, at 153.

¹⁵⁴ *Id.*

¹⁵⁵ See Odinkalu, *supra* note 113.

changed a lot since the beginning of the African system, which must be transformed in our times to meet those changes. The government of one of Africa's most prominent human rights educators (in this case the United States) seems to be abandoning the idea. The African system must decide how to respond. Whatever response is articulated must address both the crisis within the idea of human rights itself, as well as the need to carry forward the work of the system without the material support it used to get from foreign donors, especially United States government and institutions. As importantly, African governments cannot afford to use America's changed position to justify a return to the days of hostility to the idea of protecting the human rights of Africans.

Second, the African system must address the multiplicity of institutional mechanisms both to avoid needless overlaps and to ensure that enduring mechanisms get the full extent of support that they need. There is still a cloud of uncertainty around the idea of an African Union Court of Justice and Human Rights. The earlier that uncertainty is cleared, the better for the African system. If it persists, there just might be too much of a price to pay. Note must be taken that the potential of having a separate AU Court of Justice and the African Court of Human and Peoples' Rights delayed the establishment of the latter.¹⁵⁶ In turn, the discussion about merging both courts has paralyzed the establishment of the former even though the protocol establishing it entered into force in 2009.¹⁵⁷

Third, with the current institutions of the African system suffering chronic funding limitations, it may be wise to streamline the institutions to better manage limited resources. However, the streamlining of institutions should not be at the cost of human rights protection on the continent. Whatever courts are ultimately agreed, they must have human rights mandated in the instruments to be applied, and their procedures must be open and accessible to individuals/organizations who may have human rights grievances. The bottom-line is that a multiplicity of human rights institutions may not translate to actual protection or enforcement, but streamlined institutions need explicit guarantees of rights.

¹⁵⁶ See Sarkin, *supra* note 124, at 287; see also John Mubangizi & Andreas O'Shea, *An African Court on Human and Peoples' Rights*, 24 S. AFR. Y. B. INT'L L. 256, 256-58, 269 (1999).

¹⁵⁷ See Ademola Abass, *The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects*, 60 NETH. INT'L L. REV. 27, 31 (2013).

Fourth, there is also the need to re-evaluate the human rights instruments applicable within the African system to assess the extent that they address newer challenges in a dynamic and evolving global context. The world has changed a lot since the 1980s when the system took its first steps. This paper has demonstrated that newer challenges that may not have been prominent in those early days are emerging and must be addressed. Confronting these emerging challenges can only be done by applying solutions that may be absent in the original documents but are needed today. This could require the development of new norms in some areas or the establishment of new institutions and mechanisms in others. Specifically, for these times, the measures must address the linkages between and among these emerging issues.

It seems the time may also be ripe to pay more attention to the economic dimension of human rights. The African Commission has taken hopeful steps towards integrating economic, social, and cultural rights into its protective work. Some of today's challenges warrant re-articulating those rights under the African system and expanding their protection. The denial of socio-economic rights often foreshadows the suppression of civil liberties. While not an acceptable reason for violence against foreigners, xenophobia in countries like South Africa is often blamed on economic exclusion and lack of opportunities. Anger at the lack of economic opportunities has boiled over to violence, leading to killings and assaults. Moreover, the political implications of environmental challenges, including climate change, must be placed at the center of the human rights discourse on the continent. The African Commission and Court must therefore play their respective parts by responding appropriately to claims and complaints that may have their roots in one or more of these emerging challenges.