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## Furthering the Enjoyment of Freedom of Assembly in Sub-Saharan Africa through Its Legal Systems

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# FURTHERING THE ENJOYMENT OF FREEDOM OF ASSEMBLY IN SUB-SAHARAN AFRICA THROUGH ITS LEGAL SYSTEMS

SARAH E. HAGER\*

*In spite of the financial and other constraints facing the Commission, it is an institution capable of responding to the present day challenges in Africa. For it to do this however, **people should make use of it**. The more it is used as a regional mechanism, the stronger and more useful it becomes in safeguarding human rights on the continent. NGOs, human rights advocates and lawyers should make use of the Commission and assist people to submit cases to the latter.*

—African Commission on Human and Peoples' Rights<sup>1</sup>

## *Introduction*

It is not hard to find iconic images of the protests that shaped modern sub-Saharan Africa; marches demanding independence or civil disobedience in the face of an apartheid regime. What is also visible in these historic moments is a harsh governmental response; police beating protestors and military vehicles in the streets. Sadly, one can look at an image from 40 years ago and see it replicated in recent years, both in the demand to see change as the impetus for protest and the harsh governmental response.

Last year was a tumultuous time across the sub-Saharan region of the continent, reflected in mass mobilizations in multiple

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<sup>1</sup> *History*, AFRICAN COMM'N ON HUM. & PEOPLES' RTS., <http://www.achpr.org/about/history/> (last visited Apr. 16, 2016) (emphasis added).

areas. South Africans took to the streets in multiple cities demanding an end to corruption,<sup>2</sup> while students stood against tuition increases believed to make education inaccessible for many residents.<sup>3</sup> Mothers and grandmothers in Angola attempted to march peacefully demanding the release of political prisoners.<sup>4</sup> Women in Zimbabwe danced and sang while delivering petitions asking the government to respect the rights of informal traders.<sup>5</sup> Citizens in Burundi engaged in large scale protests over a third presidential term grab they deemed invalid and violative of the 2000 Arusha peace agreement.<sup>6</sup> These are only some of the instances of citizens assembling to promote their rights.

Freedom to peacefully assemble is a revered right frequently exercised on much of the continent, but it is also just as common to see it harshly repressed. Governments deploy police, armed security agents, military, tear gas, dogs, and military grade vehicles to stop protests. They attack, beat, and kill participants in the streets. They disrupt informational meetings where people gather to learn about their rights and the measures they can take to assert them, in an anticipatory attempt to halt protests before they begin.<sup>7</sup> In that same vein, activists and civil society members' homes and offices are

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<sup>2</sup> Govan Whittles & Siyabonga Sesant, *Anti-corruption March Officially Kicks Off in PTA and CT*, EYEWITNESS NEWS (Sept. 30, 2015), <http://ewn.co.za/2015/09/30/Anti-corruption-march-officially-kicks-off-in-Pta-and-CT>.

<sup>3</sup> Basani Baloyi & Gilad Isaacs, *South Africa's 'Fees Must Fall' Protests Are About More Than Tuition Costs*, CNN (Oct. 28, 2015), <http://www.cnn.com/2015/10/27/africa/fees-must-fall-student-protest-south-africa-explainer/>.

<sup>4</sup> Rafael Marques de Morais, *Police Brutally Repress Protesting Mothers of Political Prisoners*, MAKANGOLA (Aug. 8, 2015), [http://makaangola.org/index.php?option=com\\_content&view=article&id=11598:police-brutally-repress-protesting-mothers-of-political-prisoners&catid=28&Itemid=230&lang=en](http://makaangola.org/index.php?option=com_content&view=article&id=11598:police-brutally-repress-protesting-mothers-of-political-prisoners&catid=28&Itemid=230&lang=en).

<sup>5</sup> *Harare Petition Kasukuwere*, WOMEN OF ZIMBABWE ARISE (Sept. 9, 2015) <http://wozazimbabwe.org/?p=1578>.

<sup>6</sup> Sarah Steffen, *Crisis in Burundi – A Timeline*, DEUTSCHE WELLE (May 12, 2015), <http://www.dw.com/en/crisis-in-burundi-a-timeline/a-18446677>.

<sup>7</sup> *Angola Youth Activists Arbitrarily Arrested*, AMNESTY INT'L (July 3, 2015), <https://www.amnesty.org/en/documents/afr12/1971/2015/en/>. See also *Zimbabwe: Sentencing of Activists a 'Setback' for Freedom of Expression*, AMNESTY INT'L (Mar. 21, 2012), <https://www.amnesty.org/en/latest/news/2012/03/zimbabwe-sentencing-activists-setback-freedom-expression/>.

raided, their computers and documents are seized, they are surveilled and monitored, and their assets are confiscated. People are arrested and the judicial system is used to stifle dissent by trying, imprisoning and setting a punitive example for others who might organize.<sup>8</sup>

In such an environment, what is the recourse? Constitutions of most countries in Africa guarantee the right to freedom of assembly, all are parties<sup>9</sup> to international instruments that also guarantee these rights,<sup>10</sup> and nearly all are members of the African Union<sup>11</sup> which also asserts these rights. There are examples of the use of legal systems to push back at government repression, but there is room to do more. Members of a civil society organization in Zimbabwe prevailed in a constitutional challenge asserting their rights of assembly and association.<sup>12</sup> Since that ruling, there has been a dramatic decrease in arrests and violent suppression of their protests. Within the African Union system, the African Commission on Human and Peoples' Rights addressed the issue of freedom of assembly by promulgating an advisory committee.<sup>13</sup> The

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<sup>8</sup> *Angola: Conviction of Jose Marcos Mavungo a Blatant Violation of Freedom of Expression*, AMNESTY INT'L (Sept. 15, 2015), <https://www.amnesty.org/en/latest/news/2015/09/angola-conviction-of-jose-marcos-mavungo-a-blatant-violation-of-freedom-of-expression/>.

<sup>9</sup> *Status of Ratification: Interactive Dashboard*, OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RTS. [OHCHR], <http://indicators.ohchr.org/> (last visited Apr. 16, 2016) (showing that every African country except South Sudan is a state part to the International Covenant on Civil and Political Rights).

<sup>10</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 20 (Dec. 10, 1948) [hereinafter UDHR]; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 21 (Dec. 16, 1966) [hereinafter ICCPR]; African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (June 27, 1981), <http://www.achpr.org/instruments/achpr/> [hereinafter Banjul Charter].

<sup>11</sup> *Member States of the AU*, AFRICAN UNION, <http://au.int/en/countryprofiles> (last visited Apr. 16, 2016). Morocco is the only African state not a member, although the Central African Republic recently had its membership suspended due to coup and civil war. *Id.*

<sup>12</sup> *Williams & Anor v. Msipha*, Zimbabwe, Supreme Court. Nov. 26, 2010 (on file with author).

<sup>13</sup> African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] Res. 49/186 (May 12, 2011), available at <http://www.achpr.org/sessions/49th/resolutions/186/>.

Commission also filed litigation with the African Court of Human and Peoples' Rights against Great Socialist People's Libya Arab Jamahiriya for violently dispersing protests.<sup>14</sup>

This paper will examine the legal right to assemble in sub-Saharan Africa before turning to discuss historic and present protest movements. I will examine the tactics activists today employ in sub-Saharan Africa, from flash mob protests to hunger strikes to mass mobilization as they continue to express their right to protest, often in very challenging environments. I will then detail the legal systems through which individuals can attempt to assert their right to assemble and how they have been utilized to this point. I will conclude with recommendations activists and citizens can implement as they further their right to assembly with a specific focus on measures that utilize legal systems.

### *I. The Right to Peaceable Assembly in Sub-Saharan Africa*

The right to peacefully assemble is the ability to congregate in groups with persons of your choosing in public space or private for a specific purpose.<sup>15</sup> This right is often associated with political purposes but in actuality it is not so narrowly defined. This right is enshrined in the Universal Declaration of Human Rights,<sup>16</sup> the

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<sup>14</sup> African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, 004/2011, Decision, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Mar. 15, 2013), [http://en.african-court.org/images/Cases/Decision/DECISION\\_-\\_Application\\_004-2011\\_African\\_Commission\\_v\\_Libya\\_Struck\\_outEngl.pdf](http://en.african-court.org/images/Cases/Decision/DECISION_-_Application_004-2011_African_Commission_v_Libya_Struck_outEngl.pdf).

<sup>15</sup> Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, ¶ 24, U.N. Doc. A/HRC/20/27 (May 21, 2012). See also Paul Harris SC, *The Right to Demonstrate*, 3 UCL HUM. RTS. REV. 44, 45 (2010). In his study of peaceful protest, Harris concludes the idea of assembling peaceably developed in London in reaction to the violence of the French Revolution by citizens desiring to balance the desire to bring attention to matters of concern while assuring they were not dangerous and were worthy residents deserving of merit. *Id.*

<sup>16</sup> UDHR, *supra* note 10, at art. 20 ("Everyone has the right to freedom of peaceful assembly and association.").

International Covenant on Civil and Political Rights,<sup>17</sup> the International Covenant on Economic, Social and Cultural Rights<sup>18</sup> and the African Charter on Human and Peoples' Rights<sup>19</sup> as well as widespread incorporation into constitutions on the continent.<sup>20</sup> Assembling is considered an important part of the political process, necessary to allow citizens to elevate issues to the consciousness of State leaders and raise awareness across the broader community. It is especially critical for underrepresented groups to be able to utilize this mode of expression as they are often excluded from other participatory functions in government such as voting.<sup>21</sup>

However, there is a tension in the exercise of this right when an assemblage of individuals interferes with the rights of others because the group blocks egress on public sidewalks or streets or in

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<sup>17</sup> ICCPR, *supra* note 10, at art. 21 ("The right of peaceful assembly shall be recognized."). <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>18</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter ICESCR]. Article 8 includes the right to strike which usually entails assembling in public to air grievances. *Id.* at art. 8.

<sup>19</sup> Banjul Charter, *supra* note 10, at art. 10 ("Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restriction provided for by the law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."). These are the major instruments of focus for this article however the right to assemble is either explicitly mentioned or derived by implication from other international treaty documents such as the Convention on the Rights of the Child. *See* G.A. Res. 44/25, Convention on the Rights of the Child, art 15(1) (Nov. 20, 1989).

<sup>20</sup> CRM Dlamini, *The Protection of Civil and Political Rights in Africa: A Model for South Africa?*, 24 DE JURE 290, 291 (1991). Sub-Saharan Africa's constitutions reflect assembly and other civil and political rights for three predominant reasons as most were first drafted in the immediate aftermath of independence. First, these rights were often harshly suppressed under colonial rule and were some of the very liberties fought to enjoy. Second, a large swell of African countries gained independence in the time frame when international human rights instruments were being written and ratified, normalizing the concepts. Last, colonial powers often continued to play a role in shaping these constitutions and many had these rights already under enjoyment by their own citizens, even if denied to those under occupation. Dlamini, *The Protection of Civil and Political Rights in Africa: A Model for South Africa?* *Id.*

<sup>21</sup> Richard Hart, *The Mobs Are Out: The Right to Protest on Public Roads*, 9 AUCKLAND U.L. REV. 311, 313 (2000-2003).

some other way bars the enjoyment of the rights of others. The recognition of these competing rights is reflected in language in human rights instruments, constitutions and domestic laws setting parameters to assembly. These “claw-back clauses” in international treaties qualify the manner under which the right can be restricted and allow the State latitude to determine to some degree where those parameters lie within their domestic legislation.<sup>22</sup> The International Covenant on Civil and Political Rights<sup>23</sup> and the African Charter explicitly state the right to assemble is qualified. “The African Commission has stated that claw-back clauses must be interpreted in a manner that is consistent with international law and protection of human rights.”<sup>24</sup>

Such language exists to acknowledge not only competing rights but the legitimate need to ensure security and safety by the State. There is always the potential for violence when large amounts of people congregate with elevated passions. However, the Article 11 claw-back allows States wide latitude to restrict assembly when it deems it a matter of “interest of national security, the safety, health, ethics and rights and freedoms of others;” which also serves to protect the interests of a government not interested in tolerating criticism or threats to its sanctity or power structures.<sup>25</sup> Many States in sub-Saharan Africa remain in active conflict, or in a place of transition from conflict, decades past the liberation struggles; a status that enhances the strain between these competing rights. A perceived

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<sup>22</sup> Josephine Ndagire, *The Ghost of the Organization for African Unity (OAU) Haunts Africa*, 17 E. AFR. J. PEACE & HUM. RTS. 53, 59 (2011).

<sup>23</sup> ICCPR, *supra* note 10, at art. 21 (“No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”).

<sup>24</sup> Stacy-Ann Elvy, *Theories of State Compliance with International Law: Assessing the African Union’s Ability to Ensure State Compliance With the African Charter and Constitutive Act*, 41 GA. J. INT’L & COMP. LAW 75, 95 (2013).

<sup>25</sup> See Isaac Terwase Sampson, *The Right to Demonstrate in a Democracy: An Evaluation of Public Order in Nigeria*, 10 AFR. HUM. RTS. L.J. 432, 436 (2010) (“[N]ational security meant...security of life and property of the dictator and his family ... security of tenure for life of the dictator ...absence of opposition to the rule of the dictator.”).

need to prevent a descent into renewed conflict while promoting a goal of social cohesion can be used to justify measures that stifle citizen rights to assemble.<sup>26</sup>

The challenges inherent in this dichotomy of rights are obvious and can lead to situations where one's rights are subsumed in order to elevate another's in the scenario. It is the role of the State to determine if it is necessary for this condition to occur and who prevails. However, it is often the case that the right to assemble is deemed the lesser right, with repressive measures deployed to subvert gatherings. Frequently, the violence occurring during large-scale assemblies develops in the course of regulating protestors by use of disproportionate force on the part of security forces to control or disperse the gatherings. Additionally, States often employ disruptive means to curtail assemblies before they even occur, through byzantine permitting procedures, outright denials, or arrests of key organizers prior to the events start.<sup>27</sup>

The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and association has published reports discussing "best practices" in how states are to balance the spectrum of rights at play during peaceful assemblies. "Freedom is to be considered the rule and its restriction the exception."<sup>28</sup> In establishing measures related to assembly rights, States must ensure they are necessary and proportionate. The Special Rapporteur laid out the following guidelines: peaceful assembly should not be subject to prior authorization by the government but merely include a notice procedure to allow States to facilitate public safety; the notice procedure must not be overly burdensome or bureaucratic and not be required more than 48 prior to the event; notice should only be required for large-scale gatherings with the potential to disrupt traffic; failure to notify must not result in the disbanding of the gathering nor subject the organizers to criminal sanctions; organizers

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<sup>26</sup> Michael Hamilton, *Freedom of Assembly, Consequential Harm and the Rule of Law: Liberty-limiting Principles in the Context of Transition*, 27 OXFORD J. LEGAL STUD. 75, 85 (2007).

<sup>27</sup> *Angola: Conviction of Jose Marcos Mavungo a Blatant Violation of Freedom of Expression*, *supra* note 8.

<sup>28</sup> Kiai, *supra* note 15, at ¶ 16.



must not bear the cost of public safety measures implemented in the course of the assembly nor considered liable for the conduct of others.<sup>29</sup>

There is a perception on the part of States and often the general populace that assemblies are at best a nuisance and at worst inherently dangerous, leading to greater infringement on others' rights through looting and violence if they are allowed to occur or are not held closely in check.<sup>30</sup> "Governments . . . often claim that the precariousness of the political climate precludes peaceful assembly, and cite national security grounds or a heightened risk of public disorder to justify the imposition of restrictions."<sup>31</sup> A technique called "kettling," penning demonstrators into an enclosed area to minimize access, size and geographical reach of a protest, is increasing in practice and withstanding judicial scrutiny.<sup>32</sup> Security agents also deploy chemical means through the release of tear and other gases to turn back protestors and confine the gathering or disperse it entirely. In the worst cases, the State employs violence through the use of dogs, batons, or even live ammunition to stop an assembly.

It is easy to look back at the nostalgia of historic peace movements that blocked streets in Selma or occupied white only street cars in South Africa, contributing to the creation of a new social condition, and laud the efforts and bravery of the activists who called attention to deprivations and social harms. It is harder to view through the same lens events occurring in real time as you are directly impacted by your inability to get to work or you are a State actor concerned with maintaining the status quo. How do we continue to work to ensure the rights of protestors are protected so a new generation can look back and applaud students who fought for access to education or challenged presidential term limits?

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<sup>29</sup> *Id.* at ¶¶ 28-31.

<sup>30</sup> See generally, Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics and Culture*, 16 U. PA. J. CONST. L. 949 (2014). The article focuses on the United States but the views about public assembly perceptions can be broadly generalized to a global audience.

<sup>31</sup> Hamilton, *supra* note 26, at 78.

<sup>32</sup> Harris, *supra* note 16, at 58-59 (defining kettling as the arrest and/or confinement to an enclosed area of an entire demonstration).

## II. *Protests for Social Change in Sub-Saharan Africa*

The independence of sub-Saharan countries most often involved wars for independence; however there were peaceful protests that also marked this time of transition and were instrumental in the push to end colonial occupation. The 1929 Aba Women's Revolt in Nigeria to resist a system of colonial administration hampering women's economic and social rights mobilized thousands of women before it was suppressed by State forces and "was the only mass protest to take place in Nigeria prior to the years leading to independence in 1960."<sup>33</sup> The first sub-Saharan country to gain independence was Ghana in 1951, starting a slow wave that crested in the 1960's. In 1948, unarmed Ghanaians were fired upon while attempting to deliver a grievance petition to the British governor.<sup>34</sup> While the incident led to rioting, it also galvanized political efforts to push for independence by Ghanaian resistance leaders, focusing on nonviolent resistance methods.<sup>35</sup> The Zambian independence movement included employment strikes and noncooperation with the government but also consisted of rallies and roadblocks that persisted despite the frequent arrests of opposition leaders.<sup>36</sup>

The most well-known, however, is the anti-apartheid movement in South Africa. Apartheid was a social structure disguised as a government that promulgated oppressive laws of actual and structural inequality among the races.<sup>37</sup> Europeans,

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<sup>33</sup> Benjamin Talton, *African Resistance to Colonial Rule, Africana Age*, N.Y. PUB. LIBR. <http://exhibitions.nypl.org/africanaage/essay-resistance.html> (last visited Apr. 16, 2016).

<sup>34</sup> *Ghanaians Campaign for Independence From British Rule, 1949-1951*, SWARTHMORE COLLEGE (Nov. 7, 2010) <https://nvdatabase.swarthmore.edu/content/ghanaians-campaign-independence-british-rule-1949-1951>.

<sup>35</sup> *Id.*

<sup>36</sup> *Zambians Campaign for Independence 1944-1964*, SWARTHMORE COLLEGE (Jan. 26, 2011) <https://nvdatabase.swarthmore.edu/content/zambians-campaign-independence-1944-1964>.

<sup>37</sup> *Apartheid Legislation 1850s-1970s*, S. AFR. HIST. ONLINE <http://www.sa-history.org.za/politics-and-society/apartheid-legislation-1850s-1970s> (last updated Apr. 11, 2016). The first laws date back to 1856 with the Masters and Servants Act and continue through the 1970's, creating such restrictions as where people could

Africans, Indians and those of mixed race were categorized and allowed to occupy different spheres of influence based on their designation. This created endemic discrimination and poverty and pitted groups of people against each other for resources.<sup>38</sup> It separated families as it was illegal to marry across some of the racial categories<sup>39</sup> and created individual and family nightmares of disassociation from identity as a person's categorization could be changed multiple times over the course of his or her life.<sup>40</sup>

Resistance to apartheid gained momentum in the 1950's, when the African National Congress (hereinafter ANC) capitalized on a greater urban concentration of Africans in conjunction with increasingly harsh legislation depriving many of even more rights and opportunities to galvanize into action.<sup>41</sup> The Defiance Campaign was a mass mobilization to resist apartheid through acts of civil disobedience, labor strikes and peaceful protests.<sup>42</sup> On March 21, 1960, thousands of unarmed people peacefully assembled in front of a police station in Sharpville without their passbooks in open protest

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live, congregate and work, what facilities were accessible, what modes of transport could be utilized, with whom people could associate, set curfews and required individuals to carry racial classification identity cards, including passbooks, that provided permissions for where people could go and when. *Id.*

<sup>38</sup> Nelson Mandela described the differential treatment amongst prisoners on Robben Island, designed to foster an environment not conducive to prisoners working together to demand better treatment. See NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* 379-448 (1994).

<sup>39</sup> See, e.g., David Tobia, *Trevor Noah Didn't Come From Nowhere*, NEW REPUBLIC (Sept. 26, 2015) <https://newrepublic.com/article/122936/trevor-noah-didnt-come-nowhere> (discussing comedian Trevor Noah's early life, where he was not able to walk on the street with his father who is of European descent).

<sup>40</sup> JUDITH STONE, *WHEN SHE WAS WHITE: THE TRUE STORY OF A FAMILY DIVIDED BY RACE* (2007). This book chronicles the story of a South African woman born into a family classified as white but due to her hair and facial features was classified at various points in her life as White or Colored.

<sup>41</sup> The ANC was formed in 1912 as an organization to protect and defend rights and freedoms. It formed into a political party and won the first democratic elections post-apartheid in 1994. It remains the dominant political party today in South Africa. *A Brief History of the African National Congress*, AFR. NAT'L CONG. <http://www.anc.org.za/show.php?id=206> (last visited Apr. 16, 2016).

<sup>42</sup> Dirk van Zyl Smit, *Public Protest and Violence in South Africa-Past Wrongs and Future Rights*, 2 TILBURG FOREIGN L. REV. 321, 323 (1992-1993).

of the pass laws. The police opened fire, killing 69 and wounding 186.<sup>43</sup> The Sharpsville Massacre was a turning point in the movement, garnering international support and changing the focus of the ANC away from a policy of strict nonviolent resistance.<sup>44</sup>

Anti-apartheid resistance included thousands of peaceful assemblies over the decades the institution was in place, as the beneficiaries of the institutional structure refused to concede to growing international pressure and alter its path of exclusion. Arguably, the two defining moments that encapsulated this effort, emboldened the movement and insured international condemnation of the structure of apartheid was the Sharpsville Massacre and the Soweto Student Uprising. As previously noted, underrepresented groups with limited access to formal political structures are often most served by the vehicle of popular protest as their only means to address grievances. This was exemplified in Sharpsville and Soweto.

Educational structures in South Africa were designed to support and further embed the racial biases of the system. Formal learning in half of classes taught in secondary education was required to be taught in Afrikaans, the language of the European minority who established the apartheid system.<sup>45</sup> On June 16, 1976, an unarmed group of schoolchildren, numbering around 10,000, marched in protest to the denial of education in languages they were more fluent in communicating.<sup>46</sup> They were met by a group of police who attempted to turn them back, ultimately resorting to utilizing tear gas and warning shots before firing directly into the crowd. Two students were killed and hundreds injured in the resulting melee.

It was nearly two more decades before apartheid fell in South Africa but during this time, the tide turned on the end of colonial rule while unfortunately the sub-Saharan continent experienced in its

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<sup>43</sup> *A Brief History of the African National Congress*, *supra* note 41.

<sup>44</sup> The day is now commemorated in South Africa as a national holiday — Human Rights Day. See *Human Rights Day*, PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA [http://www.parliament.gov.za/live/content.php?Item\\_ID=1481](http://www.parliament.gov.za/live/content.php?Item_ID=1481) (last visited Apr. 16, 2016).

<sup>45</sup> Van Zyl Smit, *supra* note 42, at 325.

<sup>46</sup> *South Africa: Overcoming Apartheid, Building Democracy*, MICHIGAN STATE UNIVERSITY <http://overcomingapartheid.msu.edu/sidebar.php?id=65-258-3> (last visited Apr. 16, 2016).

wake civil wars, Cold War manipulation and autocratic rulers who repressed civil rights as a measure to ensure power longevity. It is impossible to chronicle all the peaceful demonstrations that occurred in the rich history of this time period within the constraints of this discussion. Rather, I will move to the present and discuss more recent utilizations of the right to assembly, for, sadly the similarities are more stark than the differences between events previously noted and those that occurred more recently.

The recent year witnessed large scale demonstrations across sub-Saharan Africa. Some of the impetus for these protests was rooted in political change while others were spawned by social issues. One of the most prominent parallel to the Soweto Student Uprising was the #FeesMustFall movement in South Africa. Earlier in the year, students in several universities mobilized around the removal of colonial and apartheid markers continuing to be prominently displayed on university campuses. One of the most prominent was the successful demand for the removal of a statue of Cecil Rhodes at University of Cape Town, under the banner #RhodesMustFall.<sup>47</sup> Emboldened in victory, university students engaged in mass mobilization efforts several months later in protest of tuition hikes and other policies the net effect of which would make education inaccessible for many.<sup>48</sup>

The protests occurred across the country, with thousands of students occupying campus property, city streets and encircling government buildings. The response by the South African government was swift and harsh. Security forces utilized tear gas, pepper spray, stun grenades, water cannons and violence to disperse crowds, arresting large numbers of protestors.<sup>49</sup> The mass

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<sup>47</sup> *South African Rhodes Statue Removed*, BBC (Apr. 9, 2015), <http://www.bbc.com/news/world-africa-32236922>. Cecil Rhodes is the man credited with the solidification of British occupation in the country and the establishment of colonial control of natural resources, in particular gold, by the occupying authority. *Id.*

<sup>48</sup> Baloyi et al., *supra* note 3.

<sup>49</sup> David Sim, *Fees Must Fall: South African Students and Police Clash in Tuition Cost Protests*, INT'L BUS. TIMES (Oct. 23, 2015) <http://www.ibtimes.co.uk/fees-must-fall-south-african-students-police-clash-tuition-cost-protests-photo-report-1525389>. There were students that reacted to violence when engaged by

mobilization yielded eventual success with a freeze in rising education costs and a promise to examine policies that contribute to broad inequalities at all levels of academia from support staff to student composition, professors and university administrators. But it was not without cost. The attempts to stifle the voices of the students demonstrate a continuing lack of respect for the views of children and the underrepresented and reveal a government in disagreement with the populace characterized not only in South Africa's past but is not unique to the global present.<sup>50</sup>

Images from the protests portray police armed with riot gear and deploying military strategies to contain the protests. The situation sets up a hostile atmosphere of confrontation. It is challenging for emotionally engaged protestors who are motivated by a social injustice or political failing to remain calm in such an environment. One such group in a neighboring country, Women of Zimbabwe Arise (hereinafter "WOZA"), has a long practice in remaining nonviolent in the face of such provocation.<sup>51</sup> Their strict policy is to sit and not resist when faced with police confrontation during a march through the streets of Bulawayo or Harare, Zimbabwe. Founded as a civil society organization to empower women to participate in the political process and address issues disproportionately affecting women,<sup>52</sup> the movement frequently organized protests characterized by dancing, singing and delivering flowers along with their political petitions. The leaders of the organization have been arrested over 50 times and their protests are often met with antiriot police who viciously beat the women.<sup>53</sup> In

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security forces but the majority of students gathered without weapons and demonstrated peacefully. *Id.*

<sup>50</sup> The protests in the United States in 2014 and 2015 surrounding police violence and inequality were met with similar disdain by government officials and citizens.

<sup>51</sup> *About, WOMEN OF ZIMBABWE ARISE*, [http://wozazimbabwe.org/?page\\_id=4](http://wozazimbabwe.org/?page_id=4) (last visited Apr. 16, 2016).

<sup>52</sup> The organization expanded its mandate to include men and address broader concerns of poor governance that affect all Zimbabweans. *Id.*

<sup>53</sup> Sarah Hager, *Ten Years of Love Met with Violence in Zimbabwe*, AMNESTY INT'L (Feb. 8, 2012), <http://blog.amnestyusa.org/africa/10-years-of-love-met-with-violence-in-zimbabwe/>.

2015, during WOZA's annual march on Valentine's Day, antiriot police approached near the end of their peaceful assembly in front of a government building and began to corral and push the women away from the building, using batons to beat and push the women.<sup>54</sup>

Utilizing violence against women assembling also occurred in Luanda, Angola as mothers, grandmothers, other relatives and concerned citizens attempted to assemble in protest over the arrest of a group of political prisoners.<sup>55</sup> The Angolan government has become increasingly repressive of those exercising freedom of assembly, requiring activists to exercise their creativity. Following the violent dispersal of protests in 2012,<sup>56</sup> including disappearances and deaths of activists by state security agents,<sup>57</sup> one group resorted to flash mob style protests, with small groups popping up in a coordinated manner in various parts of the city for short bursts of activism and dispersing before the police could appear to make arrests.<sup>58</sup>

Protests occurred in multiple countries over 2015 related to political processes involving heads of state extending their reign in office. In Congo-Brazzaville, the announcement by President Sassou Nguesso that he would contest a third term of presidency was met with citizens taking to the streets to express their disfavor.<sup>59</sup> In the

<sup>54</sup> *Police Disturb WOZA "Love Day"*, BULAWAYO 24 (Feb. 17, 2015), <http://bulawayo24.com/index-id-news-sc-local-byo-62940.html>.

<sup>55</sup> *From Beating Women to Unleashing Dogs on Protesters, Angola Regime Rules in Brutal Apartheid Style*, MAIL & GUARDIAN AFRICA (Aug. 16, 2015), <http://mgafrica.com/article/2015-08-16-from-beating-women-to-unleashing-dogs-on-protesters-angola-regime-rules-in-brutal-apartheid-style-activist>.

<sup>56</sup> *Angola: Protect Free Speech as Youth Activists Attacked*, AMNESTY INT'L (May 4, 2012), <https://www.amnesty.org/en/latest/news/2012/05/angola-protect-free-speech-youth-activists-attacked/>.

<sup>57</sup> *Angolan War Veterans Abducted*, AMNESTY INT'L (Aug. 24, 2012), <https://www.amnesty.org/en/documents/afr12/003/2012/en/>.

<sup>58</sup> *Five Minutes: The Length of a Protest in Angola*, FRANCE24 (October 28, 2014), <http://observers.france24.com/en/20141028-angola-video-protest-police-photo-activism>. Luaty Beirao, one of the organizers, was one of the arrestees on whose behalf the women were protesting. *Id.*

<sup>59</sup> *Congo Protestors Tear-Gassed Ahead of Referendum*, AL JAZEERA (Oct. 21, 2015), <http://www.aljazeera.com/news/2015/10/congo-protesters-tear-gassed-referendum-151021164323092.html>.

Democratic Republic of the Congo, protestors assembled over attempts to delay the presidential election and extend the term of President Joseph Kabila.<sup>60</sup> The protests beginning early in 2015 in Burundi with the nomination of President Pierre Nkurunziza by the ruling party for the upcoming election for an additional term<sup>61</sup> devolved into civil conflict over the course of the year that continues to escalate.<sup>62</sup> All of these protests were marked by severe repression by State agents utilizing violent methods to disperse the groups including tear gas and other measures designed to quickly move a crowd with minimal respect for their assembly rights. The response to peaceful assembly has been markedly the same since colonial occupation through to present day.

Assuming protests continue to occur in sub-Saharan Africa raising valid political and social concerns not being addressed, and States continue to violently suppress the rights of those individuals to peaceful protest, what are the options available to protect and advance that right in the face of intractable government policies and a propensity to quash those gathering to raise their voice? I believe the legal systems in sub-Saharan Africa are underutilized and offer a path forward.

### *III. Legal System Mechanisms*

Enforcing international law in sub-Saharan Africa has historically been and remains a challenge. Perceived as another imposition of colonial rule, there was a resistance to embracing international norms and an insistence on African values, particularly seen in the founding documents and institutions of African legal structures. There was a shift at the beginning of the new century,

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<sup>60</sup> Nicholas Bariyo, *Congo's Police Disperse Election-Delay Protests*, WALL ST. J. (Jan. 20, 2015), <http://www.wsj.com/articles/security-tightened-in-congos-capital-after-protesters-and-police-clash-1421751978>.

<sup>61</sup> *Hundreds Protest in Burundi Over President's Third Term*, GUARDIAN, (Apr. 26, 2015), <http://www.theguardian.com/world/2015/apr/26/protest-burundi-president-third-term-bujumbura-pierre-nkurunziza>.

<sup>62</sup> Edmund Blair, *Burundi Rebel Group Says Behind Killing of Senior Army Officer*, REUTERS (Mar. 26, 2016), <http://www.reuters.com/article/us-burundi-security-idUSKCN0WS0GB>.



with African countries leading the way to ratify the Rome Statute,<sup>63</sup> the treaty that established the International Criminal Court (hereinafter ICC). However, there has been a pull back from this stance as the African Union has condemned the ICC as biased,<sup>64</sup> has refused to implement an arrest order against an African head of State,<sup>65</sup> and several States have either said they will remove themselves from the treaty or indicated they are leaning in that direction.<sup>66</sup> In such an environment, are African legal institutions an option for recourse?<sup>67</sup>

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<sup>63</sup> There are 34 African countries that are parties to the Rome Statute. *The States Parties to the Rome Statute*, INT'L CRIM. CT., [https://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Apr. 16, 2016).

<sup>64</sup> The argument is that the majority of prosecutions undertaken by the ICC are of Africans and there is no prosecution of individuals from other regions, in particular Western nations. While not without merit and acknowledging a legitimate entitlement to the grievance, there are practical considerations also at play. The ICC may not litigate violations of international law that occurred prior to the inception of the court. Additionally, it may not institute proceedings against nationals of States that have not ratified the Rome Statute unless expressly requested by the State or by order of the United Nations Security Council. Further, it is limited in its ability to initiate proceedings against nationals from States with the internal capacity to address the violations through a competent court system. The majority of the prosecutions undertaken against African nationals have occurred at the request of the State or under the direction of the UN Security Council. Michael Bimbaum, *African Leaders Complain of Bias at ICC as Kenya Trials Get Underway*, WASH. POST (Dec. 5, 2013), [https://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b\\_story.html](https://www.washingtonpost.com/world/europe/african-leaders-complain-of-bias-at-icc-as-kenya-trials-are-underway/2013/12/05/0c52fc7a-56cb-11e3-bdbf-097ab2a3dc2b_story.html).

<sup>65</sup> *Kenya Refuses to Arrest Sudanese President Omar Al-Bashir*, AMNESTY INT'L (Aug. 27, 2010), <https://www.amnesty.org/en/press-releases/2010/08/18456/>.

<sup>66</sup> Namibia stated in November 2015 it will withdraw from the ICC as a part of a new foreign affairs policy agenda. Immanuel Shinovene, *Cabinet Affirms ICC Withdrawal*, THE NAMIBIAN (Nov. 24, 2015), <http://www.namibian.com.na/index.php?page=archive-read&id=144660>.

<sup>67</sup> The recent trial of former Chadian president Hissène Habré for atrocities he committed during his time in office suggests there are justice mechanisms the African Union can and should employ outside the ICC, but they need to occur regularly and not as a one off occurrence. Peter Fabricius, *Now to Make This Extraordinary Court Ordinary*, INST. FOR SECURITY STUD. (Feb. 11, 2016), <https://www.issafrika.org/iss-today/now-to-make-this-extraordinary-court-ordinary>.

The 1963 founding Charter of the Organization of African Unity (hereinafter “OAU”) made clear its primary concern rested with ending colonialism and apartheid while preserving individual State autonomy.<sup>68</sup> The OAU Charter establishes an assembly of Heads of State and various other bodies including a Secretary General but makes no explicit mention of human, civil or political rights of the citizens of member states.<sup>69</sup> Despite the prominent denial of these rights under colonial occupation, this inaugural body of African governance neither acknowledges these rights nor provides mechanisms to enforce and advance protections for citizens<sup>70</sup> whether in independent States or those still laboring under colonial rule.

Over years of concentrated lobbying to address this deficiency and acknowledge the high levels of human rights abuses on the continent, the OAU eventually constituted a group of experts to draft a document intended to fill the void. This document, the African Charter on Human and Peoples’ Rights (hereinafter Charter), also referred to as the Banjul Charter, specifically enumerates rights and freedoms that are to be respected and establishes a commission to provide oversight and interpretation of the Charter.<sup>71</sup> The Commission on Human and Peoples’ Rights (hereinafter Commission) was established in 1987 and is “charged with three

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<sup>68</sup> Organization of African Unity Charter, May 25, 1963, 479 U.N.T.S. 39, available at [http://www.au.int/en/sites/default/files/treaties/7759-file-oau\\_charter\\_1963.pdf](http://www.au.int/en/sites/default/files/treaties/7759-file-oau_charter_1963.pdf). Article II of the Charter enumerates the purposes of defending sovereignty and eradicating colonialism; Article III affirms a policy of non-interference in internal affairs of States and an absolute dedication to total emancipation of African territories still occupied. *Id.* at arts. II-III. The OAU Charter may not have been a clarion call for human rights, but it certainly succeeded with its stated intentions. When the OAU was formed there were only thirty-two independent states. By the time the OAU was reconstituted to the African Union in 2001, there were fifty-three independent states and apartheid had collapsed. *See* Elvy, *supra* note 24, at 84.

<sup>69</sup> AFRICAN COMM’N ON HUM. & PEOPLES’ RTS., *supra* note 1.

<sup>70</sup> The OAU Charter provides for a Court of Justice, different than the Court on Human and Peoples’ Rights later instituted under the African Charter on Human and Peoples’ Rights, and the Court of Justice has yet to be established. Ndagire, *supra* note 22, at 55.

<sup>71</sup> *See, e.g., Banjul Charter, supra* note 10.

main functions: the protection of human and peoples' rights; the promotion of human and peoples' rights and; the interpretation of the African Charter on Human and Peoples' Rights."<sup>72</sup> Unfortunately, however, the Charter "makes no provision for enforcement of duties or remedies."<sup>73</sup> The Charter establishes that the Commission is to strive toward amicable settlements whereby after the completion of an investigation of a communication, it attempts to mediate such a conclusion.<sup>74</sup> "Only when it fails will it produce a report of its findings and recommendations, to be sent to the states concerned and to the Assembly."<sup>75</sup>

The promotion aspect consists predominantly of conferences and seminars hosted by the Commission and generating reports on the function and processes of the Commission. The Commission also grants observer status to nongovernmental organizations. To fulfill the protection piece of the mandate, the Commission allows a process by which individuals and non-governmental organizations (hereinafter NGO) can submit a communication to the Commission alleging a rights violation.<sup>76</sup> The Commission then determines if the communication meets the criteria laid out in the Charter before it formally accepts it and notifies the state party of the allegations.<sup>77</sup>

Communications can be deemed inadmissible if written in disparaging, foul or insulting language; submissions must include the author's name even if a request is made for anonymity; it must be compatible with the rights and procedures enumerated in the OAU Charter and the Charter; it cannot be based exclusively on media coverage of an incident; all domestic remedies must have first been

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<sup>72</sup> *About ACHPR*, AFR. COMM'N H.P.R., <http://www.achpr.org/about/> (last visited Apr. 16, 2016).

<sup>73</sup> Ndagire, *supra* note 23, at 58.

<sup>74</sup> S.K.C. Mumba, *Prospects for Regional Protection of Human Rights in Africa*, 8 *HOLDWORTH L. REV.* 101, 109 (1983).

<sup>75</sup> *Id.*

<sup>76</sup> *History*, *supra* note 1. State parties may also submit a communication alleging a violation of the Charter by another State party but this has yet to occur in practice. In regards to the interpretation function of the Commission; "To date, neither the OAU nor a state party to the Charter has approached the Commission for an interpretation of any of the provisions of the Charter." *Id.*

<sup>77</sup> *Id.*

exhausted; it must be submitted within a reasonable amount of time from the exhaustion of domestic legal remedies and; it may not address a matter already settled by another international human rights body.<sup>78</sup>

As the Commission evolved, the rigidity of the submission requirements and the confidentiality clause has been shaped into a model that is more demonstrative to the needs of the public. The Commission has taken it upon itself to approach States regarding human rights situations to which it is made aware by media reports in the absence of a communication lodged by a complainant.<sup>79</sup> Additionally, in 2010 the Commission amended its rules to allow exceptions to the exhaustion of local remedies provision based on the provision of specific grounds as to why such remedies are impossible or unavailable.<sup>80</sup>

One author noted in 1998, “[t]he Commission has not yet expressly found a violation of Article 11 of the Charter, although many of the cases in which it has found violations of the right to life arising from the fatal shooting of peaceful demonstrators, could also be regarded as Article 11 violations.”<sup>81</sup> A search of the Commission’s on line communications database shows continued sparse addressing of the right. The Commission has issued several resolutions noting concerns about human rights defenders in peril for exercising their right to peaceful assembly<sup>82</sup> or specific incidents in

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<sup>78</sup> Secretariat of the African Commission on Human and Peoples’ Rights, *Information Sheet No. 2: Guidelines For the Submission of Communications - Organisation of African Unity*, 6, available at [http://www.achpr.org/files/pages/communications/guidelines/achpr\\_infosheet\\_communications\\_eng.pdf](http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf).

<sup>79</sup> U.O. Umozurike, *The African Charter on Human and Peoples’ Rights: Suggestions for More Effectiveness*, 13 ANN. SURV. INT’L & COMP. L. 179, 186 (2007).

<sup>80</sup> Elvy, *supra* note 24, at 150-51.

<sup>81</sup> Chidi Anselm Odinkalu, *The Individual Complaints Procedure of the African Commission on Human and Peoples’ Rights: A Preliminary Assessment*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 359, 395 (1998).

<sup>82</sup> See Afr. Comm’n H.P.R. Res.196, Resolution on Human Rights Defenders in Africa (Nov. 5, 2011); Afr. Comm’n H.P.R. Res. 119, Resolution on the Situation of Human Rights Defenders in Africa (Nov. 28, 2007); Afr. Comm’n H.P.R. Res. 104, Resolution on the Situation of Human Rights Defenders in Africa (May 30, 2007).

countries where reports were made of violent suppression of peaceful assemblies<sup>83</sup> but has not rendered a decision expressly related to Article 11 where it provided an analysis of the right, how it was violated and how it should be addressed going forward.

A communication from Senegal alleging the banning of a demonstration on the eve of its scheduled start was refused for failure to exhaust local remedies.<sup>84</sup> Women of Zimbabwe Arise put forth a communication before the Commission averring their right to peaceable assembly was routinely violated by the Zimbabwe government.<sup>85</sup> WOZA received notice the communication had been accepted by the Commission, requiring the Zimbabwe government to respond and WOZA to argue for admissibility. The case remains pending with information as to the status not publically available as the Commission's interpretation of the confidentiality provisions in the rules of procedure inhibit not only the Commission from updating the case status but also restrict WOZA's counsel from providing public comment or publish their filings.<sup>86</sup>

In one communication, a Sudanese attorney filed, among other allegations, a violation of assembly rights as he was denied the right to travel to participate in a public lecture. The Commission merely stated in its adjudication the complainant was prevented "from gathering with others to discuss human rights and by punishing him for doing so, the Respondent State had violated [his] human rights to freedom of association and assembly."<sup>87</sup>

The Commission did undertake to establish a Study Group on freedom of association and assembly rights in Africa.<sup>88</sup> The preface

<sup>83</sup> Afr. Comm'n H.P.R. Res. 146, Resolution on the Human Rights Situation in the Republic of Guinea (Oct. 11, 2009).

<sup>84</sup> *Mouvement des Réfugiés Mauritaniens au Sénégal pour la défense des droits de l'Homme v Senegal*. 254/02, Afr. Comm'n H.P.R. (May 2003).

<sup>85</sup> *African Commission for Human and Peoples' Rights Accept WOZA Case, WOMEN OF ZIMBABWE ARISE* (Nov. 19, 2013), <http://wozazimbabwe.org/?p=1495>.

<sup>86</sup> Email communication with Wade McMullen, RFK Human Rights Center, March 31, 2016 (on file with author).

<sup>87</sup> *Law Offices of Ghazi Suleiman v. Sudan*. 228/99, Afr. Comm'n H.P.R. ¶ X (May 2003).

<sup>88</sup> Rep. of the Study Group on Freedom of Association & Assembly in Africa, Freedom of Association, as Pertaining to Civil Society, and Freedom of Assembly

notes:

Let me emphasize that people's desire to speak out and organize is not a cultural construct specific to a particular place and time. It's virtually biological, born from our common human heritage and rooted in the simple fact that every civilization is built upon cooperation and collaboration. . . . And it can't be stopped no matter how many laws are created to try to do so.<sup>89</sup>

The Report examines the legal basis of assembly rights in international law and the implementation of the right in all the sub-regions of the continent and provides case examples of representative situations from specific representative countries. It lays out best practices mirroring those set forth earlier by the UN Special Rapporteur and explicitly and unequivocally states, "[e]xcessive force must never be used to break up an assembly, and the only circumstances justifying the use of firearms is the imminent threat of death or serious injury."<sup>90</sup>

Criticisms of the Commission have been robust, in particular in its early years when the mandated opaqueness of the Commission process created an appearance of silence in the face of horrific human rights violations. The Charter requires the Commission to report serious human rights violations to the African Union assembly but also requires that they be kept confidential and may only be made public upon decision by the Assembly.<sup>91</sup> "[T]he Commission appeared, in the eyes of the public, to remain inactive, not even expressing condemnation at alleged acts of human rights violations."<sup>92</sup> Additionally, the Commission meets for a limited time each year during which it attempted to reach consensus on decisions,

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in Africa: A Consideration of Selected Case and Recommendations, Afr. Comm'n H.P.R. (2014).

<sup>89</sup> *Id.* at 8.

<sup>90</sup> *Id.* at 26.

<sup>91</sup> Umozurike, *supra* note 79, at 182. *See also* Elvy, *supra* note 24, at 90.

<sup>92</sup> *Id.*

and had no legal officers to write opinions with appropriate analysis of the violations and based on and citing to international legal requirements of the State that were violated and prior precedent.<sup>93</sup> All these factors were further hampered by the inability of the Commission to enforce judgments or provide reparations for human rights violation survivors.

In recognition of these deficits, the African Court on Human and Peoples' Rights (hereinafter Court) was established by the OAU as a protocol to the Charter in 1998 and came into force in 2004 following the requisite number of ratifications.<sup>94</sup> The jurisdiction of the Court encompasses States parties to the Protocol on the Court who have committed alleged violations of the Charter or "any other human rights instrument that the state has ratified."<sup>95</sup> This provides very broad subject matter discretion to bring matters before the Court. The Court is also able to provide advisory opinions on matters relating to the Charter or other human rights instruments as long as it is not an issue already before the Commission.<sup>96</sup>

There is, in fact, however, limited access to the Court. Only the following parties may bring applications: the Commission, States parties to the Court's Protocol where a complaint has been lodged at the Commission, African intergovernmental organizations, NGOs with observer status before the Commission and individuals if the State against which the allegation is made has signed a declaration allowing such applications.<sup>97</sup> In practice, this is a very narrow pool as only thirty of the fifty-four African Union<sup>98</sup> members have ratified the Protocol and only seven countries have made the necessary

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<sup>93</sup> *Id.* at 185.

<sup>94</sup> *Establishment of the Court*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/index.php/about-the-court/court-establishment> (last visited Apr. 16, 2016).

<sup>95</sup> Robert Wundeh Eno, *The Jurisdiction of the African Court on Human and Peoples' Rights* 2 AFR. HUM. RTS. L.J. 223, 226 (2002).

<sup>96</sup> *Id.* at 231.

<sup>97</sup> *Frequently Asked Questions*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://en.african-court.org/index.php/faqs/frequent-questions> (last visited Apr. 16, 2016).

<sup>98</sup> *Country Tracker*, AFR. CT. ON HUM. & PEOPLES' RTS. MONITOR, <http://www.acthprmonitor.org/country-tracker/> (last visited Apr. 16, 2016).

declaration to allow direct access to the Court.<sup>99</sup>

The Court provided a thorough consideration and reasoning regarding the restriction on NGOs and individuals and whether there was any ability of the Court to maneuver around its tight strictures on accepting jurisdiction over matters brought before the Court by those parties. *In the Matter of Femi Falana v The African Union*,<sup>100</sup> a human rights lawyer from Nigeria alleged despite multiple efforts on his part to urge and compel Nigeria to make a declaration before the Court submitting to jurisdiction, it refused, resulting in a denial of the ability of Nigerian citizens to address human rights violations before the Court. He requested the Court find that section of the Protocol invalid. The Court denied his request on the grounds “we find no provision in the Protocol empowering the Court to declare null and void and/or set aside any Article of the Protocol.”<sup>101</sup> However, the Court expressed its clear sympathy with the complainant by continuing on to say “[i]t is, however, hoped that the problems raised by [the relevant Article] will receive appropriate attention.”<sup>102</sup>

Partly due to its young age and partly due to the restrictions to access, the Court has a very small body of case law. The Court’s database also does not allow access to many of the pending matters currently before the Court in order to determine the allegations being adjudicated. As best as I could determine, there have been two matters on freedom of assembly before the Court. One was dismissed for lack of personal jurisdiction as the complainants were individual from South Africa, which has not submitted a declaration before the Court.<sup>103</sup> In the other, the Commission exercised its ability to bring a

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<sup>99</sup> *Id.* The eight countries are Benin, Burkina Faso, Cote d’Ivoire, Ghana, Mali, Malawi, Rwanda and Tanzania.

<sup>100</sup> *In the Matter of Femi Falana v. The African Union*, 001/2011 (Afr. Ct. of Hum. & Peoples’ Rts., Jun. 26, 2012), *available at* <http://dev.ihrda.org/doc/001.11/view/>.

<sup>101</sup> *Id.* at ¶ 17.

<sup>102</sup> *Id.*

<sup>103</sup> *In the Matter of Emmanuel Joseph Uko and Others v The Republic of South Africa*, 004/2012 (Afr. Ct. on Hum. & People’s Rts., Mar. 13, 2012), *available at* <http://en.african-court.org/images/cases/decision/decision%20Application%20No%20004-2012%20English.pdf>.



matter before the Court in *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*.<sup>104</sup> The Court initially rendered a provisional order in 2011, only its second decision as a new institution.<sup>105</sup>

The Commission received multiple complaints against the government of Libya for massive human rights violations occurring in the course of demonstrations in Benghazi and other cities in February 2011.<sup>106</sup> The Commission alleged demonstrators' right to assemble had been violated when these demonstrations were

violently suppressed by security forces who opened fire at random . . . killing and injuring many people . . . engaged in excessive use of heavy weapons and machine guns . . . targeted aerial bombardment . . . amount[ing] to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly.<sup>107</sup>

Based on the allegations in the Commission's allegation, the Court moved to issue a provisional order "given the extreme gravity and urgency of the matter."<sup>108</sup> The Court is empowered through its Protocol to take emergency interim measures to protect complainants during the course of adjudication.<sup>109</sup> The Court concluded it had *prima facie* jurisdiction over the matter as the dispute related to the interpretation of the Charter, Libya was a party to the Charter and the

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<sup>104</sup> *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, *supra* note 14.

<sup>105</sup> Rowland J.V. Cole, *The Emerging Jurisprudence of the African Court on Human and People's Rights* — *African Commission on Human and Peoples' Rights v Great Socialist People's Libya Arab Jamahiriya (Order for Provisional Measures)*, 14 U. BOTSWANA L.J. 147 (2012).

<sup>106</sup> *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, *supra* note 14.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Frans Viljoen, *The Relevance of the Inter-American Human Rights System for Africa*, 11 AFR. J. INT'L & COMP. L. 659, 668 (1999).

Commission was entitled to submit a case to the Court.<sup>110</sup> In a unanimous decision, the Court ordered Libya to refrain from engaging in actions that would result in loss of life or other violation of the physical integrity of the citizens of Libya amounting to a breach of the Charter or other relevant human rights instruments.<sup>111</sup> Libya was ordered to report to the Court on the measures implemented within 15 days.

While the case was eventually dismissed as the situation in Libya deteriorated such that it was not able to provide a defense and the Commission was unable to fully investigate in order to continue the prosecution, the issuing of the provisional order was significant. It set the tone that the Court considers freedom of assembly an important right that must not be violently quashed by States. It also established that the Court was prepared to take measures to intervene to protect Africans from harm committed by current and on-going human rights abuses and hold States accountable for violations against its own citizens. The inviolate belief in African state sovereignty was dealt another crack to its foundation.

Despite such a strong start, the Court has struggled to continue to develop a body of jurisprudence that can be used to further rights in Africa due to the limited actors who may bring an application forward. The gap in access frustrates the efforts of civil society to secure protections for those willing to mobilize to bring change to intolerable social situations. "NGOs and individuals often times play a crucial role in monitoring state compliance with human rights norms by bringing human rights violations to the attention of the applicable human rights regime, thereby permitting a human rights regime to hold abusive states accountable for violations of human rights, especially when the state is unwilling to acknowledge or address its own violations."<sup>112</sup>

In light of the restricted access to the Court by individuals and NGOS, the Commission should use its ability to bring matters before the Court on a more frequent basis. In addition, the Commission is also specifically enabled to take interim measures to

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<sup>110</sup> Cole, *supra* note 104, at 150.

<sup>111</sup> *Id.* at 150-51.

<sup>112</sup> Elvy, *supra* note 24, at 153

protect applicants bringing a communication prior to rendering an opinion, such as to stay an execution.<sup>113</sup> Both these measures are underutilized and should be furthered by the Commission and Court to provide critical protections for those availing themselves of the judicial measures available to protect their rights.

#### *IV. Regional and Domestic Courts Enforcement of Civil and Political Rights*

In order to bring a case before the Court or Commission, applicants are required to have exhausted domestic remedies. There is a perception in sub-Saharan Africa of a widespread lack of independent judiciary,<sup>114</sup> resulting in the legal system serving as an ineffective, if not inexistent resource for those harmed by human rights abuses. This accusation is not without merit. In Angola, seventeen young activists were convicted of rebellion against the State for meeting to discuss books that provided tools for creating peaceful change in government despite a failure on the part of the government to produce credible evidence of threat to the sanctity of the State.<sup>115</sup>

However, even within repressive States, the judiciary can be a source of recourse. In 2010, WOZA achieved a victorious result from a suit brought before the Supreme Court in Zimbabwe alleging the consistent violent dispersals of their marches violated their guaranteed right to assembly.<sup>116</sup> The Zimbabwe court agreed and issued an order to that effect. The Supreme Court stated an assembly is only in conflict with the law when “it is intended to produce the consequence of a forcible disturbance of the peace, security or order of the public” and “the applicants were simply exercising their

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<sup>113</sup> *Id.* at 146-148.

<sup>114</sup> See, e.g. Nelson Enonchong, *The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?*, 46 J. AFR. L. 197, 198 (2002) (“[O]nce in a while a national judge somewhere will put his or her head above the parapet by condemning violations of human rights.”).

<sup>115</sup> *Angola: Conviction of 17 Peaceful Activists an Affront to Justice*, AMNESTY INT’L (Mar. 29, 2016), <https://www.amnesty.org/en/latest/news/2016/03/angola-conviction-of-17-peaceful-activists-an-affront-to-justice/>.

<sup>116</sup> *Williams & Anor v. Msipha*, *supra* note 12.

fundamental rights to freedom of assembly and freedom of expression.”<sup>117</sup> The Zimbabwe Supreme Court also stated, “[a]s the exercise of the fundamental rights to freedom of assembly and freedom of expression presupposes the existence of an organized society in which the existence of peace, security or order of the public is the quintessence of the security of these liberties, they cannot be held to include in their exercise the right to virtually destroy that which is essential for their enjoyment.”<sup>118</sup>

Following that ruling, the organization experienced a marked decrease in the intensity to which their demonstrations were disrupted by police and antiriot police. There were fewer activists arrested, they were detained for shorter lengths of time, and there was less violent abuse perpetuated against WOZA members. As noted earlier, the intimidation and harmful behavior did not cease entirely, but greater space was opened up for more activists to enjoy their right to assemble by the ruling. Most recently, Zimbabwe Lawyers for Human Rights successfully challenged a refusal by police to allow a rally by a political opposition party in the High Court of Zimbabwe.<sup>119</sup> The judge found the police to be out of order and their refusal on grounds of security reasons was insufficient. The subsequent rally gathered thousands in the streets of Harare for a peaceful demonstration.<sup>120</sup>

South Africa has also been a leader in several cases brought in its courts, demonstrating a broader commitment to enforcing international law. After Sudanese president Omar al-Bashir visited the country in July 2015 for an African Union summit and South African officials refused to fulfill their obligations under the Rome Statute to proceed with his arrest, several domestic NGOs filed suit against the government for failure to complete their duties.<sup>121</sup> The

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Richard Chidza, *Open Season for Protests as Courts Rein in Police*, STANDARD (Apr. 17, 2016), <http://www.thestandard.co.zw/2016/04/17/open-season-for-protests-as-courts-rein-in-police/>.

<sup>120</sup> Conor Gaffey, *Zimbabwe: Mugabe's Zanu-PF Dismiss Opposition Protests*, NEWSWEEK (Apr. 15, 2016), <http://www.newsweek.com/zimbabwe-mugabes-zanu-pf-dismiss-opposition-protests-448291>.

<sup>121</sup> *South African Court Rules Failure to Detain Omar al-Bashir was*

appeal court agreed and found the conduct of the government to be “disgraceful.”<sup>122</sup>

The courts in South Africa have also not been afraid to push back against government efforts to resist international obligations in regards to the actions of neighboring country, Zimbabwe. Zimbabwe experienced high levels of political violence in 2008 surrounding an election.<sup>123</sup> An NGO based in South Africa compiled a report and submitted it to the National Prosecuting Authority, calling on the body to investigate the allegations of torture and other crimes under South Africa’s obligations established in national implementing legislation for the ICC.<sup>124</sup> The authority refused and the NGO litigated, winning before the Constitutional Court a decision that requires South Africa to investigate and arrest and prosecute anyone determined culpable if they enter the country.<sup>125</sup> In a separate matter, a South African court ruled property owned by the Zimbabwe government in Cape Town, South Africa could be seized and sold at auction to compensate Zimbabweans who previously won a legal victory before a regional tribunal against the Zimbabwe government.<sup>126</sup>

The Ghanaian courts have also set strong precedent on human rights cases since independence, predominantly utilizing constitutional law principles but with a growing incorporation of cites to international law principles in legal decisions.<sup>127</sup> The

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“Disgraceful,” *GUARDIAN* (Mar. 15, 2016), <http://www.theguardian.com/world/2016/mar/16/south-african-court-rules-failure-to-detain-omar-al-bashir-was-disgraceful>.

<sup>122</sup> *Id.*

<sup>123</sup> *Violence and Coercion Mark Zimbabwe’s Election*, AMNESTY INT’L (June 27, 2008), <https://www.amnesty.org/en/latest/news/2008/06/violence-and-coercion-mark-zimbabwe039s-election-20080627/>.

<sup>124</sup> *South Africa’s Police Must Investigate Zimbabwe Torture Allegations*, INST. FOR SECURITY STUD. (Nov. 10, 2014), <https://www.issafrica.org/iss-today/south-africas-police-must-investigate-zimbabwe-torture-allegations>.

<sup>125</sup> *Id.*

<sup>126</sup> *Evicted Zimbabwe White Farmers in “Symbolic South Africa Win,”* BBC (Sept. 21, 2015), <http://www.bbc.com/news/world-africa-34313485>.

<sup>127</sup> See generally, Kwadwo Appiahyei-Atua, *Ghana at 50: The Place of International Human Rights Norms in the Courts*, in MENSE-BONSU ET AL., *GHANA LAW SINCE INDEPENDENCE: HISTORY, DEVELOPMENT AND PROSPECTS*

Supreme Court has held the government may not promulgate legislation that places a prior restraint on the right to assemble.<sup>128</sup> “A regulation which has the sole objective of giving the police advance notice to enable them make provision for the maintenance of order during the procession will be permitted. . . He will have no authority to prevent the planned peaceful demonstration from being held.”<sup>129</sup>

There is a middle ground between domestic courts and the Commission and Court established by the OAU. There are sub-regional development communities across the continent that established tribunals for causes of action between community members and by citizens of those States. In sub-Saharan Africa, the three development communities that established such mechanisms are the Economic Community of West African States (hereinafter ECOWAS), the East African Court of Justice (hereinafter EACJ), and Southern African Development Community Tribunal (hereinafter SADC).<sup>130</sup>

The ECOWAS Court and EACJ have thus far been successful in handling human rights litigations and resisted efforts to derail its mandate by member States.<sup>131</sup> They are promising sources of protections for citizens to bring actions in response to human rights violations. The SADC Tribunal does not have the same positive trajectory-in fact it was disbanded in 2009. The SADC Tribunal began operating in 2007 and heard five cases in its short, storied history.<sup>132</sup> One of those cases was a matter brought by Zimbabwean

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(2007).

<sup>128</sup> E.K. Quashigah, *The Constitutional Right to Freedom of Assembly and Procession in Ghana in the Light of the Decision in the Public Order Case and the Public Order Act*, 20 U. GHANA L.J. 1, 2 (1996-1999).

<sup>129</sup> *Id.*

<sup>130</sup> *Regional Economic Communities in Africa*, CLAIMING HUMAN RIGHTS, [http://www.claiminghumanrights.org/african\\_recs.html](http://www.claiminghumanrights.org/african_recs.html) (last updated Jan. 12, 2010).

<sup>131</sup> Amy Porges, *Regional and Sub-Regional Human Rights Tribunals: The African Response*, AM. SOC’Y OF INT’L L. (Apr. 12, 2015, 11:32 AM), <https://www.asil.org/blogs/regional-and-sub-regional-human-rights-tribunals-african-response> (last visited Apr. 16, 2016).

<sup>132</sup> Sarah Hager, *SADC Tribunal Struggles for Legitimacy*, AMNESTY INT’L. (Sept 3, 2009), <http://blog.amnestyusa.org/africa/sadc-tribunal-struggles-for-legitimacy/>.

farmers alleging illegal seizure and dispossession of their land by the Zimbabwe government. They won.<sup>133</sup> In response, the Zimbabwe government challenged the legality of the Tribunal's existence, asserting it has no force as it was not properly constituted. Arguably, the Zimbabwe government is correct in that there is a discrepancy between the constitutive charter of SADC and the protocol that details the structure of the Tribunal.<sup>134</sup> As of now, the Tribunal is mired in a morass of lack of political will to move forward and reconstitute it as an adjudicating body.<sup>135</sup>

### *V. Recommendations*

"The African Commission has existed for [nearly thirty] years with inadequate resources and personnel."<sup>136</sup> It is time the States of Africa meet their obligations and fully support the Commission by paying their full dues and assist with the provision of staff and other resources so the Commission may robustly implement its mandate.<sup>137</sup> States must also show their commitment to the Commission by completing their required reporting<sup>138</sup>, responding appropriately to inquiries from the Commission<sup>139</sup> and acknowledging and adhering to Commission recommendations based on communication findings. Finally, States must allow Commission

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<sup>133</sup> This is the case under which the South African government subsequently determined the legality of the seizure of Zimbabwe government owned property in South African to compensate the farmers. *See generally* MAIL & GUARDIAN AFRICA, *supra*, note 55.

<sup>134</sup> Hager, *supra* note 129.

<sup>135</sup> The complainant in the Zimbabwe farm case approached the Commission regarding the dismantling of the Tribunal, however the Commission determined it had no authority to determine the legality of the action of SADC nor require SADC to reconstitute the Tribunal as there is no cause of action under the Charter nor any other instrument to which Zimbabwe is a party. A right to access courts refers only to national courts, not sub-regional, regional or international court systems. *Luke Munyandu Tembani and Benjamin John Freeth v Angola and Thirteen Others*, Afr. Comm'n H.P.R., Commc'n 409/12, (Nov. 5, 2013).

<sup>136</sup> Umozurike, *supra* note 79, at 181

<sup>137</sup> *See* Elvy, *supra* note 24, at 91

<sup>138</sup> *See id.* at 98

<sup>139</sup> Odinkalu, *supra* note 81, at 395.

members to enter their borders to conduct investigations of human rights abuses as needed and also regularly invite Commission members to conduct missions to explore situations on the ground, even when there are no active communications put forward. By States displaying such acceptance of the Commission, its mandate and the human rights values encapsulated in the process, citizens are encouraged to embrace the Commission and normalize the concept of utilizing it as a mechanism for promoting and addressing human rights.

Advancing human rights norms in sub-Saharan Africa will require the work and dedication of creative and courageous legal minds willing to lead the charge forward in what are often dangerous situations. “Lawyers . . . more than any other group in society, have the capacity to check the arbitrary powers of government, expand and protect citizen’s rights, reform legal institutions, rejuvenate the civil society, and induce attitudinal changes necessary to sustain democracy.”<sup>140</sup> In order to empower members of the Bar to take up this charge, they need resources, support and training.

This should start from the beginning of the legal career. University law programs should support courses on international law that provide the opportunity to not only learn the concepts but understand their application across all aspects of life. Universities should also establish human rights clinics to provide practical training opportunities for students while simultaneously serving the community. These courses and clinics should take the view of preparing students to not only litigate human rights abuses in the domestic courts, but also in the sub-regional systems and African Union legal mechanisms. This would assist with bringing more matters before at least the Commission.

Bar committees of States should also support and encourage a pro bono requirement of all practicing attorneys. Legal costs can be prohibitive, especially for marginalized communities. The provision of free legal services would help mitigate this concern and provide more claimants to petition the above noted legal structures. Additionally, law firms should assist in meeting the financial costs

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<sup>140</sup> Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT’L L. 573, 583-84 (2000).



through pro bono efforts to bring cases before the Commission and Court by working in tandem with legal services organizations.

NGOs operating in sub-Saharan Africa should work to develop relationships with law firms operating in their State and region to attempt to foster funding, co-counsel and other support services opportunities to engage in more community education of rights and develop resource channels to take cases forward into the Commission or Court.

### *Conclusion*

The Commission itself makes a call on its web page for citizens to bring more communications forward and utilize the Commission's resources to a fuller capacity.<sup>141</sup> However, a recent Gallup poll found a majority of citizens (53%) in sub-Saharan Africa would choose to not access formal legal structures to settle a dispute in a preference for traditional systems.<sup>142</sup> In many countries, "Western" adversarial legal systems continue to be viewed with distrust as there is a sense of alienation from a process that can be expensive with sophisticated procedures to access, seemingly designed to protect the interests of the elite.<sup>143</sup>

There was a significant disparity between citizens of States with stronger functioning governments stating they would utilize the courts, and those in which a developed central government was weak, indicating a need for developing states to focus on establishing the competency of their legal system and establishing ease of access as a means to empower its citizens.<sup>144</sup> The more individuals appreciate the efficacy of the courts, the more likely they are to utilize them when there are perceived injustices amongst themselves,

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<sup>141</sup> See AFRICAN COMM'N ON HUM. & PEOPLES' RTS., *supra* note 2.

<sup>142</sup> Jay Loschky, *Majority in Sub-Saharan Africa Wouldn't Use Formal Courts*, GALLUP (Mar. 25, 2016), [http://www.gallup.com/poll/190310/majority-sub-saharan-africa-wouldn-formal-courts.aspx?utm\\_source=alert&utm\\_medium=email&utm\\_content=morelink&utm\\_campaign=syndication](http://www.gallup.com/poll/190310/majority-sub-saharan-africa-wouldn-formal-courts.aspx?utm_source=alert&utm_medium=email&utm_content=morelink&utm_campaign=syndication).

<sup>143</sup> Oko, *supra* note 137, at 610.

<sup>144</sup> See generally, *id.* Sadly, many weak States prefer to keep their citizens disempowered in order to assure continuity of power and control of resources.

but also to hold the government to account.

The cases before the European Court of Justice thus far have upheld the right to reasonable restrictions to freedom of assembly on public order justifications,<sup>145</sup> and the British House of Lords upheld the legality of such measures as the kettling of demonstrators.<sup>146</sup> This should not deter citizens of African states from proceeding forward with claims. Challenges need to be made to permitting and notice laws to ensure such measures are reasonable and most assuredly, the violent repression of peaceful assemblies must be curtailed. Holding States to account for these practices is necessary and legal challenges in the domestic, regional and sub-regional legal systems are effective ways to move forward.

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<sup>145</sup> Hamilton, *supra* note 26, at 81-83.

<sup>146</sup> Harris, *supra* note 15, at 58-59.

