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Theories of State Compliance With International Law: Assessing the African Union's Ability to Ensure State Compliance With the African Charter and Constitutive Act

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THEORIES OF STATE COMPLIANCE WITH INTERNATIONAL
LAW: ASSESSING THE AFRICAN UNION’S ABILITY TO ENSURE
STATE COMPLIANCE WITH THE AFRICAN CHARTER AND
CONSTITUTIVE ACT

Stacy-Ann Elvy*

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I. INTRODUCTION

May 26, 2011, marked the ten-year anniversary of the establishment of the African Union, and with the sudden death of Muammar al Gaddafi, who was instrumental in the creation of the African Union,¹ the time is ripe to fully re-assess the ability of the African Union to ensure state compliance with the Constitutive Act of the African Union (Constitutive Act) and the African Charter on Human and Peoples' Rights (African Charter). The African continent has a long history of massive human rights abuses. Prior to 2001, the Organization of African Unity (OAU) was responsible for ensuring that African states complied with international law and respected the human rights of their citizens.² Given the OAU's many failures, including its inability to stop or prevent human rights violations, member states of the OAU elected to overhaul the OAU and establish the African Union on May 26, 2001.³ Previous writings by legal scholars on the African Union have generally concluded that the African Union, like its predecessor the OAU, has been unable to protect human rights in Africa or ensure state compliance with the democratic and human rights principles set forth in the African Charter.⁴

This Article contributes to the body of scholarship on the effectiveness of the African Union by analyzing the African Union's response to the political and humanitarian crises in Madagascar, Guinea-Conakry, Zimbabwe, Libya, and Kenya from both a realist and institutionalist perspective on state compliance with international law. This Article argues that while the African Union's handling of the crises in Madagascar and Guinea-Conakry indicates that the African Union is successfully providing incentives for its smaller and less powerful member states to comply with the Constitutive Act and the African Charter, the African Union's ultimate resolution of the crisis in Zimbabwe and its feeble responses to the political turmoil in Libya and Kenya signal that the African Union continues to be plagued by a number of problems, including, but not limited to, the following: limited political will, failure to timely and uniformly impose sanctions, state reporting failures, and inadequately drafted governing instruments. This Article will propose a number of solutions to these problems, such as revising the African Charter

¹ Paul Reynolds, *African Union Replaces Dictators' Club*, BBC NEWS (July 8, 2002, 11:23 GMT), <http://news.bbc.co.uk/2/hi/Africa/2115736.stm> (identifying Gaddafi as instrumental in a captioned photo).

² Constitutive Act of the African Union, *entered into force* May 26, 2001, 2158 U.N.T.S. 3, 33 [hereinafter AU Constitutive Act].

³ Corinne A.A. Packer & Donald Rukare, *The New African Union and Its Constitutive Act*, 96 AM. J. INT'L L. 365, 365, 374 (2002).

⁴ *Id.* at 377-78.

to eliminate claw-back clauses, amending the Constitutive Act, revising the protocol establishing the Peace and Security Council to remove the principle of equitable regional representation and rotation, better utilizing the African Union Commission on International Law, and revising the protocols establishing the African Court on Human and Peoples' Rights and the African Court of Justice and Human Rights.

This Article proceeds as follows. Part II introduces the institutionalist and realist theories of state compliance with international law. Part III establishes the applicable legal framework by addressing the history of the African regional human rights system and critiques the provisions of both the African Charter and the Constitutive Act. By using the realist and institutionalist theories to review the African Union's response to the political crises in Madagascar and Guinea-Conakry, Part IV analyzes the effectiveness of the African Union in ensuring state compliance with the provisions of the African Charter and the Constitutive Act. Part V examines the African Union's paltry reaction to the political crises in Zimbabwe, Libya, and Kenya from an institutionalist and realist perspective and analyzes the African Union's inability to ensure that these countries comply with the principles contained in the African Charter and the Constitutive Act. Part VI unveils the problems the African Union continues to face in light of its response to the crises in Zimbabwe, Libya, and Kenya. Part VI also proposes concrete legal solutions to enable the African Union to more effectively protect human rights in Africa and obtain member state compliance with the human rights and democratic principles set forth in the Constitutive Act and the African Charter.

II. THEORIES OF STATE COMPLIANCE WITH INTERNATIONAL LAW

While a number of individual theories provide a suitable basis for analyzing state compliance with international law, this Article combines the institutionalist and realist theories to ultimately produce a cohesive and unique paradigm to evaluate the African Union's efficacy in obtaining member state compliance with the African Charter and Constitutive Act.

A. Institutional Perspective

The institutionalist theory of state compliance with international law views states as rational actors that behave on the basis of self-interest.⁵ According to institutionalists, membership in a regional human rights

⁵ Catherine Powell, *United States Human Rights Policy in the 21st Century in an Age of Multilateralism*, 46 ST. LOUIS U. L.J. 421, 425 (2002).

system, which states join with the aim of setting a common standard of behavior, positively impacts a state's perception of its self-interest by creating significant incentives to comply with the international rules and norms established by the regional human rights system.⁶

Proponents of the institutionalist theory assert that the rules and norms established by institutions will reform a state's decision-making process, thereby encouraging a state to cooperate by surrendering certain short-term goals in order to reap greater benefits of long-term gains.⁷ Additionally, according to institutionalists, human rights violations occur "when the conditions supporting compliance are absent or weak, that is, when international norms are ambiguous."⁸ Thus, institutionalists believe that state compliance with the norms and rules of a human rights regime will be greatest in those regions of the world where human rights regimes are strong, such as in Western Europe.⁹

Furthermore, institutionalists assert that state compliance with the norms established by a human rights regime can occur in a number of ways:

[B]y rewarding states that develop reputations for adherence to international rules; by creating greater interdependence between states thereby raising the cost of cheating; by increasing the amount of available information to ensure effective monitoring of adherence and early warning of cheating; and by reducing the transaction costs of individual agreements, thereby making cooperation more profitable for self-interested states.¹⁰

In essence, the rules and norms of a human rights regime increase the likelihood of a state's transformation from frequently cheating for its own self-interest to instead choosing cooperation in pursuit of long-term gains. In the human rights context, monitoring mechanisms may be established in the founding documents of the human rights regime (e.g., state reporting procedures). Alternatively, they may be established on an ad hoc basis to monitor and resolve specific political and humanitarian crises in noncompliant countries (e.g., international contact groups).¹¹ Additionally,

⁶ See *id.* (explaining that human rights systems or institutions minimize the non-cooperative element of self-interest called cheating).

⁷ *Id.* at 426.

⁸ Sonia Cardenas, *Norm Collision: Explaining the Effects of International Human Rights Pressure on State Behavior*, 6 INT'L STUD. REV. 213, 220 (2004).

⁹ *Id.* at 217.

¹⁰ Powell, *supra* note 5, at 426–27.

¹¹ U.N. Office of the High Commissioner for Human Rights, Making Human Rights a

institutionalists argue that institutions "can promote cooperation in the absence of a common . . . or . . . formal govern[ment] . . . by providing 'a stable environment for mutually beneficial decision-making as they guide and constrain behavior.'"¹² International institutions, such as the African Union, bestow upon participating members the ability to create long-term relationships, effectually eliminating mere short-term relationships that are void of incentives to cooperate. For instance, under the direction of the African Union, the New Partnership for Africa's Development (NEPAD) was established in an effort to promote democracy in Africa and increase economic integration and peace and security among African countries.¹³ In connection with the creation of NEPAD, the African Union also created a peer review mechanism that utilizes principles of self-monitoring, mentoring, and guidance in the hopes of promoting good governance and socioeconomic integration in African countries.¹⁴ Moreover, institutionalists emphasize "inducing, rather than persuading or coercing, decision makers to comply with international norms as the best means of protecting and promoting human rights."¹⁵ In fact, "[r]ather than applying punitive sanctions, advocates of this liberal position assume that greater economic openness will spill over into increasing political reform . . . [and that] trade provides greater opportunities for societal contact and an exchange of democratic [and human rights] ideas. . . ."¹⁶

B. Realist Perspective

The realist perspective assumes international anarchy and purports that a state will comply with international law only when compliance is in the state's self-interest.¹⁷ Thus according to realists, a rational state actor will

Reality: The Human Rights Mechanisms (Feb. 2009), http://www.ohchr.org/Documents/AbouutUs/IK_HR_mechanisms_En.pdf.

¹² William J. Aceves, *Institutionalist Theory and International Legal Scholarship*, 12 AM. U. J. INT'L L. & POL'Y 227, 242 (1997) (quoting Duncan Snidal, *Political Economy and International Institutions*, 16 INT'L REV. L. & ECON. 121, 127 (1996)).

¹³ See generally African Union, *The New Partnership for Africa's Development* 16–21 (Oct. 2001), available at http://www.uneca.org/nepad/Media-Dialogue/NEPAD_Framework_Document.pdf (outlining the purpose and goals of NEPAD).

¹⁴ Org. of African Unity Assembly of Heads of State & Gov't, *The New Partnership for Africa's Development (NEPAD): The African Peer Review Mechanism (APRM)*, §§ 1–2, 4, AHG/235(XXXVIII) Annex II. For a detailed discussion on the African peer review system, see Okezie Chukwumerije, *Peer Review and the Promotion of Good Governance in Africa*, 32 N.C. J. INT'L L. & COM. REG. 49 (2006).

¹⁵ Cardenas, *supra* note 8, at 217.

¹⁶ *Id.*

¹⁷ MARKUS BURGSTALLER, *THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW* 96–99 (2005).

not abide by a treaty or the norms and rules established by a human rights regime when doing so would not be in the state's self-interest. In fact, realists question the efficacy of international institutions such as human rights regimes and posit that individual states, not international institutions, are the key actors in international relations.¹⁸ Further, traditional realists argue that "a state commits an action because it advances its national interest but it does not need to claim that the national interest itself serves to justify international acts."¹⁹

In contrast to the institutionalist theory, the underpinnings of the realist theory derive from the notion that states are rationally seeking to increase two vital components—power and security.²⁰ According to realists, the important factor influencing state compliance with international law is the power of a state relative to the other states that are parties to a particular human rights regime.²¹ Therefore, the extent to which a state's behavior conforms to international law mainly depends on a state's political, economic, and military power in comparison to its neighboring states or the human rights regime, not on the norms and rules established by the governing human rights regime.²² According to realists, "[w]eaker governments 'accept international obligations because they are compelled to do so by great powers.'"²³ Moreover, realists "expect human rights violations to be pervasive, given that it is not in most states' material interests to attach sufficiently high costs to noncompliance."²⁴ Thus, according to realists, military intervention and sanctions are often necessary to coerce a recalcitrant state into compliance.²⁵

It should be noted that, in general, the realist perspective focuses mainly on the role of individual states in international politics rather than on the actions of international institutions, such as human rights regimes.²⁶

¹⁸ Jack Snyder, *One World, Rival Theories*, FOREIGN POL'Y, Nov.–Dec. 2004, at 59; see also Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1842 (2002) (noting realists' lack of concern for international organizations, which do not impose constraints on hegemonic states).

¹⁹ BURGSTALLER, *supra* note 17, at 97.

²⁰ See *id.* at 97–98 (describing realist theories that focus on security and power).

²¹ See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 221 (2000) (discussing the effect hegemonic power dynamics have on human rights regimes).

²² BURGSTALLER, *supra* note 17, at 96.

²³ Helfer, *supra* note 18, at 1842 (quoting Moravcsik, *supra* note 21, at 221).

²⁴ Cardenas, *supra* note 8, at 219.

²⁵ Tseming Yang, *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT'L L. 1131, 1139–40 (2006).

²⁶ Snyder, *supra* note 18; see also Helfer, *supra* note 18, at 1895 (assessing realist theory).

However, the concepts of state security, power, self-interest, coercion, and sanctions, all of which underlie the realist theory, play an instrumental role in understanding international politics and state compliance with international law. As such, this Article will utilize the concepts underlying the realist perspective—state security, power, self-interest, coercion, and sanctions—to analyze the actions of the African Union and propose solutions to better aid the African Union in obtaining state compliance with the African Charter and Constitutive Act.

The evolution of the institutionalist and realist theories of state compliance with international law has afforded scholars a potent tool for analyzing international relations and determining the efficacy of regional human rights systems. However, these theories are not immune from criticism and neither theory alone can definitively and conclusively account for all factors that may impact or determine state compliance with international law. Therefore, this Article seeks to combine both the realist and institutionalist theories to utilize a wider range of factors that may predict member state compliance, and thereby, comprehensively determine whether the African Union has successfully obtained member state compliance with the African Charter and Constitutive Act.

III. AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: LEGAL FRAMEWORK AND CRITIQUE

Established in 1963, the OAU had as its main goal the elimination of colonization in Africa and the promotion of unity and solidarity among African states for the betterment of its peoples.²⁷ Absent from the OAU Charter, however, was an explicit statement of the OAU's role in protecting the human rights of the African citizenry.²⁸ The absence of this provision would lay the foundation for the OAU's failure to prevent or stop the human rights violations later committed by abusive African states and rebel fighters. Of course, with the exception of a few international conventions adopted prior to 1963—the Universal Declaration of Human Rights, the Convention

²⁷ G. Aforika Nweke, *The Organization of African Unity and Intra-African Functionalism*, 489 ANNALS AM. ACAD. POL. & SOC. SCI. 133, 134, 138 (1987).

²⁸ See Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39, reprinted in *THE INTERNATIONAL LAW OF HUMAN RIGHTS IN AFRICA: BASIC DOCUMENTS AND ANNOTATED BIBLIOGRAPHY* 28 (M. Hamalengwa et al. eds., 1988) [hereinafter OAU Charter]. It should be noted that the preamble of the OAU Charter affirmed the OAU's commitment to the Charter of the United Nations (UN Charter) and the Universal Declaration of Human Rights (Universal Declaration), and Article II, Section 1(e) of the OAU Charter provided that the OAU must promote international cooperation with due regard to the UN Charter and the Universal Declaration. *Id.* at pmb., art. 2, § 1(e). However, those were the only references to the term "human rights" in the OAU Charter. See *id.*

on the Prevention and Punishment of the Crime of Genocide, and the Convention Relating to the Status of Refugees—neither the United Nations (UN) nor leading western countries had adopted many of the modern international conventions and treaties that recognize and guarantee human rights.²⁹ In fact, most of the international conventions and international human rights treaties recognized today were adopted after 1965.³⁰ For example, the International Convention on the Elimination of All Forms of Racial Discrimination was adopted in 1965, and the International Covenant on Economic, Social, and Cultural Rights was adopted in 1966.³¹ Therefore, one cannot fault the OAU's thirty-two founding countries³² for failing to specifically include a human rights provision in the OAU Charter when most Western countries and the UN were not primarily focused on the protection of human rights at that time. Moreover, at the time of the OAU's creation, its founding countries may have viewed colonialism and apartheid in South Africa as the most pressing human rights concerns in Africa. Thus, while the OAU had many failures, which will be discussed later in this section, the OAU arguably achieved success in two main areas: (a) the elimination of colonization in Africa and (b) the elimination of apartheid in South Africa.

Article II, Section 1(d) of the OAU Charter provided that a preeminent objective of the organization was “to eradicate all forms of colonialism from Africa.”³³ Undoubtedly, the OAU successfully achieved this goal. The organization not only took advantage of Cold War tensions, but also provided diplomatic support to African countries and galvanized the world

²⁹ The United Nations General Assembly proclaimed the Universal Declaration of Human Rights on December 10, 1948. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on December 9, 1948. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. Doc. A/RES/260(III) (Dec. 9, 1948). The Convention Relating to the Status of Refugees was adopted by the United Nations General Assembly on July 28, 1951. Convention Relating to the Status of Refugees, *done* July 28, 1951, 189 U.N.T.S. 150.

³⁰ See *International Law*, OFF. UN HIGH COMMISSIONER ON HUM. RTS., <http://www2.ohchr.org/english/law/> (last visited Sept. 4, 2012).

³¹ The International Convention on the Elimination of All Forms of Racial Discrimination was adopted on December 21, 1965. *Id.* The International Covenant on Civil and Political Rights was adopted on December 16, 1966. *Id.* The International Covenant on Economic, Social and Cultural Rights was adopted on December 16, 1966. *Id.* The Convention on the Elimination of All Forms of Discrimination Against Women was adopted on December 18, 1979. *Id.*

³² S. Afr. Dep't of Int'l Relations & Cooperation, *Organization of African Unity (OAU)/African Union (AU)*, INT'L REL. & COOPERATION, <http://www.dfa.gov.za/foreign/Multilateral/Africa/oau.htm> (last visited Sept. 5, 2012).

³³ OAU Charter, *supra* note 28, art. 2, § 1(d).

community and the UN into actions aimed at ending colonialism.³⁴ For example, the OAU established a sanctions bureau to further implement economic boycotts of African states controlled by European powers.³⁵ It also created a coordinating committee of African states to assist liberation movements in colonial states.³⁶ As a result of the OAU's diplomacy, along with the wars fought by the Front for the Liberation of Mozambique in Mozambique and the Popular Movement for the Liberation of Angola in Angola, Portugal was forced to grant independence to Mozambique in 1974 and to Angola in 1975.³⁷ There were only thirty-two independent African states when the OAU was founded in 1963.³⁸ However, due to the organization's multifaceted efforts, many more African states were able to gain independence, and the OAU was composed of fifty-three independent African states by its overhaul in 2001.³⁹

The OAU also played a critical role in ending apartheid in South Africa. Through its many efforts, the African Union successfully excluded South Africa from international organizations such as the ILO, UNESCO, FIFA, the International Olympic Movement, and most notably, the UN General Assembly.⁴⁰ In 1977 the OAU, along with the UN, organized an antiapartheid world conference; there, with approximately 112 governments participating, the Lagos Declaration for Action Against Apartheid was adopted.⁴¹ Further, the OAU successfully lobbied the UN and its member states to adopt sanctions against South Africa.⁴² Although the people of South Africa played a central role in the destruction of apartheid, the OAU, through its diplomatic efforts, figured significantly in the eradication of apartheid.

Despite the OAU's success in eliminating colonialism in Africa and apartheid in South Africa, on the whole, the OAU generally failed to fully shield African peoples from abusive states, and in fact, many have argued that the OAU "exist[ed] only for the protection of African Heads of State."⁴³

³⁴ See generally GEORGE WILLIAM MUGWANYA, HUMAN RIGHTS IN AFRICA: ENHANCING HUMAN RIGHTS THROUGH THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM 173-81 (2003) (describing the success of the OAU).

³⁵ Godfrey L. Binaisa, *Organization of African Unity and Decolonization: Present and Future Trends*, 432 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 58 (1977).

³⁶ *Id.* at 59.

³⁷ MUGWANYA, *supra* note 34, at 174-75.

³⁸ *Id.* at 174.

³⁹ AU Constitutive Act, *supra* note 2.

⁴⁰ MUGWANYA, *supra* note 34, at 175.

⁴¹ *Id.* at 177.

⁴² *Id.* at 177-78.

⁴³ Yassin El-Ayouty, *An OAU for the Future: An Assessment*, in THE ORGANIZATION OF AFRICAN UNITY AFTER THIRTY YEARS 179, 179 (Yassin El-Ayouty ed., 1994).

The inability of the OAU to address human rights needs was due in part to abuse of the noninterference clause found in Article III, Section 2 of the OAU Charter.⁴⁴ This clause, which promoted noninterference in the internal affairs of states as a major principle, was used by heads of state to shield their human rights abuses from outside interference.⁴⁵ Once a state labeled its actions or those of its citizens as “internal affairs,” the OAU was powerless to intervene.⁴⁶ A 1979 statement by the then President of Guinea-Conakry, Sekou Toure, aptly illustrates the problem. President Toure claimed that “the OAU was not ‘a tribunal which could sit in judgement on any member state’s internal affairs.’”⁴⁷ This belief, it seems, was widespread among many OAU heads of state, and as a result, the organization was unable to hold recalcitrant states accountable for human rights violations. For example, in 1963, Burundi pleaded with the OAU to prevent and stop the massacre of Tutsis, but the organization failed to act, and in 1972 and 1973, the OAU failed to prevent the murder of thousands of Hutus in Burundi.⁴⁸ The OAU again sat dormant as Equatorial Guinea’s then president, Francisco Marcias Nguema, committed human rights atrocities that eventually forced almost 1.5 million Equatorial Guineans to flee the country.⁴⁹ Moreover, the OAU proved unable to prevent or end the massacre of over 300,000 Ugandans under Idi Amin’s deadly eight-year rule.⁵⁰ Even after the OAU adopted the African Charter, the OAU continued to prove incapable of protecting the human rights of African peoples, and it failed to obtain member state compliance with the human rights principles contained in the African Charter. For example in 1994, the OAU could not thwart the massacre of approximately 800,000 Rwandan Tutsi and moderate Hutu.⁵¹ Similarly, the OAU failed to prevent the reported genocides that occurred in the Democratic Republic of Congo and Burundi in 1996.⁵²

⁴⁴ MUGWANYA, *supra* note 34, at 182.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*; see also U.O. Umozurike, *The African Charter on Human and Peoples’ Rights*, 77 AM. J. INT’L L. 902, 902–03 (1983) (noting the limited authority members imposed upon themselves).

⁴⁸ MUGWANYA, *supra* note 34, at 182. The OAU generally failed to intervene in human rights abuses, as most African leaders believed that foreign criticism of their actions violated the non-interference clause contained in the OAU Charter. *Id.*

⁴⁹ Olusola Ojo & Amadu Sesay, *The O.A.U. and Human Rights: Prospects for the 1980s and Beyond*, 8 HUM. RTS. Q. 89, 92 (1986).

⁵⁰ AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 1979, at 37–38 (Amnesty Int’l Publ’ns 1979).

⁵¹ MUGWANYA, *supra* note 34, at 55.

⁵² *Id.*

As a result of the many failures of the OAU, and in an effort to mimic the success of the European Union (EU), the member states of the OAU, with the support of Gaddafi, elected to replace the OAU with the African Union in 2000.⁵³ Gaddafi submitted a proposal for the creation of an African Union as early as 1999 and he re-affirmed this idea at an African summit meeting in Togo in 2000.⁵⁴ It should be noted, however, that while many have credited Gaddafi with the creation of the African Union, evidence suggests that there were other African leaders, such as Kwame Nkrumah, who advocated for the creation of the African Union as early as the 1960s.⁵⁵

The African Union was created to ultimately fulfill many of the goals of the OAU. As such, the African Union has incorporated many of the principles and purposes previously stated in the OAU Charter. Some of these inherited objectives include achieving unity and solidarity between African peoples, defending sovereignty and territorial integrity of member states, promoting and defending common African positions, encouraging international cooperation, and having due regard for the UN Charter and the Universal Declaration of Human Rights.⁵⁶

The African Union has also retained many of the organs of the OAU. In some instances the names of the bodies or institutions were changed, but nonetheless, their functions have remained the same. For example, as a replacement to the Office of the Secretary General, the African Union established the Commission of the Union and the Office of the Chairman.⁵⁷ The African Union has preserved the Assembly of Heads of State and Government of the Union (Assembly) as the supreme organ of the union,⁵⁸ with most powers of the Assembly specifically mandated in the Constitutive Act. Article 9 of the Constitutive Act provides that the Assembly may direct the executive council on the management of wars and conflicts, monitor the

⁵³ See Lome Declaration, AHG/Decl.2(XXXVI) (July 12, 2000) (recording considerations that lead to support for the AU model); *Transition from the OAU to the African Union: Design of the African Union*, AFR. UNION SUMMIT, http://www.au2002.gov.za/docs/background/oau_to_au.htm (last updated July 2, 2002) (noting intent to mimic the EU).

⁵⁴ See Lome Declaration, *supra* note 53 (declaring support for an African Union); see also Sirte Declaration, EAHG/Draft/Decl.(IV) Rev. 1 (Sept. 9, 1999) (recording decisions based on Gaddafi's proposals including the decision to establish an African Union).

⁵⁵ Tiyanjana Maluwa, *The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa*, 16 LEIDEN J. INT'L L. 157, 161 (2003).

⁵⁶ Compare AU Constitutive Act, *supra* note 2, art. 3, with OAU Charter, *supra* note 28, art. 2.

⁵⁷ Compare AU Constitutive Act, *supra* note 2, art. 20, with OAU Charter, *supra* note 28, art. 16.

⁵⁸ Packer & Rukare, *supra* note 3, at 375.

implementation of policies and compliance by member states, and determine the common policies of the African Union.⁵⁹

A. *Constitutive Act*

Perhaps the most notable norm change under the African Union is the newly placed restriction on the OAU's noninterference clause. Article 4(h) of the Constitutive Act now limits a state's ability to abuse the noninterference clause by permitting the African Union to intervene in the internal affairs of a member state in "grave circumstances, namely[] war crimes, genocide[,] and crimes against humanity."⁶⁰ Theoretically then, heads of state can no longer use the noninterference clause as a shield against accountability for human rights violations. Additionally, Articles 4(o) and 4(p) of the Constitutive Act indicate that the African Union is obligated to condemn and reject unconstitutional changes of government and political assassinations.⁶¹ Similarly, Article 3(g) of the Constitutive Act provides that the African Union must "promote democratic principles and institutions, popular participation and good governance."⁶² Article 30 of the Constitutive Act provides that states that come to power through unconstitutional means will have their membership in the African Union suspended.⁶³ Moreover, Article 23 of the Constitutive Act permits the African Union to impose appropriate sanctions, including political and economic sanctions, in the event that a member state fails to comply with the decisions and policies of the African Union as determined by the Assembly.⁶⁴ In accordance with Section 5(2) of the Constitutive Act, the African Union established the Peace and Security Council of the African Union (Peace and Security Council) via the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (Council Protocol).⁶⁵ The Peace and Security Council is primarily responsible for the peaceful resolution of African conflicts and one of its goals is to ensure the protection of human rights in Africa.⁶⁶ Part VI of this Article will critique certain provisions of the Council Protocol and will propose amendments to the Council Protocol to ensure state compliance with the democratic principles of the Constitutive Act.

⁵⁹ AU Constitutive Act, *supra* note 2, art. 9.

⁶⁰ *Id.* art. 4(h).

⁶¹ *Id.* arts. 4(o)–4(p).

⁶² *Id.* art. 3(g).

⁶³ *Id.* art. 30.

⁶⁴ *Id.* art. 23.

⁶⁵ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, July 9, 2002, http://www.africa-union.org/root/au/organs/psc/Protocol_peace%20and%20security.pdf [hereinafter Council Protocol].

⁶⁶ *Id.* arts. 2, 3(f).

There are a number of provisions contained in the Constitutive Act that should be revised to more effectively ensure state compliance with the principles contained in the Constitutive Act and African Charter. First, Article 6, Section 3 of the Constitutive Act provides that the Assembly need only convene once per year; however, upon the request of a member state and two-thirds majority approval of the member states, the Assembly must meet in an extraordinary session.⁶⁷ The Assembly is the supreme organ of the African Union and is responsible for monitoring the implementation of the principles of the Constitutive Act and the decisions of the African Union.⁶⁸ Moreover, the Assembly has the power to suspend states that come to power through unconstitutional means.⁶⁹ Additionally, Article 7 of the Council Protocol provides that the Peace and Security Council has the power to recommend intervention by the Assembly pursuant to Article 4(h) of the Constitutive Act,⁷⁰ which permits the Assembly to intervene in a country in the event of crimes against humanity and grave circumstances.⁷¹ Given the frequency of political crises in Africa and the Assembly's main role in the African Union, in conjunction with its extensive powers, the Assembly should be required to meet and address issues regarding compliance more than once per year.

In practice, the Assembly generally meets at least twice per year.⁷² Although the Peace and Security Council is authorized to meet as frequently as may be required and already plays an instrumental role in resolving African conflicts, the Assembly is the head of the African Union and is the organ best equipped to exercise the powers granted under the Constitutive Act. In fact, once the Peace and Security Council renders a decision or provides a recommendation, the Assembly then has the power to express its support for the implementation of these decisions and recommendations, a fact that may have additional benefits for implementation. For example, on October 20, 2011, the Peace and Security Council authorized the creation of an AU Liaison Office in Libya to address the Libyan crisis.⁷³ However, the next scheduled meeting of the Assembly was not until January 30, 2012, and it was at this meeting that the Assembly expressed its support of the Peace

⁶⁷ AU Constitutive Act, *supra* note 2, art. 6(3).

⁶⁸ *Id.* arts. 6, 9.

⁶⁹ *Id.* art. 30.

⁷⁰ Council Protocol, *supra* note 65, art. 7(e).

⁷¹ AU Constitutive Act, *supra* note 2, art. 4(h).

⁷² See *id.* arts. 10(2), 13(2) (establishing the Executive Council, which meets twice annually and reports directly to the Assembly).

⁷³ African Union, *Communiqué of the 297th Meeting of the Peace and Security Council on Its Activities and the State of Peace and Security in Africa*, ¶ 5, Doc. PSC/PR/COMM/2.(CCXCVII) (Oct. 20, 2011).

and Security Council's recommendation by requesting that the African Union Commission accelerate the process of establishing an AU Liaison Office in Libya to monitor the situation in Libya.⁷⁴ Thus, despite the meetings of the Peace and Security Council, the Assembly should meet more frequently, at the very least to more expediently express official support for the decisions of the Peace and Security Council.⁷⁵

In contrast to the provisions of the Constitutive Act, which obligate the Assembly to meet only once per year and require a two-thirds majority in order to hold an extraordinary session of the Assembly,⁷⁶ Article 237 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) provides that the Council of the EU must meet whenever convened by the president on his own initiative or at the request of one of its members or the European Commission.⁷⁷ Moreover, Article 15 of the Consolidated Version of the Treaty on European Union (EU Treaty) provides that members of the European Council, another EU organ, must meet at least twice every six months to discuss the political priorities of the EU.⁷⁸ In order to ensure that the Assembly meets frequently enough to timely respond to political crises, Article 6, Section 3 of the Constitutive Act should be revised to mimic the provisions contained in Article 237 of the TFEU, Article 15 of the EU Treaty, or both. However, unlike the African Union, the EU is well funded. Thus, one must acknowledge the logistical difficulties, including increased financial costs that the African Union may face due to more frequent meetings of the Assembly. Given the frequency of political and humanitarian crises in Africa (Guinea-Bissau and Mali being the most recent⁷⁹), such increased costs may be insignificant and well incurred in light of the African Union's long-term goals of protecting human rights and increasing political stability and democracy in Africa.

⁷⁴ Assembly of the African Union, *Decision on the Report of the Peace and Security Council on Its Activities and the State of Peace and Security in Africa*, ¶ 4, Doc. Assembly/AU/6(XVIII) (Jan. 2012).

⁷⁵ In order to facilitate a quick and timely response to ongoing crises, the Constitutive Act should not only be amended to require more frequent Assembly meetings, but also to remove the two-thirds majority requirement imposed on approval of extraordinary sessions. AU Constitutive Act, *supra* note 2, art. 6(3).

⁷⁶ *Id.*

⁷⁷ Consolidated Version of the Treaty on the Functioning of the European Union art. 237, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

⁷⁸ Consolidated Version of the Treaty on European Union art. 15, May 9, 2008, 2008 O.J. (C 115) 13.

⁷⁹ *Mali: UN Calls for Immediate Action to Avert Humanitarian Disaster*, UN NEWS CENTRE (July 26, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42561&Cr=+mali+&CrI=#.UEuXiWgyiyM>; *Unity, Common Purpose Vital to Resolve Guinea-Bissau Political Crisis – UN Officials*, UN NEWS CENTRE (July 26, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42572&Cr=bissau&CrI=#.UEuUqmggyiyM>.

Second, Article 6, Section 4 of the Constitutive Act provides that “[t]he Office of the [Chairperson] of the Assembly shall be held for a period of one year . . . after consultations among Member States.”⁸⁰ The Constitutive Act contains no guidance regarding the standards that should be used to elect the chairperson of the Assembly. President Boni Yayi of Benin was recently elected to serve as the chairperson of the Assembly.⁸¹ However, prior to President Boni’s election, President Mbasogo, long-ruling dictator of Equatorial Guinea, served as chairperson.⁸² Similarly, Gaddafi, the former dictator of Libya, also previously served as chairperson of the Assembly.⁸³ To prevent the election of dictators who fail to respect human rights and democracy, Article 6, Section 4 of the Constitutive Act should be revised to specifically provide that the office of chairperson of the Assembly shall be held only by heads of state with a consistent track record of promoting democracy and human rights in their respective countries. Moreover, from an institutionalist perspective, human rights violations occur when the norms of the human rights regime are ambiguous.⁸⁴ The chairman of the supreme organ of the African Union must be ready to lead by example, thereby signaling to member states clear norms regarding the protection of human rights and the promotion of democracy.

Third, although Article 7 of the Constitutive Act provides some guidance regarding the decisions of the Assembly, it fails to impose a timeliness requirement on the Assembly’s issuance and communication of its decisions. Article 7, Section 1 of the Constitutive Act provides that the Assembly must “take its decisions by consensus or, failing which, by a two-thirds majority of the Member States However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.”⁸⁵ Given the African Union’s slow and meager response to the political crises in Libya and Kenya (discussed in detail in Part V of this Article), there needs to be some provision in the Constitutive Act whereby the Assembly is required to timely make and convey its decisions. Moreover, Article 59 of the African Charter provides that all measures adopted by the African Commission “shall remain confidential until such time as the Assembly” authorizes the dissemination of such measures.⁸⁶

⁸⁰ AU Constitutive Act, *supra* note 2, art. 6(4).

⁸¹ African Union Comm’n, *African Leaders Look to the Future with Hope and Optimism*, THE CHAIRPERSON’S MONTH, Feb. 2012, at 1, 2.

⁸² *Id.*

⁸³ CHRISTOPHER M. BLANCHARD & JIM ZANOTTI, CONG. RESEARCH SERV., RL33142, LIBYA: BACKGROUND AND U.S. RELATIONS 7 (2011).

⁸⁴ Cardenas, *supra* note 8, at 220.

⁸⁵ AU Constitutive Act, *supra* note 2, art. 7(1).

⁸⁶ African Charter on Human and Peoples’ Rights, art. 59, OAU Doc. CAB/LEG/67/3

Thus, the Assembly's lack of timeliness impacts not only decisions made by the Assembly but also decisions rendered by the African Commission. As such, Article 7, Section 1 of the Constitutive Act should be amended to provide that the Assembly must make its decisions in a timely manner and must communicate its decisions within ten days of reaching a consensus or, failing that, a two-third majority of member states.

Fourth, while Article 14, Section 1(b) of the Constitutive Act establishes a committee on monetary and financial affairs,⁸⁷ absent from the Constitutive Act is a provision which directly addresses the budget and financing for the organs of the African Union.⁸⁸ From a realist perspective, the extent to which a state will comply with the norms of a human rights regime depends on the power of the state in comparison to the political and economic power of the human rights regime.⁸⁹ Thus, the African Union must have the economic power to pressure recalcitrant states to comply with the principles of the African Charter and Constitutive Act. Article 23, Section 1 of the Constitutive Act provides that member states that default on their payment obligations to the African Union may be denied "the right to speak at meetings, to vote, . . . or to present candidates for any position or post within the [African] Union."⁹⁰ However, in practice it appears that either the African Union has been inconsistent at utilizing Article 23, Section 1 to force member states to meet their financial obligations to the African Union, or the suspension of member benefits is not an effective sanctioning tool to engender compliance with respect to paying membership dues. If the latter is true, additional methods of enforcement may be needed in order to force member states to pay their membership dues. As recently as July 1, 2011, the African Union has acknowledged that it has continued to face budgeting and financial issues due to member states' failure to pay their dues.⁹¹ It has been reported that Gaddafi paid membership dues on behalf of a number of African states that were delinquent in their financial obligations to the

rev.5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [hereinafter African Charter].

⁸⁷ AU Constitutive Act, *supra* note 2, art. 14(1)(b). Additionally, Article 19 of the Constitutive Act establishes certain financial institutions. *Id.* art. 19.

⁸⁸ While a number of articles have discussed the lack of budgetary provisions in the Constitutive Act (*see, e.g.,* Packer & Rukare, *supra* note 3, at 377), this Article contributes to this discussion by addressing the need for the inclusion of budgetary and financing rules in the Constitutive Act from a realist and institutionalist perspective and contrasts the provisions of the Constitutive Act with those of the European Union.

⁸⁹ *See* discussion *supra* Part II.B.

⁹⁰ AU Constitutive Act, *supra* note 2, art. 23(1).

⁹¹ Assembly of the African Union, 17th Sess., June 30–July 1, 2011, *Decision Alternative Sources of Financing the African Union*, ¶ 3, Doc. EX.CL/656(XIX) [hereinafter *Decision on Financing*].

African Union.⁹² Despite Gaddafi's payment of membership dues for other member states, the African Union continued to struggle with budgetary issues.⁹³ With Gaddafi's death it is unlikely that these states will continue to receive aid from Libya in paying membership dues to the African Union.

Moreover, in contrast to the Constitutive Act, which although modeled after the EU fails to provide details on budgetary issues, Part Six, Title II of the TFEU specifically addresses financing and budgeting issues in detail. For example, Article 310 of Title II of the TFEU provides that "[a]ll items of revenue and expenditure of the [EU] shall be included in estimates to be drawn up for each financial year and [must] be shown in the budget," and that "the revenue and expenditure shown in the budget must be in balance."⁹⁴ Further, institutionalists argue that vague or unclear norms lead to state noncompliance and human rights violations.⁹⁵ The African Union does not file an annual report, lacks an independent audit authority, and the details of the annual budget are not publicly disclosed—in contrast to the many financial disclosures made by other international organizations such as the UN and the Economic Community of West African States (ECOWAS).⁹⁶ The African Union must amend the Constitutive Act to ensure that its founding document clearly establishes the rules and norms regarding not only general financing and budgeting issues, but also member state financing obligations. Additionally, the African Union must adopt measures to improve financial transparency in its operations.

Fifth, Article 23, Section 2 of the Constitutive Act should be revised to clearly provide for the imposition of political and economic sanctions in the event of a violation of the human rights and democratic principles contained

⁹² Faith Karimi, *Gadhafi's Legacy in Africa: 'Madman or God?'*, CNN, Oct. 5, 2011, http://articles.cnn.com/2011-10-05/africa/world_africa_africa-gadhafi-legacy_1_moammar-gadhafi-african-union-mosque?_s=PM:AFRICA; see also Wongai Zhangazha, *Gaddafi Missed by AU Member States*, NEWS DAY (Mar. 10, 2012), <http://www.newsday.co.zw/2012/03/10/2012-03-10-gaddafi-missed-by-au-member-states/>.

⁹³ See *Decision on Financing*, *supra* note 91 (noting continued budgetary problems as late as July 2011).

⁹⁴ TFEU, *supra* note 77, art. 310.

⁹⁵ Cardenas, *supra* note 8.

⁹⁶ Brett D. Schaefer & Morgan Lorraine Roach, *African Union: Transparency and Accountability Needed*, ISSUE BRIEF No. 3535 (Heritage Foundation, Wash. D.C.), Mar. 8, 2012, at 2; see also Admin. & Fin. Dep't, *Finance Directorate*, ECOWAS, http://www.comm.ecowas.int/dept/stand.php?id=c_c4_brief&lang=en (last visited Sept. 9, 2012) (noting the Finance Committee's responsibility for annual audits and disseminating financial information of the Commission). It should be noted that the African Union does provide information on how its funds will be allocated among the different organs. Exec. Council of the African Union, *Decision on the Budget of the African Union for the 2013 Financial Year*, Doc. EX.CL/721(XXI) (July 2010), available at <http://www.au.int/en/content/addis-ababa-09-13-july-2012-executive-council-twenty-first-ordinary-session>.

in the Constitutive Act, the African Charter, or any other convention, protocol, or instrument adopted by the African Union. Currently, Article 23, Section 2 of the Constitutive Act provides that “any Member State that fails to comply with the decisions and policies of the [African] Union may be subject to economic” and political sanctions.⁹⁷ The term *policies* is not defined in the Constitutive Act. Thus, it is unclear as to whether *policies* may be deemed to include the democratic and human rights principles referenced in the Constitutive Act, the African Charter, or other instruments such as the African Charter on Democracy, Elections and Governance which contains expansive provisions regarding unconstitutional changes in government as discussed in Part VI.B of this Article. In practice, it appears that the African Union has either interpreted the term *policies* to include violations of the African Charter or rendered sanctions after a “decision” has been made by the Peace and Security Council or the Assembly.⁹⁸ However, from an institutionalist perspective, norm ambiguity leads to human rights violations and clear norms can bolster the strength and efficacy of a human rights regime.⁹⁹ Therefore, Article 23 should be revised to clearly indicate that economic and political sanctions will be automatically issued not only for a state’s failure to comply with the decisions and policies of the African Union, but also for violations of the democratic and human rights principles contained in any instrument adopted by the African Union, including but not limited to, the African Charter and the African Charter on Democracy, Elections and Governance. Additionally, Article 30 of the Constitutive Act should be revised to provide, not only that a state’s membership in the African Union be suspended if the state comes to power through unconstitutional means, but also that the state will automatically face economic and political sanctions. Moreover, as discussed in Part VI.A of this Article, the African Union has repeatedly failed to impose sanctions on recalcitrant states in a timely manner. Thus, from a realist perspective, in order to pressure states to comply with the democratic and human rights principles of the African Charter and Constitutive Act, Article 23 and Article 30 of the Constitutive Act should be revised to provide that the Assembly must issue sanctions no later than thirty days after an unconstitutional change in government, as defined in the African Charter on

⁹⁷ AU Constitutive Act, *supra* note 2, art. 23(2).

⁹⁸ See African Union, *Communiqué of the 216th Meeting of the Peace and Security Council*, ¶ 8, Doc. PSC/PR/COMM.1(CCXVI) (Feb. 19, 2010) (threatening sanctions on AU member states involved in unconstitutional government changes); African Union, *Communiqué of the 221st Meeting of the Peace and Security Council*, ¶¶ 2–4, Doc. PSC/PR/COMM.(CCXXI) (Mar. 17, 2010) (imposing sanctions based on failure of AU member states to comply with past decision of the Peace and Security Council).

⁹⁹ Cardenas, *supra* note 8, at 217, 220.

Democracy, Elections and Governance.¹⁰⁰ Part VI.A of this Article provides a detailed discussion regarding the efficacy of sanctions.

B. African Charter

The newly created African Union retained the African Charter, which was adopted, by member states of the OAU in 1981.¹⁰¹ The African Charter recognizes a broad array of fundamental human rights of both individuals and groups. For example, Article 3 provides that “[e]very individual shall be equal under the law” and is entitled to equal protection under the law.¹⁰² Article 4 contains a broad recognition of respect for human life and the integrity of a person and further provides that no person shall be arbitrarily deprived of his right to life.¹⁰³ Article 10 provides for the right of free association,¹⁰⁴ while Article 13 provides that every individual has “the right to participate freely in the government of his [or her] country.”¹⁰⁵ Article 23 of the African Charter provides that an individual is entitled to international and national peace and security,¹⁰⁶ and Article 30 establishes the African Commission on Human and Peoples’ Rights (African Commission).¹⁰⁷ The African Commission is responsible for promoting and protecting the human rights principles contained in the African Charter.¹⁰⁸ Pursuant to Article 42, Section 2 of the African Charter, the African Commission has established rules of procedure, which govern its operations.¹⁰⁹ As discussed in detail below, despite the many fundamental human rights guaranteed by the African Charter, it contains a number of claw-back clauses and fails to include a specific right to vote. Moreover, certain rules of procedure adopted

¹⁰⁰ An unconstitutional change in government is defined as (i) a military “coup d’Etat against a democratically elected government”; (ii) “an intervention by mercenaries to replace a democratically elected government”; (iii) a “replacement of a democratically elected government by armed [dissident groups] or [rebel movements]”; (iv) the “refusal by an incumbent government to relinquish power to the winning party . . . after free, fair and regular elections”; or (v) “[a]ny amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.” African Charter on Democracy, Elections and Governance art. 23, *entered into force* Feb. 15, 2012 [hereinafter Democratic Charter], *available at* <http://www.africa-union.org/root/au/Documents/Treaties/text/Charter%20on%20Democracy.pdf>.

¹⁰¹ HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1064 (3d ed. 2008).

¹⁰² African Charter, *supra* note 86, art. 3.

¹⁰³ *Id.* art. 4.

¹⁰⁴ *Id.* art. 10.

¹⁰⁵ *Id.* art. 13.

¹⁰⁶ *Id.* art. 23.

¹⁰⁷ *Id.* art. 30.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* art. 42(2).

by the African Commission may impede the African Union's ability to obtain state compliance as discussed in Part VI.C of this Article.

Claw-back clauses permit states to restrict the rights established by the African Charter. For example, Article 8 of the African Charter provides for the freedom of conscience, and the free practice of religion; however, these rights are subject to "law and order."¹¹⁰ Article 9 of the African Charter grants every individual the right to express and disseminate opinions, provided that such opinions are "within the law."¹¹¹ Article 12 of the African Charter guarantees each individual the right to leave any country, including his or her own, and to return to his or her country; however, this right is subject to restrictions established by African states for the protection of "national security, law and order, public health or morality."¹¹² Similarly, although Article 14 guarantees the right to property, this right "may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws" established by African states.¹¹³ In short, the claw-back clauses allow African governments to remove or restrict the human rights established by the African Charter.

The African Commission has indicated that it will take an expansive approach, turning to international human rights law when interpreting African Charter provisions, including the claw-back clauses.¹¹⁴ That is, the African Commission has stated that the claw-back clauses must be interpreted in a manner that is consistent with international law and the protection of human rights. Nevertheless, the existence of the claw-back clauses allows heads of state to justify human rights violations through the use of state law, and it may signal to recalcitrant member states that the African Commission "condone[s] infringements of human rights norms as long as it is done through domestic law."¹¹⁵ Therefore, there is a pressing need for the African Union to revise the African Charter to remove the claw-back clauses.

For example, in a 1988 case the African Commission noted that the Government of Zambia incorrectly relied on the claw-back clause of Article 12(2) of the African Charter when the government blocked a number of individuals from returning to Zambia.¹¹⁶ The African Commission stated that

¹¹⁰ *Id.* art. 8.

¹¹¹ *Id.* art. 9.

¹¹² *Id.* art. 12.

¹¹³ *Id.* art. 14.

¹¹⁴ Christof Heyns, *The African Regional Human Rights System: The African Charter*, 108 PENN ST. L. REV. 679, 688–89 (2004).

¹¹⁵ *Id.* at 689.

¹¹⁶ CHELSEA THOMAS, LAWYERS' RIGHTS WATCH OF CANADA, PROTECTIVE MEASURES IN THE

the claw-back clauses in the African Charter should not be used to give credence to violations of the human rights principles set forth in the African Charter.¹¹⁷ The African Commission ultimately recommended that Zambia allow the individuals in question to return to Zambia.¹¹⁸ If the African Charter is revised to remove the claw-back clauses, there would be no need for the African Union to continually remind states that the claw-back clauses should not restrict the human rights guaranteed by the African Charter. Moreover, institutionalists posit that human rights violations occur when a human rights regime is weak and is unable to provide unambiguous norms and rules for its member states to follow.¹¹⁹ The African Union must revise the African Charter to remove the claw-back clauses in order to eliminate ambiguity regarding the utilization of the claw-back clauses.

A number of African states have incorporated similar claw-back clauses into their respective constitutions. For example, Equatorial Guinea's constitution provides that individuals have the right to freedom of expression and freedom of association; however, such rights are subject to legislative provisions establishing conditions under which those rights may be exercised.¹²⁰ President Mbasogo's restrictions on freedom of expression and freedom of assembly in Equatorial Guinea have been well documented.¹²¹ The African Union cannot with a "straight face," condemn countries such as Equatorial Guinea, for abusing the claw-back clauses contained in their respective constitutions, when the founding document that establishes and guarantees human rights in Africa—the African Charter—contains expansive claw-back provisions. Therefore, as the organization that is responsible for protecting human rights in Africa, the African Union should revise the African Charter to remove the claw-back clauses in order to send a strong message to countries such as Equatorial Guinea, that violations of human rights through the use of claw-back clauses will not be tolerated.

It should be noted that while claw-back clauses are contained in a number of international instruments, the claw-back clauses set forth in other

AFRICAN UNION 12 (Feb. 2011) (citing *Amnesty Int'l v. Zambia*, African Comm'n on Human & Peoples' Rights, Comm. 212/98, 125h ACHPR AAR Annex V (1998–1999), available at <http://www.lrwc.org/ws/wp-content/uploads/2012/03/ProtectiveMeasuresintheAfricanUnionNovember-23.pdf>).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Cardenas, *supra* note 8.

¹²⁰ CONSTITUTION OF EQUATORIAL GUINEA 1991, art. 13, available at <http://www.constitutionnet.org/files/Equatorial%20Guinea%20Constitution.pdf> (providing an unofficial consolidated version as amended on January 17, 1995).

¹²¹ Equatorial Guinea: Unesco-Obiang Nguema Mbasogo International Prize for Research in the Life Sciences, ALLAFRICA.COM, Feb. 29, 2012, <http://allafrica.com/stories/201203091099.html>.

instruments are not as sweeping as some of the claw-back clauses contained in the African Charter. For example, Article 19 of the International Covenant on Civil and Political Rights provides that the right to freedom of expression is subject to restrictions “[f]or the respect of the rights or reputations of others [and] [f]or the protection of national security[,] . . . public order . . . , or of public health or morals.”¹²² In contrast, Article 9 of the African Charter grants every individual the right to express and disseminate opinions, provided that such opinions are “within the law.”¹²³ Under the African Charter, African leaders may simply enact a law to prevent freedom of expression and arguably still be in compliance with the terms of the African Charter. In contrast, under the International Covenant on Civil and Political Rights, a state may only enact laws that limit the right to freedom of expression if those laws are narrowly tailored to address the rights of others, national security, public order, or public health. As such, at a minimum the broad claw-back clauses contained in the African Charter should be more narrowly tailored.

Another solution that may aid the African Union in ensuring member state compliance with democratic principles is to revise Article 13 of the African Charter. Currently, Article 13 of the African Charter provides that “[e]very citizen shall have the right to participate freely in the Government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”¹²⁴ While Article 13 arguably provides support for the democratic process in member states, it does not specifically provide that each individual in each member state has the right to vote and cast a ballot to elect the leaders of his or her country. The “one person, one vote” concept is integral to the democratic process and the proper functioning of a truly democratic country. Sham elections where the “one person, one vote” concept has been ignored have led to the repeated election of President Mugabe and President Mbasogo. To better promote democracy in African states, the African Charter should ensure that every African citizen has the right to vote and not just the right to participate in the political process according to the law of the individual member state.¹²⁵

¹²² International Covenant on Civil and Political Rights, GA res. 2200A (XXI), art. 19, 21 UN GAOR Supp. (No. 1) at 52, UN Doc. A/6316 (Dec. 16, 1966).

¹²³ African Charter, *supra* note 86, art. 9.

¹²⁴ *Id.* art. 13.

¹²⁵ Article 4, Section 2 of the African Charter on Democracy, Elections and Governance provides that member states must “recognize popular participation through universal suffrage as the inalienable right of the people.” Democratic Charter, *supra* note 100, art. 4(2). Arguably, the use of the term “universal suffrage” may be deemed to include the principle of “one person one vote”; however, to date, this charter has only been ratified by fifteen member states. African Union, *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Democracy, Elections and Governance*, EISA (Jan. 17, 2012), <http://www.chr.up.ac.za/images/>

Additionally, Article 62 of the African Charter requires member states to submit biennial reports "on the legislative or other measures taken with a view to giving effect to the rights and freedoms recogni[z]ed and guaranteed by the present [African] Charter."¹²⁶ As of 2007, eighteen member states have yet to submit biennial reports to the African Union.¹²⁷ As of May 2010, Madagascar, Kenya, and Guinea-Conakry have each submitted only one state report since ratification of the African Charter.¹²⁸ Similarly, Zimbabwe and Libya have only submitted three reports to the African Union.¹²⁹ Moreover, Equatorial Guinea, the country of the former chairman of the African Union, has never submitted a state report.¹³⁰ Institutionalists posit that a human rights regime can encourage member state compliance with its norms and rules by increasing the amount of available information to ensure effective monitoring and early warning of noncompliance.¹³¹ If member states complied with the state reporting requirements, the African Union would be better able to gauge state compliance with the human rights and democratic principles contained in the African Charter and Constitutive Act. From a realist perspective, member states should be motivated to make reporting a priority by the implementation of sanctions or other penalties for failure to submit timely and high quality reports. The lenient approach currently taken by the African Commission communicates to member states that the submission of timely and accurate reports is not important. Therefore, it is not surprising that many member states do not place a high priority on their state reporting obligations. The African Commission should review all reports and provide member states recommendations, as well as sanction states for their failure to timely comply with the reporting requirements of Article 62 of the African Charter. Moreover, Article 62 of the African Charter should be revised to specifically provide that the African Union will automatically issue economic and political sanctions against member states that fail to adequately comply with the state reporting procedures in a timely manner.

files/news/news_2012/African_charter_democracy_governance.pdf [hereinafter *Ratification Status of Democratic Charter*].

¹²⁶ African Charter, *supra* note 86, art. 62. See generally Takele Soboka Bulto, *Beyond the Promises: Resuscitating the State Reporting Procedure Under the African Charter on Human and Peoples' Rights*, 12 BUFF. HUM. RTS. L. REV. 57 (2006) (discussing in detail the state reporting procedures).

¹²⁷ STEINER, ALSTON & GOODMAN, *supra* note 101, at 1069.

¹²⁸ *Status on Submission of State Initial/Periodic Reports to the African Commission*, AFR. COMMISSION HUM. & PEOPLES' RTS., http://old.achpr.org/english/_info/statereport_considered_en.html (last updated May 2010).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Powell, *supra* note 5, at 426–27.

While African states should be lauded for adopting the African Charter, which recognizes the fundamental human rights of both individuals and groups, recognizing the existence of such rights is only the first step in assessing the effectiveness of a regional human rights system. An effective human rights regime not only recognizes fundamental human rights but also protects them by holding recalcitrant member states accountable for violations.¹³²

IV. AU RESPONSE IN MADAGASCAR AND GUINEA-CONAKRY

The following section provides an overview of, and analyzes the African Union's response to, the political crisis in Madagascar from both institutionalist and realist perspectives on state compliance with international law.

A. Madagascar

On March 17, 2009, the president of Madagascar, Marc Ravalomanana, was forced to turn over power of the country to the military, and over 135 people were injured or killed in riots.¹³³ It is clear that the killing of these civilians was in violation of Article 4 of the African Charter, which provides that "[e]very human being [is] entitled to respect for his life and the integrity of his person."¹³⁴ The dispute between Ravalomanana and Andry Rajoelina arose after Rajoelina was elected in 2007 as the mayor of Antananarivo, the capital of Madagascar.¹³⁵ Ravalomanana unilaterally shut down Rajoelina's television station, VIVA, after Rajoelina broadcast an interview with former

¹³² While this Article focuses on the Constitutive Act and the African Charter, member states have adopted a number of other human rights instruments that are part of the larger African human rights regime. See, e.g., Democratic Charter, *supra* note 100; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG/66.6 (Sept. 13, 2000), *entered into force* Nov. 25, 2005; African Union Convention on Preventing and Combating Corruption, *concluded* July 11, 2003, 43 I.L.M. 5; OAU Convention on the Prevention and Combating of Terrorism, *entered into force* Dec. 6, 2002, *available at* <http://treaties.un.org/doc/db/Terrorism/OAU-english.pdf> (stating the conviction that terrorism is a serious breach of human rights); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999. These other instruments have been adopted by the African Union to address specific issues such as democracy, women's rights and children's rights. This Article does not seek to determine the efficacy of the African Union in obtaining member state compliance with these other instruments.

¹³³ LAUREN PLOCH, CONG. RESEARCH SERV., R40448, MADAGASCAR'S POLITICAL CRISIS 1 (2010), *available at* <http://www.policyarchive.org/handle/10207/bitstreams/19818.pdf>.

¹³⁴ African Charter, *supra* note 86, art. 4.

¹³⁵ OTTILIA MAUNGANIDZE, INST. FOR SEC. STUDIES, MADAGASCAR: ANATOMY OF A RECURRENT CRISIS 2 (2009).

President Didier Ratsiraka that was extremely critical of Ravalomanana.¹³⁶ This action was clearly in violation of Article 9 of the African Charter, which provides that “[e]very individual shall have the right to express and disseminate his opinions within the law.”¹³⁷ On March 17, 2009, one of the presidential palaces was stormed and taken over by the Malagasy army.¹³⁸ The military then appointed Rajoelina, Ravalomanana’s political rival, as the leader of the government. Madagascar’s constitutional court deemed the transfer of power valid.¹³⁹ This judgment was in stark violation of Article 26 of the African Charter, which requires each member state to guarantee the independence of its national courts and refrain from restricting the establishment of national institutions that promote and protect the human rights guaranteed by the African Charter.¹⁴⁰

The African Union immediately responded to the political crisis in Madagascar by issuing a statement deploring the loss of life caused by the political uprising and holding talks with the relevant members of Madagascar’s government.¹⁴¹ Further, the African Union responded by invoking Article 30 of the Constitutive Act, which provides that “[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”¹⁴² In accordance with Article 30 of the Constitutive Act, the Peace and Security Council of African Union suspended Madagascar from the African Union and directed Rajoelina’s administration to take concrete steps towards returning the country to constitutional order.¹⁴³ Chairperson Jean Ping then

¹³⁶ *Id.*

¹³⁷ African Charter, *supra* note 86, art. 9. The African Commission has found that “[t]he intimidation and arrest or detention of journalists for articles published and questions asked deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information” and violates Article 9 of the African Charter. *Jawara v. Gam.*, African Comm’n on Human & Peoples’ Rights, Comm. 147/95, 149/96, ¶ 65, 13th ACHPR AAR Annex V (1999–2000), *available at* http://www.worldcourts.com/achpr/eng/decisions/2000.05.11_jawara_v_Gambia.htm.

¹³⁸ MAUNGANIDZE, *supra* note 135, at 1.

¹³⁹ *Id.*

¹⁴⁰ African Charter, *supra* note 86, art. 26.

¹⁴¹ Press Release, African Union, Chairperson Ping Presents the African Union Position on the Sudan / Chad Relationship and the Situation in Madagascar, AU Press Release 38/2009 (Jan. 30, 2009), *available at* http://www.africa-union.org/root/au/conferences/2009/January/summit/Press_Releases.html; *see also* Communiqué, Statement of Jean Ping, Chairperson of the African Union Comm’n (Feb. 3, 2009) (noting stated willingness of the conflicting parties to dialogue), *available at* http://www.africa-union.org/root/au/conferences/2009/January/summit/Press_Releases.html.

¹⁴² MAUNGANIDZE, *supra* note 135, at 4 (citing AU Constitutive Act, *supra* note 2, art. 30).

¹⁴³ *Id.*; *see also* African Union, *Communiqué of the 181st Meeting of the Peace and Security Council*, ¶ 4, Doc. PSC/PR/COMM.(CLXXXI) (Mar. 20, 2011) [hereinafter *Communiqué 181st Meeting*] (issuing suspension until restoration of constitutional order).

lobbied for the establishment of an international contact group to ensure that the international community established a common position on returning constitutional order to Madagascar.¹⁴⁴

The institutionalist theory provides that membership in an institution such as a regional human rights system facilitates cooperation by encouraging states to adhere to the norms and principles of the institution.¹⁴⁵ The African Union appears to have employed an effective institutionalist approach when the organization supported the creation of the International Contact Group on Madagascar (ICGM)¹⁴⁶ in order to resolve the crisis and obtain Madagascar's adherence to the rights guaranteed by the African Charter and the democratic principles recognized in the Constitutive Act. Additionally, from an institutionalist perspective, the African Union appears to have appealed to the merits of belonging to a human rights institution to force behavioral change in Madagascar.¹⁴⁷ With the aid of the ICGM, members of the rival Malagasy political camps met in Maputo on August 8th and 9th, 2009 and adopted the Charter of the Transition, the Maputo Political Agreement and the Charter of Values Agreement, known collectively as the "Maputo Agreements."¹⁴⁸ The Maputo Agreements provided for a peaceful transition to democracy that would occur over a fifteen month period and further called for the establishment of a "Government of National Unity," a body to be comprised of twenty-eight ministers, a prime minister, and three deputy prime ministers.¹⁴⁹

Through utilization of the ICGM, and as a result of the Maputo Agreements and a subsequent meeting held in Addis Ababa, the Peace and Security Council established a monitoring mechanism and an assessment mission which collaborated with other international actors, such as the UN, to evaluate Madagascar's electoral needs.¹⁵⁰ As previously noted in Part II.A

¹⁴⁴ See Press Release, Statement by Jean Ping, Chairperson of the African Union Commission (Apr. 7, 2009) (denoting that the African Union "initiated consultations for the early formation of an International Contact Group" to restore constitutional order in Madagascar).

¹⁴⁵ Powell, *supra* note 5, at 426–27.

¹⁴⁶ African Union, *Press Statement of the 211th Meeting of the Peace and Security Council*, Doc. PSC/PR/BR(CCXI) (Dec. 7, 2009) [hereinafter *Press Statement of PSC 211*].

¹⁴⁷ See *id.* (imploping states to demonstrate the political will necessary to comply with various remedial international documents); PLOCH, *supra* note 133, at 4 (noting the ICGM's use to apply international pressure on the opposing sides).

¹⁴⁸ See African Union, *Communiqué of the 216th Meeting of the Peace and Security Council*, ¶ 2, Doc. PSC/PR/COMM.1(CCXVI) (Feb. 19, 2010) (identifying the dates of signing and using the collective term "Maputo Agreements"); *Agreement on Madagascar Crisis Reached in Maputo*, ALLAFRICA.COM (Aug. 10, 2009) [hereinafter *Agreement in Maputo*] (identifying the three treaties signed at Maputo).

¹⁴⁹ *Agreement in Maputo*, *supra* note 148.

¹⁵⁰ *Press Statement of PSC 211*, *supra* note 146.

of this Article, institutionalists posit that state compliance with the norms established by a human rights regime can occur through the establishment of effective systems for monitoring a country's adherence to the norms of the human rights regime and providing early warning of cheating and noncompliance with these norms. Arguably, implementation of the ICGM expedited resolution of the crisis because the contact group and the Peace and Security Council has monitored the transition process and has demanded that democratic elections occur with transparency and credibility, consistent with the Maputo Agreements.¹⁵¹ To some extent, the ICGM, a monitoring mechanism encouraged by institutionalists, compelled Rajoelina to take steps to return Madagascar to constitutional order,¹⁵² thereby, encouraging state compliance with the democratic norms and principles contained in the African Charter and Constitutive Act. Moreover, this monitoring mechanism stabilized the political crisis between Ravalomanana's supporters and Rajoelina's supporters.¹⁵³ Additionally, the ICGM encouraged the rivaling parties to comply with the provisions of the Maputo Agreements, and it continues to attempt to resolve ongoing disputes between the parties through the contact group's systematic and orderly dispute resolution process.¹⁵⁴

As noted in Part II.B of this Article, from the realist perspective, states are more inclined to cooperate when it serves their self-interest to comply. Thus, a state is more likely to adhere to international law when the costs of cheating (i.e., noncompliance with international obligations), are higher than the benefits the state would reap from noncompliance. In response to Rajoelina's refusal to adhere to the Maputo Agreements, the African Union imposed a number of sanctions against Rajoelina including freezing his assets and issuing travel bans against him and approximately 108 of his supporters.¹⁵⁵ The African Union also suspended Madagascar from

¹⁵¹ See LAUREN PLOCH & NICOLAS COOK, CONG. RESEARCH SERV., R40448, MADAGASCAR'S POLITICAL CRISIS 12–13 (2012) (describing the role of international pressure in negotiating resolution to the political crisis).

¹⁵² African Union, *Press Statement of the 202nd Meeting of the Peace and Security Council*, 2, Doc. PSC/PR/BR(CCII) (Sept. 10, 2009) (expressing gratitude to the ICGM for monitoring the Madagascar crisis).

¹⁵³ PLOCH & COOK, *supra* note 151. Some sources indicate that the Southern African Development Community (SADC) was the stabilizing force in the Madagascar crisis. *Id.* at 1. But it is important to recall that, in its efforts to monitor the situation, ICGM was composed of many different organizations including SADC, *id.* at 12, and often facilitated meetings between SADC and other international institutions. *5th Meeting of the International Contact Group on Madagascar*, ALLAFRICA.COM (Feb. 19, 2010).

¹⁵⁴ Press Release, Council of the European Union, 13th Africa–EU Ministerial Troika Meeting, at 10, E.U. Press Release 14504/09 (Oct. 14, 2009); see also *Madagascar: Fifth Meeting of the International Contact Group*, ALLAFRICA.COM (Feb. 10, 2010), <http://allafrica.com/stories/201002190618.html?page=2>.

¹⁵⁵ African Union, *Communiqué of the 216th Meeting of the Peace and Security Council*,

participation in the African Union.¹⁵⁶ These targeted sanctions remain a classic tool endorsed by realists and serve to punish cheaters in hopes of deterring future misconduct.¹⁵⁷ In theory, issuance of sanctions such as freezing assets and travel bans will discourage states from cheating and noncompliance because the costs and consequences of such sanctions are far more detrimental than any benefits gained through noncompliance. This realist instrument may have been successful in contributing to resolution of the unrest in Madagascar because shortly after the African Union imposed sanctions against Rajoelina and his supporters, the Madagascar leader chose to cooperate with the international community.¹⁵⁸

Article 13 of the African Charter provides that “[e]very citizen shall have the right to participate freely in the Government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”¹⁵⁹ Article 4(m) of the Constitutive Act provides that the African Union must ensure member state “respect for democratic principles, human rights, the rule of law and good governance.”¹⁶⁰ By establishing the ICGM and levying sanctions when faced with noncompliance by Madagascar’s rival political camps, the African Union took one step closer toward ensuring Madagascar’s compliance with the principles of democracy and respect for human life set forth in Article 13 of the African Charter and Articles 4(m) and 4(o) of the Constitutive Act.

Parliamentary and presidential elections in accordance with the Maputo Agreements were scheduled for April 13, 2011 and July 1, 2011; however, the elections have been postponed numerous times.¹⁶¹ Nevertheless, on December 8, 2011, the Peace and Security Council expressed its intention to remove the sanctions placed on Madagascar upon submission by the

¶¶ 4, 8, Doc. PSC/PR/COMM.1(CCXVI) (Feb. 19, 2010); see also *Raejolina Negotiates on Army Demands*, ALLAFRICA.COM (May 4, 2010) (identifying the specific number of Raejolina supporters affected).

¹⁵⁶ *Communiqué 181st Meeting*, *supra* note 143.

¹⁵⁷ See Yang, *supra* note 25, at 1136–39.

¹⁵⁸ PLOCH & COOK, *supra* note 151, at Summary. But see Keri Leicher, *Not Out of the Woods: Madagascar’s Troubled Road to Democracy*, CONSULTANCY AFR. INTELLIGENCE (Feb. 2, 2012), http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=936:not-out-of-the-woods-madagascars-troubled-road-to-democracy-&catid=57:Africa-watch-discussion-papers&Itemid=263 (summarizing the progress to the 2011 roadmap and Raejolina’s continuing recourse to improper unilateral action contrary to the roadmap).

¹⁵⁹ African Charter, *supra* note 86, art. 13.

¹⁶⁰ AU Constitutive Act, *supra* note 2, art. 4(m).

¹⁶¹ Game Diebeela, *Pre-Election Reflection: Madagascar’s (Postponed) 2011 Parliamentary and Presidential Elections*, CONSULTANCY AFR. INTELLIGENCE (Feb. 16, 2011), http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=689:pre-election-reflection-madagascars-postponed-2011-parliamentary-and-presidential-elections-&catid=42:election-reflection&Itemid=270.

Southern African Development Community (SADC) of a report confirming satisfactory progress in the implementation of the Maputo Agreements.¹⁶² The situation in Madagascar is ongoing, and the African Union must continue its efforts to effectively resolve the crisis and return Madagascar to constitutional order in accordance with the African Charter and Constitutive Act. Currently, presidential elections in Madagascar are scheduled for May 8, 2013, and parliamentary elections are scheduled for July 3, 2013.¹⁶³ Only time will tell whether these elections will occur.

The following section discusses the political unrest that has unfolded in Guinea-Conakry and analyzes the African Union's response to the turmoil from the institutionalist and realist perspectives of state compliance with international law.

B. Guinea-Conakry

On December 23, 2008, the National Council for Democracy and Development (CNDD) seized power in Guinea-Conakry (Guinea) via military coup, named military captain Moussa Dadis Camara acting president, and promised to hold democratic presidential and legislative elections.¹⁶⁴ However, CNDD soon dissolved the government and suspended the constitution in violation of Article 4(p) of the Constitutive Act¹⁶⁵ and Articles 11 and 13 of the African Charter.¹⁶⁶ Camara seemed intent to run for president in the future scheduled elections, sparking thousands of Camara oppositionists to peacefully demonstrate.¹⁶⁷ On September 28, 2009, police and militia forces released tear gas and fired at civilian demonstrators, killing approximately 150 people and injuring many more.¹⁶⁸ Such actions were in clear violation of the respect for life, freedom of expression, and freedom of

¹⁶² African Union, *Communiqué of the 303rd Meeting of the Peace and Security Council*, ¶ 7, Doc. PSC/PR/COMM.1(CCCIII) (Dec. 8, 2011).

¹⁶³ Alain Iloniaina, *Madagascar to Hold Presidential Election Next May*, CHI. TRIB. (Aug. 1, 2012), http://articles.chicagotribune.com/2012-08-01/news/sns-rt-us-madagascar-electionbre870Iny-20120801_1_president-marc-ravalomanana-andry-rajoelina-madagascar.

¹⁶⁴ ALEXIS ARIEFF, CONG. RESEARCH SERV., R41200, GUINEA'S NEW TRANSITIONAL GOVERNMENT: EMERGING ISSUES FOR U.S. POLICY 1 (2010).

¹⁶⁵ The AU Constitutive Act requires member states to reject unconstitutional changes of governments. AU Constitutive Act, *supra* note 2, art. 4(p).

¹⁶⁶ ARIEFF, *supra* note 164. Articles 11 and 13 of the African Charter on Human and Peoples' Rights provide that every African citizen has the right to freedom of assembly and the right to participate in his or her government. African Charter, *supra* note 86, arts. 11, 13.

¹⁶⁷ ALEX ARIEFF, CONG. RESEARCH SERV., R40703, GUINEA: BACKGROUND AND RELATIONS WITH THE UNITED STATES 6 (2011).

¹⁶⁸ HUMAN RIGHTS WATCH, BLOODY MONDAY: THE SEPTEMBER 28 MASSACRE AND RAPES BY SECURITY FORCES IN GUINEA 4, 7 (2009).

association principles set forth in Articles 4, 9, and 10 of the African Charter, respectively.¹⁶⁹

In response to Guinea's violations of the democratic and human rights principles set forth in the African Charter and the Constitutive Act, the African Union condemned the unconstitutional change of government and, in conjunction with ECOWAS and the UN Security Council, formed the International Contact Group on Guinea (ICG-G), to provide an efficient resolution of the crisis.¹⁷⁰ The ICG-G, with the support of the Peace and Security Council, pledged to resolve the political crisis in Guinea and held discussions led by Blaise Compaoré, the President of Burkina Faso, to begin a dispute resolution plan for Guinea.¹⁷¹ The ICG-G's main objective was to establish free and fair parliamentary and presidential elections in Guinea.¹⁷² As previously noted in Part II.A of this Article, institutionalists argue that a human rights regime can obtain state compliance with the norms and rules it creates by establishing effective monitoring systems to prevent the political crises that may lead to a state's noncompliance with human rights norms. Arguably, institutionalists would encourage the establishment of councils, such as the ICG-G, that serve as monitoring mechanisms to evaluate and resolve political crises and to ensure state compliance with norms. Therefore, the measures taken by the African Union are consistent with the

¹⁶⁹ African Charter, *supra* note 86, at 4, 9–10. The African Commission has found that shootings by police officers violate the right-for-life principle contained in Article 4 of the African Charter. *Achutan v. Malawi*, African Comm'n on Human & Peoples' Rights, Comm. 64/92, 68/92, 78/92, ¶ 6, 7th ACHPR AAR Annex VI (1994–1995), available at http://www.worldcourts.com/achpr/eng/decisions/Undated_Achutan_v_Malawi_AR08.htm. Additionally, with respect to Article 10 of the African Charter, the African Commission has found that member states have a duty to abstain from interfering with the free formation of associations, and that there “must . . . be a general capacity for citizens to join, without member state interference, in associations in order to attain various ends.” *Civil Liberties Org. v. Nigeria*, African Comm'n on Human & Peoples' Rights, Comm. 101/93, ¶ 14, 8th ACHPR AAR Annex VI (1994–1995), available at http://www.worldcourts.com/achpr/eng/decisionns/1995.03_Civil_Liberties_Organisation_v_Nigeria_AR08.htm.

¹⁷⁰ ARIEFF, *supra* note 164, at 4; see also Assembly of the African Union, *Decision on the Resurgence of the Scourge of Coups D'etat in Africa*, ¶ 2 Doc. Assembly/AU/Dec.220(XII) (Feb. 2009) (condemning the change of government); Assembly of the African Union, *Decision on the Report of the Peace and Security Council on its Activities and the State of the Peace and Security in Africa*, ¶ 10, Doc. Assembly/AU/Dec.252(XIII) (July 2009) (expressing satisfaction with the International Contact Group on Guinea and those who formed it).

¹⁷¹ African Union, *Press Statement of the 206th Meeting of the Peace and Security*, Doc. PSC/PR/BR.1(CCVI) (Oct. 15, 2009).

¹⁷² See *International Contact Group on Guinea*, NORWAY.ORG, http://www.norway.org.et/news_and_events/au/icgg/ (last updated Sept. 2, 2009) (cataloging information primarily related to ICG-G monitoring of progress toward elections in Guinea and stressing the need to have elections).

institutionalist approach, where several states and institutions combine their resources to guide states toward adherence to all applicable norms and rules.

In accordance with Article 30 of the Constitutive Act,¹⁷³ on December 29, 2008, the African Union suspended Guinea and threatened further sanctions unless the soldiers who seized power restored constitutional order.¹⁷⁴ The Peace and Security Council, in conjunction with ICG-G, informed Camara that his government would face sanctions if he failed to provide by October 17, 2009, assurances that neither he nor his associates in CNDD would participate in future presidential elections.¹⁷⁵ When Camara refused to comply with the African Union's request, the Peace and Security Council released a statement on October 29, 2009, indicating that it would "take all the necessary measures towards the implementation of targeted sanctions, including denial of visas, travel restrictions and freezing of assets."¹⁷⁶ The realist theory posits that states are more inclined to adhere to international law when compliance furthers their self-interests.¹⁷⁷ As previously discussed in Part II.B of this Article, realists frequently endorse the imposition of targeted sanctions because realists argue that a state is more likely to comply with international law when the calculation of compliance is economically beneficial. Thus, if the costs of compliance with international law are lower than the significant sanctions and high financial costs a state would incur from failure to comply with international law, realists argue that a rational state will choose cooperation and compliance in order to avoid the economic loss.¹⁷⁸ In the Guinean crisis, the African Union threatened to impose sanctions against Camara if he failed to provide assurances that he would not participate in upcoming presidential elections. When Camara refused to comply with the African Union's request, the Peace and Security Council implemented sanctions including denial of visas, travel restrictions and freezing of assets. Following the imposition of such sanctions, Camara

¹⁷³ AU Constitutive Act, *supra* note 2, art. 30.

¹⁷⁴ African Union, *Communiqué of the 165th Meeting of the Peace and Security Council*, ¶ 3, Doc. PSC/PR/Comm(CLV) (Dec. 29, 2008).

¹⁷⁵ Press Release, ECOWAS, 8th Session of the Int'l Contact Grop. On Guinea (ICG-G), ¶ 8, Press Release 107/2009 (Oct. 13, 2009), available at <http://news.ecowas.int/presseshow.php?nb=107&lang=en&annee=2009>; African Union, *Communiqué of the 204th Meeting of the Peace and Security Council*, ¶¶ 6–7, Doc. PSC/PR/Comm(CIV) (Sept. 17, 2009), available at <http://www.africa-union.org/root/AU/organs/204%20Communique%20Rep%20%20Guinea%20204th%20%20%20EN%20Final.pdf>. Hereinafter the above sources will collectively be referred to as the "Camara Requirements."

¹⁷⁶ African Union, *Communiqué of the 207th Meeting of the Peace and Security Council*, ¶ 4, Doc. PSC/AHG/COMM.2(CCVII) (Oct. 29, 2009) [hereinafter *Communiqué 207th Meeting*].

¹⁷⁷ BURGSTALLER, *supra* note 17, at 96.

¹⁷⁸ See *id.* at 104–05 (discussing Hanspeter Neuhold's neorealist view that states use a cost-benefit analysis in determining whether to comply with international law).

ultimately complied with the African Union and other international actors, in large part because he could not practically remain in power without these sanctions being lifted.¹⁷⁹ Additionally, after a failed assassination attempt on Camara, on December 3, 2009, Camara quickly resigned to recover in Burkina Faso.¹⁸⁰

In response to Camara's resignation, General Sekouba Konaté was appointed interim president of the National Transition Council, the acting interim power in Guinea.¹⁸¹ On January 15, 2010, with the help of the ICG-G, Guinea's leaders signed a joint declaration agreement in Ouagadougou, Burkina Faso (Ouagadougou Agreement), which established a 155-member transitional government led by Prime Minister Jean-Marie Doré.¹⁸² Further, the Ouagadougou Agreement stipulated that presidential and parliamentary elections would occur within six months of the signed agreement and reiterated that Camara, Konaté, and other CNDD members could not participate in the elections.¹⁸³ After the transitional government took power, it continued to comply with the requests and regulations of the African Union. From a realist perspective, the transitional government's continued compliance with the requests and regulations of the African Union are explained by the presence of consequences, such as isolation from the African Union and the International community coupled with other sanctions, that would have been contrary to the state's self-interest and detrimental to the overall power and economy of Guinea.

With the support of the international community and the ICG-G, presidential elections occurred on June 27, 2010, in the first open election in Guinea's history.¹⁸⁴ Despite a few isolated reports of violence during campaigning, the citizens of Guinea finally enjoyed an overall peaceful election devoid of harassment or severe injury.¹⁸⁵ Consistent with the institutional perspective's support of monitoring mechanisms that observe and audit state compliance with applicable norms, rules, and agreements, the ICG-G, for a time, continued to monitor the political crisis in Guinea to ensure compliance with the provisions of the Ouagadougou Agreement.¹⁸⁶ Pursuant to the previously signed Ouagadougou Agreement, neither Camara

¹⁷⁹ See ARIEFF, *supra* note 164, at 1–2 (describing Camara's acquiescence to the interim government despite strong CNDD support).

¹⁸⁰ *Id.* at 1.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1–2.

¹⁸³ *Id.* at 2.

¹⁸⁴ ARIEFF, *supra* note 167, at 8.

¹⁸⁵ *Id.*

¹⁸⁶ See *id.* at 8, 16 (noting praise by international and domestic monitoring groups for the 2010 elections and that ICG-G continued to operate until February 2011).

nor his associates participated in the presidential elections, and on November 15, 2010, the Independent National Electoral Commission (CENI) announced Alpha Condé as the new president of Guinea.¹⁸⁷ As an additional sign of progress, in February 2012 a Guinean court filed charges against Camara for the mass rapes and killings of civilians that occurred in 2009.¹⁸⁸ These charges provide evidence that Guinea's courts are becoming more independent and more willing to hold human rights violators such as Camara accountable as required by Article 26 of the African Charter, which requires "the independence of the courts" of each member state and "the promotion and protection of the rights and freedoms guaranteed by the [African] Charter."¹⁸⁹ The African Union's persistent and attentive response to the political turmoil in Guinea serves as evidence that the organization may be overcoming some of the problems of its predecessor, the OAU. Further, the resolution of the crisis in Guinea indicates that the African Union has the ability to ensure state compliance with the democratic and human rights principles set forth in the African Charter and Constitutive Act.

The African Union's response to the political and humanitarian turmoil in Madagascar and Guinea suggests that the African Union is successfully attempting to play a vital role in the resolution of the political disputes that oftentimes lead to human rights violations in Africa. However, perhaps the African Union's relative success in Madagascar and Guinea¹⁹⁰ is due in part to a pressing need to address potential human rights violations as well as unconstitutional changes of government that come about due to coup d'états. In attempting to resolve such crises, the African Union is not only concerned with state compliance with the Constitutive Act and the African Charter, but also with state compliance with other relevant instruments that address unconstitutional changes of government. For example, both the Charter Protocol and the African Charter on Democracy, Elections and Governance address the African Union's role in resolving unconstitutional changes in governments.¹⁹¹

¹⁸⁷ *Id.* at 9.

¹⁸⁸ Sarah Jones, *Guinean Military Official Charged in 2009 Killings, Rapes of Protestors*, CNN (Feb. 11, 2012), http://www.cnn.com/2012/02/11/world/africa/guinea-mass-rape/index.html?hpt=iaf_c2.

¹⁸⁹ African Charter, *supra* note 86, art. 26.

¹⁹⁰ As discussed earlier in this Part, the crisis in Guinea-Conakry has been resolved. However, elections in Madagascar have not yet occurred. See *Southern Africa Ministers Discuss Madagascar, Congo*, ALLAFRICA.COM (July 31, 2012) (noting comments regarding attempts to garner an election).

¹⁹¹ Democratic Charter, *supra* note 100, art. 3; Charter Protocol, *supra* note 65, art. 7.

V. AU RESPONSE IN ZIMBABWE, LIBYA, AND KENYA

Despite its relative achievements in countries such as Guinea, the African Union nonetheless is unable to consistently obtain member state compliance with the African Charter and Constitutive Act, as evidenced by the African Union's handling of the crisis in Zimbabwe and its feeble response to the political crises in Libya and Kenya. This section first explores the African Union's response to the 2008 political crisis in Zimbabwe, followed by an evaluation of the African Union's paltry reaction to the violent uprisings in Libya and the 2007 political crisis in Kenya.

A. Zimbabwe

The Zimbabwe African National Union-Patriotic Front (ZANU-PF), led by Robert Mugabe, has been the major power in Zimbabwe since 1980.¹⁹² The opposition group Movement for Democratic Change (MDC) was formed during a period of economic decline in the 1990s and was lead by Morgan Tsvangirai.¹⁹³ In March 2007, police assaulted opposition members in Zimbabwe in violation of the freedom of association and freedom of assembly principles set forth in Articles 10 and 11, respectively,¹⁹⁴ of the African Charter, prompting South African President Thabo Mbeki to mediate talks between the Government of Zimbabwe and the MDC in order to establish a framework for democratic elections.¹⁹⁵

In the months leading up to the elections, reports revealed that 1,775 incidents of political violence occurred¹⁹⁶ in violation of the respect-for-life and security-of-a-person principles set forth in Articles 4 and 6 of the African Charter, respectively, and Article 4(o) of the Constitutive Act.¹⁹⁷ The results of the election, which were not announced until five weeks later, indicated that opposition leader Tsvangirai had received more votes than incumbent President Mugabe; however, Tsvangirai had still failed to attain the requisite 50% to secure the presidency.¹⁹⁸ Overall, President Mugabe's first attempt at holding a democratic election was highly scrutinized for its numerous inconsistencies and was generally characterized as failing to constitute a true "free and fair" election in violation of the democratic

¹⁹² LAUREN PLOCH, CONG. RESEARCH SERV., RL34509, ZIMBABWE: 2008 ELECTIONS AND IMPLICATIONS FOR U.S. POLICY 1 (2008).

¹⁹³ *Id.* at 1, 5.

¹⁹⁴ African Charter, *supra* note 86, arts. 10–11.

¹⁹⁵ *Id.* at 1.

¹⁹⁶ *Id.* at 3.

¹⁹⁷ AU Constitutive Act, *supra* note 2, art. 4(o); African Charter, *supra* note 86, arts. 4, 6.

¹⁹⁸ PLOCH, *supra* note 192, at 6.

principles set forth in Article 13 of the African Charter and Article 4(m) of the Constitutive Act.¹⁹⁹

Following the election results, violent political unrest increased exponentially. One report from the Zimbabwe Association of Doctors for Human Rights indicated that the violence at the time "[was] on such a scale that it [was] impossible to properly document all cases."²⁰⁰ Additionally, many reports suspected a trend of violence and torture predominantly against supporters of the MDC opposition group.²⁰¹ Such actions of violence and torture are in clear violation of Article 5 of the African Charter, which provides in part that "all forms of exploitation and . . . degrading punishment and treatment shall be prohibited."²⁰² One specific report from Amnesty International further indicated that medical institutions often refused to treat the victims and militia teams attacked humanitarian groups offering assistance to victims.²⁰³ Article 16 of the African Charter provides that member states must ensure that their citizens receive adequate medical attention.²⁰⁴ Thus, the inability of Zimbabwe's government to ensure that medical institutions provided adequate care to victims of the political crisis constitutes a violation of Zimbabwe's obligation under Article 26 of the African Charter to promote and protect the rights guaranteed by the African Charter.²⁰⁵

In response to the violence in Zimbabwe, the Assembly endorsed President Mbeki as the facilitator of mediation efforts between the rivaling parties and called upon the SADC to establish a monitoring mechanism designated to ensure resolution of the political crisis.²⁰⁶ The African Union

¹⁹⁹ African Charter, *supra* note 86, art. 13; AU Constitutive Act, *supra* note 2, art. 4(m); *see also* PLOCH, *supra* note 192, at 12 ("[T]he African Union expressed concern over the delayed [election] results, 'which creates an atmosphere of tension that is not in the least conducive to the consolidation of the democratic process that was felicitously launched through the organization of the elections.'").

²⁰⁰ PLOCH, *supra* note 192, at 8.

²⁰¹ *See, e.g., id.* at 8, 10.

²⁰² African Charter, *supra* note 86, at 5. *See, e.g.,* Amnesty Int'l v. Sudan, African Comm'n on Human & Peoples' Rights, Comm. 48/90, 50/91, 52/91, 89/93, ¶ 54, 13th ACHPR AAR Annex V (1999–2000), *available at* http://www.wouldcourts.com/achpr/eng/decisions/1999.11_Amensty_International_v_Sudan.htm (holding that physical abuse constitutes a violation of the principles contained in Article 5).

²⁰³ PLOCH, *supra* note 192, at 10.

²⁰⁴ African Charter, *supra* note 86, at 16. The African Commission has found that the enjoyment of the human right to health is "crucial to the realization of fundamental human rights and freedoms[] [and] [t]his right includes the right to obtain access to health care facilities." *See, e.g.,* Purohit v. The Gambia, African Comm'n on Human & People's Rights, Comm. 241/2001, ¶ 80, 16th ACHPR AAR Annex VII (2002–2003).

²⁰⁵ African Charter, *supra* note 86, art. 26.

²⁰⁶ Assembly of the African Union, *Resolution on Zimbabwe*, Doc. Assembly/AU/Res.1 (XI) (June–July 2008).

entrusted the SADC to lead the peacekeeping efforts but continued to monitor the situation by retaining a position in the reference group, which consisted of the SADC, the African Union, and the UN.²⁰⁷ On September 15, 2008, under the guidance of the SADC and Mbeki, the ZANU-PF and MDC parties agreed to establish a “Government of National Unity” via the execution of the Global Political Agreement of Zimbabwe.²⁰⁸ This agreement stipulated that President Mugabe would continue as the President of Zimbabwe and Tsvangirai would hold the Office of Prime Minister.²⁰⁹ Moreover, once the competing political parties had agreed to the Government of National Unity, the Assembly and Chairman Jean Ping encouraged the United States and the EU to remove their sanctions against Zimbabwe in order to assist the country in rebuilding its economy.²¹⁰

Consistent with the institutional approach, the African Union worked together with other regional and international actors to encourage the rivaling political parties in Zimbabwe to reach an agreement. As discussed in Part II.A of this Article, institutionalists believe that human rights regimes can impact the behavior of their member states by encouraging adherence to the regime’s established norms, rules, and procedures. From an institutional perspective, the African Union systematically restored order to Zimbabwe by collaborating with other organizations including the SADC and the UN to collectively influence Zimbabwe’s political leaders to form a Government of National Unity. Moreover, the African Union’s collaboration with other international actors and the appointment of President Mbeki to mediate talks, which ultimately resulted in Zimbabwe’s cooperation with the international community, strongly evidences the efficacy of the institutionalist theory. In essence, the African Union was a key player in effectuating the dispute resolution process and restoring order to Zimbabwe, while simultaneously

²⁰⁷ *Id.* (recommending that SADC establish a monitoring mechanism); see also *Diplomats Aid Mbeki with Zimbabwe*, BBC (July 18, 2008), <http://news.bbc.co.uk/2/hi/7513060.stm> (discussing the composition of the reference group and its role in the resolution of Zimbabwe’s political crisis).

²⁰⁸ Statement by His Excellency Jakaya Mrisho Kikwete, the Outgoing African Union Chairman & President of the United Republic of Tanz. at the 12th Summit of the Heads of State & Gov’t of the African Union (Feb. 2009) [hereinafter Statement by Kikwete]; Assembly of the African Union, *Decision on Zimbabwe*, ¶ 1, Doc. Assembly/AU/Dec.219(XII) (Feb. 2009) [hereinafter *Decision on Zimbabwe*] (identifying the September 15 agreement as the Global Political Agreement).

²⁰⁹ Statement of Kikwete, *supra* note 208.

²¹⁰ See *Decision on Zimbabwe*, *supra* note 208, ¶ 6 (noting AU general call to lift sanctions on Zimbabwe); *Zanu-PF Calls EU Sanctions Decision ‘Nonsense,’* MAIL & GUARDIAN (July 23, 2012), <http://mg.co.za/article/2012-07-23-zimbabwe-zanu-pf-eu-sanctions-nonsense> (noting economic impact of U.S. and EU sanctions on Zimbabwe).

altering the state's behavior and enabling Zimbabwe to realize the benefits of cooperation.

However, despite the African Union's success, from an institutionalist perspective, in brokering a peace deal that ended the political crisis in Zimbabwe via the efforts of President Mbeki, it is notable that Mugabe was allowed to remain in power. Mugabe has controlled Zimbabwe for almost thirty-two years.²¹¹ Article 4(m) of the Constitutive Act clearly provides that the African Union should respect democratic principles.²¹² By allowing Mugabe to remain in power, the African Union is clearly failing to operate in accordance with the terms of its founding documents. Furthermore, Mugabe has a long track record of human rights abuses. For example, in 2006 the African Union condemned Mugabe's forceful eviction of citizens from their homes in violation of the human rights principles contained in the African Charter.²¹³ The Assembly's decision to support the terms of the SADC's Global Political Agreement of Zimbabwe,²¹⁴ a power sharing agreement that permitted Mugabe to remain in power despite his lack of respect for human rights and democracy,²¹⁵ evidences the African Union's limited political will and that it may be following in the footsteps of its predecessor the OAU.

From an institutionalist perspective, the African Union was successful to the extent that, it was able to convince Mugabe and Tsvangirai to execute a peace agreement that ended the 2008 political crisis.²¹⁶ However, the African Union did not obtain Zimbabwe's full compliance with the democratic principles of the African Charter and Constitutive Act because Mugabe was allowed to remain in power in violation of these principles. Arguably, governments of national unity may not be a real solution to the lack of democratic governance in a particular country. In some instances, as was the case in Zimbabwe, governments of national unity may simply lead to a convenient co-optation of the opposition. This co-optation process may allow leaders who are unwilling to subject themselves to the full force of

²¹¹ *Robert Mugabe*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/m/robert_mugabe/index.html (last updated Apr. 10, 2012).

²¹² AU Constitutive Act, *supra* note 2, art. 4(m).

²¹³ Andrew Meldrum, *African Leaders Break Silence over Mugabe's Human Rights Abuses*, GUARDIAN (Jan. 3, 2006), <http://www.guardian.co.uk/world/2006/jan/04/zimbabwe.andrewmeldrum>. See generally U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: ZIMBABWE (2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154377.htm>; U.S. DEP'T OF STATE, 2004 HUMAN RIGHTS REPORT: ZIMBABWE (2005), available at <http://www.state.gov/j/drl/rls/hrrpt/2004/41634.htm>.

²¹⁴ *Decision on Zimbabwe*, *supra* note 208, ¶¶ 4–5.

²¹⁵ See PLOCH, *supra* note 192, at 1–5 (describing Zimbabwean elections in which Mugabe was permitted to participate).

²¹⁶ See Statement by Kikwete, *supra* note 208 (noting the arrival at agreement to establish a government of national unity).

democracy to perpetuate their power by either placating the opposition or essentially destroying the opposition. The leaders of Zimbabwe and Kenya²¹⁷ tried to placate political opponents who were cheated through sham elections by offering a national unity government. However, in many cases the end result is not a unity government, but a cobbling together of two groups with different political philosophies. Thus, governments of national unity may simply be political “marriages of convenience”²¹⁸ that are used to immediately “solve” a current crisis, but that fail to address the underlying reasons for the crisis. As a result, the underlying problem eventually reemerges. For example, in Zimbabwe, President Mugabe intends to run for re-election in 2012, despite opposition from rival political camps.²¹⁹ Therefore, it appears that the long-term solution is to embrace democracy in its fullest form rather than permitting leaders like Mugabe to remain in power under the auspices of a government of national unity.

As discussed in detail in Part II.B of this Article, realists posit that rational state actors calculate their decisions based on maximizing two of the most prominent state interests—power and security. It follows that state leaders may cheat, or choose a path of noncompliance, if disregarding international laws furthers such state interests. To deter this misconduct and encourage compliance, realists suggest utilizing targeted sanctions, such as travel bans and freezing assets, against states and leaders that fail to comply with international law.²²⁰ The African Union did not impose sanctions against Zimbabwe.²²¹ The EU and the United States have both implemented targeted sanctions against Zimbabwe.²²² In fact, on February 15, 2012, the

²¹⁷ See *infra* Part V.C of this Article for a detailed discussion on Kenya.

²¹⁸ Jephias Mapuva, *Government of National Unity (GNU) as a Conflict Prevention Strategy: Case of Zimbabwe and Kenya*, 12 J. SUSTAINABLE DEV. AFR. 247, 255 (2010), available at http://www.jsd-africa.com/Jsda/V12No6_Fall2010_B/PDF/Government%20of%20National%20Unity%20as%20a%20Conflict%20Prevention%20Strategy.pdf.

²¹⁹ Jonga Kandemiiri & Sithandekile Mhlanga, *Zimbabwe's Zanu-PF Endorses Mugabe to Run in 2012 Election*, VOICE AM., <http://www.voazimbabwe.com/content/zanu-pf-says-it-will-discuss-resolutions-with-partners-in-unity-government-135451508/1458246.html> (last updated Aug. 6, 2012).

²²⁰ Yang, *supra* note 25, at 1136.

²²¹ U.N. S.C. Dep't of Pub. Info., *Security Council Fails to Adopt Sanctions Against Zimbabwe Leadership as Two Permanent Members Cast Negative Votes*, U.N. Doc. SC/9396 (July 11, 2008), available at <http://www.un.org/News/Press/docs/2008/sc9396.doc.htm>. See generally *Crisis in Zimbabwe*, INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-zimbabwe?format=pdf> (last visited Sept. 19, 2012) (describing the Zimbabwe crisis and noting African Union acquiescence to Mugabe's leadership).

²²² Council Decision of 18 February 2002 Concluding consultations with Zimbabwe Under Article 96 of the ACP-EC Partnership Agreement (2002/148/EC), 2002 O.J. (L 50) 64 (noting violations by the Government of Zimbabwe and adopting “appropriate measures”); see also Zimbabwe Sanctions Regulations, 31 C.F.R. § 541 (2004).

EU elected to maintain its sanctions against Zimbabwe despite Mugabe's fervent opposition to these sanctions.²²³ One suggestion to improve the efficacy of the African Union as a whole, which will be discussed in further detail in Part VI of this Article, is to encourage the African Union to timely and uniformly impose sanctions against states who fail to comply with the principles set forth in the African Charter and the Constitutive Act. As demonstrated by the Zimbabwe situation, the African Union's failure to implement sanctions against deserving political leaders weakened the legitimate aims of the African human rights regimes. The imposition of sanctions by the African Union, in addition to the sanctions that were already issued by the EU and the United States, might have provided an additional incentive for Mugabe to relinquish power.

While it is evident that the African Union should have done much more to effectively resolve the situation in Zimbabwe, the historical and political situation in Zimbabwe may shed some light on the African Union's inability to remove Mugabe from power. The African Union was probably cognizant of the fact that the leaders of some African countries sympathize with Mugabe's policy of expropriation of land from white settlers, and these leaders may in fact have bought into Mugabe's characterization of his political rivals (the MDC) as lackies of Western neocolonialist powers.²²⁴ Moreover, it is well known that Mugabe was vocal in opposing apartheid in South Africa.²²⁵ As a result, some leaders view Mugabe as a comrade in arms in the historic fight against apartheid and colonization.²²⁶ Thus, South Africa's reluctance in pushing for Mugabe's ouster, and former President Thabo Mbeki's apparently biased mediation in favor of Mugabe, are

²²³ Council Decision 2012/97/CFSP of 17 February 2012 amending Decision 2011/101/CFSP concerning restrictive measures against Zimbabwe (EU), 2012 O.J. (L 47) 50.

²²⁴ *Western and Zimbabwean Media Sharply Differ in their Reactions to Wikileaks Tsvangirai Revelations*, ZIM. REV. (Jan. 4, 2011), <http://www.thezimreview.com/2011/01/western-and-zimbabwean-media-sharply.html>. See, e.g., *Mugabe: No 'Imperialist' Observers for Zimbabwe Elections*, NEWZIMBABWE.COM, <http://www.newzimbabwe.com/PAGES/electoral4.11160.html> (last updated Nov. 12, 2009) (noting comments of sympathy for Mugabe's stance against "former imperialists").

²²⁵ See generally Robert G. Mugabe, *Struggle for Southern Africa*, 66 FOREIGN AFF. 311 (1987) (chastising the United States for maintaining relations with apartheid South Africa); Mutumwa D. Mawere, *The World According to Mandela and Mugabe*, NEWZIMBABWE.COM, <http://www.newzimbabwe.com/pages/mawere135.18510.html> (last updated Nov. 12, 2009) (noting Mugabe's theories about reforming apartheid South Africa).

²²⁶ Alex Perry, *Mugabe Meets African Leaders*, TIME (Apr. 11, 2008), <http://www.time.com/time/world/article/0,8599,1730047,00.html>; see also David Blair, *Zimbabwe's Robert Mugabe 'a Hero', Say African Leaders*, TELEGRAPH (June 30, 2008), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/2224175/Zimbabwe-Robert-Mugabe-a-hero-say-African-leaders.html> (noting African leaders' support for Mugabe despite global criticism).

probably a result of Mugabe's historical position against apartheid. As such, the African Union's lack of success in resolving the Zimbabwean crisis may be due in part to the African Union's overreliance on President Mbeki's role as SADC mediator to Zimbabwe.

Similarly, from a realist perspective, Article 4(h) of the Constitutive Act authorizes the African Union to intervene in the affairs of a country in grave circumstances such as crimes against humanity and genocide.²²⁷ Arguably the African Union should have invoked Article 4(h) to intervene in Zimbabwe and remove Mugabe, who has a long history of human rights abuses, from power. However, this would have essentially amounted to regime change in Zimbabwe, and as discussed in Part V.B of this Article, member states of the African Union have decried regime change in other countries, such as Libya, as attacks on Africa's right to self-determination. Perhaps the African Union's inability to effectuate regime change in Zimbabwe is due not only to a lack of political will or the historical and political situation in Zimbabwe, but also to a lack of resources²²⁸ and complications resulting from additional players with different political agendas, such as the SADC.²²⁹ Furthermore, regime change may be easier said than done, as exemplified by the problems that some powerful nations are facing in Iraq, a country where regime change was externally imposed,²³⁰

²²⁷ AU Constitutive Act, *supra* note 2, art. 4(h).

²²⁸ See Part III.A of this Article for details on the African Union's lack of financial resources.

²²⁹ Brilliant Pongo, *SADC Leaders Don't like Mugabe, but They Hate West More*, NEWZIMBABWE.COM, <http://www.newzimbabwe.com/pages/opinion255.16228.html> (last updated Nov. 12, 2009). The SADC has historically had a complicated relationship with Mugabe. Many member states of the SADC do not fully support Mugabe's insistence on retaining power but defend him either because their leaders engage in the same type of power-grabbing behavior as Mugabe or because their leaders view Mugabe as a brother in arms and oppose western intervention in African states. *Id.* As a result of this complicated relationship, member states of the SADC have historically expressed support for Mugabe. See Beauregard Tromp, *SADC Welcomes Mugabe as an African Hero*, IOLNEWS (Aug. 26, 2003), http://www.iol.co.za/news/africa/sadc-welcomes-mugabe-as-an-african-hero-1.111858#.UBsnyI4_7G4 ("Zimbabwean President Robert Mugabe received a rapturous welcome at the annual Southern African Development community summit on Monday."). The SADC has also previously called for the removal of sanctions against Zimbabwe. Benjamin Sirota, Note, *Sovereignty and the Southern African Development Community*, 5 CHI. J. INT'L L. 343, 343 (2004). However, recently the SADC has taken a more publically critical stance against Mugabe and has insisted that elections in Zimbabwe will not occur until Mugabe adopts reforms to ensure free and fair elections. ROBERT I. ROTBERG, CTR. STRATEGIC & INT'L STUDIES, BEYOND MUGABE: PREPARING FOR ZIMBABWE'S TRANSITION 1-2 (2011).

²³⁰ For a detailed discussion of the issues, including security failures, that the U.S. has encountered since imposing regime change in Iraq, see generally KENNETH KATZMAN, CONG. RESEARCH SERV., RL31339, IRAQ: POST-SADDAM GOVERNANCE AND SECURITY (2009).

and in Syria, a country that may in the future be subject to externally imposed regime change.²³¹

B. Libya

Gaddafi led Libya's 1969 revolution against the Libyan monarchy four decades ago, and while Gaddafi always insisted that he maintained no formal governmental position, his authoritarian leadership controlled the country until his death in 2011.²³² Gaddafi's forty-year authoritarian leadership was clearly in violation of Article 13 of the African Charter, which provides that every individual has "the right to participate freely in the government of his country, either directly or [indirectly] through freely chosen representatives."²³³ Additionally, Gaddafi's long rule of Libya was also in violation of the democratic principles contained in the Constitutive Act, more specifically, Articles 3(g) and 4(m).²³⁴ Further, the 2009 U.S. Department of State report on human rights in Libya labeled the country's human rights record as "poor,"²³⁵ and provided that the country faced "[c]ontinuing problems includ[ing] reported disappearances, torture, arbitrary arrest and imprisonment, lengthy pretrial and sometimes incommunicado detention, official impunity, and poor prison conditions."²³⁶ Despite Gaddafi's tainted past, the African Union nonetheless elected him to serve as chairman of the African Union in 2009 for a one-year term.²³⁷ Gaddafi had long-standing ties to the African Union. In fact, Gaddafi typically receives credit in full as the driving force behind the establishment of the African Union, which culminated in the Sirte Declaration at the fourth extraordinary session of the

²³¹ For a discussion of the challenges associated with imposing regime change in Syria, see generally JERRY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: U.S. AND INTERNATIONAL RESPONSE (2012). See also Amos N. Guiora, *Northern Africa and the Mideast: to Where?: Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration*, 44 CASE W. RES. J. INT'L L. 251 (2011) (examining U.S. response to Libyan and Syrian crises in light of international law and humanitarian intervention); *Kofi Annan Resigning as U.N. Envoy to Syria*, CBSNEWS.COM (Aug. 2, 2012, 12:58 PM), http://www.cbsnews.com/8301-202_162-57485309/kofi-annan-resigning-as-u-n-envoy-to-syria/ (noting a shrinking likelihood of finding a diplomatic solution to the Syrian crisis).

²³² CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL33142, LIBYA: UNREST AND U.S. POLICY 1 (2012).

²³³ African Charter, *supra* note 86, art. 13.

²³⁴ See AU Constitutive Act, *supra* note 2, arts. 3(g), 4(m) (promoting democratic principles and governance).

²³⁵ BLANCHARD & ZANOTTI, *supra* note 83, at 22.

²³⁶ U.S. DEP'T OF STATE, 2010 HUMAN RIGHTS REPORT: LIBYA (2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/nea/154467.htm>.

²³⁷ BLANCHARD & ZANOTTI, *supra* note 83, at 7.

OAU in 1999.²³⁸ Gaddafi had also provided significant financial contributions to the African Union since its inception in 2000.²³⁹

On February 15, 2011, pro-democracy protests marked the beginning of a violent uprising against Gaddafi.²⁴⁰ Libyan security forces opened fire on opposition activists and chaos ensued, allegedly escalating until attacks on secure locations prompted Libyan forces to fire with heavy weaponry.²⁴¹ Such confrontations between government authorities and the opposition caused the deaths and likely severe injuries of several unarmed protestors in violation of the right to life and liberty principles set forth in Articles 4 and 6 of the African Charter.²⁴² Ultimately, the opposition created an Interim Transitional National Council that sought international recognition as a formal, organized body and alternative to the Gaddafi regime.²⁴³ In an attempt to quell the escalating opposition, Gaddafi loyalists reportedly fired on crowds and protestors.²⁴⁴ This reckless response by the Gaddafi regime contributed to the estimated 30,000 people who were killed.²⁴⁵ With Libya on the brink of civil war, regional and international actors intervened. Deliberations among participating nations resulted in a demand for Gaddafi's immediate departure, yet Gaddafi refused to relinquish power.²⁴⁶ The International Criminal Court later issued arrest warrants for Gaddafi, one of his sons, Saif al-Islam Gaddafi, and his head of military intelligence, Abdullah al-Senussi.²⁴⁷

The UN Security Council requested that Gaddafi's government adhere to Resolution 1973 (UN Resolution 1973), a proposition that necessitated "an immediate cease-fire, . . . declare[d] a no-fly zone in Libyan airspace, . . . and

²³⁸ See, e.g., Andrew Meldrum, *African Union refuses to arrest Gaddafi*, GLOBALPOST (July 1, 2011), <http://www.globalpost.com/dispatches/globalpost-blogs/Africa-emerges/african-union-refuses-arrest-gaddafi> (identifying Gaddafi as fundamental to the African Union's founding). See generally Sirte Declaration, *supra* note 54 (declaring decision to establish the African Union).

²³⁹ Barry Malone, *Insight: Africa to Miss Gaddafi's Money, Not His Meddling*, REUTERS (Nov. 11, 2011, 9:27 AM), <http://www.reuters.com/article/2011/11/11/us-gaddafi-africa-legacy-fidUSTRE7AA36E20111111>.

²⁴⁰ BLANCHARD & ZANOTTI, *supra* note 83, at 1.

²⁴¹ BLANCHARD, *supra* note 232, at 1.

²⁴² African Charter, *supra* note 86, arts. 4, 6.

²⁴³ BLANCHARD, *supra* note 232, at 17.

²⁴⁴ Catherine Norris Trent, *Gaddafi Loyalists Open Fire on Protesters in Tripoli*, FRANCE24, <http://www.france24.com/en/20110225-troops-loyal-gaddafi-open-fire-tripoli-unrest-libya-protests> (last updated Feb. 26, 2011).

²⁴⁵ *U.S.: Libya Death Toll as High as 30,000*, CBSNEWS (Apr. 27, 2011), <http://www.cbsnews.com/stories/2011/04/27/501364/main20057968.shtml>.

²⁴⁶ BLANCHARD, *supra* note 232, at Summary.

²⁴⁷ Prosecutor v. Gaddafi, Case No. ICC-01/11, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ¶¶ 95, 99, 102 (June 27, 2011), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

authorize[d] member states 'to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack.'²⁴⁸ While the Assembly acknowledged the need for an immediate cease-fire in Libya as required by UN Resolution 1973,²⁴⁹ the Assembly rejected foreign military intervention and instead encouraged peaceful resolution of the Libyan conflict.²⁵⁰ Arguably, there may be a causal connection between the African Union's lack of response and the significant monetary contributions made by Gaddafi to the African Union each year. The sum of Libya's annual membership dues, along with the dues of several poorer countries paid by Gaddafi, amounts to an estimated \$40 million per year.²⁵¹ Moreover, the former Libyan leader had billions of dollars at his disposal for further potential contributions.²⁵² The paraphrased statement of one analyst, Delphine Lecoutre of the French Center for African Studies at Addis Ababa University, stated that "even leaders who find [Gaddafi]'s behavior repugnant [still] fear his wrath if the [African Union] should anger him."²⁵³ Thus, it appears that the African Union may have failed to support international intervention in Libya because the organization feared Libya would withdraw from the African Union or terminate its financial contributions in the event that sanctions were imposed on the country.

Although the fact that Gaddafi made financial contributions to the African Union is well-known, the extent of, and the African Union's reliance on, these contributions may be grossly overstated. Based on the African Union formula for contributions of each respective country, Libya, Egypt, Algeria, Nigeria, and South Africa each contribute 15% towards the African Union's annual budget.²⁵⁴ Therefore, it could be argued that Gaddafi held the same amount of power over the African Union as did Nigeria, Algeria, Egypt, and South Africa. Additionally, though Gaddafi often agreed to host special

²⁴⁸ BLANCHARD, *supra* note 232, at 6 (quoting S.C. Res. 1973, ¶ 4, Doc. A/RES/1973 (Mar. 17, 2011)).

²⁴⁹ Assembly of the African Union, *Decision on the Peaceful Resolution of the Libyan Crisis*, ¶ 4, Doc. EXT/ASSEMBLY/AU/DEC/(01.2011) (May 25, 2011) [hereinafter *Decision on Resolution of Libyan Crisis*].

²⁵⁰ Assembly of the African Union, *Decision on the Report of the Peace and Security Council and Its Activities and the State of Peace and Security in Africa Doc. Assembly/AU/4(XVII)*, ¶ 27, Doc. Assembly/AU/Dec.369(XVII) (June–July 2011).

²⁵¹ Peter Heinlein, *Gaddafi Maintains Africa Policy Influence, Even with Rule in Doubt*, VOICE OF AM., <http://www.voanews.com/english/news/Gadhafi-Maintains-Africa-Policy-Influence-Even-With-Rule-in-Doubt-118171204.html> (last updated Mar. 16, 2011).

²⁵² Michael Goldfarb, *What Happens to Gaddafi's Billions?*, GLOBALPOST (Oct. 20, 2011), <http://www.globalpost.com/dispatches/globalpost-blogs/europa/what-happens-gaddafis-billions>.

²⁵³ Heinlein, *supra* note 251.

²⁵⁴ *Zuma Calls on African Funds for Development*, AGENCE FRANCE PRESSE (June 29, 2011), available at <http://www.nepad.org/fr/print/2350>.

meetings of the African Union at his expense in Libya,²⁵⁵ he also hosted similar meetings for the Arab League²⁵⁶ and the Community of Sahelian and Sahara States (CEN-SAD)²⁵⁷ without any suggestion that he was controlling the countries of the Arab League or CEN-SAD. Furthermore, Gaddafi was well-known for interfering in African conflicts by providing financing to various rebels in countries such as Liberia,²⁵⁸ Sierra Leone,²⁵⁹ Chad, Niger, Mali, and Uganda.²⁶⁰ Thus, many African heads of state may in fact have had their own grievance with Gaddafi and may not have been Gaddafi's so-called little minions, as many have argued.²⁶¹

Additionally, many have argued that South Africa and the African Union failed to support military action in Libya because Gaddafi allegedly supported the African National Congress (ANC), thus allowing the ANC to ultimately end apartheid in South Africa.²⁶² However, according to former President Thabo Mbeki of South Africa, this "support" was fictitious:

[T]he incontrovertible fact is that during [apartheid], Libya did not give the ANC even one cent, did not train even one of our military combatants, and did not supply us with even one bullet. This is because Gaddafi's Libya made the determination that the ANC was little more than an instrument of Zionist Israel, because we had among our leaders such outstanding

²⁵⁵ Bram Posthumus, *Libya in the Dock?*, RADIO NETH. WORLDWIDE (Dec. 1, 2010, 11:15 AM), <http://www.rnw.nl/international-justice/article/Libya-dock>.

²⁵⁶ See, e.g., *Arab League summit concludes in Libya*, MAANNEWS (Mar. 28, 2010), <http://www.maannnews.net/eng/ViewDetails.aspx?ID=272375>.

²⁵⁷ *11th CEN-SAD Summit Begins*, PANAPRESS (May 29, 2009), <http://www.panapress.com/11th-CEN-SAD-summit-begins--12-525786-29-lang2-index.html>.

²⁵⁸ Shout Afr., *Libya: Indict Muammar Gaddafi Now for War Crimes in Sierra Leone*, NL-AID.ORG (Mar. 15, 2011), <http://www.nl-aid.org/continent/sub-saharan-africa/libya-indict-muammar-gaddafi-now-for-war-crimes-in-sierra-leone/>.

²⁵⁹ *Id.*; see also Paul Richards, *War and Peace in Sierra Leone*, 25 FLETCHER F. WORLD AFF. 41, 41, 48 (2001) (discussing the Revolutionary United Front in Sierra Leone and Libya's role in backing the group).

²⁶⁰ AFP, *Gaddafi amasses army of African mercenaries*, AL ARABIYA NEWS (Mar. 3, 2011), <http://www.alarabiya.net/articles/2011/03/03/140004.html>; see also Scott Baldauf, *Qaddafi's Ties to Rebel Groups Scrutinized as 'African Mercenaries' Patrol Libya*, CHRISTIAN SCI. MONITOR (Feb. 23, 2011), available at <http://www.csmonitor.com/World/Middle-East/2011/0223/Qaddafi-s-ties-to-rebel-groups-scrutinized-as-African-mercenaries-patrol-Libya> (describing Gaddafi's history of aiding rebels throughout Africa, though not discussing events in Uganda).

²⁶¹ See, e.g., Erin Conway-Smith, *Libya: Africa Sticks by Old Friend Gaddafi*, GLOBALPOST (Aug. 23, 2011, 6:55 AM), <http://www.globalpost.com/dispatch/news/regions/Africa/110822/libya-africa-sticks-old-friend-gaddafi-south-africa> (reasoning that Gaddafi's contributions may have put the African Union nations in his debt).

²⁶² *Id.*; see also Suzanne Merkelson, *South Africa's Dictator Dance*, FOREIGN POL'Y (Oct. 4, 2011), http://www.foreignpolicy.com/articles/2011/10/04/south_africa_dalai_lama_dictator_dance?page=0,4#3.

patriots as the late Joe Slovo. Libya came to extend assistance to the ANC after 1990, when it realised that the ANC was a genuine representative of the overwhelming majority of our people.²⁶³

There is a growing concern in the African Union that Africa's right to self-determination, which was acknowledged in the UN's Declaration on the Granting of Independence to Colonial Countries and Peoples,²⁶⁴ is not only being encroached upon by a lack of respect for international law but also by powerful countries' co-opting the UN Security Council for their own purposes.²⁶⁵ African leaders such as President Mbeki view the Security Council's response to Libya, particularly UN Resolution 1973, as a perfect example of this problem. UN Resolution 1973 was adopted to protect civilians in Libya and effectuate a ceasefire.²⁶⁶ However, according to President Mbeki, UN Resolution 1973 was misused by NATO members to effectuate regime change in Libya despite the fact that the "Resolution said nothing about 'regime change.'"²⁶⁷ The Peace and Security Council expressed a similar view at its 275th meeting:

[The] Council stresses the need for all countries and organizations involved in the implementation of Security Council resolution 1973 (2011) to act in a manner fully consistent with international legality and the resolution's provisions, whose objective is solely to ensure the protection of the civilian population. [The Peace and Security Council urged] all involved to refrain from actions, including military operations targeting Libyan Senior Officials and socio-economic [sic] infrastructure, that would further compound the situation and make it more difficult to achieve international consensus on the best way forward.²⁶⁸

²⁶³ Thabo Mbeki, *International Law and the Future of Africa* (Nov. 5, 2011), available at <http://www.thabombekifoundation.org.za/Pages/ADDRESS-BY-THE-PATRON-OF-THE-TM-F,-THABO-MBEKI,-AT-THE-AGM-OF-THE-LAW-SOCIETY-OF-THE-NORTHERN-PROVICNES-SUN-CITY,-NOVEMBER-5.aspx>.

²⁶⁴ Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684, at 66 (Dec. 14, 1960).

²⁶⁵ Mbeki, *supra* note 263.

²⁶⁶ S.C. Res. 1973, ¶¶ 1, 3, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

²⁶⁷ Mbeki, *supra* note 263.

²⁶⁸ African Union, *Communiqué of the 275th Meeting of the Peace and Security Council of the African Union*, ¶ 11, Doc. PSC/MIN/COMM.2(CCLXXV) (Apr. 26, 2011) [hereinafter

Thus, although some African countries may have been unmotivated to act by Gaddafi's financial contributions, it appears that the African Union and several African countries failed to support military action in Libya because they may have viewed the Security Council and NATO's use of UN Resolution 1973 as an attack on African self-determination.

On February 24, 2011, the African Union finally publicly criticized the actions of the Gaddafi regime.²⁶⁹ The African Union established a high-level, ad hoc committee (Libyan Committee) comprised of the African Commission chairperson and the presidents of Mali, Uganda, the Republic of Congo, Mauritania, and South Africa.²⁷⁰ During the May 25, 2011 extraordinary session Assembly meeting, the Libyan Committee set forth recommendations for the peaceful resolution of the Libyan crisis in an "AU Roadmap."²⁷¹ The Assembly ultimately adopted the AU Roadmap, along with the Libyan Committee's purported recommendations, agreeing to endorse the following preliminary steps:

- (i) a further visit to Libya to pursue the dialogue initiated with the parties, including [a discussion of] [the urgent] issue of the ceasefire, for which the Ad hoc Committee intends [to table] a detailed document;
- (ii) the dispatching of a ministerial delegation to New York to interact with the [Security Council] and its members; and
- (iii) practical steps to engage specific AU bilateral partners on the Roadmap and [the actions] to be taken by the international community to facilitate an early resolution of [the conflict] in Libya.²⁷²

The African Union's establishment of the Libyan Committee stands as a quintessential employment of the institutionalist approach in international

Communiqué 275th Meeting].

²⁶⁹ *Libya: Africa's Rights Body Should Act Now*, HUM. RIGHTS WATCH (Feb. 26, 2011).

²⁷⁰ Press Release, African Union, The African Union Announces the composition of Ad-hoc High Level Committee on Libya (Mar. 14, 2011), available at <http://www.au.int/en/content/african-union-announces-composition-ad-hoc-high-level-committee-libya>; see also *The African union high-level ad hoc committee on Libya-Outcomes of the Meeting*, NEPAD PLAN. & COORDINATING AGENCY (May 30, 2011), <http://www.nepad.org/economicandcorporategovernance/knowledge/doc/2259/african-union-high-level-ad-hoc-committee-libya-ou> [hereinafter *Ad hoc committee on Libya*] (describing the committee actions taken during a May 2011 meeting).

²⁷¹ *Ad hoc committee on Libya*, supra note 270; see also *Decision on Resolution of Libyan Crisis*, supra note 249, ¶ 3 (endorsing the Peace and Security Council's roadmap).

²⁷² *Ad hoc committee on Libya*, supra note 270.

relations. Together with allied international actors, the African Union's response team sought to pursue a dialogue with parties to the Libyan crisis, obtain implementation of the AU Roadmap, and monitor—and ultimately resolve—the crisis in Libya.²⁷³ A team such as this Libyan Committee arguably constitutes a monitoring mechanism, an idea fervently encouraged by the institutionalism perspective. As previously noted in Part II.A of this Article, the institutionalism standpoint supports these monitoring mechanisms, as such tactics may serve to urge compliance and cooperation, monitor cheating, and systematically maintain order and resolution. However, although the African Union established the Libyan Committee, the Committee enjoyed little success once created. For example, the AU Roadmap adopted by the Libyan Committee failed to stop the daily violent clashes between the rebels and Gaddafi's supporters.²⁷⁴

Additionally, while the Peace and Security Council welcomed Gaddafi's decision to initially accept the AU Roadmap,²⁷⁵ negotiations eventually fell through. In fact, the peace plan that was tentatively approved by Gaddafi did not include a provision for Gaddafi's removal from power.²⁷⁶ In June of 2011, the Libyan Committee announced that it would attempt to broker peace negotiations despite the fact that Gaddafi was not participating.²⁷⁷ Negotiations eventually broke down again as the Libyan rebels objected to any plan that would permit Gaddafi to remain in power.²⁷⁸ The Libyan rebels believed that members of the Libyan Committee, such as President Zuma of South Africa, were long time allies of Gaddafi and were therefore partial to ensuring that Gaddafi remained in power.²⁷⁹

Moreover, Gaddafi's financial contributions to the African Union may also have led the Libyan rebels to conclude that the African Union's Libyan

²⁷³ *Id.*

²⁷⁴ Peter Clotey, *African Union Official Urges Political Solution to Libyan Crisis*, VOICE OF AM. (May 8, 2011), available at 2011 WLNR 9189137.

²⁷⁵ *Communiqué 275th Meeting*, *supra* note 268, ¶ 6.

²⁷⁶ George Grant, *Libya and the African Union: Right in Principle, Wrong in Practice*, TELEGRAPH (Apr. 12, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/Libya/8445465/Libya-and-the-African-Union-Right-in-Principle-Wrong-in-Practice.html>.

²⁷⁷ *Communiqué*, African Union High-Level *Ad Hoc* Committee on Libya, ¶ 6(ii) (June 26, 2011); see also *African Union: Gadhafi Will Not be Part of Peace Negotiations*, CNN (June 26, 2011), http://articles.cnn.com/2011-06-26/world/libya.war_1_libyan-leader-moammar-gadhafi-libyan-people-african-union?_s=PM:WORLD (expressing uncertainty as to who would negotiate on behalf of the Libyan government in Gaddafi's absence).

²⁷⁸ *Libyan Rebels Reject African Union Peace Plan*, RTÉ NEWS (July 4, 2011), <http://www.rte.ie/news/2011/0703/libya.html>.

²⁷⁹ See Leila Fadel, *Libyan Rebels Reject African Union Cease-Fire Proposal*, WASH. POST (Apr. 10, 2011), http://www.washingtonpost.com/world/gaddafi-accepts-road-map-for-peace-proposed-by-african-leaders/2011/04/10/AFbrtuJD_story.html (noting the rebels' deep skepticism of the African Union, "which they see as packed with Gaddafi allies").

Committee supported Gaddafi's retention of power. In sum, while the institutionalist theory promotes the creation of international committees that can serve as monitoring mechanisms to resolve crises and obtain state compliance with norms and rules, utilization of tactics consistent with this theory may prove to be useless if the resolution team lacks efficacy and genuine intentions to achieve resolution. This may have been the case with the Libyan Committee, which appears to have lacked impartiality. From an institutionalist perspective, the African Union clearly failed to obtain Gaddafi's compliance with the human rights and democratic norms contained in the African Charter and Constitutive Act. The Peace and Security Council eventually acknowledged that the African Union mediation efforts in Libya failed.²⁸⁰

On June 15, 2011, Dr. Ruhakana Rugunda, Uganda's Permanent Representative to the UN, delivered the African Union's stance on NATO's military presence in Libya during a meeting between the UN Security Council and the Libyan Committee.²⁸¹ Dr. Rugunda acknowledged that further dialogue and action on the part of the African Union should have occurred much sooner given that Libya is a founding member of the African Union.²⁸² Dr. Rugunda described the Libyan conflict as a civil war, and he expressed that the characterization of the violence in Libya as genocide or imminent genocide was simply an attempt "to use it as a pretext for the undermining of the sovereignty of States."²⁸³ Dr. Rugunda stated that the African Union encouraged the promotion of dialogue, the implementation of a transitional mechanism, and an overall peaceful resolution of the conflict in Libya.²⁸⁴

In sum, while Dr. Rugunda's statement of the African Union's position supports effective institutionalist measures, such as monitoring mechanisms and the collaboration of institutions to effectuate peaceful resolution, his casual characterization of the violence in Libya as a mere civil war not graduated to the classification of genocide unveils the blatant inadequacies of the African Union and a potential bias in favor of Libya. In fact, Libya's own representative to the UN, Ibrahim Dabbashi, claimed that Gaddafi had

²⁸⁰ African Union Peace & Security Council, *Report of the Chairperson of the Commission on the Situation in Libya and on the Efforts of the African Union for a Political Solution to the Libyan Crisis*, ¶¶ 15–16, Doc. PSC/AGH/3(CCXCI) (Aug. 26, 2011) [hereinafter *Report on a Political Solution*].

²⁸¹ Ruhakana Rugunda, *African Union Statement on the NATO Invasion of Libya: It's Time to End the Bombing and Find a Political Solution in Libya*, COUNTERPUNCH (June 22, 2011), <http://www.counterpunch.org/rugunda06222011.html>.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

committed genocide against the people of Libya.²⁸⁵ Furthermore, Gaddafi appears to have threatened the Libyan people and the opposition with genocide in a speech given in February of 2011.²⁸⁶ Additionally, Dr. Rugunda accused the international community of an attempt to undermine the sovereignty of states.²⁸⁷ This sounds strikingly similar to the statements made by several African heads of state who sought to utilize the OAU Charter's noninterference clause to shield themselves from international intervention.²⁸⁸ Thus, in order to rectify its inconsistencies and successfully protect the human rights of African peoples, the African Union must respond to grave violations of larger countries such as Libya just as tenaciously as it has responded to violations by smaller countries such as Guinea (as discussed in Part IV.B of this Article).

The African Union's inability to resolve the crisis in Libya may have been exacerbated by the roles of the Arab League and NATO, two organizations with competing political agendas. Dr. Rugunda essentially alleged that other countries used the Libyan crisis to perpetuate regime change in Libya, and as a result, he claimed that the UN and NATO were not impartial in their response to the Libyan crisis.²⁸⁹ On the other hand, leaders of the member states of the Arab League have historically avoided any action that could be perceived as supporting Western intervention in Arab countries and have resorted to using anti-western language to "distract public attention from other, far more serious problems [in their countries]."²⁹⁰ In his speech to the UN, Dr. Rugunda condemned NATO and the international community for "[i]gnoring the AU for three months" and instead proceeding with reckless bombings, actions that he classified as "arrogant and provocative."²⁹¹ It may be that neither NATO nor the Arab League has taken the African Union seriously, either in its role in resolving African crises generally or in its suggestions for peaceful resolution of the Libyan crisis. Thus, the African Union's credibility and effectiveness on the international stage was called into question and likely contributed to the African Union's inability to effectively resolve the Libyan crisis. For example, the Libyan rebels already

²⁸⁵ Colin Moynihan, *Libya's U.N. Diplomats Break with Qaddafi*, N.Y. TIMES, Feb. 21, 2011.

²⁸⁶ *Gaddafi Speech Threatens to Trigger "Genocide" in Libya*, GLOBALPOST (Feb. 22, 2011), <http://www.globalpost.com/dispatch/africa/110222/gaddafi-speech-genocide-libya>.

²⁸⁷ Rugunda, *supra* note 281.

²⁸⁸ See *supra* Part III.

²⁸⁹ Rugunda, *supra* note 281.

²⁹⁰ Barry Rubin, *The Real Roots of Arab Anti-Americanism*, 81 FOREIGN AFF. 73, 73 (2002). For a detailed discussion of anti-Americanism in the Arab world, see generally, Lisa Blaydes & Drew A. Linzer, *Elite Competition, Religiosity, and Anti-Americanism in the Islamic World*, 106 AM. POL. SCI. REV. 225 (2012).

²⁹¹ Rugunda, *supra* note 281.

believed that the African Union was biased in favor of Gaddafi,²⁹² and because the Security Council and NATO ignored the African Union's recommendations for resolution, the Libyan rebels and Gaddafi were likely more inclined to ignore the African Union's attempts to address the crisis.

According to realists, the extent to which a state's behavior conforms to international law depends on a state's political, economic, and military power in comparison to its surrounding states²⁹³ and human rights regime.²⁹⁴ Consistent with the realist approach, the African Union attempted to exert political power over Libya by joining other international players, such as the EU, the United States, Russia, and the Arab League, in publicly communicating vehement opposition to the Gaddafi regime's vicious attacks on civilians.²⁹⁵ The Assembly endorsed the UN Security Council's adoption of Resolution 1970,²⁹⁶ a proposition imposing an arms embargo on Libya as well as financial and travel sanctions on Gaddafi and certain members of his government.²⁹⁷ Specifically, the United States, the EU, Japan, South Korea, and other countries imposed additional sanctions on Gaddafi and restricted financial transactions and arms shipments to Libya.²⁹⁸ The EU expanded existing sanctions "to include a visa ban and asset freezes on [particular] individuals."²⁹⁹

In contrast, the African Union failed to impose direct financial sanctions on Gaddafi or Libya.³⁰⁰ Simply put, the African Union's response appears feeble in comparison to the ardent efforts of other international actors. From a realist perspective, states are more likely to comply with international law when the costs of noncompliance outweigh the benefits of noncompliance.³⁰¹ However, while the measures contained in Resolution 1970 are coherent with the realist perspective, these measures were merely endorsed by the African Union and were not actually initiated or implemented.³⁰² From a realist perspective, the African Union needs to individually impose sanctions on its member states in order to increase the likelihood of member state compliance

²⁹² Fadel, *supra* note 279.

²⁹³ BURGSTALLER, *supra* note 17, at 96.

²⁹⁴ See *id.* at 97 (noting the realist idea that pressures from the international community can override domestic concerns and achieve uniform behavior).

²⁹⁵ BLANCHARD, *supra* note 232, at 5.

²⁹⁶ *Decision on Resolution of Libyan Crisis*, *supra* note 249, ¶ 7.

²⁹⁷ S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

²⁹⁸ BLANCHARD, *supra* note 232, at 5.

²⁹⁹ *Id.* at 16.

³⁰⁰ *African Union Declines Action Against Libya*, VOICE OF AM., <http://www.voanews.com/content/african-union-declines-action-against-libya--117095183/157547.html> (last updated Feb. 17, 2011).

³⁰¹ See *supra* Part II.B.

³⁰² *Decision on Resolution of Libyan Crisis*, *supra* note 249.

with the African Charter and Constitutive Act. By inflicting targeted financial and travel sanctions on Gaddafi and his supporters the African Union could have alleviated the concerns of both the international community and the Libyan rebels regarding the African Union's alleged lack of impartiality, which were due to the financial contributions it received from Gaddafi. This might have led the Libyan rebels to support, rather than oppose, the African Union's attempts to resolve the crisis.

When the Libyan rebels eventually seized power from Gaddafi and established the National Transitional Council (NTC), the African Union initially refused to recognize the NTC as the legitimate government of Libya.³⁰³ The African Union's initial refusal to recognize the NTC may have been due in part to Article 30 of the Constitutive Act. Article 30 suspends governments that come to power through unconstitutional means from participation in the African Union.³⁰⁴ Of course the irony here is that Gaddafi, like many other African leaders of that era, unconstitutionally came to power by overthrowing the Libyan royal family in 1969.³⁰⁵ In September of 2011, the African Union finally recognized the NTC as the *de facto* government in Libya.³⁰⁶ This was one month after the United States and a number of other European countries had recognized the NTC.³⁰⁷ The African Union's failure to timely recognize the NTC is indicative of its lack of efficacy in resolving the Libyan crisis. On January 30, 2012, the Assembly directed the African Union Commission to take all steps necessary to establish an AU Liaison Office in Libya to monitor the situation in Libya.³⁰⁸

³⁰³ See *Report on a Political Solution*, *supra* note 280, ¶¶ 5, 18 (categorizing the grievance as one between the NTC and the Libyan Government, and calling for an inclusive transitional election); see also Michael J.K. Bokor, *The African Union Says "No" to the Libyan Rebel Leadership*, MODERN GHANA (Aug. 26, 2011), <http://www.modernghana.com/news/347381/1/the-african-union-says-no-to-the-libyan-rebel-lead.html> (noting the African Union's refusal to recognize the NTC even though certain of its member states did).

³⁰⁴ AU Constitutive Act, *supra* note 2, art. 30.

³⁰⁵ BLANCHARD, *supra* note 232, at 23.

³⁰⁶ *Libya War: African Union Recognises NTC as Leaders*, BBC NEWS, <http://www.bbc.co.uk/news/world-africa-14986442> (last updated Sept. 20, 2011); see also Press Communiqué, African Union, Participation of the Chairperson of the African Union Commission in the Paris Conference on Support to the New Libya (Sept. 2, 2011), available at <http://www.au.int/en/sites/default/files/Press%20Release%20Participation%20of%20the%20Chairperson%20of%20the%20African%20Union%20Commission%20in%20the%20Paris%20Conference%20on%20Support%20to%20the%20New%20Libya%20English.pdf> (referring only to the NTC when calling for new Libyan authorities to take the Libyan seat at the African Union).

³⁰⁷ Scott Stearns, *AU's Slow Recognition of NTC Prompts Calls for Reform*, VOICE OF AM. (Sept. 20, 2011).

³⁰⁸ Assembly of the African Union, *Decision on the Report of the Peace and Security Council on Its Activities and the State of Peace and Security in Africa Doc. Assembly/AU/66(XVIII)*, ¶ 4, Doc. Assembly/AU/Dec.408(XVIII) (Jan. 2012) (requesting the

In sum, the African Union should have timely exercised its authority to counteract the human rights violations committed by Gaddafi. Article 4(h) of the Constitutive Act allows the African Union to intervene in the affairs of a member state in grave circumstances such as crimes against humanity and genocide.³⁰⁹ The African Union could have utilized Article 4(h) to exert its authority during the Libyan crisis by deploying a peacekeeping force to Libya. Additionally, the African Union should have imposed financial and travel sanctions on Gaddafi and other individuals in his entourage in accordance with the Constitutive Act, which permits the African Union to impose sanctions when a member state fails to comply with the decisions and policies of the African Union.³¹⁰ The African Union's feeble response to the Libyan crisis was heavily criticized by the international community. For example, a February 25, 2011 report revealed that several civil society organizations organized a press briefing regarding Africa's part in the Libyan revolts; the briefings were held in Rosebank, Johannesburg by a panel consisting of Civicus, Amnesty International, Global Call to Action against Poverty, and African Democracy Forum.³¹¹ Ingrid Srinath, secretary general of Civicus, asserted that "Libya is part of the AU. . . . There's a need to send a message across Africa about what the AU stands for. If the AU is going to be the last to respond, what does [that lack of response] say about [the AU's] legitimacy?"³¹² According to the report "for Noel Kututwa, who deals with foreign policy at Amnesty International, the international community has failed the Libyan people in their hour of greatest need. . . . he said the African Union should start showing concrete action towards African conflicts."³¹³ Moreover, Rajesh Latchman of Global Call to Action against Poverty believes that democracy and human rights in Africa have been threatened by the African Union's failure to take appropriate action in Libya.³¹⁴ Unfortunately, the African Union's performance during the Libyan

Commission "accelerate the process of establishing an AU Liaison Office").

³⁰⁹ AU Constitutive Act, *supra* note 2, art. 4(h).

³¹⁰ *Id.* art. 23. The AU Constitutive Act requires the African Union to function in accordance with "respect for democratic principles, human rights, the rule of law and good governance." *Id.* art. 4(m). As previously noted, Gaddafi had clearly violated a number of these principles during his reign in Libya and during the recent Libyan crisis. Thus, Gaddafi was in violation of the "policies" of the African Union, and the Assembly may have had the ability to impose sanctions against Gaddafi but elected not to.

³¹¹ Vuvu Vena, *Africa is Failing Libya, Say NGOs*, MAIL & GUARDIAN (Feb. 25, 2011), <http://mg.co.za/article/2011-02-25-africa-is-failing-libya-say-ngos>.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ Press Release, Ingrid Srinath, Sec'y Gen. CIVICUS, African Governments Are "Failing" Libyan Citizens and All Africans (Feb. 25, 2011), *available at* <http://www.ireport.cnn.com/docs/DOC-561696>.

crisis demonstrated an unwillingness to exert strong disciplinary measures against large countries that are led by its wealthy benefactors, such as Gaddafi. Furthermore, from a realist perspective the organization lacks the requisite characteristics of timeliness and efficacy to minimize conflict in such countries or obtain compliance with the African Charter or Constitutive Act.

The following section examines the political turmoil in Kenya and the African Union's efforts to resolve the crisis. Similar to the organization's response to the human rights violations in Libya, the African Union's actions were feeble in comparison to the resources and attention other international organizations committed.

C. Kenya

In the December 2007 presidential elections, polls predicted that the Orange Democratic Movement political party would win the election and Raila Odinga would become the next president of Kenya.³¹⁵ The Electoral Commission of Kenya eventually declared that President Kibaki had been re-elected, but the election process was controversial. International and domestic observers described the election as "rigged and deeply flawed."³¹⁶ Even the chairman of the Electoral Commission, Samuel Kivuitu, "admitted the irregularities and claimed he was pressured into announcing the results."³¹⁷ Such coercion violates the democratic principles contained in the African Charter and Constitutive Act.

Brutal violence erupted in Kenya immediately after the election results were announced. Observers described supporters of the opposition engaging in "spontaneous demonstrations of anger" and violently attacking pro-government districts and properties.³¹⁸ Such violence resulted in the deaths of more than 1,000 individuals and the displacement of around 350,000, including 80,000 children under the age of five³¹⁹ in violation of the respect for life and dignity principles contained in Articles 4 and 5 of the African Charter, respectively.³²⁰ Some protestors were reported to have been "shot and killed by police, while many others died [as a result] of mob violence."³²¹

³¹⁵ Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accountability?*, 3 AFR. J. LEGAL STUD. 78, 80 (2009).

³¹⁶ TED DAGNE, CONG. RESEARCH SERV., RL34378, KENYA: CURRENT CONDITIONS AND THE CHALLENGES AHEAD 8 (2011).

³¹⁷ Nmaju, *supra* note 315, at 80.

³¹⁸ DAGNE, *supra* note 316, at 10.

³¹⁹ *Id.*

³²⁰ African Charter, *supra* note 86, arts. 4–5.

³²¹ DAGNE, *supra* note 316, at 10.

Other reports allege that, Kenyan security forces targeted opposition supporters, provided assistance to pro-government gangs, and failed to protect the civilian population³²² in violation of Article 6 of the African Charter, which provides that “[e]very individual [has] the right to liberty for and the security of his person,” and “no one may be arbitrarily arrested or detained.”³²³ The Kenyan police have been blamed for much of the brutality that occurred during the post-election violence.³²⁴ In 2008, the Peace and Security Council estimated that as a result of the election violence in Kenya approximately 235,000 people were in Internationally Displaced Persons (IDP) camps, 270,000 were believed to be outside of these camps, and 12,000 people were refugees in Uganda.³²⁵

Soon after the post-election violence erupted, the Peace and Security Council condemned the violence in Kenya,³²⁶ and former chairperson of the African Union, President Kufuor of Ghana, traveled to Kenya in an attempt to resolve the conflict.³²⁷ However, President Kufuor’s attempts to initiate peace negotiations between the rivaling political factions were not welcomed by the Kenyan government.³²⁸ After President Kufuor’s failed attempt to initiate negotiations between the parties, the UN became involved. On January 22, 2008, former UN Secretary General Kofi Annan traveled to Nairobi with a mediation team to begin negotiation efforts between President Kibaki and Odinga.³²⁹ On February 28, 2008, after a month of negotiations, Kibaki and Odinga signed a power-sharing agreement that created the prime minister position, to be held by Odinga, as well as a multi-party cabinet.³³⁰ Although the power-sharing agreement brought an end to the post-election violence, some argue that the agreement was rushed and did not allow President Kibaki and Odinga to develop a working partnership.³³¹ Additionally, the power-sharing agreement did not address the underlying

³²² *Id.* at 10–11.

³²³ African Charter, *supra* note 86, art. 6.

³²⁴ DAGNE, *supra* note 316, at 5 (noting that President Kibaki fired Mohamed Hussein Ali, who was chief of the Kenya Police at the time of the post-election violence).

³²⁵ African Union Peace & Sec. Council, *Information Note on the Situation in Kenya and the Evolution of the Mediation Efforts*, ¶ 32, Doc. PSC/PR/2(CXV) (Mar. 14, 2008) [hereinafter *Evolution of Mediation Efforts*].

³²⁶ Press Statement of the Peace & Sec. Council on Its 109th Meeting, PSC/PR/BR(CIX) (Jan. 21, 2008).

³²⁷ Edwin Odhiambo Abuya, *Consequences of a Flawed Presidential Election*, 29 LEGAL STUD. 127, 156 (2009).

³²⁸ *Id.*

³²⁹ BRIDGET MOIX, FRIENDS COMM. ON NAT’L LEGISLATION, KENYA: TEMPORARY CEASEFIRE OR LASTING PEACE? 3 (2009).

³³⁰ *Id.*

³³¹ *Id.*

ethnic and political tensions that ignited the violence in the first place.³³² Nevertheless, Jakaya Kikwete, former Chairperson of the African Union has maintained that the African Union "succeeded in bringing the two warring parties to the negotiating table, efforts that culminated in the establishment of the Government of National Unity."³³³

Institutionalists posit that the rules and norms created by a human rights regime can engender member state compliance.³³⁴ From an institutionalist perspective the African Union failed in its attempt to ensure that Kenya complied with the democratic and human rights principles contained in Articles 4, 5, and 6 of the African Charter and Article 4(m) of the Constitutive Act.³³⁵ Based on those principles, the African Union's efforts to end the violence and crisis in Kenya via brokering a peace deal between President Kibaki and Odinga that would bring Kenya back into compliance with the norms set forth in the African Charter and Constitutive Act was a complete failure.³³⁶ It was not until Kofi Annan and the UN got involved that a power-sharing agreement was signed.³³⁷ From an institutionalist perspective, merely attempting to initiate negotiations was not enough to

³³² See The National Accord and Reconciliation Act No. 2 (2008), KENYA GAZETTE No. 12, available at http://www.kenyalawreports.or.ke/klr/fileadmin/pdfdownloads/Bills/2008/The_National_Accord_and_Reconciliation_Bill_2008.pdf (establishing offices, their functions, and procedures for selection with the goal of addressing the political crisis, but failing to identify those causes specifically or set clear standards addressing them); see also Jeremy Horowitz, CTR. FOR THE STUDY OF CIVIL WAR, *Power-Sharing in Kenya* (2008), available at <http://www.prio.no/sprtrans/-1593447654/Kenya%20Policy%20Brief.pdf> (rationalizing the likelihood of renewed violence, despite the agreement, because of the failure to address fundamental, polarizing grievances). See generally Justice Mkhabela, *Kenya: From Democratic and Economic Engine to Security and Economic Crisis*, AFR. EXECUTIVE 17–23 (Aug. 2011), <http://www.africanexecutive.com/downloads/Policy%20Brief,%20Kenya-1.pdf> (discussing ethnic tensions in Kenya).

³³³ Statement by Kikwete, *supra* note 208.

³³⁴ Cardenas, *supra* note 8.

³³⁵ AU Constitutive Act, *supra* note 2, art. 4(m); African Charter, *supra* note 86, arts. 4–6.

³³⁶ *Kofi Annan to Head Kenya Mediation Efforts*, USA TODAY (Jan. 10, 2008), http://www.usatoday.com/ews/world/2008-01-10-kenya-elections_N.htm.

³³⁷ While the African Union's initial attempts to resolve the Kenyan crisis failed, Secretary General Kofi Annan's mediation effort, which eventually resolved the Kenyan crisis, was originally configured as a joint United Nations and African Union effort. *Evolution of Mediation Efforts*, *supra* note 325, ¶ 7; see also Press Statement of the Peace & Sec. Council on Its 113th Meeting, PSC/PR/BR/CXIII (Feb. 28, 2008) (discussing developments in the mediation process). Furthermore, the African Union expressly supported Kofi Annan's mediation efforts and encouraged the rivaling political camps in Kenya to cooperate in the negotiation process. Assembly of the African Union, *Decision on the Activities of the Peace and Security Council of the African Union and the State of Peace and Security in Africa*, ¶ 15, Doc. Assembly/AU/Dec.177(X) (Jan.–Feb., 2008). However, the African Union acknowledged that Kofi Annan would take over negotiations between the rivaling camps because the African Union's efforts to mediate the crisis failed. *Kofi Annan to Head Mediation Efforts*, *supra* note 336. Ultimately, the power-sharing agreement was executed due to the efforts of Kofi Annan and the United Nations not the African Union.

ensure compliance and cooperation by the rivaling political factions in Kenya. Additionally, despite the fact that the power-sharing agreement immediately ended the crisis, the power-sharing agreement has only been marginally successful at eliminating human rights violations in Kenya. For example, in March 2009 unknown gunmen assassinated two human rights advocates, Kamau King'ara and John Paul Oulu.³³⁸ Several of the key reforms agreed to in the power-sharing agreement have yet to be implemented by the Kenyan government.³³⁹ Prime Minister Odinga acknowledged this shortcoming in June of 2008 at a meeting with members of the Bush Administration and of Congress.³⁴⁰ Additionally, although the power-sharing agreement resolved the immediate political dispute in Kenya "it also institutionalized systemic political deadlock and set the stage for other African experiments in power sharing, notably in Zimbabwe."³⁴¹ Today, the Kenyan government continues to struggle with promoting good governance, and as national elections "draw near in [Kenya,] a country [that remains] sharply divided along tribal lines, observers say lawmakers are prioritizing political expedience at the expense of constitutional implementation."³⁴² As recently as June 2012, the Kenyan parliament attempted to pass legislation that would safeguard their incumbency during upcoming elections.³⁴³

While the African Union did attempt to assist in the mediation efforts in Kenya, it has not made any attempt to encourage the prosecution of those Kenyan officials that were responsible for the post-election violence. The African Union has actually supported Kenya's resistance to prosecuting these individuals. In December of 2010, the International Criminal Court (ICC) Chief Prosecutor Luis Moreno-Ocampo claimed that six senior Kenyan officials were responsible for the violence that followed the 2007 election.³⁴⁴ Initially the Kenyan Government agreed to cooperate with the ICC.³⁴⁵ However, Kenya reversed its position and received support from the African Union to defer the ICC prosecution.³⁴⁶ The African Union's reluctance to

³³⁸ DAGNE, *supra* note 316, at 5.

³³⁹ *Id.*

³⁴⁰ *Id.* at 6.

³⁴¹ Tom Woods, *Kenya: Rounding the Corner back to Democracy?*, WORLD POL. REV. (Apr. 20, 2010).

³⁴² Brian Dabbs, *In Kenya, Pressure Builds to Implement New Constitution*, WORLD POL. REV. (July 6, 2012).

³⁴³ *Id.* (noting that the proposed bill, which contained membership requirements such as university degrees, was ultimately defeated).

³⁴⁴ DAGNE, *supra* note 316, at 1.

³⁴⁵ *Id.*

³⁴⁶ Assembly of the African Union, *Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII)*, ¶ 6, Doc. Assembly/AU/Dec.334(XVI)

support the Kenyan ICC prosecutions is indicative of the African Union's wider negative stance on the ICC.³⁴⁷ The African Union has historically been concerned with what the African Union sees as a discriminatory double standard in ICC prosecutions. The African Union, along with many of its member states, believes that the ICC is quite willing to prosecute individuals for human rights violations in Africa but fails to prosecute Westerners for human rights abuses, such as those in Iraq, Afghanistan, and Pakistan.³⁴⁸

The African Union's concern regarding the ICC may be valid given the fact that almost all of the ICC's indictments and prosecutions have involved African individuals and African conflicts.³⁴⁹ However, it is true that Africa continues to be plagued with vast human rights abuses. As such, perhaps the ICC's record of prosecuting African individuals simply reflects the large number of human rights abuses that occur in Africa. In either case, the perception that the ICC is willing to prosecute Africans but not Westerners must be resolved jointly by the African Union and the ICC. Despite the African Union's stance on the ICC, it appears that Kenya is beginning to cooperate with the ICC to some extent. President Kibaki has recently promised to resolve the problems born by displaced victims of the political crisis.³⁵⁰ Further, on January 23, 2012, the ICC ruled that four prominent Kenyans must stand trial for crimes against humanity committed during the political crisis in 2007–2008.³⁵¹ Kenyan judges took the time to explain the ICC ruling at a public session.³⁵²

(Jan. 2011).

³⁴⁷ See Press Release of the African Union on the Decisions of Pre-Trial Chamber I of the International Criminal Court, No. 002/2012 (Jan. 9, 2012) (arguing against two decisions of the ICC, which referred to alleged failures of AU states to comply with ICC arrest warrants); Press Statement of the Peace & Sec. Council on Its 141st Meeting, PSC/PR/BR(CXLI) (July 11, 2008) [hereinafter Press Statement, PSC/PR/BR(CXLI)] (implying that ICC attempts to pursue justice are disruptive the process of attaining lasting peace in Africa).

³⁴⁸ See Assembly of the African Union, *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/14(XI)*, ¶ 5, Doc. Assembly/AU/Dec.199(X) (June–July 2008) (noting belief in the abuse of the principle of Universal Jurisdiction by non-African states against African leaders); Press Statement, PSC/PR/BR(CXLI), *supra* note 347 (referencing decision Assembly/AU/14(XI) and reiterating concern for abuse of ICC indictments against African Leaders).

³⁴⁹ ALEXIS ARIEFF ET AL., CONG. RESEARCH SERV., RL34665, INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 7–8 (2011).

³⁵⁰ *ICC Prosecutor Hails Ruling on Kenya as Crucial Step for Country's Future*, UN NEWS CENTRE (Jan. 24, 2012), <http://www.un.org/apps/news/story.asp?NewsID=41025&Cr=Kenya&Cr1=>

³⁵¹ *ICC Ruling on the Kenyan Cases*, STANDARDMEDIA (Jan. 23, 2012), <http://www.standardmedia.co.ke/?articleID=2000050591&pageNo=1>.

³⁵² *ICC Prosecutor Hails Ruling on Kenya as Crucial Step for Country's Future*, *supra* note 350; see also *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, No. ICC-01/09-02/11, ¶ 429 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/>

Analyzing the African Union's response from a realist perspective indicates that the African Union's response to the postelection crisis in Kenya was enormously ineffective at eliminating the human rights violations as well as ensuring Kenya's compliance with the human rights and democratic principles contained in the African Charter and Constitutive Act. The realist perspective suggests that states will choose to abide by their international obligations only when it is in their self-interest to do so.³⁵³ Therefore, states perform a cost-benefit analysis in determining whether to comply with their human rights obligations, and the African Union should effectively communicate that the costs of non-compliance outweigh the benefits. Unfortunately, the African Union did not initiate or implement any measures that would communicate to Kenya that the cost of noncompliance outweighed the benefits.

The African Union did not sanction Kenya with financial penalties.³⁵⁴ Furthermore, the African Union's attempt to initiate negotiations was feeble and ineffective. The African Union's support of the delay in the ICC prosecutions is also inconsistent with a realist approach to international relations. As discussed in Part II.B of this Article, realists posit that states are more likely to comply with international law when the cost of noncompliance outweighs the benefits of compliance. By failing to support the ICC prosecutions, the African Union has communicated to Kenya that it is in the country's best interest not to comply with its obligations under Articles 1 and 26 of the African Charter, which provide that member states must promote, protect, and recognize the human rights and democratic principles contained in the African Charter.³⁵⁵ Despite the African Union's failure to resolve the Kenyan crisis on its own accord, it is important to acknowledge that the Kenyan crisis presented a unique set of circumstances that possibly go beyond the African Union's ability to both eliminate human rights violations and ensure compliance with the principles contained in the African Charter and the Constitutive Act. The Kenyan crisis involved the creation of a post-electoral, power-sharing agreement as well as a new constitution. As such, perhaps the ultimate solution to the Kenyan crisis had to involve the participation of mediators and mechanisms outside of the African Union itself (even if the African Union remained nominally part of the process).

doc1314543.pdf.

³⁵³ BURGSTALLER, *supra* note 17.

³⁵⁴ See generally Innocent Madawo, *The African Union's Madagascar Sanctions Hypocrisy*, WORLD POL. REV. (Mar. 25, 2010) (discussing the hypocrisy of the African Union's decision to punish Madagascar but failure to sanction Kenya whose unity government faced similar problems).

³⁵⁵ African Charter, *supra* note 86, arts. 1, 26.

The following section sets forth the problems faced by the African Union in light of its response to the crises in Zimbabwe, Libya, and Kenya. The section further proposes 'additional concrete legal solutions to improve the ability of the African Union to obtain member state compliance with the African Charter and Constitutive Act.

VI. ADDITIONAL SOLUTIONS TO ENSURE STATE COMPLIANCE WITH THE AFRICAN CHARTER AND CONSTITUTIVE ACT

From an institutionalist perspective, several norms established by the African Charter and other governing instruments have stood as barriers to the African Union's success. Such limitations include claw-back clauses and the principle of equitable regional representation and rotation. Moreover, from a realist perspective, issues such as the limited political will of the African Union and its member states, as well as the African Union's failure to timely and uniformly impose sanctions, have beset the organization since inception.

From an institutionalist and realist perspective, the potential solutions that the African Union could implement to ensure member state compliance with the African Charter and Constitutive Act, include revising the latter to address budgetary issues, standards for the election of a chairman, the frequency of Assembly meetings, and the timeliness of Assembly decision making. Further, the organization could revise the African Charter to include the right to vote, remove the claw-back clauses, and address certain concerns regarding state reporting procedures. All of the above were discussed in detail in Parts III.A and III.B of this Article. The following sections discuss several additional solutions: (a) timely and uniformly imposing sanctions and amending the Council Protocol to remove the principle of equitable regional representation and rotation; (b) better utilization of the African Union Commission on International Law; (c) more frequent utilization of the provisional measures permitted by the African Commission's rules of procedure; and (d) providing individual and NGO access to the African Court on Human and Peoples' Rights and the African Court of Justice and Human Rights.

A. Limited Political Will, Council Protocol, and Timely Sanctions

The African Union's responses to the crises in Kenya, Libya, and Zimbabwe indicate that the African Union has limited political will. The African Union and its member states tend to only effectively intervene in political crises involving countries with smaller populations and less political

power, such as Madagascar and Guinea.³⁵⁶ In contrast, the African Union and its member states have responded reluctantly, and with very little success, to political turmoil occurring in larger, more powerful states such as Libya and Kenya.³⁵⁷ Moreover, many of the current leaders of African states have risen to power through undemocratic means and have been flagrant human rights violators. In fact, as of 2008, only eighteen African countries regularly elected their governments in free and open elections.³⁵⁸ As a result, some member states have been reluctant to criticize other state leaders when they violate the human rights and democratic principles set forth in the African Charter and the Constitutive Act.³⁵⁹ The composition of the Peace and Security Council evidences this problem.

³⁵⁶ See Part IV of this Article for a discussion on the African Union's response to the crises in Madagascar and Guinea-Conakry. Madagascar had a population of 20.1 million as of 2010 and a GDP of \$8.6 billion as of 2009. *Background Note: Madagascar*, U.S. DEP'T ST., <http://www.state.gov/r/pa/ei/bgn/5460.htm> (last updated May 7, 2012). Guinea-Conakry is a small country that has a population of 10,884,958 as of 2012 and a GDP of \$5.21 billion as of 2011. *The World Factbook: Guinea*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/gv.html> (last visited Sept. 28, 2012).

³⁵⁷ See Part V of this Article for a discussion on the African Union's response to the crises in Kenya and Libya. As of 2010, Kenya had a population of 39 million and a GDP of \$32 billion. *Kenya (03/16/12)*, U.S. DEP'T ST., <http://www.state.gov/outofdate/bgn/Kenya/189511.htm> (last updated Mar. 16, 2012). Kenya has been described as having one of the five biggest economies in Africa. Chanel de Bruyn, *Africa's 'Big Five' Economies Seen Driving Future Growth*, ENGINEERING NEWS (Sept. 30, 2008), <http://www.engineeringnews.co.za/article/africas-big-five-economies-seen-driving-future-growth-2008-09-30>. As of 2010, Libya had a population of 6,461,454 and a GDP of \$85.04 billion. *Libya (07/07/11)*, U.S. DEP'T ST., <http://www.state.gov/outofdate/bgn/Libya/185547.htm> (last updated July 7, 2011). As previously noted in Part V.B of this Article, Libya has contributed 15% towards the African Union's annual budget. *Zuma Calls on African Funds for Development*, *supra* note 254. Additionally, it has been reported that Gaddafi amassed a fortune of over \$200 billion prior to his death. Edwin Durgy, *Did Moammar Gadhafi Die the Richest Man in the World?*, FORBES (Oct. 25, 2011, 1:56 PM), <http://www.forbes.com/sites/edwindurgy/2011/10/25/did-moammar-gadhafi-die-the-richest-man-in-the-world/>.

³⁵⁸ STATE OF THE UNION AFR., 2010 STATE OF THE UNION CONTINENTAL REPORT 13 (2010), available at <http://allafrica.com/download/resource/main/main/1datcs/00020200:265d13f9960ba253a8e4b1d32adc899c.pdf>.

³⁵⁹ For example, as previously noted in Part V of this Article both Mugabe and Gaddafi have a record of human rights abuses and have failed to respect democratic principles. Mugabe frequently expressed his support for Gaddafi. See, e.g., *Mugabe Has Ranted Against Western Countries over Gaddafi*, ZIMBABWEAN (Mar. 22, 2011, 7:13 AM), <http://www.thezimbabwean.co.uk/news/38261/mugabe-has-ranted-against-western-countries-over-gaddafi.html>. Similarly, Mbasogo has expressed his support for Mugabe's land seizure measures in Zimbabwe. Macdonald Dzirutwe, *E Guinea Leader Praises Mugabe Land Seizures*, MAIL&GUARDIAN (Sept. 1, 2007), <http://mg.co.za/article/2007-09-01-e-guinea-leader-praises-mugabe-land-seizures-september>. Mbasogo and Mugabe have been described as two of the five worst African leaders. Mfonobong Nsehe, *The Five Worst Leaders in Africa*, FORBES (Feb. 9, 2012, 2:11 PM), <http://www.forbes.com/sites/mfonobongnsehe/2012/02/09/the-five-worst-leaders-in-africa/>.

In 2010 the leaders of Equatorial Guinea, Zimbabwe, and Libya were each elected to serve three years on the Peace and Security Council.³⁶⁰ The Peace and Security Council is responsible for resolving political conflicts and crises in member states.³⁶¹ Additionally, pursuant to Article 7(g) of the Council Protocol, the Peace and Security Council has the power to “institute sanctions whenever an unconstitutional change of Government takes place in a member state.”³⁶² The current and former leaders of Equatorial Guinea (Teodoro Obiang Nguema Mbasogo), Zimbabwe (Mugabe), and Libya (Gaddafi) each have a long record of noncompliance with the democratic and human rights principles contained in the African Charter and Constitutive Act. For example, President Mbasogo has controlled Equatorial Guinea since 1979, and after Gaddafi’s death President Mbasogo is now referred to as “Africa’s longest-serving ruler.”³⁶³ President Mbasogo has continued to violate the freedom of expression and freedom of association principles contained in the African Charter³⁶⁴ and has held sham referendums to keep himself in power.³⁶⁵ Furthermore, evidence suggests that the citizens of Equatorial Guinea are routinely arrested and detained without due process of the law in violation of Article 6 of the African Charter.³⁶⁶ Despite the fact that President Mbasogo has failed to hold free and fair democratic elections and has continued to violate a number of the human rights and democratic principles set forth in the African Charter and Constitutive Act, President Mbasogo was elected to serve as the chairman and leader of the African Union in January of 2011.³⁶⁷ This clearly undermines the African Union’s commitment to democracy and the protection of human rights.

Similarly, as previously noted in Part V.A of this Article, President Mugabe of Zimbabwe has controlled his country for almost thirty-two years, though his many human rights abuses have been well documented. Thus, it came as no surprise when President Mugabe supported Gaddafi, another

³⁶⁰ Press Release, African Press Organization, Election of Members of Peace and Security Council of the African Union (Feb. 1, 2010), <http://appablog.wordpress.com/2010/02/01/14th-a-u-summit-election-of-members-of-peace-and-security-council-of-the-african-union/> [hereinafter 2010 PSC Election].

³⁶¹ Council Protocol, *supra* note 65, art. 2.

³⁶² *Id.* art. 7(g).

³⁶³ HUMAN RIGHTS WATCH, EQUATORIAL GUINEA 1 (2012), available at http://www.hrw.org/sites/default/files/related_material/Equatorial%20Guinea_2012.pdf [hereinafter EQUATORIAL GUINEA].

³⁶⁴ *Id.* at 2.

³⁶⁵ *Equatorial Guinea: Human Rights Concerns Taint Election*, HUMAN RIGHTS WATCH (Nov. 25, 2009), <http://www.hrw.org/news/2009/11/24/equatorial-guinea-human-rights-concerns-taint-election>.

³⁶⁶ EQUATORIAL GUINEA, *supra* note 363, at 4.

³⁶⁷ Rainer Chr. Hennig, *Africa’s Worst Dictator Becomes AU Leader*, AFROL (Jan. 31, 2011), <http://www.afrol.com/articles/37183>.

flagrant human rights abuser, and condemned other African countries for supporting NATO's bombing of Libya.³⁶⁸ Furthermore, it appears that there is no end in sight to President Mugabe's reign in Zimbabwe since in January of 2012, President Mugabe appeared before the African Union to request support for his 2012 re-election campaign.³⁶⁹ The African Union is not the only organization that has erred on occasion by providing support to Mugabe. The UN recently appointed Mugabe as a tourism envoy.³⁷⁰ President Mbasogo, President Mugabe, and so many other African leaders appear to be unwilling to hold recalcitrant leaders accountable for their noncompliance with the human rights and democratic principles contained in the African Charter and Constitutive Act, because they fear that they too will be held accountable for their noncompliance. The failure of African leaders to hold their counterparts accountable evidences the limited political will of African leaders.

One potential solution to the problem of limited political will is to amend the Council Protocol. Article 5, Section 2(g) of the Council Protocol provides that the members of the Peace and Security Council are to be elected with regard to a number of principles including respect for constitutional governance, the rule of law, and human rights.³⁷¹ In theory then, states, such as Zimbabwe, Libya, and Equatorial Guinea, that continue to violate the human rights and democratic principles set forth in the African Charter and Constitutive Act should not be permitted to serve on the Peace and Security Council. However, Article 5, Section 2 of the Council Protocol also provides that in electing the members of the Peace and Security Council the Assembly must apply the principle of equitable regional representation and rotation.³⁷² While this principle is not specifically defined in the Council Protocol, it arguably requires that each African region be equally represented on the Peace and Security Council for a certain number of years. At first glance, the use of the principle of equitable regional representation appears to be appropriate given the diversity and vastness of the African continent. However, this principle may have contributed to the election of member states, such as Zimbabwe and Libya, to the Peace and Security Council since such states may regionally represent an area of Africa, though these states

³⁶⁸ Munyaradzi Huni, *Let's Stand Up to West*, HERALD (Jan. 31, 2012).

³⁶⁹ *Zimbabwe's Mugabe Seeks African Union Support for 2012 Elections*, VOICE AM. ZIM., <http://www.voazimbabwe.com/content/Zimbabwe-mugabe-seeks-african-union-support-for-2012-elections-138215999/1463954.html> (last updated Aug. 6, 2012).

³⁷⁰ David Smith, *Robert Mugabe Asked to be UN 'Leader for Tourism'*, GUARDIAN (May 29, 2012), <http://www.guardian.co.uk/world/2012/may/29/robert-mugabe-un-international-envoy-to-tourism>.

³⁷¹ Council Protocol, *supra* note 65, art. 5(2)(g).

³⁷² *Id.* art. 5(2).

have clearly failed to respect the human rights and democratic principles contained in the African Charter. In practice the principle of equitable regional representation and rotation contained in Article 5, Section 2 of the Council Protocol may trump the respect for human rights principles contained in Article 5, Section 2(g). Therefore, it may be responsible for the appointment of member states that have failed to respect human rights to the Peace and Security Council that have failed to respect human rights. As such, the Council Protocol should be amended to (1) remove references to the principle of equitable regional representation and rotation from Article 5, Section 2; and (2) clearly provide that a member state's ability to serve on the Peace and Security Council is conditioned upon acceptance by person the chair of the Assembly upon review of the state's record of compliance with the human rights and democratic principles set forth in both the African Charter and Constitutive Act.

Institutionalists posit that a human rights regime can encourage state compliance with the norms established by the human rights regime by rewarding states that comply with these norms and rules.³⁷³ Instead of relying on the principle of equitable regional representation, the African Union should reward states who comply with the norms and principles established in the African Charter and Constitutive Act with leadership positions on the Peace and Security Council. The Peace and Security Council is an integral part of the African Union as well as the main organ responsible for resolving political and humanitarian crises, and promoting peace, security, and democracy in Africa.³⁷⁴ Moreover, Article 7 of the Council Protocol provides that the Peace and Security Council has the power to "institute sanctions [when] an unconstitutional change of Government" occurs as defined in the Lome Declaration.³⁷⁵ Given the Peace and Security Council's important role in the African Union and its power to issue sanctions, the Council should consist of unbiased member states that have a strong record of protecting human rights and encouraging democracy. The need for impartial and unbiased states to serve on the Peace and Security Council is aptly evidenced by the problems the African Union faced in its attempts to resolve the Libyan crisis. Libyan rebels refused to support the African Union's negotiation efforts as the African Union was seen as biased in favor of Gaddafi, who represented Libya as a member of the Peace and Security Council at the time of the uprising.³⁷⁶

³⁷³ Powell, *supra* note 5, at 426–27.

³⁷⁴ Council Protocol, *supra* note 65, art. 2.

³⁷⁵ *Id.* art. 7.

³⁷⁶ See 2010 PSC Election, *supra* note 360 (three year term began 2012).

In a sign that the African Union might be ready to seriously promote democracy, on January 29, 2012, the African Union selected President Yayi Boni of Benin, an electoral democracy,³⁷⁷ to serve as the chairman of the African Union.³⁷⁸ While President Yayi has been accused of corruption, evidence suggests that his government has a decent track record of respecting many of the human rights principles contained in the African Charter including, but not limited to, freedom of expression.³⁷⁹ By replacing President Mbasogo—who has a track record of human rights abuses—with President Yayi, the African Union may be signaling that it is finally ready to lead by example and be taken seriously. The African Union needs to ensure that its leaders, particularly the chairman of the Assembly, and the member states of its central organs respect and promote human rights as well as democratic principles in their respective countries so that these leaders and member states can serve as stellar examples for other African countries to follow. Furthermore, countries such as South Africa and Benin that have a history of holding free and fair democratic elections should openly support and encourage democracies in countries such as Equatorial Guinea, where President Mbasogo has ruled for the last thirty-three years.³⁸⁰

Another solution the African Union could implement to encourage state compliance with the African Charter and Constitutive Act would be to timely and uniformly impose sanctions against member states for human rights violations. The limited political will of the African Union appears to be a contributing factor for the African Union's failure to impose sanctions in a timely or uniformed manner. For example, there was a one-year delay in imposing sanctions against Madagascar³⁸¹ and an eleven-month delay in imposing sanctions against Guinea.³⁸² Additionally, as discussed in Part V of this Article, the African Union failed to impose any sanctions against Zimbabwe, Libya, or Kenya. The EU first placed sanctions on Zimbabwe in 2002³⁸³ and has recently renewed those sanctions³⁸⁴ despite the African

³⁷⁷ Freedom House, *Freedom in the World 2011 – Benin*, REFWORLD (May 12, 2011), <http://www.unhcr.org/refworld/country,,FREEHOU,,BEN,,4dcbf52234,0.html>.

³⁷⁸ *President Thomas Yayi Boni Elected as Chairperson of the African Union 29-01-2012, Addis Ababa, Ethiopia*, AFR. UNION (Jan. 29, 2012), <http://au.int/en/summit/18thsummit/slides/president-thomas-yayi-boni-elected-chairperson-african-union-29-01-2012-addis-ab-0>.

³⁷⁹ Freedom House, *supra* note 377.

³⁸⁰ EQUATORIAL GUINEA, *supra* note 363.

³⁸¹ Barry Malone, *African Union Imposes Sanctions on Madagascar*, REUTERS (Mar. 17, 2010, 4:34 PM), <http://af.reuters.com/article/topNews/idAFJOE62G0M520100317>.

³⁸² See Nick Tattersall, *African Union Imposes Sanctions on Guinea Junta*, REUTERS (Oct. 29, 2009, 6:14 PM), <http://www.reuters.com/article/2009/10/29/idUSLT440627> (explaining that sanctions were imposed in October of 2009 though the military takeover occurred in December of the prior year).

³⁸³ Council Common Position (EU) 2002/145/CFSP of 18 Feb. 2002, 2002 O.J. (L 50) 1.

Union's failure to issue sanctions against Zimbabwe. The political crises in Madagascar and Zimbabwe both include a failure of each government to respect the democratic principles set forth in the Constitutive Act and the African Charter; however, the African Union has elected to sanction Madagascar but not Zimbabwe.³⁸⁵ In fact, the African Union has requested that the international community lift all sanctions against Zimbabwe.³⁸⁶ Similarly, in Guinea the African Union issued sanctions against Camara after he refused to provide assurances that he would not run for re-election in the scheduled presidential elections.³⁸⁷ However, the African Union allowed Mugabe to retain his position as president and participate in future elections despite his thirty-year reign in Zimbabwe.³⁸⁸ Rather than playing favorites with countries such as Zimbabwe, the African Union needs to utilize a more uniform approach when issuing sanctions. Furthermore, from a realist perspective, imposing sanctions in a timely and consistent manner encourages swifter compliance with international obligations, as they may lead a state to conclude that noncompliance is not in the state's financial interest. Therefore, when the African Union fails to impose timely sanctions in a uniform manner, it communicates to member states that the benefits of noncompliance outweigh the costs of compliance and that there are no real costs for failing to comply with the African Charter or the Constitutive Act.

Although there has been rigorous academic debate regarding the efficacy of sanctions, recent discussions on this topic suggest that sanctions can be effective at ensuring state compliance under certain conditions. For example, sanctions may elicit state or leader compliance when the state or leader has miscalculated the likelihood that sanctions will be imposed, "underestimate[d] the impact of sanctions, or wrongly believe[d] that sanctions will be imposed and maintained even if it yields."³⁸⁹ Additionally, sanctions that are imposed directly against a government or leader may cause

³⁸⁴ Council Decision 2012/97/CFSP, 2012 O.J. (L 47) 50.

³⁸⁵ See *supra* Part IV.B, Part V.A.

³⁸⁶ Assembly of the African Union *Decision on Zimbabwe*, ¶ 6, Doc. Assembly/AU/Dec.219(XII) (Feb. 2009).

³⁸⁷ *Communiqué 207th Meeting*, *supra* note 176, ¶ 4, Doc. PSC/AHG/COMM.2(CCVII) (Oct. 29, 2009); see also Agence France-Presse, *Guinea: African Union Threatens Junta Leader*, N.Y. TIMES (Sept. 18, 2009), <http://www.nytimes.com/2009/09/19/world/Africa/19briefs-Guineabrf.html>.

³⁸⁸ See Statement by Kikwete, *supra* note 208 (stating that Mugabe was permitted to remain in power); Robert Mugabe *Insists on Re-election Bid in Zimbabwe*, BBC NEWS (Dec. 10, 2011), <http://www.bbc.co.uk/news/world-africa-16128774> (noting that Mugabe is seeking re-election despite taking control in 1980).

³⁸⁹ Jon Hovi et al., *When Do (Imposed) Economic Sanctions Work?*, 57 WORLD POL. 479, 499 (2005).

the government or leader to lose power.³⁹⁰ For instance, some argue the economic sanctions that the United States imposed against Nicaragua's Sandinista National Liberation Front (Sandinista) in the 1980s led to the defeat of the Sandinista candidate, Daniel Ortega, in the 1990 Nicaraguan elections.³⁹¹ Thus, a leader or government may be more likely to compromise when sanctions threaten his or her position in office.³⁹² Sanctions can also be effective when the target state or leader faces significant domestic, political opposition.³⁹³ For example, the apartheid regime in South Africa faced significant domestic opposition from the African National Congress, and sanctions played an important role in the elimination of this regime.³⁹⁴ In the African context, timely and uniformly imposing sanctions may be an effective tool that enables the African Union to ensure recalcitrant states comply with the human rights and democratic provisions of the African Charter and Constitutive Act.

The conditions that may lead to the effective utilization of sanctions exist in a number of African states. For example, in Madagascar, Rajoelina faced domestic opposition from a faction of the military that demanded Rajoelina's resignation after he assumed power, and in May 2010 he faced a mutiny by gendarmerie.³⁹⁵ Similarly, Mugabe faced domestic opposition from the MDC in Zimbabwe,³⁹⁶ and in Guinea, Camara miscalculated the determination of the African Union to impose sanctions when he insisted on participating in future presidential elections over the African Union's objections.³⁹⁷

³⁹⁰ Nikolay Marinov, *Do Economic Sanctions Destabilize Country Leaders?*, 49 AM. J. POL. SCI. 564, 565 (2005).

³⁹¹ William M. Leogrande, *Making the Economy Scream: US Economic Sanctions Against Sandinista Nicaragua*, 17 THIRD WORLD Q. 329, 343 (1996). Leogrande argues that the United States "failed to achieve its . . . goal in Nicaragua—the ousting of the Sandinista government by military force" via the Contra War; however, the economic sanctions imposed on Nicaragua were far more effective at removing the Sandinistas from power, for the following reasons: (a) "[t]he structure of Nicaragua's underdeveloped economy made the Sandinistas more vulnerable to economic than military pressure," (b) "the USSR and its allies were willing to provide Nicaragua with . . . military hardware to fight the *contra* war," but were unwilling to bear the financial burden of supporting the Nicaraguan economy, (c) the "economic sanctions were undertaken in tandem with extensive paramilitary attacks," and (d) "the hardships imposed by Nicaragua's economic collapse in 1988–89 . . . undermined the Sandinistas base of popular support." *Id.* at 343–44.

³⁹² Marinov, *supra* note 390, at 564.

³⁹³ U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-92-106, ECONOMIC SANCTIONS: EFFECTIVENESS AS TOOLS OF FOREIGN POLICY 22–23 (1992).

³⁹⁴ See generally HOW SANCTIONS WORK: LESSONS FROM SOUTH AFRICA (Neta C. Crawford & Audie Klotz eds., 1999) (containing various articles covering debates on the efficacy of sanctions, both generally and in the context of South Africa's democratic transition).

³⁹⁵ PLOCH & COOK, *supra* note 151, at 12.

³⁹⁶ PLOCH, *supra* note 192.

³⁹⁷ Camara Requirements, *supra* note 175; see also *Communiqué 207th Meeting*, *supra* note

Sanctions against recalcitrant African leaders and states "should be graded according to the nature of the violation and the reason the state [or leader] proffers for failing to comply."³⁹⁸ Moreover, despite the debate regarding the efficacy of sanctions, the prevalence of human rights abuses and the lack of democracy in Africa suggest that the African Union has no choice but to utilize all potential tools in its arsenal, including graded sanctions, to ensure state compliance with the human rights and democratic principles contained in the African Charter and Constitutive Act.

B. African Union Commission on International Law

The African Union established the African Union Commission on International Law (AUCIL) at the Twelfth Ordinary Session of the Assembly held in Addis Ababa, Ethiopia in February of 2009.³⁹⁹ Article 4 of the Statute of the African Union Commission on International Law (AUCIL Statute) sets forth the primary objectives of the AUCIL, including "to undertake activities relating to codification and progressive development of international law in the African continent."⁴⁰⁰ There are striking similarities between the AUCIL Statute and the Statute of the International Law Commission (ILC) adopted in 1947 (ILC Statute).⁴⁰¹ For example, Article 3, Section 2 of the AUCIL Statute is exactly the same as Article 2, Section 2 of the ILC Statute.⁴⁰² Similarly, and most importantly, the main goal of the ILC and AUCIL appears to be the same; Article 4(a) of the AUCIL contains similar language as that found in Article 1 of the ILC Statute, which provides that "[t]he International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."⁴⁰³ Thus, the African Union seemingly has modeled the AUCIL after the widely successful ILC.

176 (granting permission to impose targeted sanctions on CNDD).

³⁹⁸ See Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 1, 156 (2008).

³⁹⁹ *Decision on the Draft Statute of the African Union Commission on International Law – Doc.-Assembly/AU/12 (XII) –a*, Doc. Assembly/AU//Dec.209(XII) (Feb. 2009).

⁴⁰⁰ Statute of the African Union Commission on International Law, art. 4(a), *adopted* Feb. 4, 2009, EX.CL/478 (XIV) [hereinafter AUCIL Statute].

⁴⁰¹ Compare *id.*, with Statute of the International Law Commission, G.A. Res. 174(II), U.N. GAOR, 2d Sess., at 105, U.N. Doc. A/519 (Nov. 21, 1947) [hereinafter ILC Statute].

⁴⁰² With respect to the composition of the AUCIL and the ILC, both the AUCIL Statute and the ILC Statute provide that "no two members can belong to the same State." Compare AUCIL Statute, *supra* note 400, art. 3(2), with ILC Statute, *supra* note 401, art. 2(2).

⁴⁰³ ILC Statute, *supra* note 401, art. 1; see also AUCIL Statute, *supra* note 400 (undertaking "activities relating to codification and progressive development").

Since its inception in 1947, the ILC has worked extensively in the field of international law, meeting annually to review issues such as nationality and statelessness and treaty law.⁴⁰⁴ The most important function of the ILC is the drafting of articles and other documents on various aspects of international law either upon request of the UN General Assembly, other U.N. organs, the member states, or its own initiative.⁴⁰⁵ Upon completion of its work on a topic, the ILC refers the final draft back to the UN General Assembly for it to take action as deemed appropriate, normally including its recommendations as to what measures should be adopted.⁴⁰⁶ The ILC is responsible for authoring a number of documents central to international law. Since its formulation of the Nuremberg principles at its first session in 1949, the ILC has worked extensively in international criminal law.⁴⁰⁷ Among its most prominent roles in that area was drafting the Statute for the International Criminal Court in 1994.⁴⁰⁸ Other successes the ILC has enjoyed include drafting the following documents: the Vienna Convention on the Law of Treaties, the Vienna Convention on Succession of States, the Vienna Convention on Diplomatic Relations,⁴⁰⁹ and the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁴¹⁰ As a result of these successes, many have argued that there are, today, few domains of international law to the development of which the ILC has not contributed in some way.⁴¹¹

⁴⁰⁴ See generally A.E. Golieb, *The International Law Commission*, 4 CAN. Y.B. INT'L L. 64 (1966) (analyzing the relative disuse of judicial dispute resolution despite the quality of ILC work); 2 THE WORK OF THE INTERNATIONAL LAW COMMISSION (7th ed. 2007) (reproducing multilateral conventions based on drafts prepared by ILC including some on nationality and statelessness); INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION (1997) (identifying the date of ILC's creation and collecting essays on the state and progression of international law).

⁴⁰⁵ ILC Statute, *supra* note 401, arts. 16–18.

⁴⁰⁶ *Id.* art. 22.

⁴⁰⁷ *Analytical Guide: Formulation of the Nurnburg Principles*, INT'L LAW COMM'N, http://untreaty.un.org/ilc/guide/7_1.htm (last visited July 14, 2008); see also Rep. of the Int'l Law Comm'n, 2d Sess., June 5–July 29, 1950, U.N. Doc. A/1316, available at http://untreaty.un.org/ilc/documentation/English/a_cn4_34.pdf (discussing the formulation of the Nuremberg trials and the question of establishing an international criminal tribunal); G.A. Res. 488(V), U.N. Doc. A/RES/488(V) (Dec. 12, 1950).

⁴⁰⁸ *Introduction*, INT'L LAW COMM'N, <http://www.un.org/law/ilc/> (last visited Oct. 1, 2012).

⁴⁰⁹ 2 THE WORK OF THE INTERNATIONAL LAW COMMISSION, *supra* note 404.

⁴¹⁰ *Introduction*, *supra* note 408.

⁴¹¹ See Christopher W. Pinto, *The International Law Commission: Methods of Work and Selection of topics*, in MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50, at 233, 248–50, 252 (1998), available at <http://www.un.org/law/books/MakingBetterIntlLaw.pdf> (providing an overview of ILC's work program since 1949 and suggesting ways to further expand topics for study).

The African Union should be lauded for creating an organ that is modeled after the very successful ILC. However, three years have passed since the creation of the AUCIL, and very little action has been taken by the AUCIL during that time period. The AUCIL website indicates that it has held only three ordinary sessions, the most recent of which took place on March 21, 2011.⁴¹² In contrast, three years after the ILC was created it drafted the Nuremberg Principles in 1950.⁴¹³ The AUCIL amended its Rules of Procedure during its Second Ordinary Session⁴¹⁴ and, after its Third Ordinary Session, developed the Report on the Inter-Sessional Activities of the AUCIL Bureau, setting forth AUCIL activities between December 2011 and March 2011.⁴¹⁵ Though norm development is also the AUCIL's main focus, modeling its statute after the ILC Statute is only the first step in ensuring the success of the AUCIL. The AUCIL has the potential to play a larger role in achieving the African Union's goal—ensuring state compliance with human rights and democratic principles—but fails to do so because it is currently underutilized.

From an institutionalist perspective, a regional human rights system can obtain state compliance by clearly establishing unambiguous rules and norms for states to follow.⁴¹⁶ Thus, in order to replicate the ILC's success, the AUCIL must become more active in promoting and establishing clear norms and rules for the African Union. Moreover, the AUCIL should be instrumental in creating new methods, via drafting new instruments, to better ensure member state compliance with the principles set forth in the African Charter and Constitutive Act.

The AUCIL should also play an instrumental role in providing guidance to the African Union on interpreting and implementing those norms already contained in the African Charter on Democracy, Elections and Governance (Democratic Charter).⁴¹⁷ The Democratic Charter was adopted on January

⁴¹² African Union, Comm'n on Int'l Law, Draft Programme of Work, 3d Sess., Mar. 23–Apr. 1, 2011, Doc. AUCIL/Legal/Doc.2(III) (2011).

⁴¹³ *Introduction*, *supra* note 408.

⁴¹⁴ *News and Events*, AFR. UNION COMMISSION INT'L L., <http://au.int/SP/AUCIL/home> (last visited Oct. 2, 2012).

⁴¹⁵ African Union, Comm'n on Int'l Law, Report on the Inter-Sessional Activities of the AUCIL Bureau, 3d Sess., Mar. 23–Apr. 1, 2011, Doc. AUCIL/Legal/Doc.3 (III) Rev. 1 (2011).

⁴¹⁶ See Powell, *supra* note 5, at 426–27 (noting that norms can be used to showcase the positive benefits of cooperation).

⁴¹⁷ Article 4(e) of the AUCIL Statute provides that the AUCIL should encourage the teaching, study, publication and dissemination of literature on international law in particular the laws of the [African] Union with a view to promoting acceptance of and respect for the principles of international law, the peaceful resolution of conflicts, respect for the Union and recourse to its [o]rgans, when necessary.

30, 2007,⁴¹⁸ and it requires, among other things, that member states commit themselves to the promotion of democracy and human rights.⁴¹⁹ Article 48 of the Democratic Charter provides that the charter will become effective only after fifteen member states have ratified the charter.⁴²⁰ The Democratic Charter entered into force on February 15, 2012.⁴²¹ To date, the following fifteen member states have ratified the Democratic Charter: Mauritania, Rwanda, Guinea, Ethiopia, Chad, Niger, Sierra Leone, Ghana, Guinea-Bissau, Burkina Faso, South Africa, Nigeria, Lesotho, Zambia, and Cameroon.⁴²² The newly effective Democratic Charter has been referred to as “one of the most progressive legal instruments” that has been adopted by the African Union.⁴²³ Other African states have been unwilling to express support for the Democratic Charter, arguably because of the Charter’s expansive provisions on the promotion of democracy,⁴²⁴ but also because these states have not placed a high priority on ratification.⁴²⁵ For example, Article 23, Section 5 of the Democratic Charter provides that an unconstitutional change of government includes “any amendment . . . to the constitution or legal instruments” of a member state, which “infringe[s] on the principles of democratic change of government.”⁴²⁶ Many African heads of state have amended the constitutions of their respective countries to keep themselves in power.⁴²⁷ Thus, given the Democratic Charter’s expansive provisions regarding democratic and human rights, this charter has the potential to further promote democracy and decrease unconstitutional changes of government in African states. The AUCIL Statute provides that the AUCIL is responsible for the codification of international law and should prepare studies on international law in areas that have not been substantially

AUCIL Statute, art.4(e) *supra* note 400.

⁴¹⁸ *Ratification Status of Democratic Charter*, *supra* note 125.

⁴¹⁹ Democratic Charter, *supra* note 100, art. 2.

⁴²⁰ *Id.* art. 48.

⁴²¹ *Ratification Status of Democratic Charter*, *supra* note 125; see also AU: *Ratification Status of the African Charter on Democracy, Elections and Governance*, EISA, <http://www.eisa.org.za/EISA/aucharter.htm> (last updated Feb. 12, 2012) (listing the instrument’s status as ratified).

⁴²² *Ratification Status of Democratic Charter*, *supra* note 125.

⁴²³ Pansy Tlakula, *Charter Will Test Africa’s Commitment*, MAIL & GUARDIAN (Jan. 27, 2012), <http://mg.co.za/article/2012-01-27-charter-will-test-africas-commitment/>.

⁴²⁴ *AU Turns Down Democracy Charter*, BBC NEWS (June 30, 2006), <http://news.bbc.co.uk/2/hi/africa/5132692.stm>.

⁴²⁵ *Promoting the African Union Charter on Democracy, Elections and Governance*, ADF/IDASA AFR. CHARTER PROJECT NEWSL. (July 2010), <http://www.idasa.org/media/uploads/outputs/files/charternews2eng.pdf>.

⁴²⁶ Democratic Charter, *supra* note 100, art. 23(5).

⁴²⁷ Isaac Esipisu, *Who Among the Seven Longest Serving African Leaders Will Be Deposed Next?*, REUTERS, Oct. 21, 2011, available at 2011 WLNR 21619939.

developed by member states of the African Union.⁴²⁸ The Democratic Charter has only recently entered into force. As such, the AUCIL should utilize its topic selection power to push the Democratic Charter to the forefront of the African Union's agenda and obtain ratification and codification of the Democratic Charter by all member states. The AUCIL should provide guidance to the African Union on how to interpret and apply the norms contained the Democratic Charter. Moreover, pursuant to Article 8 of the AUCIL Statute, the AUCIL has the power to propose revisions to legal instruments adopted by the African Union.⁴²⁹ The AUCIL should actively utilize this power to propose revisions to the legal instruments of the African Union so as to better aid the African Union in protecting human rights and promoting democracy on the African continent.

C. *Provisional Measures*

The African Union can also encourage state compliance with the African Charter and Constitutive Act by more frequently and effectively utilizing provisional measures. The Rules of Procedure of the African Commission permits the African Commission, prior to rendering a final decision on a communication, to recommend provisional measures that should be taken by a member state to avoid irreparable harm to individuals (Original Provisional Measures Rule).⁴³⁰ The Rules of Procedure of the African Commission were amended in 2010 and the provisional measures rule that was previously located in Rule 111 has now been codified in Rule 98 of the revised Rules of Procedure (Revised Provisional Measures Rule).⁴³¹ In contrast to the language contained in the Original Provisional Measures Rule, that of the Revised Provisional Measures Rule not only grants the African Commission power to recommend provisional measures independently, but also grants the parties to a petition rights to request that the African Commission issue provisional measures.⁴³² The Revised Provisional Measures Rule also explicitly requires the African Commission to send a copy of the request for provisional measures to the Assembly of the African Union and the Peace and Security Council, and establishes a fifteen-day period within which the offending state must report back to the African Commission on the

⁴²⁸ AUCIL Statute, *supra* note 400, arts. 5(1), 6.

⁴²⁹ *Id.* art. 8.

⁴³⁰ RULES OF PROC. OF THE AFR. COMM'N ON HUM. & PEOPLES' RTS., r. 111(1)–(2) (1995) (amended 2010), *available at* <http://www1.umn.edu/humanrts/Africa/rules.thm>.

⁴³¹ RULES OF PROC. OF THE AFR. COMM'N ON HUM. & PEOPLES' RTS., r. 98 (2010), *available at* http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf [hereinafter 2010 RULES OF PROCEDURE].

⁴³² *Id.*

implementation of the requested provisional measures.⁴³³ Additionally, the provisional measures rule gives the chairperson of the African Commission the power to take provisional measures when the African Commission is not in session.⁴³⁴

One example of the application of the provisional measures rule and its effectiveness in avoiding human rights violations—by ensuring state compliance with the human rights guaranteed by the African Charter—is the case of *Constitutional Rights Project v. Nigeria*.⁴³⁵ In this case, an NGO submitted a petition to the African Commission on behalf of Zamani Lekwot—a former army general in Nigeria—and a number of other individuals sentenced to death by a special tribunal in Nigeria.⁴³⁶ The petition alleged that counsel for the defendants was routinely harassed during the trial and eventually forced to withdraw as a result.⁴³⁷ The holdings and decisions of these special tribunals, which were composed of armed forces, police, and judges, were not subject to appeal under Nigerian law.⁴³⁸ The petition submitted on behalf of the defendants alleged several violations of the African Charter: first, that the lack of judicial appeals for judgments rendered by the special tribunal violated Article 7, Section 1(a)'s right to appeal decisions before a competent national organ; second, that the harassment and deprivation of defense counsel violated Article 7, Section 1(c)'s right to defense counsel of one's choice; and finally, that the composition of the special tribunals violated an individual's Article 7, Section 1(d) right to be tried by an impartial tribunal.⁴³⁹ The African Commission utilized its provisional measures power by requesting that the Nigerian government stay execution until the African Commission

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Constitutional Rts. Project v. Nigeria*, Comm. 87/93, 8th ACHPR AAR Annex VI (1994–1995), available at <http://www1.umn.edu/humanrts/Africa/comcases/87-93.html>.

⁴³⁶ *Id.* ¶ 1.

⁴³⁷ *Id.* ¶ 2. It was alleged that during the trial in Nigeria Judge Okadigbo showed . . . contempt for defense counsel[,] . . . did not write down statements made by the defense, and . . . went so far as to order the arrest of [one of the attorneys for the defense,] because the lawyer asked that the tribunal chairman record his cross examination of a particular witness.

AFR. WATCH, NIGERIA: THREATS TO A NEW DEMOCRACY: HUMAN RIGHTS CONCERNS AT ELECTION TIME 16 (1993), available at <http://www.hrw.org/sites/default/files/reports/NIGERIA936.PDF>.

⁴³⁸ *Constitutional Rts. Project*, *supra* note 435, ¶¶ 1, 5.

⁴³⁹ *Id.* ¶¶ 3–5.

completed its review of the defendants' petition.⁴⁴⁰ The Lagos High Court eventually issued an injunction that stayed the execution of the defendants.⁴⁴¹

Upon its final review of the petition, the African Commission held that Nigeria had violated Article 7 of the African Charter and reasoned, among other things, that the special tribunal's composition—primarily of persons from the executive branch of government, who passed the Civil Disturbances Act that created the tribunals—lacked the sufficient appearance of impartiality at the very least.⁴⁴² According to the African Commission, the Civil Disturbances Act rendered the decisions of the special tribunals non-appealable, and

while punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of [the right to life and liberty], to foreclose any avenue of appeal to "competent national organs" in criminal cases bearing such penalties clearly violates Article 7.1(a) of the African Charter, and increases the risk that even severe violations may go unredressed.⁴⁴³

Despite Nigeria's domestic laws, the death sentences were eventually reduced to five years imprisonment.⁴⁴⁴

The *Constitutional Rights Project* clearly illustrates that the provisional measures rule can be successfully used to protect human rights in Africa, mainly the respect for life principle referenced in Article 4 of the African Charter. Provisional measures may be especially useful when the life or physical well-being of an individual is at risk. However, the provisional measures rule is greatly underutilized by the African Commission, which has been reluctant to apply these measures to prevent individual human rights violations.⁴⁴⁵ The ability to intervene and enact protective provisions before rendering a final decision can protect African citizens from grave physical harm and even death, which under certain circumstances may violate the rights to life and liberty guaranteed by Articles 4 and 6 of the African Charter as seen in the Nigeria Case.⁴⁴⁶ The need for more frequent utilization of the provisional measures rule is evident. For example, in February of

⁴⁴⁰ VINCENT O. ORLU NMEHIELLE, *THE AFRICAN HUMAN RIGHTS SYSTEM: ITS LAWS, PRACTICE, AND INSTITUTIONS* 235 (2001).

⁴⁴¹ *Id.* at 235–36.

⁴⁴² *Constitutional Rts. Project*, *supra* note 435, ¶¶ 12–14.

⁴⁴³ *Id.* ¶¶ 10, 11.

⁴⁴⁴ NMEHIELLE, *supra* note 440, at 236.

⁴⁴⁵ THOMAS, *supra* note 116, at 4.

⁴⁴⁶ *Constitutional Rts. Project*, *supra* note 435, ¶ 11.

2011, Mugabe's government arrested, detained, and tortured individuals who were watching videos of the uprisings in Egypt and Tunisia, and charged these individuals with plotting to overthrow Mugabe's government.⁴⁴⁷ The actions of Mugabe's government were clearly in violation of a number of human rights principles guaranteed by the African Charter including, but not limited to, the Article 5 right to be free from torture and inhumane punishment.⁴⁴⁸ Moreover, at the time of this writing, a number of the individuals accused of plotting to overthrow Mugabe in an Egyptian or Tunisian style revolt are being tried in Zimbabwe.⁴⁴⁹

Of course, utilization of the provisional measures rule is not without problems, and there have been cases where the African Union's attempt to utilize the rule has failed. For example, in 1994, the African Union attempted to use the provisional measures rule to intervene in another Nigerian case, involving Kenule Beeson Saro-Wiwa Jr. (Ken Saro Case).⁴⁵⁰ Saro-Wiwa was a writer and activist, as well as the president of the Movement for the Survival of the Ogoni People.⁴⁵¹ Saro-Wiwa and a number of other defendants were arrested and charged with murdering four Ogoni leaders.⁴⁵² The Nigerian government ignored the African Union's repeated requests to stay the execution of the defendants in the Ken Saro Case and all defendants were eventually executed.⁴⁵³ Similarly, in *Zegveld v. Eritrea*, the African Commission concluded that Eritrea had violated Articles 2, 6, 7(1), and 9(2) of the African Charter when it detained eleven former government officials for criticizing the government.⁴⁵⁴ The African Commission requested that Eritrea release the prisoners.⁴⁵⁵ However, as of this writing, Eritrea has failed to release any of the prisoners and five of the eleven prisons are presumed dead.⁴⁵⁶

⁴⁴⁷ Andrew Meldrum, *New Torture Claims Against Mugabe Regime*, GLOBALPOST (Feb. 25, 2011), <http://www.globalpost.com/dispatches/globalpost-blogs/africa-emerges/new-torture-claims-against-mugabe-regime>.

⁴⁴⁸ African Charter, *supra* note 86, art. 5.

⁴⁴⁹ *Court Watch 2/2012 [S v Munyaradzi Gwisai and Others: Application for Discharge]*, ZIMBABWEAN (Feb. 2, 2012, 11:09 AM), <http://www.thezimbabwean.co.uk/news/zimbabwe/56037/court-watch-22012-s-v.html>.

⁴⁵⁰ *Int'l Pen v. Nigeria*, Comm. 137/94, 139/94, 154/96, 161/97, 12th ACHPR AAR Annex V (1998–1999), *available at* http://www.worldcourts.com/achpr/eng/decisions/1998.10.31_International_PEN_v_Nigeria.htm.

⁴⁵¹ *Id.* ¶ 1.

⁴⁵² *Id.* ¶¶ 1, 2.

⁴⁵³ *Id.* ¶ 10.

⁴⁵⁴ *Zegveld v. Eritrea*, Comm. 250/2002, ¶¶ 2, 62, 17th ACHPR AAR Annex VI (2003–2004), *available at* <http://www1.umn.edu/humanrts/africa/comcases/250-2002.html>.

⁴⁵⁵ *Id.* ¶ 19.

⁴⁵⁶ HUMAN RIGHTS WATCH, *TEN LONG YEARS: A BRIEFING ON ERITREA'S MISSING POLITICAL FIGURES 7–8* (2011), *available at* <http://www.hrw.org/embargo/node/101784?signature=dbdd>

Arguably, the provisional measures rule allows the African Union to protect individual citizens and ensure that member states take steps to extend human and democratic rights to citizens. While there have been a number of cases in which the use of the provisional measures rule was not successful,⁴⁵⁷ the Nigeria Case illustrates that the provisional measures rule exemplifies a preexisting program or mechanism that the African Union could use more effectively and frequently to prevent human rights violations in Africa and ensure state compliance with the African Charter. Thus, the African Union should publicize and signal its commitment to more quickly and effectively utilize the provisional measures rule by encouraging individuals, member states, and NGOs to submit communications and petitions to the African Commission whenever human rights are being violated.

Additionally, Rule 93 of the Rules and Procedures of the African Commission requires that all available local remedies be utilized and exhausted prior to the African Commission's review of a communication or petition,⁴⁵⁸ and Article 56, Section 5 of the African Charter provides that communications relating to human rights must be considered by the African Commission "after [exhaustion of all] local remedies . . . unless it is obvious that this procedure is unduly prolonged."⁴⁵⁹ Yet, in some instances the African Commission may need to respond to communications and petitions by utilizing its provisional measures power to stop human rights violations before local remedies have been exhausted. Moreover, given the paltry human rights track record of a number of member states, local remedies are unlikely to be impartial, timely, or effective.⁴⁶⁰ Thus, Commission Rule 93 and Article 56, Section 5 of the African Charter should be revised to permit the African Commission to review communications and petitions prior to exhaustion of local remedies in grave circumstances.

It should be noted that the African Commission has held that it "does not believe that the condition [requiring local remedies to be] exhausted can be applied literally to those cases in which it is 'neither practicable nor desirable' for the . . . victims to pursue such" local remedies.⁴⁶¹ Additionally, in 2010 the rules of procedure were amended to provide that, if local remedies have not been exhausted, an individual must provide and allege specific grounds that support the contention that domestic remedies are

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⁴⁵⁷ See, e.g., *id.* (discussing the Zegveld case in which the provisional measures rule did not result in the release of prisoners).

⁴⁵⁸ 2010 RULES OF PROCEDURE, *supra* note 431, r. 93.

⁴⁵⁹ African Charter, *supra* note 86, art. 56(5).

⁴⁶⁰ See *supra* Part V (discussing human rights abuses in Zimbabwe, Libya, and Kenya).

⁴⁶¹ Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rules in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 AM. J. INT'L L. 1, 15 (2003).

impossible or unavailable.⁴⁶² However, the existence of the exhaustion-of-local-remedies requirement in Article 56 of the African Charter and in the Rules of Procedure of the African Commission may deter individual African citizens from submitting communications that evidence human rights violations to the African Commission. Furthermore, and most importantly, the African Union must terminate its practice of belatedly adopting prophylactic measures in an attempt to correct inadequately drafted governing documents.

Institutionalists contend that human rights violations occur when a human rights regime is unable to provide unambiguous norms and rules for its member states to follow.⁴⁶³ As such, the African Union must clearly communicate its position on the exhaustion of local remedies, and the best way to do so is by amending the African Charter and Rule 93. Thus, Article 56, Section 5 of the African Charter and Rule 93 should be revised by defining circumstances in which the Commission may intervene prior to exhaustion of local remedies. From a realist perspective, and in order to ensure that states comply with the African Commission's provisional measures recommendations, the Assembly should be prepared to issue sanctions in grave circumstances against recalcitrant member states that fail to comply with these recommendations (although African Commission recommendations may be nonbinding on member states).⁴⁶⁴

D. Individual and NGO Access to the African Court

In an effort to ensure the development of a cohesive human rights jurisprudence in Africa, the African Union adopted The Protocol on the Statute of the African Court of Justice and Human Rights (Court Protocol) in

⁴⁶² 2010 RULES OF PROCEDURE, *supra* note 431, r. 93.

⁴⁶³ See *supra* Part II.A.

⁴⁶⁴ It has been argued that the decisions of the African Commission are non-binding recommendations that member states have the option of following. NMEHILLE, *supra* note 440, at 236. In fact, in its communication procedures the African Commission acknowledges that "the mandate of the Commission is quasi-judicial and as such, its final recommendations are not in themselves legally binding on the States concerned." African Comm'n on Hum. & Peoples' Rts., *Information Sheet No. 3*, available at <http://www1.umn.edu/humanrts/africa/ach-pr-infosheet3.html> (last visited Oct. 7, 2012). However, the African Commission may bring its recommendations to the Assembly for consideration, and the Assembly has the power to adopt the recommendations of the African Commission. 2010 RULES OF PROCEDURE, *supra* note 431, r. 59, 80, 84, 110, 125 (describing situations in which the Commission must seek Assembly review of their recommendations or when they may request direct implementation by the Assembly). Additionally, if a state fails to comply with the provisional measures recommended by the African Commission, the African Commission may refer the matter to the African Court on Human and Peoples' Rights. *Id.* r. 118(2).

2008.⁴⁶⁵ The Court Protocol merged the African Court on Human and Peoples' Rights (Human Rights Court) and the Court of Justice of the African Union to establish the African Court of Justice and Human Rights (African Court).⁴⁶⁶ The Court Protocol will come into effect after fifteen states have ratified the protocol.⁴⁶⁷ As of August 6, 2010, Libya, Burkina Faso, and Mali were the only African states to have ratified the Court Protocol.⁴⁶⁸ Until the Court Protocol becomes effective, the Human Rights Court is the adjudicatory body responsible for hearing cases involving violations of the African Charter.⁴⁶⁹

Article 30(f) through Article 8(3) of the Court Protocol require that member states make a declaration accepting the African Court in order for court to hear a complaint from an individual or NGO.⁴⁷⁰ Thus, unless a state makes this declaration the African Court has no jurisdiction to hear a case brought by an individual or an NGO. A similar declaration must be made by member states under the protocol establishing the Human Rights Court.⁴⁷¹ To date, only the following five countries have made the special declaration permitting individual and NGO access to the Human Rights Court: Burkina Faso, Ghana, Malawi, Tanzania, and Mali.⁴⁷² Given that only five member states have made special declarations under the protocol establishing the Human Rights Court, which was established in 1998 and entered into force in 2004,⁴⁷³ member states are unlikely to make the declaration necessary to

⁴⁶⁵ Protocol on the Statute of the African Court of Justice and Human Rights, July 1, 2008 [hereinafter Court Protocol], available at <http://www.africa-union.org/root/au/documents/treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf>.

⁴⁶⁶ *Id.* arts. 1, 2.

⁴⁶⁷ *Id.* art. 9.

⁴⁶⁸ African Union, *List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights* (Aug. 6, 2010), available at <http://www.africaunion.org/root/au/Documents/Treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf>.

⁴⁶⁹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) [hereinafter Human Rights Court Protocol]. The Human Rights Court Protocol entered into force on January 25, 2004, and has been ratified by twenty-six of the fifty-three member states of the African Union. *List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (Mar. 11, 2011), available at <http://www.african-court.org/en/index.php/documents-legal-instruments/basic-documents>.

⁴⁷⁰ Court Protocol, *supra* note 465, arts. 8(3), 30(f).

⁴⁷¹ Human Rights Court Protocol, *supra* note 469, arts. 5(3), 34(6).

⁴⁷² Thomas Mhando, *Basic Facts About the African Court on Human and Peoples' Rights*, AFCHPR, <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-2basic-facts> (last visited Aug. 23, 2012).

⁴⁷³ See *supra* note 469 and accompanying text.

permit individual and NGO access to the African Court once the African Court becomes effective. The importance of obtaining individual and NGO access to a regional human rights court has been well documented.⁴⁷⁴ From an institutionalist perspective, 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.⁴⁷⁵

Moreover, institutionalists posit that state compliance with the norms of a human rights regime will be greatest in regions where the human rights regimes are strong, for example, the EU system. Further, institutionalists assert that state compliance may be obtained by increasing the cost of cheating and creating greater interdependence among states.⁴⁷⁶ The provision of the Court Protocol that prevents individual and NGO access to the African Court is contrary to the approach taken by the European Court of Human Rights, which granted individuals the ability to have direct access to the court in 1998.⁴⁷⁷ Individual access to the European Court of Human Rights has arguably increased the ability of the Council of Europe to hold noncompliant states accountable and ensure the protection of human rights.

⁴⁷⁴ See, e.g., Carlos Alberto Dunshee de Abranches, *The Inter-American Court of Human Rights*, 30 AM. U. L. REV. 79, pt. IV (1980) (discussing access to the court and noting that "[t]he effect of any legal system for the international protection of human rights depends essentially upon the existence of organs for the defense of these rights and access of the individual to those organs"). See generally Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK. J. INT'L L. 911 (2011) (discussing NGO involvement in human rights proceedings before official courts in different regional systems); Manuel D. Vargas, *Individual Access to the Inter-American Court of Human Rights*, 16 N.Y.U. J. INT'L L. & POL. 601 (1984) (reviewing restrictions individuals face while attempting to avail themselves of the Inter-American Court of Human Rights and proposing strategies individuals should take to access this court).

⁴⁷⁵ See Mayer, *supra* note 474, at 920, 936 (discussing NGO interest in bringing attention to the Inter-American Commission of American Convention violations and expressing the heavy reliance the systems place on private parties to bring such violations to the commissions' attention).

⁴⁷⁶ See *supra* Part II.A.

⁴⁷⁷ Under Protocol 11, Article 34 replaced the previous Article 25 of the Convention on Human Rights. See Vaughne Miller, Int'l Affairs & Def. Section, *Protocol 11 and the New European Court of Human Rights*, 13 (House of Commons Research Paper 98/109, Dec. 4, 1998), available at <http://www.parliament.uk/commons/lib/research/rp98/rp98-109.pdf>. The European Court of Human Rights is an organ of the Council of Europe. Council of Europe, http://www.conventions.coe.int/?pg=/Treaty/MenuInfos_en.asp (last visited Nov. 27, 2012). The Council of Europe is a regional organization consisting of forty-seven European member states. Council of Europe, <http://www.coe.int/aboutCoe/index.asp?page=nosObjectifs&l=en> (last visited Nov. 27, 2012). The Council of Europe and the EU are separate entities with similar objectives. Council of Europe, <http://hub.coe.int/web/coe-portal/european-union> (last visited Nov. 27, 2012).

In fact, Laurence Heffler has argued that “the individual complaints mechanism of the [European Court of Human Rights] is the crown jewel of the world’s most advanced international system for protecting civil and political liberties.”⁴⁷⁸ From an institutionalist perspective, allowing individuals and NGOs unfettered access to file complaints before the African Court would provide additional protection against state sanctioned human rights violations. Further, unfettered access would improve the ability of the African Union to hold member states accountable for violations of the human rights and democratic principles contained in the African Charter and Constitutive Act, thereby increasing the cost of cheating. As such, the Court Protocol should be revised to eliminate the need for a special state declaration authorizing individual and NGO access to the African Court.

Additionally, since the Court Protocol has not yet entered into force, the Human Rights Court is the adjudicatory body that is currently responsible for hearing cases related to violations of the rights contained in the African Charter.⁴⁷⁹ As previously mentioned, the protocol establishing the Human Rights Court also requires a special state declaration to permit individual and NGO access to the court.⁴⁸⁰ Therefore, in order to allow individual and NGO access to the currently operational Human Rights Court, the protocol establishing the Human Rights Court should be amended to remove the requirement for a special declaration by member states.

VII. CONCLUSION

While the OAU fulfilled its goal of eradicating colonialism in Africa and apartheid in South Africa, it failed to provide adequate human rights protections to African peoples. The African Union is attempting to succeed where the OAU has failed. From both an institutionalist and realist perspective, the African Union has achieved success in resolving political crises and ensuring state compliance with the African Charter and Constitutive Act in smaller countries such as Guinea. Unfortunately, the African Union’s feeble and ineffective response to the political and humanitarian crises in Zimbabwe, Libya, and Kenya indicates that the African Union still has a long way to go in order to provide regional human

⁴⁷⁸ Heffler, *supra* note 398, at 159.

⁴⁷⁹ See *Ratification Status: Protocol on the Statute of the African Court of Justice and Human Rights*, COALITION FOR AN EFFECTIVE AFR. CT. HUM. & PEOPLES’ RTS., 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=17:general&Itemid=18&lang=en (last visited Oct. 9, 2012) (demonstrating that only three states have ratified the Protocol by August, 2010).

⁴⁸⁰ Human Rights Court Protocol, *supra* note 469, arts. 5(3), 34(6).

rights protection and obtain member state compliance with the African Charter and Constitutive Act.

Recent events in a number of African countries indicate that the African Union will need to address the many problems and issues outlined in this Article—including limited exercise of political will, failure to timely and uniformly impose sanctions, state reporting failures, and inadequately drafted governing instruments—in order to effectively resolve new and ongoing crises. For example, Guinea-Bissau averted an attempted coup on December 26, 2011; however, President Malam Bacai Sanha died of natural causes in a Paris clinic in January of 2012.⁴⁸¹ Guinea-Bissau eventually suffered another military coup in April 2012.⁴⁸² Similarly, the situation in Madagascar is ongoing. As recently as January 21, 2012, and in violation of the political roadmap that was executed to resolve the crisis, Rajoelina prevented former president Ravalomanana's return to Madagascar.⁴⁸³ On June 14, 2012, Rajoelina finally agreed to meet with Ravalomanana to address unresolved issues in the hopes of putting an end to the ongoing crisis.⁴⁸⁴

The African Union's ability to effectively resolve current crises by ensuring that these countries not only comply with all applicable peace agreements, but also comply with the African Charter and Constitutive Act, remains to be seen. One thing is clear, however: if the African Union intends to succeed where the OAU has failed, it must adequately address its efficacy issues so that it can obtain member state compliance with the human rights and democratic principles set forth in the African Charter and Constitutive Act.

⁴⁸¹ Mark John, *Guinea-Bissau Buries President*, REUTERS (Jan. 15, 2012), <http://www.reuters.com/article/2012/01/15/us-guineabissau-president-idUSTRE80E0IC20120115>.

⁴⁸² Lamine Djata & Krista Larson, *Guinea-Bissau Coup: Soldiers Take Over Two Weeks Before Elections*, HUFFINGTON POST (Apr. 13, 2012), http://www.huffingtonpost.com/2012/04/13/guinea-bissau-coup_n_1423006.html.

⁴⁸³ Lydia Polgreen, *Ousted Leader is Thwarted in a Return to Madagascar*, N.Y. TIMES, Jan. 22, 2012, at A11.

⁴⁸⁴ PLOCH & COOK, *supra* note 151, at 1.

