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The role of case and complaints procedures in the reform of the African regional human rights system

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1 Introduction

In June 2001, the African Charter on Human and Peoples' Rights (African Charter or Charter)[1] marked its 20th anniversary. The year 2001 also marked the 15th anniversary of the entry into force of the Charter and 14 years of the inauguration of the African Commission on Human and Peoples' Rights (African Commission or Commission), the regional human rights monitoring body established by the African Charter.[2] Since the adoption of the Charter, African states, under the auspices of the now terminal Organisation of African Unity (OAU),[3] have negotiated and

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1 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5 (entered into force 21 October 1986), reprinted in (1982) 21 *International Legal Materials* 59.

2 The African Commission is established under art 30 of the African Charter. It was inaugurated on 2 November 1987. See First Annual Activity Report of the African Commission on Human and Peoples' Rights.

3 The OAU was created under the Charter of the Organisation of African Unity, adopted 25 May 1963, 47 UNTS 39, (1963) 2 *International Legal Materials* 766. At its 36th ordinary session in July 2000 in Lomé, Togo, the Summit of the Assembly of Heads of State and Government of the OAU adopted a new foundational treaty — the Constitutive Act of the African Union, adopted by the 36th ordinary session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo, CAB/LEG/23.15, entered into force 26 May 2001 (African Union Treaty or new Treaty). Among other things, the new Treaty will replace the Charter of the OAU within a transitional period of one year. It effectively revises and reverses the OAU's long-standing policy regarding state sovereignty and non-interference in domestic affairs of its member states, and designates new institutions for the organisation. In accordance with its art 28, the new Treaty entered into force on 26 May 2001 following the deposit of the 36th instrument of ratification by Nigeria.

concluded other human rights treaties, the most notable of which include the African Charter on the Rights and Welfare of the Child[4] and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[5] In March 1999, the African Charter attained full ratification by all 53 members of the OAU, with the deposit of Eritrea's instrument of ratification.[6]

The expression 'African human rights system' is usually used to describe the architecture of norms and institutions comprised in the core pan-continental human rights treaties named above. In actual fact, the system predates all these instruments and is significantly more complicated than the norms and instruments mentioned above. The distinctive contribution of the African Charter to this system was to break through the resistance of African countries to supra-national human rights monitoring,[7] albeit only through the creation of a commission which lacks full judicial powers or attributes.

The true origins of the pan-continental human rights system in Africa date back to 1969 when the OAU adopted its Convention on the Specific Aspects of Refugee Problems in Africa.[8] Eight years later, in 1977, at its Libreville summit, the OAU adopted the Convention on the Elimination of Mercenarism in Africa,[9] to address a problem which only now is being recognised as a human rights problem.[10] Another document worth mentioning in this context is the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.[11] Included in this

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4 African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49, adopted July 1990, entered into force 29 November 1999.

5 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU/LEG/MIN/AFCHPR/PROT(III), adopted in June 1998, reprinted in (1997) 9 *African Journal of International and Comparative Law* 953.

6 Eritrea deposited its instrument of ratification on 15 March 1999, Thirteenth Annual Activity Report Annexes I–V & Addendum.

7 See T Huaraka 'Implementation mechanism in the African Charter on Human and Peoples' Rights' in African Law Association (ed) *The African Charter on Human and Peoples' Rights: Development, context, significance* (1991) 70.

8 Organisation of African Unity (OAU) 1969 Convention on the Specific Aspects of Refugee Problems in Africa; entered into force 20 June 1974, 1000 UNTS 46.

9 OAU Convention on the Elimination of Mercenarism in Africa, adopted June 1977, entered into force 1985, OAU Doc CM/433/Rev L Annex I (1972). For a recent treatment of the political, human rights, legal and security aspects of the problems of mercenarism in Africa, see JK Fayemi & A-F Musah (eds) *Mercenaries: An African security dilemma* (2000).

10 In his 1999 report to the UN Human Rights Commission, the UN Special Rapporteur on Mercenaries, Enrique Bernales Ballesteros, warned that 'the recruitment and hiring of mercenaries by private companies . . . are a serious challenge to the international human rights protection system currently in force' (E/CN4/1999 11, 13 January 1999 79).

11 Adopted 30 January 1991, entered into force 22 April 1998, reprinted in (1993) 1 *African Yearbook of International Law* 269.

expression are the political institutions of the OAU created under the OAU Charter (and its successor treaty, the Constitutive Act of the African Union) and entrusted with specific responsibilities for constituting, supporting and facilitating the work of the regional human rights monitoring bodies.[12] The most notable of these bodies are the Assembly of Heads of State and Government (AHSG), the Council of Ministers and the OAU Secretariat.[13] The system must also be understood as including the regional economic communities in Africa, most of whose founding treaties now constitutionalise respect for human rights in general and the African Charter in particular as a fundamental principle.[14]

As a system that encapsulates supra-national, pan-continental systems and mechanisms, the African regional human rights system is often described and analysed in isolation of the respective domestic legal systems that comprise it. This depiction is both inadequate and misleading because the supra-national system is only complementary to the national legal systems. The former is not and cannot be a substitute for the latter. In the African regional human rights system, the linkage between domestic and regional human rights mechanisms is processed through the rule on exhaustion of domestic remedies which is the cornerstone of the adjudicatory and protective mandate of the African Commission on Human and Peoples' Rights under the African Charter.[15] The African Commission thus recognises that the rule requiring exhaustion of domestic remedies prevents it from acting as a court of first instance as long as domestic remedies are available, effective and sufficient.[16] This rule would be equally applicable to all other supra-national institutions exercising judicial or quasi-judicial protective functions.[17]

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12 For a description of the organs of the OAU and their functions in the promotion and protection of human rights, see M Garling & CA Odinkalu *Building bridges for rights: Inter-African initiatives in the field of human rights* (2001) 45–51.

13 Under the Constitutive Act of the African Union, the Assembly is retained as the highest decision making organ of the Union. The Council of Ministers is replaced by an executive council and, in place of the secretariat, there will be a new (executive) commission. See Constitutive Act of the African Union (n 3 above) art 5.

14 For a description and analysis of these regional mechanisms and the reinforcement they afford to human rights protection in Africa generally, see CA Odinkalu & M Zard 'African regional mechanisms that can be utilised on behalf of the forcibly displaced' in J Fitzpatrick & A Bayefsky (eds) *Guide to the international human rights protection of refugees* (forthcoming). See also F Viljoen 'The realisation of human rights in Africa through sub-regional institutions' (1999) 7 *African Yearbook of International Law* 185.

15 Art 56(6) African Charter.

16 Communications 147/95, 149/95, *Sir Dawda K Jawara v The Gambia*, Thirteenth Annual Activity Report. According to the Commission 'a remedy is *available* if the petitioner can pursue it without impediment; it is deemed *effective* if it offers a prospect of success; and it is found *sufficient* if it is capable of redressing the complaint' (paras 31–32).

17 See *Exceptions to the exhaustion of domestic remedies in cases of indigency or inability to obtain legal representation because of a generalised fear within the legal community* Advisory Opinion IACHR OC-11/90 (10 August 1990), reprinted in (1991) 12 *Human Rights Law Journal* 20.

Quite apart from this technical legal point, there are also practical reasons for not defining the African regional human rights system in isolation of the national legal systems that comprise it. After all, Africa's pan-continental human rights institutions require diplomatic and political support for their effective functioning. These institutions are equally reliant on the state parties for funding, the nomination of credible members, entry clearance, protocol and security for the conduct of missions, periodic reporting and the fulfilment of monitoring obligations and other similar responsibilities. The best human rights standards in the world (including the African region) would hardly be worth the paper they are written on in the face of state parties determined to consign them to irrelevance. Clearly, therefore, Africa's regional human rights system is a composite of national systems, the pan-continental systems and the complementarities — political, legal, diplomatic and judicial — between these two.

This point is essential for a dispassionate assessment of the existing pan-continental human rights systems, an exercise that must precede any meaningful discussion of reform. The understanding and analysis of the African human rights system are often attended by two prominent errors. One is to levy on the African Commission as the sole functioning continental human rights institution a burden of responsibility for the failings of the state parties to the Charter or a burden of expectations that cannot, in international law, be fairly laid at the doorstep of any inter-governmental institution.[18] While the Commission may fairly and necessarily be upbraided when it fails to make its views known to the state parties, it cannot take responsibility for the failure of states to implement its recommendations, decisions or views.

Related to this, the second problem is an unduly legalistic focus on the pan-continental norms and systems to the exclusion of the domestic political, judicial and diplomatic measures required to make human rights meaningful to African peoples. It is thus useful to remember that enforcement in international law is often a function of the political values of states subject to any regime of international obligation and

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18 For instance, the Commission is often chastised for having no powers of enforcement. 'Its decisions either have a declaratory effect or are merely recommendatory. Ultimate power resides with the Organisation of African Unity (OAU), a political body the resolutions of which have no binding force.' See G Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the establishment of a regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431 432. International enforcement is and has always been the function of political bodies. See M Mutua 'Looking past the Human Rights Committee: An argument for de-marginalising enforcement' (1998) 4 *Buffalo Human Rights Law Review* 211; P Leuprecht 'The execution of judgments and decisions' in R St J MacDonald *et al* (eds) *The European system for the protection of human rights* (1993) 791; LR Helfer 'Forum shopping for human rights' (1999) 148 *University of Pennsylvania Law Review* 285 288.

responsibility.[19] In approaching the question of reform of the African regional system, it is therefore important that we clarify the matters that fairly belong to the Commission's sphere of responsibility and separate them from those that belong to the sphere of responsibility of the African state parties to the Charter.

This paper argues essentially that reform of the African regional human rights system is a multi-dimensional and incremental project, the realisation of which will benefit from optimising the case-based and quasi-judicial mandates of the African Commission. Because it creates an institutional mechanism for implementing human rights in Africa, this paper is built around the African Charter and the Commission created by it. It begins with a summary of some of the criticism of the Charter and the Commission and then proceeds to give an overview of the current performance of the Commission and the constraints faced by it. It attempts to summarise some of the major areas of the Commission's jurisprudence to demonstrate how many of the early criticisms of the Charter and the Commission are now in arrears of the current state of evolution of the African regional system. This paper seeks to make the case that the clamour for reform of the African regional system must be based on a careful, more rigorous assessment of the actual performance and real potential of the African regional system than is presently the case.

2 The African regional human rights system and its critics

No regional human rights system attracts as much suspicion, even disdain,[20] as the African regional system. Murray points out that the African Charter, which is widely regarded as the main instrument in this system, was beset at birth with fundamental legitimacy questions.[21] None of the African leaders who met in Nairobi in June 1981 to adopt the Charter could claim anything like credible electoral legitimacy. Their political insecurities and pervasive suspicion of both the notion of human

19 See R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 33–34; A Chayes & A Chayes *The new sovereignty: Compliance with international regulatory agreements* (1995); T Franck *Fairness in international law and institutions* (1995); R Higgins *Problems and process: International law and how we use it* (1994) 105–107; H Koh 'Why do nations obey international law?' (1997) 106 *Yale Law Journal* 2599; LR Helfer & A Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273.

20 R Murray 'The African Charter on Human and Peoples' Rights 1987–2000: An overview of its progress and problems' (2001) 1 *African Human Rights Law Journal* 1 notes that because of its perceived shortcomings, the African Charter was 'even neglected in the mainstream debate on human rights'.

21 As above.

rights and supra-national oversight mechanisms for its monitoring[22] are well reflected in the Charter. The African Charter was the product of the ideological cleavages of the Cold War and post-independence, and 'nation-building' projects in post-independence Africa.[23] It reflects a compromise between the ideological and belief systems represented at its negotiation. As described by Dankwa, writing before he became a member of the African Commission, these diverse interests included 'atheists, animists, Christians, Hindus, Jews and Muslims; and over 50 countries and islands with Marxist-Leninist, capitalist, socialist, military, one-party and democratic regimes'.[24]

Two decades after the adoption of the Charter, the international context may have changed but the domestic environment in most African countries remains largely unfriendly to human rights, as the dictators of yore have found creative means of buying electoral legitimacy.[25] It is widely acknowledged that, around Africa, 'there is frequently a considerable discrepancy between the law and actual practice with regard to fundamental rights and freedoms at the state level'.[26] All these factors provide the context for the proliferation of predominantly pessimistic academic and research opinions on the Charter and its institutional mechanism, the Commission.

Early writers on the Charter questioned whether it could ever come into force,[27] as well as its implementability.[28] Others feared that it gave African states wide latitude for repressive human rights exceptionalism.[29] On the tenth anniversary of the African Charter in 1991, an African scholar dismissed it as 'a façade, a yoke that African leaders have put around our necks'[30] and called on like-minded peoples and interests to 'cast it off and reconstruct a system that we [Africans] can proudly proclaim as ours'.[31] Writing three years ago, the present author complained

22 See T Huaraka 'Implementation mechanisms in the African Charter on Human and Peoples' Rights' in African Law Association (ed) *The African Charter on Human and Peoples' Rights: Development, context, significance* (1991) 70 71.

23 See SKB Asante 'Nation building and human rights in emergent African nations' (1969) 2 *Cornell International Law Journal* 72.

24 V Dankwa 'The African Charter on Human and Peoples' Rights: Hopes and fears', in African Law Association (eds) *The African Charter on Human and Peoples' Rights: Development, context, significance* (1991) 1 8.

25 S Adejumobi 'Elections in Africa: A fading shadow of democracy?' (2000) 21 *International Political Science Review* 59.

26 Naldi & Magliveras (n 18 above) 432.

27 O Ojo & A Sesay 'The OAU and human rights: Prospects for the 1980s and beyond' (1986) 8 *Human Rights Quarterly* 89 101.

28 E Bondzie-Simpson 'A Critique of the African Charter on Human and Peoples' Rights' (1988) 31 *Howard Law Journal* 643.

29 R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667 689.

30 M Mutua 'The African human rights system in a comparative perspective' (1993) 3 *Review of the African Commission on Human and Peoples' Rights* 5 11.

31 As above.

that the Charter itself was problematic because it is 'opaque and difficult to interpret'.[32] Writing more recently, senior English Barrister and Queen's Counsel, Geoffrey Robertson, dismisses the Charter as a document that 'might more honestly have been entitled the African Charter for Keeping Rulers in Power'.[33]

The African Commission has fared no better. It is worth recalling here that the Charter creates the Commission to protect and promote human rights in Africa.[34] To realise this objective, the Charter confers on the Commission a composite mandate, including far reaching promotional, protective, quasi-judicial, advisory, investigative, diplomatic good offices and monitoring roles.[35] An often overlooked power of the Commission is its entitlement to lay down its Rules of Procedure, a power the exercise of which often captures the extent of the evolution of the institutional will of bodies like the Commission.[36]

By way of an overview, critics of the Commission accuse it of a mixture of radical impotence, radical incompetence, ponderous irrelevance, and even lack of independence bordering on complicity in the violations of human rights in Africa. Naldi and Magliveras, for instance, claim that the Commission has relatively weak powers of implementation and investigation.[37] Similarly, Welch believes the Commission is weak[38] and questions whether the Commission will ever have the power, resources and willingness to fulfil its functions.[39] He complains that 'the political will to interpret the wording of the African Charter broadly has not been present.'[40] However, when the Commission claims a power under article 62 of the Charter to request and examine periodic reports from states, the same writer demurs that 'commissioners have taken it upon themselves to examine reports from state parties in public sessions,

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32 CA Odinkalu 'The individual complaints procedure of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359 398. A classic example of this is art 24 of the Charter which provides that '[A]ll peoples' shall have the right to a general, satisfactory environment favourable to their development'. The popular view is that this provision embodies a guarantee of environmental human rights in the Charter. Yet this could equally be read not as a guarantee of the right to an environment but to a satisfactory policy framework in which the right to development can be realised.

33 G Robertson *Crimes against humanity: The struggle for global justice* (2000) 63.

34 Art 30 African Charter.

35 Arts 30, 45, 46, 47 & 62.

36 Art 42(2).

37 Naldi & Magliveras (n 18 above) 432. Compare art 46 of the Charter: '[T]he Commission may resort to any appropriate method of investigation. It may hear from the Secretary-General of the Organisation of African Unity or any other person capable of enlightening it.' This hardly reads like a 'weak' power of investigation.

38 CE Welch 'The African Charter and freedom of expression in Africa' (1998) 4 *Buffalo Human Rights Law Review* 103 114.

39 Welch (n 38 above) 115.

40 Welch (n 38 above) 113.

although the Charter is by no means clear that this is what the framers intended'.[41]

It has also been suggested that the Commission lacks the power to consider petitions alleging individual violations of human and peoples' rights.[42] In 1990, Edem Kodjo, the OAU Secretary-General who oversaw the adoption and entry into force of the Charter, confessed that he had difficulty seeing members of the Commission agreeing easily on petitions from individuals.[43] The capacity of the Commission to address remedies for such violations has also been questioned.[44] The members of the Commission, it is said, are not independent of their governments,[45] and 'its meetings are always disorganised and often verge on the absurd'.[46] In their 1998 study on the proposed African Court on Human and Peoples' Rights, Naldi and Magliveras conclude that 'the Commission does not give hope for optimism'[47] because, in their opinion it adopts 'a generally pusillanimous approach too respectful of state sovereignty'.[48] In a remarkable three pages of his book *Crimes against humanity: The struggle for global justice*, Robertson caricatures the Charter as 'a sad joke'[49] and the Commission 'a farce'[50] and the 'hollowest of pretences'.[51]

The image of the African regional system from this rather brief sampling of views is unedifying to say the least. To summarise:[52]

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41 As above.

42 R Murray 'Decisions by the African Commission on Human and Peoples' Rights on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412 413.

43 E Kodjo 'The African Charter on Human and Peoples' Rights' (1990) 11 *Human Rights Law Journal* 271 280. In actual fact, the Commission had begun to do this two years earlier. See CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state procedures' (1998) 20 *Human Rights Quarterly* 235.

44 W Benedek 'The African Charter and Commission on Human and Peoples' Rights: How to make it [*sic*] more effective' (1993) 11 *Netherlands Quarterly of Human Rights* 25 31.

45 Robertson (n 33 above) 63.

46 As above.

47 Naldi & Magliveras (n 18 above) 456.

48 As above.

49 Robertson (n 33 above) 62.

50 Robertson (n 33 above) 63.

51 Robertson (n 33 above) 64. Remarkably, the author comes to these conclusions from second hand material. This is evident from the fact that he did not even bother to find out or know how often the Commission meets annually, saying only that it meets 'for a week or so twice or thrice annually.' Robertson (n 33 above) 63. In fact, the Commission meets twice annually for two weeks on each occasion. See Rules of Procedure of the African Commission on Human and Peoples' Rights (1995) Rule 2.

52 CA Odinkalu 'Analysis of paralysis or paralysis by analysis? Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327 328.

> The perception of the African regional system that is often conveyed in much of the available literature is something of a juridical misfit, with a treaty basis that is dangerously inadequate and an institutional mechanism liable, ironically, to be slated as errant when it pushes the envelope of interpretation positively.

The argument for reform of the African regional system in general, and of the African Charter in particular, invites us to salvage something of the African regional human rights mechanism. Yet, it is difficult to see anything worth salvaging from an instrument or of an institution that is so thoroughly slated and savaged. It is hardly surprising, therefore, that the argument for reform of the Charter has always been premised on and cast as a case for its abrogation or complete revision,[53] in effect, for a re-negotiation of the Charter as a treaty. As I show below, treaty re-negotiation is almost undoubtedly the least productive of the reform options available for improving the African regional system.

3 Background to and structure of the reform debate

Arguments for reform of the African Charter encompass substantive, institutional and resourcing issues. Rachel Murray sums them up thus:[54]

> From the adoption in 1981 and coming into force in 1986 of the African Charter on Human and Peoples' Rights, this regional mechanism has been criticised for being ineffective, poorly funded, lacking impartiality and based on ambitious and unenforceable rights.

Even if we were to assume that all of the shortcomings of the African regional mechanism are established and founded, they are unlikely to respond to a single, undifferentiated intervention. For instance, constraints like poor funding, the absence of impartiality, and even ineffectiveness cannot be rectified with a treaty-based response or reform. Such problems provide evidence, if any were needed, of underlying shortcomings of political will on the part of the state parties to the Charter, a problem that no treaty can cure. On the other hand, objections to the substantive provisions of the Charter may be more suited to a treaty-based response, although the success of such treaty-based responses to substantive objections, as will be shown below,

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53 See Benedek (n 44 above) 262. See also Mutua (n 30 above).

54 Murray (n 20 above) 1.

cannot be guaranteed or assured. Some of these substantive objections include the claw-back clauses in the Charter,[55] and what one writer has referred to as 'the more unusual provisions of the Charter'.[56]

Gittleman who observed the negotiation of the Charter for the US based International Human Rights Law Group suggests that the African Charter was adopted prematurely before negotiations on its final text were concluded. He narrates the story of its adoption:[57]

> Early discussion by the Council [of Ministers of the OAU] cast grave doubts as to its [the Charter's] future. It [the Council] decided, however, to take note of the Draft Charter and to submit it with no amendments to the Assembly of Heads of State and Government for the Assembly's consideration. On June 17, 1981, the eighteenth Assembly of Heads of state and Government convened to discuss the Charter. The Assembly took note of the recommendations and adopted the Charter with no amendments.

This may partly explain some of the omissions from or inadequacies of the African Charter, but does not at all demonstrate that such inadequacies make the Charter unworkable. The Charter's positive features are often under-estimated or overlooked. Its capacity for metamorphosis has yet to be fully explored or analysed.[58] Quite apart from the natural imperative of change, the Charter and the Commission have in-built mechanisms for self-correction and adjustment. These include the Commission's Rules of Procedure, its case-based, quasi-judicial and advisory mandates,[59] its investigative powers under article 46 and the interpretive latitude granted to the Commission under articles 60 and 61 of the Charter to import jurisprudence from other international human rights instruments or institutions to which African states are party.

Over the first 14 years of its existence, the Commission has experienced significant change and innovated in several respects. Its membership

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55 For the meaning of claw-back clauses, see R Higgins 'Derogations under human rights treaties' (1976–77) 48 *British Yearbook of International Law* 281. Far from being unique to the African Charter, claw-back clauses are to be found in all human rights treaties. For some of the early and most influential decisions in the European human rights system on claw-backs, see eg *Handyside v UK* ECHR (7 December 1976) 24 Ser A. Also, *Sunday Times v UK* ECHR (26 April 1979) 30 Ser A; R St J Macdonald 'The margin of appreciation' in R St J Macdonald *et al The European system for the protection of human rights* (1993) 83. This in turn is a matter for operationalisation and interpretation of such clauses by the implementing organs of these treaties. In effect, the real question on the subject of claw-back clauses, for instance, is whether the Charter institutions can have the will to interpret them in such a way as to curb their being used as a basis for oppressive exceptionalism by the state parties.

56 Murray (n 20 above) 2. These 'unusual provisions' include the third generation rights, and possibly the provisions on duties in art 29.

57 Gittleman (n 29 above) 398.

58 Murray (n 20 above).

59 Arts 45(2) & (3) African Charter.

now reflects a diversity of gender and the five regions of Africa,[60] and it has revised its Rules of Procedure and evolved its practice to, among other things, grant rights of representation to authors in equality with states in contentious matters.[61] Reports of the Commission's protective work are now routinely made public when in the past they were confidential. This has been achieved by the simple device of reinterpreting article 59(3) of the Charter to enable the Commission to publish its reports *unless the OAU objects to*, instead of the previous interpretation which precluded the Commission from publishing the report *unless the OAU authorises* its publication. Through its Rules of Procedure, the Commission has formalised its powers to indicate provisional measures in urgent cases so as to preserve the subject matter of a communication pending before it.[62] In the exercise of its powers under the Charter,[63] the Commission has constituted special thematic mechanisms (rapporteurs) on several themes but the performance of these special rapporteurs remains uneven at best.

In the next section, this article demonstrates how the Commission has, through its casework, jurisprudence, and practice, rendered much of this call for treaty revision irrelevant.

4 Reform through the cases: Crystallising the advances

The African Commission has evolved a body of practice and case law since its inauguration in 1987. The Commission's practice is governed by its Rules of Procedure, the latest revision published in 1995[64] which, being nearly seven years old, do not currently reflect the current evolution of its practice in many respects. Its case law is published through the Commission's Annual Activity Reports. In particular, the Commission

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60 The Commission currently comprises four women and seven men. Until 1993, it had no women on its membership. Similarly, it now has three members each from North Africa and Southern Africa, two each from West and Central Africa and one from East Africa. The secretary is from Burundi in Central Africa. At a point in 1996, the Commission had seven members from West Africa and none from Southern or East Africa.

61 Rule 119(1) Rules of Procedure of the African Commission. Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted at the 18th ordinary session of the Commission, Praia, Cape Verde, 6 October 1995, available on the African Human Rights Resource Centre website, <http://www1.umn.edu/humanrts/africa/rules.htm> (accessed 31 July 2001).

62 See *Registered Trustees of Constitutional Rights Project v The President of the Federal Republic of Nigeria & 5 Others* Suit No M/102/93, Ruling of the High Court of Lagos State, Nigeria, 1993, reprinted in (1994) 4 *Journal of Human Rights Law and Practice* 218.

63 Art 46.

64 n 61 above.

has progressively issued and published the texts of decisions in cases since 1994.[65] The latest of these reports as at the time of writing was the Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights,[66] adopted at and published after the 36th ordinary session in Lomé, Togo, in July 2000, the Assembly of Heads of State and Government (the AHSG) of the OAU.

Over the years, the Commission's decisions have addressed a wide range of substantive and procedural issues in the Charter. In the process, it has elaborated several aspects of the admissibility requirements under article 56 of the Charter, and addressed the meaning of several substantive rights, including economic, social and cultural rights.[67] The Commission has also addressed such problematic issues as the relationship between culture, religion and human rights in the Charter in two different decisions involving questions of Islamic Shari'a in Sudan and the contemporary forms of slavery in Mauritania and clarified the legal basis for the communications procedures under the Charter.

4.1 Legal basis of the Commission's power to consider communications

In 1994, Dawda Jawara was deposed as the president of The Gambia in a mutiny of the army. Subsequently, he instituted two cases against his military usurpers alleging violations of multiple provisions of the Charter the acts of the usurping regime during and after coming to power. In response to these cases, the government of The Gambia argued that the Commission's power to consider communications was limited only to those cases that reveal a series of serious and massive violations of human rights.[68] This argument is identical to similar arguments in academic

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65 See the Seventh Annual Activity Report of the African Commission on Human and Peoples' Rights, adopted by the Assembly of Heads of State and Government, 30th session, Tunis 13–15 June 1994 ACHPR/AHG/198(XXX) (1994).

66 Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annexes I–V & Addendum. This report covers the work of the Commission in the year ending in May 2000, and includes the decisions and resolutions adopted by the Commission at its 26th ordinary session in Kigali, Rwanda, between 1 & 15 November 1999 and its 27th ordinary session in Algiers, Algeria, between 27 April & 11 May 2000. This was the first complete cycle of reporting on the work of the Commission since the African Charter attained full ratification by all 53 members of the OAU, with the deposit of Eritrea's instrument of ratification on 15 March 1999. Published in this report, for instance, are 16 decisions by the Commission in 26 non-state communications brought against parties to the Charter. The decisions were rendered in cases instituted against Nigeria, Mauritania, Sudan, The Gambia, Djibouti, Egypt and Gabon. The Fourteenth Annual Activity Report was put before the 37th ordinary session of the OAU's AHSG in Lusaka, Zambia in July 2001. That summit was ongoing at the time of writing.

67 Odinkalu (n 52 above) 327.

68 Communications 147/95, 149/95, *Sir Dawda K Jawara v The Gambia*, Thirteenth Annual Activity Report and (2001) 8 *International Human Rights Law Reports* (the *Jawara* cases). Reliance was placed on arts 58(1)–(3) of the Charter.

writing and criticisms of the Commission as being unable to remedy any violations of the Charter.[69] The Commission dismissed this as an 'erroneous proposition'.[70] In reaching this conclusion, it referred to the provisions of the Charter empowering it to consider inter-state communications[71] and non-state communications.[72] The Commission also justified this view on the basis of its past practice, stating that:[73]

> In any event, the practice of the Commission has been to consider communications even if they do not reveal a series of serious or massive violations. It is out of such useful exercise that the Commission has, over the years, been able to build up its case law and jurisprudence.

4.2 Admissibility requirements

Through its jurisprudence on admissibility, the Commission has espoused a philosophy of the encouraging significantly wide access to its protective procedures. It has thus interpreted the requirement for exhaustion of domestic remedies in article 56(5) of the Charter, for instance, as implying an obligation on the part of the state parties to ensure that domestic remedies are available, effective and sufficient.[74] In effect, this gives the Commission flexibility to permit 'wide margins of exception to the rule on exhaustion of domestic remedies'.[75] The Commission has granted this exception in cases where national courts have been rendered ineffective by military regimes,[76] in two cases involving a deposed and exiled former president who was tried and convicted *in absentia* by his usurpers,[77] in another case concerning a refugee complaining against his home country for violations that justified another country in granting

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69 R Murray 'Decisions of the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412 413; Benedek (n 44 above) 25 31; E Kodjo 'The African Charter on Human and Peoples' Rights' (1990) 11 *Human Rights Law Journal* 271 280.

70 The *Jawara* cases (n 68 above) para 42.

71 The Commission cited arts 47 & 49 of the Charter. See the *Jawara* cases (n 68 above) para 42.

72 Art 55 African Charter.

73 As above.

74 As above. According to the Commission 'a remedy is *available* if the petitioner can pursue it without impediment; it is deemed *effective* if it offers a prospect of success; and it is found *sufficient* if it is capable of redressing the complaint' (n 72 above paras 31–32).

75 Odinkalu (n 32 above) 402.

76 Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*; Communications 143/95, 150/96, *Constitutional Rights Project and Civil Liberties Organisation v Nigeria,* Thirteenth Annual Activity Report. Also, Communications 48/90, 50/91, 52/91 & 89/93, *Amnesty International, Comité Loosli Bachelard v Sudan, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa v Sudan,* Thirteenth Annual Activity Report para 122.

77 The *Jawara* cases (n 68 above) para 36.

him asylum,[78] or where *habeas corpus* was denied.[79] Similarly, the Commission exempts from this requirement persons who were *prima facie* victims of collective expulsion.[80] Similarly, in considering the requirement in article 56(4) of the Charter that communications should not be 'based exclusively on news disseminated through the media', a provision that could easily be employed to constrain access, the Commission reasons that it would be[81]

> damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word 'exclusively'. There is no doubt that the media remains the most important, if not the only source of information . . . the issue therefore should not be whether the information was gotten from the media, but whether the information is correct.

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78 Communication 215/98, *Rights International v Nigeria*, Thirteenth Annual Activity Report para 84.

79 Communication 153/96, *Constitutional Rights Project v Nigeria*, Thirteenth Annual Activity Report para 10.

80 In Communication 71/92, *RADDHO v Zambia,* Tenth Annual Activity Report, the government of Zambia objected on the ground of non-exhaustion of domestic remedies to the admissibility of a case filed on behalf of several hundred West African nationals who had been expelled *en masse* by Zambian authorities. In dismissing the Zambian objection and upholding the admissibility of the communication, the Commission reasoned that art 56(5) of the Charter did not mean that complainants were required to exhaust any local remedy that was found to be, as a practical matter, unavailable or ineffective. The Commission pointed out that the victims and their families were collectively deported without regard to possible judicial challenge to such conduct and concluded that 'this fact alone gives rise to serious doubts as to the effectiveness of the remedies technically available to the complainants under Zambian law'.

81 The *Jawara* cases (n 68 above) paras 24–26. A rather curious case on the same point involved Lamine Diakité, a Malian expelled with his family from Gabon in November 1987. The expulsion was allegedly procured on the authority of Mba Eyoghe, a Gabonese government minister who, the complainant alleged, was indebted to him. Also deported with Mr Diakité was his friend, one Coulibaly Hamidou who was allegedly involved in an extra-marital liaison with the first wife of Mr Eyoghe. The complainant introduced the communication in April 1992 while he was still expelled from Gabon. Two months later, in June 1992, the government of Gabon nullified the expulsion orders. It was not suggested that there was any link between the introduction of the communication before the Commission and the nullification of the expulsion orders. In December 1997, Mr Diakité and his family and friend returned to reside in Gabon, based on 'a political decision by the Gabonese Head of State following talks with his Malian counterpart during an official visit to Mali.' See Communication 73/92, *Lamine Diakite v Gabon*, Thirteenth Annual Activity Report para 17. In May 2000, the Commission inexplicably declared the Communication inadmissible for non-exhaustion of domestic remedies because the complainant had never contested the decision to expel him from Gabon.

4.3 Substantive rights, including economic, social and cultural rights

The Commission elaborated on several substantive rights the terms of whose protection in the Charter were mostly brief and widely considered incomplete. It has, for instance, done this in relation to the prohibition against torture in article 5 of the Charter in two cases against the *Sudan*[82] and *Mauritania*.[83] The Commission found that this provision protects against, *inter alia*, arbitrary deprivation of life.

In both cases, the Commission also decided that deaths resulting from acts of torture or from trials concluded in breach of the due process guarantees in article 7 of the African Charter violated the prohibition against arbitrary deprivation of life in article 4 of the Charter. In the *Sudan* cases, the Commission noted that allegations that 'prisoners were executed after summary and arbitrary trials and that unarmed civilians were also victims of extra-judicial executions' had been 'upheld by evidence taken from the report of the United Nations Special Rapporteur'.[84] It laid down some guidelines for investigating such executions, observing that[85]

> the investigations undertaken by the government are a positive step, but their scope and depth fall short of what is required to prevent and punish extra-judicial executions. Investigations must be carried out by entirely independent individuals, provided with the necessary resources, and their findings should be made public and prosecutions initiated in accordance with the information uncovered. Constituting a commission of the District Prosecutor and police and security officials, as was the case in the 1987 Commission of Enquiry set up by the governor of South Darfur, overlooks the possibility that police and security forces may be implicated in the very massacres they are charged to investigate. The commission of enquiry, in the Commission's view, by its very composition, does not provide the required guarantees of impartiality and independence.

The Commission has made the article 5 guarantee of respect for human dignity the basis for an evolving, violations-based approach to the protection of economic, social and cultural rights.[86] On this basis, it has condemned 'practices analogous to slavery' such as 'unremunerated

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82 Communications 48/90, 50/91, 52/91 & 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of the Episcopal Conference of East Africa v Sudan*, Thirteenth Annual Activity Report (the *Sudan* cases).

83 Communications 54/91, 61/91,98/93, 164/97 & 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayant-droit and Association Mauritanienne des Droits de l'Homme v Mauritania*, Thirteenth Annual Activity Report (the *Mauritania* cases).

84 The *Sudan* cases (n 82 above) para 48. See also the *Mauritania* cases (n 83 above) para 119.

85 The *Sudan* cases (n 82 above) paras 61–62.

86 See Odinkalu (n 52 above) 358–365.

work'.[87] The Commission has also pronounced on several aspects of culture as a human rights issue. In Communications 140/94, 141/94 and 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria,* the Commission expressed the view that the African Charter should be interpreted in a culturally sensitive way, taking into account the differing legal traditions of Africa.[88]

In the *Mauritania* cases, the Commission considered that the allegation that black Mauritanians were denied the right to enjoy their culture, including their language. It took the view that this fell within the scope of articles 17(2) and (3) of the Charter. Its views on the nature of language rights as human rights demonstrate the interdependence and permeability of the rights in the Charter. In particular, the Commission emphasised the value of language as an integral part of culture (cultural right), a means of expression (civil and political right) and an expression of identity (group and collective right). Its usage enriches the individual and enables him to take part in the community and in its activities (social right).[89]

The African Commission has elaborated the contents of the right to a fair trial in both its casework and its resolutions,[90] extending it to such problems as legal aid and assistance, resourcing of the legal and judicial process and traditional and military courts.[91] Thus, for instance, the Commission routinely links articles 7(1)(d) and 26 of the Charter to achieve protection of the independence and integrity of the judiciary. In the *Sudan* cases, it took the view that the purge of over 100 judicial officers by the Sudanese government deprived the courts of qualified personnel required to ensure their impartiality and thus violated articles 7(1)(d) and 26 of the Charter.[92] In separate decisions against Sudan,[93] Nigeria,[94] and Mauritania,[95] the Commission similarly condemned the practice of setting up special courts or tribunals parallel to or above the normal judicial procedures as contrary to both articles 7(1)(d) and 26 of the Charter.

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87 Also the *Mauritania* cases (n 83 above) para 135.

88 Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria,* Thirteenth Annual Activity Report para 26.

89 The *Mauritania* cases (n 83 above) para 137. On the facts of the cases, the Commission was unable to find that these particular violations had been established, para 138.

90 See Odinkalu (n 52 above).

91 See Resolution of the Right to a Fair Trial and Legal Assistance in Africa, adopting the Dakar Declaration on the Right to a Fair Trial in Africa, DOC/OS(XXVI)INF 19.

92 n 82 above, paras 68–69. Art 26 reads: 'States Parties to the present Charter shall have the duty to guarantee the independence of the Courts. . .'

93 n 82 above.

94 Communication 151/96, *Civil Liberties Organisation v Nigeria,* Thirteenth Annual Activity Report para 71.

95 The *Mauritania* cases (n 83 above).

The Commission has also applied the freedom of religion guarantee in article 8 to the controversial problem of application of Islamic Shari'a to non-Muslims in the *Sudan* cases. The Commission held that Shari'a is inapplicable to non-adherents of the Islamic faith unless they voluntarily submit to it.[96] In this connection, the Commission concluded that:[97]

> . . . it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish.

Significantly, the Commission also required that even where Shari'a is applied to Muslims in the administration of justice, 'trials must always accord with international fair trial standards'.[98]

4.4 Political rights and claw-back clauses

The Commission has long recognised the close link between rights of citizens to access to government, governmental accountability and participation in government.[99] In no particular order, these guarantees incorporate the rights to freedom of expression, association, assembly, and information. In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*,[100] it was not disputed that the Nigerian government at different times between 1994 and 1996 proscribed critical newspapers, occupied their premises with soldiers and detained several advocates for plural politics without trial. Similarly, in the *Jawara* cases, it was common ground that The Gambia had arrested or harassed some journalists, forcing them into exile. The complainant also alleged that those journalists who were not forced into exile were expelled by the government. In response to these allegations, Nigeria and The Gambia respectively invoked the claw-back clauses in the relevant provisions of the Charter and claimed that all the violations complained of were authorised by their respective domestic legal systems.

The Commission rejected the Nigerian government's reliance upon the claw-back provision in article 9 of the Charter to assert that it could use its national laws to defeat the manifest purpose of the Charter.[101] From these cases, the Commission distils four conditions which must be

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96 The *Sudan* cases (n 82 above) para 73.

97 As above.

98 As above.

99 Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, Thirteenth Annual Activity Report para 54.

100 As above.

101 Art 9(2) reads: 'Every individual shall have the right to express and disseminate his opinions *within the law*' (claw-back wording in italics).

met cumulatively before a limitation of rights in domestic law can be considered compatible with the Charter by virtue of claw-back wording in the Charter text. These are:

(a) limitations shall be exercised with due regard to the rights of others, collective security, morality and common interest;
(b) the justification for limitations must be strictly proportionate with and absolutely necessary for the purposes that follow;
(c) a limitation may not erode a right such that the right itself becomes illusory;[102]
(d) limitations must be consistent with the obligations of state parties under the Charter.[103]

The Commission has similarly found protection for plural politics and a prohibition of military coups in the combination of articles 10, 11, 13 and 20 of the Charter. In the *Jawara cases,* the Commission found that the combined effect of the military coup and resulting measures violated the right of the Gambian people 'to freely determine their political status', which was an aspect of the right to self-determination in article 20(1) of the Charter, stating that:[105]

> [S]ection 62 of the Gambian Constitution of 1970 provides for elections based on universal suffrage, and section 85(4) made it mandatory for elections to be held within at most five years. Since independence in 1965, The Gambia has always had a plurality of parties participating in elections. This was temporarily halted in 1994 when the military seized power. The complainant alleges that the Gambian peoples' right to self-determination has been violated. He claims that the policy that the people freely choose to determine their political status, since independence has been 'hijacked' by the military. That the military has imposed itself on the people. It is true that the military regime came to power by force, albeit, peacefully. This was not through the will of the people who have known only the ballot box since independence, as a means of choosing their political leaders.[104] The military coup was therefore a grave violation of the right of the Gambian people to freely choose their government as entrenched in article 20 (1) of the Charter.

4.5 Remedies

The Commission has not always been as explicit or clear as it could be in its indication of remedial measures. However, in its decision in the *Mauritanian* cases the Commission outlined elaborate requests for clear remedial measures, including directions to investigate extra-judicial

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102 Communications 140/94, 141/94 & 145/95, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria,* Thirteenth Annual Activity Report paras 41–42. This footnote applies to (a), (b) & (c) above.

103 See the *Jawara* cases (n 68 above) para 59.

104 The *Jawara* cases (n 68 above) paras 71–73.

105 As above. Art 20(1) provides: 'All peoples shall . . . freely determine their political status . . . according to the policy they have freely chosen.'

executions and torture, to prosecute their perpetrators and to compensate the victims and eradicate slavery.[106]

4.6 Delay in deciding cases

One feature of the Commission's decision making is the inordinate delay between the institution of a complaint and a final decision thereon. The Thirteenth Annual Activity Report of the Commission provides a rather egregious example of this phenomenon. *Diakité v Gabon*[107] was filed with the Commission in April 1992. The Commission declared this case inadmissible more than eight years later, only in May 2000, a length of delay that is both unsatisfactory and worrisome. One obvious way of avoiding such delays or ameliorating its adverse consequences on victims would be for the Commission to make use of its powers of provisional measures more frequently. In *Association pour la defence des droits de l'homme et des libertés v Djibouti,*[108] where the Commission did this, the case was coincidentally settled amicably, although the records do not provide sufficient information to support an inference of causation between the indication of provisional measures and prompt amicable settlement.[109]

5 Taking reform seriously

The foregoing analysis and description demonstrate amply that the mechanism of the African Charter is not the altogether hopeless beast caricatured by the literature. Although sometimes confused and confusing, it cannot fairly be characterised as pusillanimous, indulgent of human rights infractions or irrelevant to human rights in Africa. Claude Welch's claim that 'the political will to interpret the wording of the African Charter broadly has not been present'[110] is clearly unsustainable on the basis of the current jurisprudence of the Commission. This does not necessarily address the Commission's effectiveness which, it is submitted, is more a reflection of the political values in the context of which the mechanism is deployed rather than a statement about the autonomous viability of the mechanism itself.

A case for wholesale revision of the Charter can hardly be made out on the basis of the material currently available. As at the end of 2000, after 13 full years of operation, the Commission had registered fewer

106 The *Mauritania* cases (n 83 above) paras 159–160.

107 Communication 73/92, *Mohamed L Diakité v Gabon*, Seventh Annual Activity Report.

108 Communication 133/94, *Association pour la Defence des Droits de l'Homme et des Libertés v Djibouti*, Thirteenth Annual Activity Report.

109 Thirteenth Annual Activity Report paras 13–17.

110 Welch (n 38 above).

than 250 cases and complaints, including only one inter-state complaint.[111] With 53 state parties to the Charter, this averages out at just about 4.5 cases against each state or one case every three years against each state in the period since the inception of the Charter. The conclusion from this has to be that the Commission is very much unknown and under-utilised. The Commission surely has its share of responsibility for this. But so do the state parties to the Charter as well as the African and international NGOs that seek to use it.

A hypothetical reform project would have to diagnose the constraints that need to be reformed, define appropriate interventions and settle its strategy and directionality, which may be top-down, with a regional, inter-governmental OAU-focused lobbying effort, or bottom up with a focus on arguing the legitimacy of the rule of law and constitutional governance as common political values for state parties at the domestic level. There would have to be clarity about what the outcome of reform would be and how it would be enacted — by treaty, case law or administrative, political or other diplomatic machinery.

Such a project would, moreover, confront a minimum of four possible areas of reform, namely institutions, substantive norms, procedures of the system, and effectiveness. In relation to the first, the adoption of the African Court Protocol[112] has dealt with the absence of a full and mature judicial organ in the African regional human rights system. In relation to the second, the on-going drafting process for a protocol to the Charter on the human rights of women in Africa responds to this.[113] In relation to the third, the African Commission has a capacity, like all other institutions of its kind, to make and revise its own rules of procedure.[114] The real problem lies in the fourth issue — addressing the effectiveness of the system.

A close look at the African regional system shows that its shortcomings are mostly practical and political matters to which treaties are, to put it bluntly, irrelevant. These include matters such as the funding of the system, the absence of compliance and supportive political will on the part of the state parties, inadequate popular awareness about the system, and the management and administration of the Commission. It becomes clear that the most necessary subjects of reform within the

111 As at its 29th ordinary session in Tripoli, Libya in May 2001, the Commission had recorded only 241 communications in its nearly 14 years of existence.

112 n 5 above.

113 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa DOC CAB/LEG/88.7 (May 2001) (Draft Protocol). For a review of the main features of this draft Protocol, see MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40.

114 Art 42(2) African Charter.

regional human rights system may require forms of intervention other than the norm creation through treaty making.

An argument for wholesale revision of the African Charter is hardly made out on the basis of available material but not because treaty revision is an unknown concept in Africa.[115] For one, the evidence suggests that a significant part of the criticisms of the African Charter mechanism can be met by natural growth processes in the institutional practice and case-based jurisprudence of the Commission. For another, the process of revision is itself state-controlled as non-state entities do not revise treaties. As much as it is to be hoped to the contrary, there is no assurance that a process of revision will result in a document much better than the existing Charter. Indeed, normative reform could create room for negotiating regional exceptionalisms into extant international consensus on the body of existing norms. Moreover, wholesale treaty revision would effectively result in the creation of a two-track regional system in the absence of an assurance (which no one can give) that the outcome of the revision will ever attract universal ratification or accession by all the existing African Charter states.

This is far from saying, however, that forms of treaty-based intervention would be totally irrelevant to the evolution or reform of the African regional human rights system. It is possible, for instance, to contemplate discrete aspects of human rights problems in Africa that could and would deserve the specific treaty's attention. Samples of such problems include nationality, poverty and participation in government, the protection of aliens and the mass deportation of Africans within their own continent, all problems that have become established as sources of gross violations of human rights in Africa. For instance, to prevent former President Kenneth Kaunda from presenting himself for the presidential contest in Zambia in 1996, the ruling Movement for Multi-Party Democracy attempted but failed to deport him to a neighbouring country, whose national they alleged he was. This took Zambia to the brink of conflict from which it has yet to fully recover politically.[116]

Human security, national stability and the international standing of Côte d'Ivoire have similarly been severely injured by the orchestrated attempt to exclude former Prime Minister Alassane Ouattara from

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115 Between 1991 and 1992, the countries of West Africa, for instance, successfully reviewed the founding treaty of their regional economic community, ECOWAS. See Treaty of the Economic Community of West African States (ECOWAS), *Review of the ECOWAS Treaty: Final Report by the Committee of Eminent Persons* (June 1992).

116 The government of Zambia achieved this by amending the Constitution of Zambia. This amendment was challenged by the Zambian NGO, the Legal Resources Foundation, in Communication 211/98, *Legal Resources Foundation v Zambia,* Fourteenth Annual Activity Report. In its decision in May 2001, the Commission found that this amendment to the Constitution of Zambia was incompatible with Zambia's obligations under art 13 of the African Charter.

participating in the presidential polls in that country in 2000 through the nebulous notion of 'Ivoirité'.[117] There is also the question of legal responses to extra-constitutional usurpation of government which is now made an issue in the Constitutive Act of the African Union.[118] These and similar issues may justifiably be addressed in separate protocols to the Charter.

Change is a necessity in every aspect of African life, none more so than in the area of human rights. In a 1997 article, Nicholas Howen properly captured the dilemmas that face advocates for reform of international regimes of human rights protection as follows:[119]

> Whether any gaps in protection should be addressed by a new, rather than progressive interpretation of existing standards, is a difficult decision. A proliferation of weak or unnecessary standards would undermine the credibility of the system. Generally, new standards should not be proposed unless they would lead to a significant development of protection under international law or reinforce existing standards in particular geographical areas (such as regional human rights treaties). New standards should not weaken or undermine existing standards. They should be a significant practical tool to stop violations. Even if these tests are passed, the reformer will have to decide strategically whether the political climate is right and whether a resolution of a political body would be sufficient, or a more formal and negotiated though still not legally binding, declaration is needed which may or may not lead to a legally binding treaty.

Casework and litigation serve multiple functions in reform. They help to identify gaps, legitimise the search for alternatives and demands for remedy and anchor policy response to such demands. Casework also has the appeal of not being under the exclusive political control of states. Those who advocate treaty-based reform must consider that treaties are negotiated between states, whose sole prerogative it is to define the rules of engagement and access to such negotiations. I would much rather prefer a reform process or forum that is not so state-centric.

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117 Writing in the January–March 2000 issue of the *Focus on Africa* magazine, V Tadjo described 'Ivoirité', as 'an abstract concept of Ivorian identity'. On the consequences of this, she reported that '[t]he fear of exclusion is great. Some weeks ago, the government appealed for calm after one person was killed and hundreds of Burkina Faso nationals fled for their lives in a land dispute with Ivorian villagers.'

118 Arts 4(p) & 30 Constitutive Act of the African Union (n 3 above), reprinted as Annexure A in this issue.

119 N Howen 'International human rights law making: Keeping the spirit alive' (1997) 2 *European Human Rights Law Review* 566 571–572.