

The African regional human rights system: In need of reform?

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1 Introduction

The African regional human rights system, created under the auspices of the Organisation of African Unity (OAU), is constituted primarily by the following instruments: The African Charter on Human and Peoples' Rights of 1981¹ (African Charter or Charter), which created the African Commission on Human and Peoples' Rights (African Commission or Commission); the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969;² and the African Charter on the Rights and Welfare of the Child of 1990.³ The African Commission monitors compliance by state parties with the African Charter, *inter alia* in terms of their Rules of Procedure⁴ and in terms of the Reporting Guidelines for State Reports.⁵ Once in force, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 1998⁶ (the African Human Rights Court Protocol) will create an African regional human

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¹ OAU Doc OAU/CAB/LEG/67/3/Rev 5.

² OAU Doc CAB/LEG/24.3.

³ OAU Doc CAB/LEG/153/Rev 2.

⁴ ACHPR/RP/XIX.

⁵ The first and most elaborate set of guidelines was adopted by the Commission in 1988. AFR/COM/HPR.5(IV). A second and apparently additional set of guidelines, which is much more concise, was adopted by the Commission in 1998. OAU Doc/05/27 (XXIII).

⁶ OAU/LEG/MIN/AFCHPR/PROT (III).

rights court. The foundational document of the OAU is its Charter of 1963.⁷ The OAU itself is in the process of being replaced by the African Union (AU).⁸

Of course, legal mechanisms for the protection of human rights in Africa operate in the context of the practices and attitudes of those in Africa who deal with human rights issues on a daily basis: government officials, lawyers, non-governmental organisations (NGOs), academics and civil society. The legal and extra-legal aspects of human rights protection in Africa form part of the same organic whole, and as such they are interdependent. The ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people.

This contribution focuses primarily on the legal mechanisms for the regional protection of human rights created by the OAU, and in particular on the African Charter system. Some comments will also be made on aspects of human rights that are outside the legal domain, but which are nevertheless important if the Charter system is going to have an influence in changing reality. The underlying question is whether there is a need to change the legal basis of the Charter system in order to enhance its impact.

The African Charter, soon to be supplemented by the African Human Rights Court Protocol, lies at the heart of the African human rights system. Africa has often been criticised on account of its human rights record, and the African Charter system in particular has been subjected to stringent criticism due to its apparent inability to improve the situation. Many are also sceptical about the potential of the Court to improve the situation. It is in this context that this paper asks the question whether the African Charter system is in need of reform.

'Reform' of the Charter system could take place in a number of ways. It could, for example, involve amendment of the Charter itself,⁹ of the African Human Rights Court Protocol,¹⁰ or of the Rules of Procedure.¹¹ On a more informal level it could involve changes in the practices of the Commission. It might also manifest itself in the form of new approaches being followed by those who are actually or potentially engaged in the practical implementation of the system.

If one proceeds from the premise that the level of human rights violations in Africa constitutes a problem of immense magnitude, and

⁷ 47 UNTS 39 (1963) *International Legal Materials*, 766, reprinted in C Heyns *Human rights law in Africa 1998* (2001) 117.

⁸ Constitutive Act of the African Union CAB/LEG/23.15, entered into force 26 May 2001.

⁹ Art 68 of the Charter provides that amendments to the Charter need to be approved by a majority of state parties.

¹⁰ Art 35 of the Protocol provides that the Assembly has to approve amendments to the Protocol by a simple majority.

¹¹ Rules 121 & 122 provide that the Commission can change its own rules.

that the African Charter system has to date made a far from satisfactory impact in redressing the situation, one may follow one of two very different approaches in respect of the question whether the reform of the Charter system is called for.

The first approach would be to emphasise the value of stability and advocate for minimal reform. According to this line of thinking, the Charter system is not perfect, but at least it is a reality; it is in place. The Commission is just finding its way, and in fact has largely reinvented the Charter to bring the system in line with international jurisprudence. For example, the so-called 'claw-back' clauses, which have been the subject of much criticism, have effectively been neutralised through their interpretation by the Commission. Articles 60 and 61 of the Charter, in terms of which the Commission is required to interpret Charter provisions in line with international precedents, provide ample opportunity for the flaws of the Charter system to be corrected by the Commission. In other words, the system as it stands makes sufficient provision for its own adjustment, if necessary. The African Charter is a flexible instrument and does not need amendment. The Court is still in the process of being established, and should first be given an opportunity to make its contribution before the system is modified.

Moreover, in its present form the Charter enjoys overwhelming support, even if largely on a symbolic level, having been ratified by every member state of the OAU. To now tamper with the system may create confusion, and provide an opportunity for some of the 'fish' that have already been caught to escape. The momentum gained over many years might be lost.

Proceeding from the same premise outlined above, a second approach might emphasise the need for more extensive reform to improve the effectiveness and impact of the system. The Charter was drafted in a world that no longer exists. In the early 1980s Africa was emerging from colonialism, apartheid was alive and well, the Cold War was raging, and the idea of human rights had gained only tentative acceptance. The Charter could consequently not be framed to protect human rights to the same extent as is presently possible.

The 'father of the African Charter', Kéba M'Baye, said that the Charter was 'the best that could be achieved' at the time. This might be true, but times have changed and today more should and can be achieved. The concept of human rights is now accepted as the idea of our time, and a vast body of experience has been acquired in respect of international human rights systems. The Charter can be made much stronger than it is at present. Part of what has been learnt elsewhere is that these systems need to be constantly adapted to match changing conditions.¹²

¹² Eg 11 protocols have been adopted in the European system since 1950 and the 12th protocol has been opened for ratification.

From this point of view it could be argued that while it is true that the Commission has in substantial respects reinvented the Charter and compensated for its flaws, this is not a healthy development in the long run if these new interpretations are not followed up by the reform of the Charter itself. The rule of law demands that law is predictable, and as a result words used in legal texts should be given their ordinary meaning as far as is possible. To retain its integrity, the Charter should in this sense be understood to say what it means, and to mean what it says. Where there are deviations, these need to be rectified, even if that means that the Charter has to be amended.

The Commission's practice during the last few years of interpreting the Charter in line with international precedents, though brave, does not solve the problems in the long run. The Charter itself is not well known in Africa, and the decisions of the Commission are even less known. Someone who wants to hold a state party to observe the norms of the Charter has a much smaller chance of achieving this if that person first has to cite Commission (or Court) decisions to support a specific interpretation of the Charter that is not obvious from its wording. Decisions of the Commission also do not have the same binding force as, for example, the Charter itself. Moreover, some of the problems inherent in the African Charter, as well as the African Human Rights Court Protocol, are beyond the powers of the Commission and the Court to rectify, even through creative interpretation.

A perhaps small but telling example of the kind of problems the present wording of the Charter causes is that it is hardly worth the effort to go on a massive campaign to popularise the Charter across Africa and to make it available in easily accessible format, in all the languages of the continent, if the Charter does not say what it means.

Because the entire OAU is being restructured, and is being placed on a much firmer human rights foundation, the time is ripe to consider amendments to the Charter as well. Steps are in any event underway to amend the Charter to remedy the way in which women's rights are treated. The other defects might just as well also be remedied in the same process.

To assess the relative merits of the two different approaches outlined above, we would need to take a closer look at the areas where the Charter system is in need of reform, treating each case on its own merits. Only after the full magnitude of potential problem areas has been established in a 'no punches pulled' fashion, could an appropriate response be devised. After such an investigation one might well conclude that it is not a question of total reform or of no reform at all, but rather that some reforms are necessary and others are desirable, and that different strategies should be followed in respect of the various areas where change is needed. This could for example lead to the AU appointing a team tasked with formulating proposals on the reform of the Charter system. What follows is a discussion of a number of areas of possible reform, which in my view deserve serious attention.

2 Areas of possible reform of the Charter system

Areas for reform might include aspects of the normative or substantive human rights provisions of the Charter (the norms included, the question how they should be formulated, and also the general provisions dealing for example with the limitation of rights). They might also include the mechanisms for the protection of these norms (the mandates and operation of the Commission and the envisaged Court). Each of these areas will now be considered.¹³

2.1 The normative provisions of the African Charter

In respect of the substantive human rights provisions of the Charter, the following are among the issues that should be considered: According to article 1 of the Charter, '[t]he member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them'. This seems to be a very weak way of formulating the obligations of state parties. Words such as 'state parties undertake to respect, protect, promote and fulfil . . .' or 'undertake to secure . . .' would set out the obligations of the state parties in a stronger and more meaningful way.

Several internationally recognised civil and political, as well as socio-economic rights are not recognised by the Charter, or are not explicitly or fully recognised. For example, no right to privacy exists in the Charter. No right against forced labour is included.¹⁴ Compared to international standards, Charter norms in the important field of criminal procedure, both before and during trial, are woefully inadequate.¹⁵ The right to form trade unions is not explicitly recognised.¹⁶ Article 13 recognises the right to vote in a very limited fashion.¹⁷ The treatment of women's rights in the Charter is also highly unsatisfactory, and it has prompted the

¹³ It should also be pointed out that the call in the Preamble of the Charter to eliminate Zionism, together with other evil systems such as apartheid, has been considered to be problematic by some states. For example, South Africa has entered a *note verbale* when it ratified the Charter, objecting to the characterisation of Zionism in the Charter. Reprinted in C Heyns *Human rights law in Africa 1997* (1999) 10.

¹⁴ Art 5.

¹⁵ Arts 6 & 7. For a discussion, see C Heyns 'Civil and political rights in the African Charter' in R Murray & M Evans (eds) *The African Charter on Human and Peoples' Rights: The system in practice* (forthcoming, Cambridge University Press).

¹⁶ Although art 10, dealing with the right to free association, could be understood to incorporate this right.

¹⁷ The right to vote in genuine periodic elections, based on universal franchise, as recognised in art 25 (b) of the International Covenant on Civil and Political Rights is not recognised in the Charter.

present initiative to amend the Charter.¹⁸ Given the inclusion of other socio-economic rights in the Charter, the absence of the rights to housing, food and social security is striking.¹⁹

While the inclusion of duties in the African Charter is welcomed, not all duties that are recognised can easily be given meaning in a legal context.²⁰

The way in which the Charter deals with the limitation and derogation of rights is particularly problematic. This is important because rights will be, and under some circumstances should be, limited in any society that is not to become ungovernable. However, this is a process that must be carefully managed, in order to ensure that such limitations are done in an acceptable way. Carefully constructed limitation and derogation clauses serve the dual function of allowing infringements of rights and at the same time defining standards that must be met by such infringements. In other words, such clauses limit rights, but they also limit limitations.

A number of articles in the Charter contain internal modifiers, or provisions that limit the reach of these rights.²¹ Article 9(2) provides an example of what is termed a claw-back clause: 'Every individual shall have the right to express and disseminate his opinions within the law.' The effect of the phrase 'within the law' has long been taken to be that no domestic legal provision which limits the right in question, may be challenged in terms of the Charter. The word 'law' was understood to mean domestic law. This is indeed the obvious meaning of such a provision, and it has rightly been the subject of stringent criticism of the Charter, since that would imply that international supervision of domestic law is ruled out in respect of these rights, defying the very reason for the existence of a regional human rights system.²²

However, the Commission has now ruled that the term 'law' in these clauses should in fact be understood as a reference to international law.²³

¹⁸ Women's rights are grouped with children's rights in art 18(3), suggesting that the role of women is confined to that context. For a discussion, 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. The language of the Charter is also strongly male oriented. Only the masculine form is used throughout. Art 42 provides for the election of a 'Chairman' and a 'Vice-Chairman'.

¹⁹ It is also not entirely clear whether art 15 recognises the right of the unemployed to be employed, or the right of the employed to be treated fairly in the course of their employment.

²⁰ For example, it is not clear exactly how the duty to 'preserve the harmonious development of the family' in art 29(1) should be interpreted and given practical application by a court of law.

²¹ See R Higgins 'Derogation under human rights treaties' (1976-77) 48 *The British Yearbook of International Law* 281.

²² See for example EA Ankumah *The African Commission on Human and Peoples' Rights* (1996) 176.

²³ Communication 101/93, *Civil Liberties Organisation in respect of the Nigerian Bar Association v Nigeria*, Eight Annual Activity Report para 16.

This creative, if somewhat desperate move on the part of the Commission to save the Charter from itself, should be succeeded by a modification of the Charter, given that the words of the Charter are no longer understood, at least by the Commission, to have their ordinary meaning. Unless this is done, states could still attempt to defend infringements of rights through national law with reference to the claw-back clauses in the Charter. Claw-back clauses, to the extent that they purport to exclude international supervision, should be scrapped. Because the Commission could not follow the provisions of the Charter, the provisions of the Charter now have to follow the Commission.²⁴

The Charter does not contain a general limitation clause. Instead, the Commission has largely assigned this role to article 27(2), which reads as follows: 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'²⁵ Article 27(2) does not seem to have been designed to play the role of a general limitation clause and leaves critical issues, such as the standard against which limitations should be measured, unresolved. The Commission has posed the (in my view unrealistically stringent) requirement that such limitation must be 'absolutely necessary'.²⁶ If the Charter is going to be reformed, a fully defined general limitation clause is called for.²⁷

A further problem is that the Charter does not contain any reference to derogation in times of emergency. This has been interpreted by the Commission to mean that the Charter does not allow derogation under any circumstances, even during a properly declared, genuine state of emergency.²⁸ Although sometimes presented as evidence of the steely

²⁴ It should at the same time be noted that the small number of socio-economic rights contained in the Charter do not contain the standard and in my view necessary internal modifiers. For example, art 16 provides as follows: '1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure they receive medical attention when they are sick.' The unconditional way in which the right is stated — it is not made subject to progressive implementation, the availability of resources, etc — could easily create unrealistic expectations, and as such could undermine the legitimacy of the Charter.

²⁵ Eg Communications 105/93, 128/94, 130/94 & 152/96, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*, Twelfth Annual Activity Report para 68.

²⁶ n 25 above, para 69.

²⁷ In this context the recognition of duties in the African Charter system could play a unique role. It is instructive to note that art 27 appears under the heading 'Duties'. Duties can in effect be seen as limitations on rights. A general limitation clause could for example state that all the rights in the Charter may be limited by laws of general application in accordance with those duties that are reasonable and justifiable in an open and democratic society, in respect of the rights of others, collective security, etc.

²⁸ Communication 70/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*, Ninth Annual Activity Report para 21.

resolve of the Commission not to allow deviations from human rights standards under any circumstances, this approach can in reality hardly be conducive to the protection of human rights. States facing real emergencies could in practice be expected to ignore the Charter rather than succumb to the emergency, if those are the only two options available. Under such circumstances the Charter will exercise no restraining influence on states in respect of the way in which the operation of the rights in question is suspended, and the Charter will be discredited.²⁹

The Commission should thus reverse its interpretation of the Charter on this point, and recognise the right of states to derogate certain Charter rights under closely defined circumstances. Since the Charter is silent on the issue of derogation, international norms in this regard should prevail. A less ideal alternative for the Commission (or the Court) would be to hold that at least those rights containing claw-back clauses may be derogated from in times of real emergency, to the extent that this is allowed under international law. This option would obviously only be available as long as the claw-back clauses are still part of the Charter. If, however, the Charter is going to be amended, it will be advisable to make explicit provision for derogation in the Charter, in addition to the scrapping of the claw-back clauses. Until such time, a ruling from the Commission (or in future the Court) setting out the conditions for legitimate derogation, is called for.

2.2 Enforcement mechanisms created by the Charter and the Protocol

The Commission is the sole supervisory body for the African Charter at the moment, but the Court will come into existence as soon as the African Human Rights Court Protocol has entered into force.³⁰ Possible ways of strengthening both institutions will now be considered.

a The Commission

Important aspects of the Commission's mandate to monitor compliance with the Charter norms are not provided for, or are not clearly provided for, in the Charter. This in fact applies in respect of the two most important monitoring mechanisms used by the Commission, namely the individual complaints system and the state reporting procedure.

The Charter contains elaborate and explicit provisions for inter-state complaints, which have hardly played a role in practice.³¹ However, for

²⁹ See J Oraá *Human rights in states of emergency in international law* (1992) 210.

³⁰ Fifteen ratifications are required in terms of art 34(3) for the Protocol to enter into force. So far, ratifications by the following states have been received: Burkina Faso, Mali, Senegal, The Gambia and Uganda.

³¹ Arts 47–54.

a long time there was uncertainty as to whether the Commission had the authority to consider ordinary individual complaints, and as a result also uncertainty about the exact mandate of the Commission when considering such complaints. Under the heading 'Other communications', article 58 does provide for a special procedure to be followed where it appears to the Commission that there has been 'a series of serious or massive' human rights violations, but it was not entirely clear from the text whether individual communications could be considered by the Commission if these communications did not reveal such 'serious or massive violations'. Nor was it clear whether the 'serious or massive violations' procedure should necessarily have been the result of an individual communication.

In practice, the Commission has simply asserted a right under article 55 of the Charter to consider individual communications, even if they do not reveal serious or massive violations.³² Moreover, the article 58 procedure, which requires that the Commission draws the attention of the Assembly of Heads of State and Government (the Assembly) to *prima facie* situations of serious or massive violations, and then await further instructions from the Assembly, proved to be a dead letter, since the Assembly has apparently never responded to such requests.³³ The Commission has nevertheless proceeded to find that there have been 'a series of serious or massive' violations in a number of cases.³⁴

If the Charter is going to be amended, it may be advisable to provide a clear legal basis for the lodging of individual communications. The legal position should be revised to reflect the *de facto* situation. The procedure set out in the Charter in respect of situations of 'serious or massive violations' of human rights makes little sense, and should be scrapped or reformed.³⁵

Article 59(1) provides that '[a]ll measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of States and Governments shall otherwise decide'. This is an obvious and long-standing source of concern in human rights circles. Although it may now for all practical purposes be a routine matter for the Commission's reports to be approved by the Assembly,³⁶ the Assembly can still block publication if it wishes to do so. In this way,

³² This was confirmed in Communications 147/95, 149/96, *Sir Dawda K Jawara v The Gambia*, Thirteenth Annual Activity Report para 42.

³³ See R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 20.

³⁴ R Murray 'Serious or massive violations under the African Charter on Human and Peoples' Rights: A comparison with the Inter-American and European mechanisms' (1999) 17 *Netherlands Quarterly of Human Rights* 109.

³⁵ That is, the involvement of the Assembly should be terminated. The concept that the Commission may make special findings in cases of exceptional gravity does not present a problem.

³⁶ See F Viljoen 'Overview of the African regional human rights system' in Heyns (n 7 above) 128.

the independence of the Commission could be inhibited. The most powerful tool at the disposal of international monitoring bodies is publicity, and this provision leaves the question whether there will be such publicity in the hands of the likely perpetrators. The entire article should not survive scrutiny of the Charter.

It is not clear from the Charter what kind of findings the Commission is able to make after the consideration of individual communications, or indeed whether it can make a finding at all, and what the possible remedies are. The Commission has developed a practice of its own in this regard, but this needs to be clarified in the Charter.

The mandate of the Commission to consider the reports that are submitted by states on a bi-annual basis is not at all provided for in the Charter. Article 62 provides that state parties should submit such reports, but does not stipulate to whom they should be submitted, and it does not determine who should consider those reports. The Assembly has agreed to a request by the Commission that the Commission considers the reports,³⁷ but this kind of arrangement should be formalised in the Charter itself.

Although improving, the procedure followed by the Commission in respect of the reports that have been submitted is still not satisfactory. The Commission should give serious consideration to developing a practice of issuing 'concluding observations' after it has considered a report.³⁸ Without such concluding observations the process has little meaning.³⁹

The Commission has started using the potentially powerful mechanism of appointing special rapporteurs, so far with mixed results. Part of the problem is that the legal basis for appointing such rapporteurs is rather tenuous.⁴⁰ Specific provisions for the appointment of special rapporteurs need to be included in the Charter.

Other aspects of the Commission's functioning also deserve attention. The composition of the Commission has been controversial for many years. The main problems have been members' lack of independence from governments, the fact that the various regions of Africa have not been properly represented, and that almost no women served on the Commission. The situation has improved in some respects in recent years, but appropriate provisions in the Charter determining the profile

³⁷ Viljoen (n 36 above) 154.

³⁸ This is in fact provided for in rules 85(3) & 86(1) of the Rules of Procedure.

³⁹ See F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the South' (2000) 44 *Journal of African Law* 110. The observation by M Mutua 'The African Human Rights Court: A two-legged stool?' (1991) 21 *Human Rights Quarterly* 350 that the Commission communicates its comments and general observations to the state in question after consideration of its report, is not borne out by Commission practice.

⁴⁰ It seems that the Commission relies on article 46: 'The Commission may resort to any appropriate method of investigation . . .'

of those who are appointed to serve on the Commission would help to increase and consolidate those gains.

The Commission has a daunting task, if one considers the sheer number of countries in Africa, the prevalence of human rights violations on the continent, and the diversity of African cultural, religious and legal traditions. As is evident from the experience in the Americas, regional human rights commissions are powerful tools in such situations, in some respects even more so than courts.⁴¹ However, the question needs to be asked whether the African Commission could not be better structured to meet this challenge.

It is almost inconceivable to think that a commission of eleven people, meeting twice a year for a few days, during which time they have a huge workload to attend to, can have a significant impact in such a situation. I have argued elsewhere that it is perhaps necessary to think about a stronger sub-regional division of responsibilities within the Commission.⁴² For example, commissioners living within a certain area (for example East or West Africa) may be given a collective role in terms of attempts at reconciliation and fact-finding within that sub-region. Whether a change in the Charter would be required to achieve this would depend on the nature of the specific proposal. Much can be done in this regard without such an amendment, simply by changing the practice of the Commission or the Rules of Procedure.

b The Court

Given the fact that the African Human Rights Court Protocol was adopted only recently, and that the Court has not yet been established, the question could be asked whether it is appropriate to talk about reforming the Court system. It is submitted that the strengths and weaknesses of the Court should indeed be analysed continuously, right from the start, in order to emphasise the strengths and to downplay, if not eliminate, possible weaknesses in a pro-active manner.⁴³ The

⁴¹ F Viljoen 'The relevance of the Inter-American human rights system for Africa' (1999) 11 *African Journal of International and Comparative Law* 659.

⁴² C Heyns 'The regional and subregional protection of human rights in Africa: In search of a realistic dream' *African Society of International and Comparative Law Proceedings of the Eighth Annual Conference Cairo* (1996) 170.

⁴³ For commentary on the creation of the Court, see GJ 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; A Stemmet 'A future African Court for [sic] Human and Peoples' Rights and domestic human rights norms' (1998) 23 *South African Yearbook of International Law* 233; J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256; NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45 and Mutua (n 39 above). See also Murray (n 33 above) 27.

Commission had a very slow start; the same should not be allowed to happen in respect of the Court.

The creation of the Court could serve to strengthen the African regional system. Without courts, the European and Inter-American systems would have had little chance to effect their societies in the way that they have. At the same time, care should be taken to ensure that the African Human Rights Court does not undermine the African Commission, either by weakening its budget or by making the Commission irrelevant. Africa needs a fully functioning Commission as well as a Human Rights Court.

In spite of the general advance which the Protocol on the Court represents, I find some aspects of the Protocol troubling. Again, a creative court could through progressive interpretation alleviate some problems. However, to have to depend on the possible goodwill of individual judges to do this undermines the rule of law, diminishes the credibility of the system and provides justifications for states not to ratify the Protocol. The wider the discretion granted to judges, the more unpredictable the system becomes, and the less likely states are to submit themselves to the system, and to remain committed to its success. It should be remembered that the entire system is based on consent, not only in terms of the willingness of states to become state parties, but also in terms of the budget allocated and in practical terms also the deference shown to the Court.

The first aspect of the Protocol discussed here relates to the jurisdiction of the Court and sources of law. Article 3(1), under the heading 'Jurisdiction', provides that: '[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the states concerned'. Article 7, entitled 'Sources of Law', provides as follows: 'The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the states concerned.'

These provisions could create a whole range of uncertainties. Article 3(1) could well be interpreted to mean that the African Court has the jurisdiction to consider cases brought before it under any human rights treaty ratified by the states concerned, including UN treaties and other African human rights treaties. Most eminent commentators have indeed taken this approach. For example, Naldi and Magliveras describe article 3(1) as 'innovative', and say that the article:⁴⁴

would appear to extend the jurisdiction of the Court over any treaty which impinged on human rights in Africa, eg, the OAU Convention on Refugees, and the African Charter on the Rights and Welfare of the Child, but also UN instruments such as the International Covenants on Human Rights . . .

⁴⁴ Naldi & Magliveras (n 43 above) 435.

They suggest that even (sub-) regional instruments, such as the ECOWAS treaty, could become justiciable. According to Udombana, an aggrieved person who is not adequately covered by the African Charter may bring a case in terms of the Protocol under 'any other international treaty' that provides a higher level of protection.⁴⁵ Mutua makes essentially the same point.⁴⁶ Presumably even environmental treaties and those related to mercenaries etc would become justiciable, in so far as they have human rights implications.

If this interpretation is correct, and followed by the Court, it will cause jurisprudential chaos. It will mean that all human rights treaties ratified by a state party to the Protocol in the past will become justiciable, and future ratification of treaties will have the same consequence. States might be deterred not only from ratification of the Protocol, but from ratification of any human rights treaty.

In one fell swoop, Africa will have jumped from a region without a court, to a region where all human rights treaties, whether they are of UN, OAU or other origin, are enforced by a regional court, even though the UN itself does not enforce them through a court of law. It would be highly unusual for an institution from one system (AU) to enforce the treaties of another system (UN). Depending on the specific treaties that have been ratified by the state in question at any point in time, its obligations will differ from those of the other states under the jurisdiction of the Court. Certain treaties, such as the Covenant on Economic, Social and Cultural Rights, have not been drafted with a view towards judicial enforcement.⁴⁷

Following this approach would also mean the end of even the pretence that there is something unique about human rights in Africa, a point that has been argued so passionately over the years.⁴⁸ This would amount to unconditional surrender to globalisation and universalism in its most pervasive form. While other regions continue to enforce human rights as they themselves understand the concept,

⁴⁵ Udombana (n 43 above) 90.

⁴⁶ Mutua (n 39 above) 354.

⁴⁷ It is already controversial in many jurisdictions to make socio-economic rights justiciable by the domestic courts. The Protocol, in making the socio-economic rights in the African Charter justiciable by a regional court, breaks new ground. It is unprecedented to give power over the national budget to an international tribunal and it remains to be seen to what extent this could work. To make the entire Covenant on Economic, Social and Cultural Rights in its present form justiciable by an international court is unheard of at this stage, while state sovereignty is still such a powerful notion.

⁴⁸ See M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; UO Umzurike *The African Charter on Human and Peoples' Rights* (1997) 87. See also C Heyns 'Where is the voice of Africa in our Constitution?' Occasional Paper 8, Centre for Human Rights (1996).

Africa — where so much is made of the unique features of the African Charter — will be the only region in the world that enforces the wider body of international human rights treaty law, with the African Charter being just one treaty among many.

It is submitted that a close reading of the Protocol does not support the above interpretation. Article 3(1) grants the Court jurisdiction in respect of the Charter, the Protocol and 'other relevant' treaties ratified by the state concerned. The word 'relevant' is overlooked in the interpretation outlined in previous paragraphs. It is submitted that the only treaties that could be potentially 'relevant' for the purposes of this provision would be treaties that make express provision for adjudication by the African Human Rights Court. Because there are no 'other' treaties in existence today that contain such a provision, article 3(1) should be understood to leave such a possibility open in the future, for example to cover the situation where a protocol to the African Charter on women's rights could make provision for applicants to approach the African Human Rights Court.⁴⁹

The present situation nevertheless has the potential to create confusion. The possibility that article 3(1) could be interpreted to grant the Court such a wide jurisdiction could deter states from ratifying the Protocol. It is also possible that the Court could follow the interpretation of article 3(1) advanced by the authors. Article 3(1) should consequently be amended to provide that the Court exercises jurisdiction over 'the African Charter and all Protocols to the Charter'. The African Human Rights Court should in any event make it clear at the first opportunity that it does not exercise jurisdiction over the entire corpus of human rights treaties ratified by African states.

The above is symptomatic of a deeper problem. Because of the defects in the Charter, the rhetoric about a unique conception of human rights in Africa is often abandoned around the first corner. International norms are embraced with open arms in an uncritical fashion. Africa is rendered defenceless against the cold winds of globalisation. There is, however, an alternative. The Charter should be modernised to ensure that it meets the needs of contemporary African society.

There are also, in the second place, problems in respect of the interpretation provisions of the African Human Rights Court Protocol. It is assumed that article 7 of the Protocol, under the heading 'Sources of law' (cited above), deals with interpretation and not with jurisdiction, which is covered in article 3. While article 3(1) creates the impression that it grants the Court a jurisdiction that has an excessively wide scope, article 7 seems to dramatically and unnecessarily limit the sources of law that are to be used by the Court as points of reference when engaging

⁴⁹ Eg art 23 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women.

in interpretation, by recognising only the provisions of the Charter 'and other relevant human rights instruments ratified by the state concerned' as legitimate sources of the law. Earlier reference was made in this contribution to the fact that articles 60 and 61 of the Charter allow the Commission to draw very widely on international jurisprudence in interpreting the Charter, and the fact that the Commission has by and large done this to good effect. However, articles 60 and 61 grant this power only to the Commission. Article 7 of the Protocol grants the Court much less latitude in respect of the Charter. This is bound to lead to a difference in the way the rights in the Charter are interpreted by the Commission and the Court, and in general to impoverish the jurisprudence of the Court.

Moreover, the Court seems to be expected in terms of article 7 of the Protocol to interpret the rights in the Charter differently in respect of the various state parties, depending on the treaties that each one has ratified at the time of the alleged violation. An article on interpretation requiring the Court to take cognisance of the entire body of international human rights law (without being bound by it) would bring the Protocol in conformity with the Charter, and resolve the issues raised above.

Access to the Court by individuals is another problematic issue. The Protocol grants the Commission (and state actors) access to the Court, presumably after the Commission has heard the case in question.⁵⁰ This is an automatic consequence of the ratification of the Protocol. Access by individuals to the Court is provided for in article 5(3) in the following terms: 'The Court may entitle relevant Non-Governmental Organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.' According to article 34(6) states may make a declaration accepting the competence of the Court to receive such cases.

In terms of these provisions, individuals and NGOs do not have standing to seize the Court in respect of states that have ratified the Protocol, unless such a state has made the article 34(6) declaration. Unless such a declaration has been made, individuals and NGOs will remain unable to proceed on their own volition past the Commission level and to take the initiative to secure binding decisions in their favour. They are in effect left to the mercy of the Commission to take their cases further. Where individuals are placed in this position — and it will be submitted that it is likely to be the case in respect of most states for a long time — the Protocol could provide a very low level of protection for the individual, except if the Commission follows an activist approach, which cannot be guaranteed.

⁵⁰ Art 5(1).

In respect of states that have made the additional declaration in terms of article 34(6), individuals and certain NGOs⁵¹ will have 'direct' access to the Court. 'Direct' in this context presumably means that they will be allowed to bypass the Commission. Granting direct access to individuals to the Court provides a high — and many will say too high — level of protection to the individual, which could be seen as threatening to state sovereignty, and result in states not making the additional declaration.

Given the sensitivities about international adjudication expressed by the states involved in the drafting and adoption process of the African Charter as well as the Protocol, granting individuals direct access to an untested and untried court that takes binding decisions is not likely to be a popular option.⁵² Requiring individuals first to present their case to the Commission before approaching the Court cushions the blow and has a higher chance of being accepted by states. In fact, granting states a choice between accepting the limited level of protection to human rights offered by the mere ratification of the Protocol, and accepting what many states are certain to consider the excessive level of protection that comes into play when the declaration is made, could well be seen by cynics as a move to ensure a choice in favour of the first option and to render the individual powerless.

The situation is aggravated by the fact that, in considering a case submitted directly by an individual to the Court, the Court is required by article 6(2) to rule on its admissibility 'taking into account' the admissibility criteria set out in article 56 of the Charter. The Court is consequently not bound by criteria such as the exhaustion of domestic remedies.⁵³ By not making the exhaustion of domestic remedies compulsory, the possibility is opened that the national systems of the countries that made the article 34(6) declaration could be bypassed by the Court when it is approached directly. While this may not happen in practice, and a wise court would certainly not admit a case in respect of which domestic remedies that are available and offer a reasonable chance for relief have not been exhausted, this feature of the Protocol

⁵¹ Udombana (n 43 above) 99 observes that the requirement that only NGOs with observer status before the Commission may approach the Court is unduly restrictive.

⁵² In the case of Europe, for example, a system of direct access to the single court was introduced decades after the Court was founded and had established the foundations of its jurisprudence.

⁵³ The Commission has stated that the local remedies must be 'available, effective and sufficient'. Communications 147/95, 149/96, *Sir Dawda K Jawara v The Gambia*, Thirteenth Annual Activity Report para 31.

may assist countries that are protective of their sovereignty to find another reason not to make the declaration.⁵⁴

Given the likely reluctance of states to make the additional declaration, most people in Africa are bound to live under dispensations where they do not have the right of access to the Court, even after the African Human Rights Court Protocol has entered into force.

The ideal option would be for the Protocol, as an automatic consequence of the ratification of the Protocol, to include the right of individuals and NGOs to have access to the Court after they have gone through the Commission procedure, and after they have met the initial admissibility criteria, including the exhaustion of domestic remedies. If the idea that individuals may proceed on their own initiative from the Commission to the Court is politically unacceptable — and it was indeed a heavily opposed position during the drafting of the Protocol — the second best option would be to provide for such access, but to include a provision entitling states to make a declaration indicating that they do not wish to subject themselves to this procedure. In other words, this will allow them to 'opt out' as an exception to the rule.

Ironically, however, even if a significant number of states are somehow persuaded to make the declaration in terms of article 34(6), as it now stands under the Protocol, it would not necessarily be a positive development from a human rights point of view, since such a situation could undermine the position of the Commission. Individuals or NGOs, under such circumstances, will have to choose at the outset between lodging a complaint with the Court or with the Commission, because their access to the Court can only be 'direct'. It seems likely that the majority of complainants will choose to approach the Court directly, since this step provides a chance to obtain a binding decision in one's favour. Choosing the route of the Commission, on the other hand, means forfeiting the opportunity later on to take the case to the Court. This gives the Court significant power, if it so wishes, to sideline the Commission and to leave it without a role.⁵⁵

2.3 Other possible reforms

At the outset of this article the broader social context within which the Charter system operates was emphasised. In order to make the system

⁵⁴ There may be a partial way out of the problem caused by the fact that the admissibility criteria are not obligatory, short of the amendment of the Protocol. States that make the declaration could enter a reservation specifying that they do not agree to the jurisdiction of the Court unless the admissibility criteria (or at least the important ones, such as the exhaustion of domestic remedies) in the Charter have been met. However, this would require a relatively high level of goodwill on the part of states, and many states might opt simply not to make the declaration at all.

⁵⁵ It should be noted that the Court has the power under art 6(3) to refer such cases to the Commission, but it is not compelled to do so.

the dynamic institution that it should be, there are many possible changes that could supplement the more technical, legal amendments suggested above and enhance the impact of the system as a whole. A small and to some extent random selection from the list of the changes that those of us who on a daily basis engage in human rights issues in Africa can bring about, will now be mentioned.

The first point relates to attitude. An uncritical attitude to the Charter system, in terms of which it is seen as above improvement, is as damaging as the cynical approach that one sometimes encounter, according to which nothing good can be expected from either the Commission or the Court. What we need is loyal or engaged criticism. We have the duty to respect, protect, promote — and criticise — the Charter.

On a more practical level, the Charter system needs to be made part of the curriculum of the different universities in Africa, with a view to educating lawyers who can make it accessible to their clients and for judges to cite Charter jurisprudence in their decisions. There is a great need for a textbook with instruments, cases and materials — a 'human rights reader' — that caters specifically for African law faculties and covers the Charter system in particular. A website needs to be developed on which progressive developments in respect of human rights law may be posted. The Charter needs to be internalised into the legal culture of Africa.

There are a small number of African journals that deal with human rights law. More of these are needed to develop the intellectual climate in which the system can flourish. In general, the conditions for the emergence of an indigenous African human rights jurisprudence need to be improved. African courts should be placed in a position to refer to one another in their judgments, as opposed to having continuously to cite non-African cases and precedents.

Well-edited and readily available publications containing the decisions of the Commission and the Court need to be developed, as well as a digest to make access easier. The compilations of decisions of the Commission that are in existence are very useful, but they lack proper referencing tools, are full of mistakes and are not readily available.

The question of the location of the Court is an important one, and does not receive enough attention. The experience with the Commission being based in a place as difficult to access as The Gambia has shown that the Court will have to be based elsewhere. In order to provide the intellectual setting in which the Court can flourish and have a wider impact in Africa, and given that all judges except the president will work part-time, it should not only be on one of the main air routes, but should also be close to libraries and universities that focus on human rights law in Africa. It will be ideal if the Commission follows the Court to such a setting.

Some of the reforms that have been proposed in respect of the UN human rights treaties may be equally applicable to the OAU system.⁵⁶ I would for example argue that in each country, an inter-departmental body responsible for reporting and dealing with communications under all human rights treaties be formed. These bodies should have access to a database with the information necessary to deal with reports under all treaties. State efforts aimed at meeting treaty obligations such as reporting, and dealing with follow-up, should be part of an ongoing process. A treaty support unit should be formed in Africa, to assist governments with setting up such structures, and to train those who will staff it.

In addition, national human rights institutions should become involved in follow-up, both in respect of individual communications and reports. The national annual reports of these institutions should comment on compliance with directives from OAU and UN human rights bodies, and the decisions of the African Human Rights Court.

3 Conclusion

I have discussed some of the most obvious flaws of the African Charter system. The ideal option for the future would indeed be the reform of the system by means of a protocol, designed to rectify these and other possible defects in a systematic and comprehensive manner. States who take the system seriously and who want it to be effective should be willing to participate in such a process. It is also clear that, if the system is at some point going to be amended, it should be done before the Court comes into existence. The African Human Rights Court, in contrast with the experience with the European Court of Human Rights, is certain to start dealing with substantive issues soon after it comes into being. It would be wasteful if the Court started developing a certain jurisprudence, only to find that substantial portions of it have become obsolete within a few years when the basic rules are changed.

However, any attempt to amend the Charter and Protocol depends on political will. If the political will of a substantial number of states is not available, it might be better to struggle on with a flawed system and engage in *ad hoc* reform, than to have the whole system fall apart, no matter how appealing some of the pieces might be. But given the wide acceptance of the idea of human rights today, more substantial support

⁵⁶ See C Heyns & F Viljoen *The United Nations human rights treaties at the national level* (forthcoming, Kluwer Law International).

for significant reforms than is traditionally expected, may be forthcoming. It depends largely on how such a process is managed and what kind of incentives or pressures are used.⁵⁷

The debate on the possible reform of the system in itself is already an important contribution towards the improvement of the system, since it is likely to make the system more responsive to the needs of the continent. Engaging in this debate is to exercise a form of ownership, and to say that since the Charter belongs to all of us, it is up to us to continuously ensure its improvement. Ideas are developed, consequences are thought through, and new initiatives are born in the course of such discourses. Such a debate is already a first step towards a more efficient and stronger regional human rights system in Africa.

⁵⁷ One way of avoiding a situation where a substantial number of states defect from the system would have been to make membership of the new African Union dependent upon acceptance of whatever reforms in respect of the African Charter system might be agreed upon. For all practical purposes that opportunity has already been missed, but there might be others that could be used with similar effect.