

## The appeal of the African system for protecting human rights

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### Summary

*Twenty years after the African Charter on Human and Peoples' Rights came into force and with the advent of an African Court on Human and Peoples' Rights, it is legitimate and appropriate to ask questions about the appeal of the African system for protecting human rights. Are the way it functions and its results effective in attracting a large number of complaints and, in the face of competition from the universal system, is it preferred by the victims of violations against human rights in Africa? Does this system merely exist or does it contribute to a substantial improvement in good state practices, reinforcing democracy, good governance and human security in Africa? According to an evaluation that has been made, the functioning of the system remains hampered by numerous obstacles and challenges. The limits and imperfections of the African system can be surmounted with the real will of the member states of the African Union. The arguments previously evoked about African cultures should be abandoned, as the universality of human rights is not an obstacle to the diversity of cultures. The appeal of the African procedures of human rights is marked by the debate on the pertinence of the fusion between the African Court and the Court of Justice of the AU. While a normative clean-up of the African Charter seems necessary in so far as duties are concerned, all the more so as doctrine indicates that it is no longer truly valid in the present context of democratic renewal, it equally seems imperative, at the institutional level, that if the AU wants to improve the system, it would be better to go beyond the idea of a fusion of the two organs to enlarge the field of competence and action of the African system of protecting human rights, by including a competence in criminal matters.*

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## 1 Introduction

The international proliferation of protection mechanisms for human rights forms part of the construction of a new 'world order of human rights',<sup>1</sup> the procedures and norms of which are weighed up and compared by legal professionals. The African regional system of human rights is often described by its normative poverty and its institutional ineffectiveness. Some authors have felt obliged to make it longer and denser by adding other supplementary mechanisms, such as the New Partnership for Africa's Development (NEPAD), sub-regional organisations or the International Criminal Tribunal for Rwanda (ICTR).<sup>2</sup> Such a presentation would not only make the African system even heavier and vaguer, but what is more, those under its jurisdiction will only reject it even further. I therefore think that the African Charter on Human and Peoples' Rights (African Charter) is the main instrument for protecting human rights in Africa,<sup>3</sup> even if the African system for protecting human rights is based, according to articles 60 and 61 of the African Charter, on the application of international law concerning human rights, which refers to international instruments duly ratified by African states and to other regional African texts. According to its 'founding fathers', the African system for protecting human rights should not only be in accord with its political and socio-cultural environment, but should also have a legal coherence derived from a 'globalising conception of human rights',<sup>4</sup> stipulating the balance between rights and duties on the one hand, and the individual and the community on the other. Moreover, they thought — wrongly — that Africa should favour conciliation rather than contention concerning human rights on the grounds that, in African thinking, 'conflicts are settled not by litigation, but by conciliation ... which reaches consensus without creating a winner or a loser'.<sup>5</sup> Perceived in the beginning as 'a new regional humanitarian order in Africa'<sup>6</sup> rather than as a legal system, is the African system attractive enough for those whose rights are regularly violated and whose internal mechanisms are neither effective, nor available or impartial?

<sup>1</sup> 'Ordre mondial des droits de l'homme' J Mourgeon 'Développement et droits de l'homme' in Y Daudet (ed) *Aspects du système des Nations Unies dans le cadre de l'idée d'un nouvel ordre mondial* (1992) 188.

<sup>2</sup> M Mubiala *Le système régional Africain de protection des droits de l'homme* (2005).

<sup>3</sup> P Tavernier (ed) *Recueil juridique des droits de l'homme en Afrique (1996-2000)* (2002).

<sup>4</sup> 'Conception globalisante des droits de l'homme', V Eteka-Yemet *La Charte africaine des droits de l'homme et des peuples* (1996) 370.

<sup>5</sup> 'Les conflits sont tranchés non pas par une procédure contentieuse mais par la conciliation ... qui aboutit à un consensus et qui ne fait ni vainqueur ni vaincu', K M'baye *Les droits de l'homme en Afrique* (2002) 28.

<sup>6</sup> 'Un nouvel ordre humanitaire régional en Afrique', F Ouguerouz *La Charte africaine des droits de l'homme et des peuples. Une approche juridique des droits de l'homme entre tradition et modernité* (1993) 393.

Twenty years after the African Charter came into force and with the advent of an African Court, it is legitimate and appropriate to ask questions about the appeal of the African system for protecting human rights.<sup>7</sup> Are the way it functions and its results effective in attracting a large number of complaints and, in the face of competition from the universal system (Human Rights Committee, Committee against Torture, etc), is it preferable to the victims of violations against human rights in Africa? Does this system merely exist or does it contribute to a substantial improvement in good state practices, reinforcing democracy, good governance and human security in Africa?

## 2 The material appeal of the African system of protecting human rights

A regional system for protecting human rights is of interest only if it ensures human rights more effectively than existing universal mechanisms, as well as offers a wider guarantee. The African Charter is not exempt from this logic of maximising law. The fact remains that one should inquire whether its unique conception and its promotional vocation are able to offer real protection of human rights on the grounds that the normative cross-fertilisation on which it is based is in accord with its socio-cultural milieu.

### 2.1 The promotional mandate of the African system of protecting human rights

Asking questions about the appeal of the African system would certainly provoke negative responses if one were limited to an assessment of what is practised in central African states.<sup>8</sup> Judges, lawyers and defendants prefer to trust in better-known internal instruments, the law being so very uncertain in Africa regarding practices of corruption, venality and ignorance of 'modern' rules compared to 'traditional' practices.<sup>9</sup>

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<sup>7</sup> S Kaba *L'avenir des droits de l'homme en Afrique au XXI<sup>e</sup> siècle* (1996); CM Eya Nchama *Développement et droits de l'homme en Afrique* (1991); TM Kabangu 'Les droits de l'homme en Afrique: énoncé, garanties et obligations' in *Les droits de l'homme à l'aube du XXI<sup>e</sup> siècle* Karel Vasak Amicorum Liber (1999) 633-654; R Degni-Segui *Les droits de l'homme en Afrique francophone. Théories et réalités* (2001); E Kodjo 'La Charte africaine des droits de l'homme et des peuples' (1989) 1 *Revue Universelle des Droits de l'Homme* 29-34; J Fierens 'La Charte africaine des droits de l'homme et des peuples' (1999) 1 *Revue trimestrielle des droits de l'homme* 235-248.

<sup>8</sup> JD Boukongou 'L'application de la Charte africaine des droits de l'homme et des peuples par les autorités nationales en Afrique centrale' in JF Flauss & E Lambert-Abdelgawad (eds) *L'application nationale de la Charte africaine des droits de l'Homme et des peuples* (2004) 123-160.

<sup>9</sup> JD Boukongou 'Vie familiale comme lieu d'exercice des droits fondamentaux: Lecture des pratiques africaines' in G Otis & JY Morin (eds) *Le défi des droits fondamentaux* (2000).

However, it should be noted that, apart from this region, more than half of the 53 African states who are members of the African Union (AU) have not yet submitted all their reports as required under article 62 of the African Charter. One does not have to be reminded that<sup>10</sup>

by ratifying the Charter without taking appropriate steps to bring its laws in line with the same, the African Commission is of the opinion that the state has not complied with its obligations under article 1 of the Charter.

Moreover, the operational budget of the African Commission on Human and Peoples' Rights (African Commission) is small and human resources are limited in comparison with similar international institutions. According to an evaluation that has been made, the functioning of the system remains hampered by numerous obstacles and challenges.<sup>11</sup> What is more, the member states of the AU want to reform the system by a merger whereby the African Court on Human and Peoples' Rights (African Court) would be absorbed by the Court of Justice of the AU, with a consequent reduction in regional influence.

Very often, analysts go no further than a glowing description of the normative and institutional scene without really questioning its appeal. As Olinga has emphasised:<sup>12</sup>

It is difficult today not to be redundant, even boring, on the subject of the African Charter on Human and Peoples' Rights or, more broadly, on African regionalism as far as the protection of fundamental rights are concerned.

In his work on the African system of protecting human rights, Mubiala presents a detailed summary of the norms and various African mechanisms, concluding that there is 'an operational weakness in the African regional system'.<sup>13</sup> However, analysts have not hesitated to attribute certain magical virtues to the African system of protecting human rights, so strong was their need to see instituted in Africa a political order that respects human dignity. The consensus that emerged when it was adopted did not lead to a practice in states that are wary of the constraints imposed by international law on their jealously guarded sovereignty.<sup>14</sup> The African Charter is perceived as 'a mere window dressing' in order to accede to 'international civilisation'.<sup>15</sup>

<sup>10</sup> Communication 251/2002, *Lawyers for Human Rights v Swaziland*, Eighteenth Activity Report para 61.

<sup>11</sup> F Viljoen & S Yonaba 'Review of the procedures of the African Commission on Human and Peoples' Rights' (2002) (unpublished).

<sup>12</sup> 'Il est difficile aujourd'hui de ne pas être redondant, voire ennuyeux, au sujet de la Charte africaine des droits de l'homme et des peuples ou, plus globalement, du régionalisme africain en matière de protection des droits fondamentaux.' AD Olinga 'L'effectivité de la Charte africaine des droits de l'homme et des peuples' (2000) *Revue Afrique* 171.

<sup>13</sup> 'Une faiblesse opérationnelle du système régional africain', Mubiala (n 2 above).

<sup>14</sup> G Cohen-Jonathan 'L'évolution du droit international des droits de l'homme' in *Mélanges Offertes à Hubert Thierry, L'évolution du droit international* (1998) 107-125.

<sup>15</sup> 'simple habit de gala', 'civilisation internationale', L Sindjoun 'La civilisation internationale des murs : éléments pour une sociologie de l'idéalisme structurel dans les relations internationales' (1996) 27 *Etudes internationales* 848.

However, the African system offers not only real possibilities of condemning states whose behaviour violates human dignity, but it also contributes to furthering a real integration of African states through the law of human rights on the basis of universal values shared by the international community.

The African Charter allows for an African Commission that reports to the Assembly of Heads of State and Government of the AU.<sup>16</sup> The African Commission's missions are the promotion and protection of human rights. It can serve as a mediatory body to settle certain cases or to propose appropriate solutions to African governments. Ankumah, however, emphasises the little interest accorded by analysts to the work of the African Commission and the importance of its decisions.<sup>17</sup>

African states may no longer hide behind their so-called sovereignty and violate human rights with impunity:<sup>18</sup>

Once ratified, states parties to the Charter are legally bound by its provisions. A state not wishing to abide by the African Charter might have refrained from ratification. Once legally bound, however, a state must abide by the law in the same way an individual must.

Every state party to the African Charter should accept its responsibilities without evasion:<sup>19</sup>

The Commission has argued forcefully that no state party to the Charter should avoid its responsibilities by recourse to the limitations and 'claw-back' clauses in the Charter. It was stated, following developments in other jurisdictions, that the Charter cannot be used to justify violations of sections thereof. The Charter must be interpreted holistically and all clauses must reinforce each other.

The African Commission feels that it must not do the work of domestic courts: 'The responsibility of the Commission is to examine the compatibility of domestic law and practice with the Charter.'<sup>20</sup>

The African Commission is not restricted to evoking the rights consecrated by the African Charter. It interprets the state's notion of commitment widely. In the case of *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi*, the Commission stressed that 'the court ignored the obligation of courts and tribunals to conform to international standards of ensuring fair trial to all'.<sup>21</sup> This position of principle

<sup>16</sup> PG Pougoué 'La Commission africaine des droits de l'homme et des peuples entre son passé et son avenir' in *L'effectivité des droits fondamentaux dans les pays de la communauté francophone* (1994) 529-532.

<sup>17</sup> E Ankumah *The African Commission on Human and Peoples' Rights: Practices and procedures* (1996).

<sup>18</sup> *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 116.

<sup>19</sup> *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 70.

<sup>20</sup> n 19 above, para 68.

<sup>21</sup> (2000) AHRLR 48 (ACHPR 2000) para 31.

has also been reaffirmed in the case of *Legal Resources Foundation v Zambia*, in which it concluded that in interpreting the Charter<sup>22</sup>

the Commission is enjoined by articles 60 and 61 to 'draw inspiration from international law on human and peoples' rights' as reflected in the instruments of the OAU and the UN as well as other international standard setting principles (article 60). The Commission is also required to take into consideration other international conventions and African practices consistent with international norms, etc.

On the other hand, in Communication 218/98, relating to the Nigerian soldiers condemned to death by the regime of Sani Abacha for an attempted *coup d'état*, the African Commission clearly expressed its position by emphasising that:<sup>23</sup>

In interpreting and applying the Charter, the Commission relies on the growing body of legal precedents established in its decisions over a period of nearly 15 years. The Commission is also enjoined by the Charter and international human rights standards which include decisions and general comments by the UN treaty bodies (article 60). It may also have regard to principles laid down by states parties to the Charter and African practices consistent with international human rights norms and standards (article 61).

However, can these declarations of principle alone guarantee the appeal of the African system? Moreover, the incorporation of other international instruments by the African Charter is not always received well by certain states that accuse the African Commission of extrapolating on their actual commitments:<sup>24</sup>

The Commission must therefore take care not to transform radically, under cover of interpretation, the obligations assumed by the states party to the Charter on the basis of the African Charter.

## 2.2 The normative cross-fertilisation of the African system of protecting human rights

The African Charter protects both persons and peoples while instituting, in an original way, duties towards the community. An analysis of the rights of persons protected by the African Charter reveals no originality when compared to the classical instruments like the Universal Declaration of Human Rights (Universal Declaration) of 1948 and the international covenants of 1966.<sup>25</sup> In this sense, Ouguergouz concludes

<sup>22</sup> n 19 above, para 58.

<sup>23</sup> *Civil Liberties Organisation and Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001) para 24.

<sup>24</sup> 'La Commission doit donc veiller à ne pas transformer radicalement, sous couvert d'interprétation, les obligations assumées par les Etats parties sur la base de la Charte africaine'. Ouguergouz (n 6 above) 390.

<sup>25</sup> N Valticos emphasises that the African Charter consecrates rights that other conventions ignore: 'Universalité et relativité des droits de l'homme' in *Mélanges en hommage à Louis Edmond Pettiti* (1998) 745.

that 'the points of convergence between them [the Charter and the Universal Declaration] are indeed definitely greater than their differences'.<sup>26</sup> This opinion is shared by Eteka-Yemet, who stresses that 'the majority of the norms of the African Charter on Human and Peoples' Rights are repeated in other universal and regional instruments of human rights'.<sup>27</sup> However, certain rights do not feature in it. Thus, there is, for example, nothing on the protection of family life and the ban on forced or compulsory labour.

Although the notion of 'peoples' rights' was not defined in the African Charter, it refers to the rights of a community to determine the way in which it must be governed, how its economy and culture must be developed and what part it must legitimately play in the management of the public affairs of the state in which it must achieve its ultimate fulfilment. 'Peoples' rights' include rights such as the right to peace and security and the right to a healthy environment.<sup>28</sup> Declaring peoples' rights constitutes a 'normative originality' based mainly on the equality of peoples and their right to exist or to be free. Virally considers 'peoples' rights' as part of positive international law.<sup>29</sup> There is no doubt that for several decades, United Nations (UN) resolutions have pronounced numerous international recommendations for the preservation of peoples against the scourges of war, pollution and poverty. It is, however, not certain that all these extremely interesting proposals have acquired the status of 'law'. Valticos is of the opinion that<sup>30</sup>

it could be objected that affirming a peoples' right is risky as this could, in certain respects, result at the very least in weakening the rights of the individual human person.

However, under this much vaunted originality smoulders a powder keg that can be used for purposes of secession or rebellion, for the adjective 'oppressed' mentioned in article 20 of the African Charter can serve as a launch-pad for small secessionist groups. According to N'gom, 'the only justification for the presence of the notion of 'peoples' rights' in the African Charter is linked to the existence of the last bastions of

<sup>26</sup> 'Les points de convergence entre celles-ci l'emportent en effet nettement sur leurs différences' Ougergouz (n 6 above) 67.

<sup>27</sup> 'La majorité des normes de la charte africaine des droits de l'homme et des peuples est reprise des autres instruments universels et régionaux des droits de l'homme', Eteka-Yemet (n 4 above) 44.

<sup>28</sup> F Rigaux 'La place de la Charte africaine des droits de l'homme et des peuples dans la reconnaissance des droits des peuples' (1989) 1 *African Journal of International and Comparative Law* 584-594.

<sup>29</sup> M Virally 'Panorama du droit international contemporain' Cours général de droit international public'; 1983 (183-V) *Recueil des cours de l'Académie de droit international* tome 60.

<sup>30</sup> 'Le risque de l'affirmation d'un droit des peuples serait, à certains égards, a-t-on pu objecter, d'entraîner pour le moins l'affaiblissement des droits de la personne humaine' Valticos (n 25 above) 749.

colonialism',<sup>31</sup> in particular, apartheid South Africa before Mandela was freed. Any other interpretation can only give rise to consequences particularly serious for the respect of the rights of citizens that the African Charter wants to protect, because of the instability that could follow from a weakening of post-colonial national sovereignties. The African Commission confirmed this opinion in the cases of *Katanga* and *Cabinda*.

A case was brought before the African Commission on 2 April 1988 by the *Union Nationale de Libération du Cabinda*, requesting the condemnation of Angola for depriving the 'people of Cabinda' of their right to self-determination. Since Angola's independence, numerous secessionist movements in Cabinda have demanded the enclave's detachment from this state. The African Commission confined itself to stating that the request could not be considered, in accordance with article 101 of its Rules of Procedure, as Angola was not a party to the African Charter.<sup>32</sup> It finally had the opportunity to interpret article 20 in the case of the independence of Katanga.<sup>33</sup> The claimant was the *Congrès du Peuple Katangais*. The latter asked the African Commission to recognise the organisation as a liberation movement, to recognise the independence of Katanga and to help it obtain the evacuation of Zaire from the territory of Katanga. In rejecting the request of the *Congrès du Peuple Katangais*, the African Commission first of all pointed out that, even if Katanga was made up of one or several ethnic groups, the question would have no bearing on the examination of the request. Next, it formulated the different ways in which self-determination could operate:<sup>34</sup>

Independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people, but is fully cognisant of other recognised principles such as sovereignty and territorial integrity.

Finally, it concluded that<sup>35</sup>

in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by article 13(1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise

<sup>31</sup> 'La seule justification de la présence de la notion de "droits des peuples" dans la Charte africaine est liée à l'existence des derniers bastions coloniaux', B N'gom 'Charte africaine des droits de l'homme et des peuples — Présentation' in A Fenet (ed) *Droits de l'homme — Droits des peuples* (1982) 207.

<sup>32</sup> Communication 24/89, *Union National de Liberation de Cabinda v Angola* Seventh Annual Activity Report.

<sup>33</sup> *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

<sup>34</sup> n 33 above, para 4.

<sup>35</sup> n 33 above, para 6.

a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.

One can deduce from the above that the African Commission insists on two conditions for self-determination: violations of human rights and the refusal of the people concerned of the right to participate in the management of public affairs. To bring its recommendation, obliging the *Congrès du Peuple Katangais* to use its right to self-determination within the context of Zaire's sovereignty, in compliance with international law, the Commission ought to have resorted to the classical distinction between self-determination and secession. Admittedly, the UN condemned Katanga's secession attempt in 1960-1961, considering it illegal and hardly representative of any movement of popular will.<sup>36</sup> The fact remains that the two conditions laid down by the Commission itself seem to have been met, thus warranting self-determination: The nature of Mobutu's regime was neither democratic nor did it respect human rights. There ought to have been no doubt, either about the serious and massive violations of human rights,<sup>37</sup> nor of the confiscation of political power by the 'King of Zaire'.<sup>38</sup> Self-determination can be organised in a democratic and peaceful manner, whereas secession is often a violent and illegal action.

As for duties enumerated by the African Charter, while they may give rise to exemplary citizenship, their actual legality and concrete consequences are disputed. The most cited case is that of the duty to promote and realise African unity. Without denying the merit of the line of argument suggested by President Senghor and developed by Kéba M'baye,<sup>39</sup> the true question that could be asked today is how one is to ensure that African individuals will discharge their duties. Or must one simply conclude that this uncertain normative construction bears witness to the pedagogical virtue of the Charter and that duties are ethical beacons that throw light on the African conception of human rights?

Madiot, who finds the first two articles presenting the duties (27 and 28) rather 'insipid', wondered for a long time about the place of article 29 in the African legal order of human rights. According to him:<sup>40</sup>

Article 29, on the other hand, consisting of eight sub-sections, is full of risks. It places the individual at the service of the community, making it possible to

<sup>36</sup> V Berny 'La sécession du Katanga' (1965) *Revue Juridique Indépendance et Coopération* 563-573.

<sup>37</sup> *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 71 (ACHPR 1995).

<sup>38</sup> *Mpaka-Nsusu v Zaire* (2001) AHRLR 17 (HRC 1986).

<sup>39</sup> Oguergouz (n 6 above) 233-234.

<sup>40</sup> 'L'article 29, en revanche, composé de huit alinéas, est plein de risques. Il met l'individu au service de la communauté et permet de justifier toutes les oppressions. Il aboutit aussi à détruire ou fortement minimiser les droits reconnus à l'homme dans les articles 1 à 18'; Y Madiot *Considérations sur les droits et devoirs de l'homme* (1998) 126.

justify all kinds of oppression. It also results in destroying or greatly minimising the human rights recognised in articles 1 to 18.

The prescription of duties in the African Charter is therefore seen as an exaltation of arbitrary power and a justification of developmental doctrines with little concern for the rights of the individual. The individual would be sacrificed for the sake of an illusory communal development, or subjected to a bloody unanimity that has characterised many African powers. Even the return to traditional African values would only be a façade leading to a dead end.

Admittedly, the African Commission has not been confronted with such a serious and permanent confusion between rights and duties, but should one necessarily continue to maintain in the text prescriptions that are neither convincing nor practicable, at the risk of reinforcing a legitimate suspicion about a camouflage of arbitrary power in the African Charter? A normative clean-up of the Charter seems necessary in so far as duties are concerned, all the more so as doctrine indicates that this Charter is no longer truly valid in the present context of democratic renewal.<sup>41</sup> After all is said and done, unless the African Charter is improved, it would be advisable to take refuge behind the venerable wisdom of Dupuy:<sup>42</sup>

It is really impossible, in the absolute, to set the community off against the individual . . . The dialectic is that of the community, without which man is an irresponsible being, concentrating on his rights as an egotistically guarded heritage, and that of man, without whom the community becomes an oppressive, not to say a murderous entity.

### 2.3 A universalist and positive interpretation of rights

In its function of controlling and interpreting the law, the African Commission has breathed new life into the normative corpus of the African Charter. Through its numerous decisions that constitute a much appreciated *corpus* of case law, the Commission has contributed to the emergence of a dynamic and objective conception of the African law of human rights, even if an internal coherence to interpretation methods remains to be found. Five major issues have surfaced in case law.

In the first place, the modern conception of equality in Africa is gained from the universality of human rights. Several clauses in the

<sup>41</sup> AD Olinga 'L'impératif démocratique dans l'ordre régional africain' (1999) 8 *Revue de la Commission africaine des droits de l'homme et des peuples* 55-76.

<sup>42</sup> 'On ne saurait opposer, dans l'absolu, communauté et individu (. . .) La dialectique est celle de la communauté, sans laquelle l'homme est irresponsable, replié sur ses droits comme sur un patrimoine égoïstement gardé, et celle de l'homme, sans lequel la communauté devient une entité oppressive sinon meurtrière', R] Dupuy 'Thème et variations sur le droit au développement' in *Mélanges offerts à Charles Chaumont, Le droit des peuples à disposer d'eux-mêmes, méthodes d'analyse du droit international* (1984) 273.

African Charter prescribe non-discrimination and equality, particularly articles 2 and 3:<sup>43</sup>

[I]t is apparent that international human rights law and the community of states accord a certain importance to the eradication of discrimination in all its guises. Various texts adopted at the global and regional levels have indeed affirmed this repeatedly.

Three domains have shown the interpretation of the African Commission on this point. They are the questions of foreigners, sexual freedom and the right to participate freely in the public affairs of one's country.

One sees many discriminatory practices in the treatment of foreigners. Thus, in the case of the expulsion of Burundian nationals from the territory of Rwanda in 1989, the African Commission concluded that article 2 of the African Charter had been violated in observing that:<sup>44</sup>

There is considerable evidence, undisputed by the government, that the violations of the rights of individuals have occurred on the basis of their being Burundian nationals or members of the Tutsi ethnic group. The denial of numerous rights to individuals on account of their nationality or membership of a particular ethnic group clearly violates article 2.

The state, by ratifying the African Charter, is committed to 'secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals'.<sup>45</sup> Another case concerned the collective expulsion of West African nationals by Zambia, on the grounds that they were living there illegally and that the African Charter did not abolish the requirements for visas and the regulation of movement over national borders between member states. The African Commission ruled that these mass expulsions of foreigners constituted 'a flagrant violation of the Charter'.<sup>46</sup> This interpretation of the Commission was confirmed in the case concerning the expulsion of certain West African nationals from Angola in 1996. For the Commission,<sup>47</sup>

African states in general, and the Republic of Angola in particular, are faced with many challenges, mainly economic. In the face of such difficulties, states often resort to radical measures aimed at protecting their nationals and their economy from non-nationals. Whatever the circumstances may be, however, such measures should not be taken to the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations 'constitute a special violation of human rights'.

<sup>43</sup> *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 131.

<sup>44</sup> *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996) para 22.

<sup>45</sup> *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 22.

<sup>46</sup> n 44 above, para 31.

<sup>47</sup> *Union Interafricaine des Droits de l'Homme & Others v Angola* (2000) AHRLR 18 (ACHPR 1997) para 16.

As far as sexual freedom is concerned, William Courson appealed to the Commission about the discriminatory legislation in Zimbabwe on homosexuals.<sup>48</sup> This ban was encouraged by the President of the Republic and his Minister of the Interior. Although the complaint was withdrawn by the applicant, one of the commissioners, who was the rapporteur, declared:<sup>49</sup>

Because of the deleterious nature of homosexuality, the Commission seizes the opportunity to make a pronouncement on it. Although homosexuality and lesbianism are gaining recognition in certain parts of the world, this is not the case in Africa. Homosexuality offends the African sense of dignity and morality and is inconsistent with positive African values . . .

No member of the Commission lodged a formal denial of this interpretation.

Finally, non-discrimination is increasingly violated in the exercise of political functions. The African Commission expounded on this at length in the case of *Legal Resources Foundation v Zambia*. In this case, the complainant alleged a violation of the Charter by a law of 1996, amending the Constitution of Zambia, which stipulates, among other matters, that whoever wants to become a candidate for the presidency of the Republic must prove that both parents are or were Zambians by birth or descent. While condemning the arbitrary nature of such a clause, the Commission very pedantically observed the following:<sup>50</sup>

Article 2 of the African Charter abjures discrimination on the basis of any of the grounds set out, among them 'language . . . nation and social origin . . . birth or other status'. The right to equality is important for a second reason. Equality or lack of it affects the capacity of a person to enjoy many other rights. For example, [a person who is disadvantaged because] of his place of birth or social origin suffers indignity as a human being and an equal and proud citizen.

In the second place, the African Commission has made several pronouncements on the protection of the physical integrity of the individual. The right to life is a primary human right; the one that makes it possible to enjoy all the other rights:<sup>51</sup>

The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, any violation of this right without due process amounts to arbitrary deprivation of life.

In the case of Ken Saro-Wiwa, the African Commission concluded that the 'protection of the right to life in article 4 also includes a duty on the state not to purposefully let a person die while in custody'.<sup>52</sup>

<sup>48</sup> *Courson v Zimbabwe* (2000) AHRLR 335 (ACHPR 1995).

<sup>49</sup> Ankumah (n 17 above) 174.

<sup>50</sup> n 19 above, para 63.

<sup>51</sup> *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000) para 19.

<sup>52</sup> n 18 above, 104.

The Commission remains very firm on violations of physical integrity. It has ruled that the African Charter has been violated, for example, as soon as an individual had been detained in a sordid and dirty cell in inhuman and degrading conditions. Being detained arbitrarily, without knowing either the reasons for or the duration of one's detention, in itself constitutes mental traumatism. Moreover, not allowing someone contact with the outside world and access to medical care constitutes cruel, inhuman and degrading treatment.<sup>53</sup> In similar cases, the Commission has given priority to the fact that the expression cruel, inhuman or degrading punishment or treatment must be interpreted so as to include the widest possible protection against abuse, physical as well as mental. It upheld the violation of article 5 against Nigeria that kept a prisoner locked up for 147 days without allowing him to take a bath,<sup>54</sup> and against Kenya that detained the student leader, John Ouko, in a basement cell equipped with a light that remained on during the whole 10 months of his detention.<sup>55</sup> The Commission also insists on the fact that<sup>56</sup>

the African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a situation of civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

What is more, even if the violations are not perpetrated by agents of the state, the mere fact of neglecting to ensure respect for the rights contained in the African Charter constitutes a violation of the said Charter, '[e]ven where it cannot be proved that violations were committed by government agents, the government had responsibility to secure the safety and the liberty of its citizens . . .'<sup>57</sup>

In the third place, the guarantee of freedom is at the heart of the work of the African Commission. The freedom to criticise the government is considered an essential way of participating in the public life of one's country. Consequently, '[p]eople who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens, otherwise public debate may be stifled altogether'.<sup>58</sup>

The African Charter does not contain any clause exempting states and individuals from the freedoms it guarantees:<sup>59</sup>

<sup>53</sup> *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) para 40.

<sup>54</sup> *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) para 70.

<sup>55</sup> *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000) para 22.

<sup>56</sup> *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21.

<sup>57</sup> n 56 above, para 22.

<sup>58</sup> *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 74.

<sup>59</sup> *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 41.

In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.

In the case of *Media Rights Agenda v Nigeria*, the African Commission recognised that the fact of arresting and incarcerating a journalist without an arrest warrant and without informing him of the charges against him was arbitrary.<sup>60</sup> They ruled in a similar fashion when the complainant was neither charged with any crime, nor allowed access to his family, friends, doctors or lawyers.<sup>61</sup> In the latter case, the founder of the NGO Civil Liberties Organisation (Nigeria) had been arrested and detained, the headquarters of his organisation searched and vandalised, and computer equipment taken away by security agents of the government. The government claimed that this action was legal in so far as it was based on Decree 2 of 1984 (amended in 1990) relating to the security of the state authorising the detention of persons. The government felt that its agents had acted within the context of the law. The Commission observed in *Media Rights Agenda v Nigeria* that it 'is not taking issue with the history and origin of the laws nor the intention for the promulgation'.<sup>62</sup> Subsequently, it referred to its decision in *Jawara v The Gambia*,<sup>63</sup> in which it declared that '[f]or a state to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter'.<sup>64</sup>

Arbitrary arrests and detentions often affect foreigners and are concomitant with the discrimination of which they are often victims. Thus, in the case of the Burundians expelled from Rwanda, the Commission ruled that:<sup>65</sup>

The arrests and detentions by the Rwandan government based on grounds of ethnic origin alone, in the light of article 2 in particular, constitute arbitrary deprivation of the liberty of an individual. These acts are clear evidence of a violation of article 6.

Arbitrary detentions also concern persons who have completed their prison sentences, but who are sometimes kept in detention or placed under house arrest. Thus, in the case of *Pagnouille (on behalf of Mazou) v Cameroon*,<sup>66</sup> the complainant was kept in detention by a military tribunal without a verdict, without witnesses and without a defence. Finally, freedom is often dearly paid for by those who express other opinions from those held by the government. Thus, in the case of *Achuthan and*

<sup>60</sup> n 54 above, para 40.

<sup>61</sup> n 53 above, para 21.

<sup>62</sup> n 54 above, para 59.

<sup>63</sup> *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>64</sup> n 54 above, para 75.

<sup>65</sup> n 44 above, para 28.

<sup>66</sup> (2000) AHRLR 57 (ACHPR 1997).

*Another (on behalf of Banda and Others) v Malawi*,<sup>67</sup> the African Commission ruled that 'the arbitrary arrests of office workers, trade unionists, Roman Catholic bishops and students' violated article 6 of the African Charter.<sup>68</sup>

In the fourth place, the issue of fair trial has nourished and consolidated the work of the African Commission. The right to a good administration of justice implies, on the one hand, the right to petition competent courts and, on the other hand, the right to a fair trial by an independent and impartial court.<sup>69</sup>

A government that governs truly in the best interest of the people, however, should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society.

The African Commission has often had to pronounce on the good administration of justice:<sup>70</sup>

The Commission is not taking an issue with the history and origin of the laws nor the intention for their promulgation. What is of concern here to the Commission is whether the said trial conforms to the fair hearing standards under the Charter.

First of all, on the level of principles, the African Commission declared in its Resolution on the Right to a Fair Trial and Legal Assistance in Africa that:

In many African countries, military courts and special tribunals exist alongside regular judicial institutions. The objective of military courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards.

In many African countries, the violations of human rights committed by the security forces fall within the jurisdiction of military tribunals. This considerably limits the action of citizens to defend their rights, for it is obvious to the Commission that<sup>71</sup>

it is not necessary to find that a tribunal presided over by a military officer is a violation of the Charter. It has already been pointed out that the military tribunal fails the independence test.

Concerning the right of access to the courts, it is particularly foreigners who are denied this right. In the case of mass expulsions, it is not possible for the victims to apply to the tribunals of the state that is

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<sup>67</sup> (2000) AHRLR 144 (ACHPR 1995).

<sup>68</sup> Para 8.

<sup>69</sup> n 58 above, para 81.

<sup>70</sup> n 54 above, para 59.

<sup>71</sup> n 23 above, para 44.

expelling them illegally regardless of the Charter. Thus, in the case of the West Africans expelled from Zambia in 1992:<sup>72</sup>

The Commission . . . has established that none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation. This constitutes a violation of their rights under article 7 of the Charter and under Zambian national law.

A government is also frequently seen to orchestrate a parody of justice to get rid of its political opponents, defenders of human rights or intellectuals and artists. In the case of *Media Rights Agenda v Nigeria*, the complainant alleged that<sup>73</sup>

prior to the setting up of the tribunal, the military government of Nigeria organised intense pre-trial publicity to persuade members of the public that a coup d'état plot had occurred and that those arrested in connection with it were guilty of treason . . . Consequently, the Commission finds the selection of serving military officers, with little or no knowledge of law as members of the tribunal in contravention of principle 10 of the United Nations Basic Principles on the Independence of the Judiciary.

Certain African states attempt by special legislation to exclude violations of human rights from the competence of the usual competent courts. The Commission in the case of *Huri-Laws v Nigeria* ruled as follows:<sup>74</sup>

Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released.

In this case, the complainants could not contest their detention before the national courts, as the competence of the national courts to judge the legality of acts laid down by the security services of the government had been annulled by a special decree. It is not enough for a government to allege the existence of a law in accordance with which acts have been committed; it also has to prove that this law complies with the obligations pronounced by the African Charter.<sup>75</sup>

Finally, the African Commission was also concerned about the content and process of trials. In the case of *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi*,<sup>76</sup> the criminal division of the Appeal Court of Bujumbura agreed on 13 June 1997 to an adjournment to allow the parties time to prepare their pleas. On the date of the hearing (20 August 1997), the prosecution gave, as a reason for its inability to plead, the fact that they needed enough time to study the plea note of the lawyer. The Court easily acceded to this request and the pleas were adjourned to 25 September 1997. On that day, the lawyer for the

<sup>72</sup> n 45 above, para 30.

<sup>73</sup> n 54 above, paras 47 & 60.

<sup>74</sup> n 53 above, para 45, quoting the Commission's Resolution on the Right to Recourse and Fair Trial (1992) para 2(c).

<sup>75</sup> n 54 above, para 75.

<sup>76</sup> n 21 above.

defendant was ill and could not attend court. The defendant therefore asked the Court to adjourn to a later date. The Court refused and decided to hear the prosecution and forced the defendant to defend himself on his own without the aid of his lawyer, on the grounds that the plea note lodged by the lawyer was sufficient. The Court condemned him to death on that very day at the end of the pleas. Despite his appeal for an annulment, the Supreme Court confirmed the decision of the Appeal Court by judging that the complainant did not need a lawyer. The African Commission ruled that<sup>77</sup>

[t]he judge should have upheld the prayer of the accused, in view of the irreversible character of the penalty involved. . . . The Commission holds that by refusing to accede to the request for adjournment, the Court of Appeal violated the right to equal treatment, one of the fundamental principles of the right to fair trial.

The African Commission stated further that the right to legal assistance is a fundamental element of the right to a fair trial:<sup>78</sup>

It was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case . . . not only do the state parties recognise the rights, obligations and freedoms proclaimed in the Charter, they also commit themselves to respect them and take measures to give effect to them.

In the fifth place, the African Commission confirmed the effectiveness of economic, social and cultural rights in Africa. In the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,<sup>79</sup> it affirmed that<sup>80</sup>

[i]nternational law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.

The right to a healthy environment, the right to housing, the right to sufficient food, the right to health and the right to education must be the subject of positive action on the part of the state whose economic and social system should be aimed at the effective realisation of these rights.<sup>81</sup>

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights — both civil and political rights and social and economic — generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect,

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<sup>77</sup> Para 29.

<sup>78</sup> Paras 30 & 31.

<sup>79</sup> (2001) AHRLR 60 (ACHPR 2001).

<sup>80</sup> Para 68.

<sup>81</sup> Para 44.

promote and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. As a human rights instrument, the African Charter is not alien to these concepts

...

Admittedly, it has been said by numerous specialists that the African Charter is a regional instrument that is 'poor and incoherent' on a technical level. Others have affirmed that the balance sought between rights and duties or between the individual and the community creates confusion which does not facilitate the social appropriation of such an instrument. For Ouguergouz, at present judge at the African Court of Human Rights:<sup>82</sup>

One of the most notable — but probably the most serious — of the shortcomings of the African Charter is to be found in the imprecise and incomplete formulation of the rights guaranteed. In the present state of their wording, indeed, the pertinent clauses of the African Charter offer only weak legal protection to the individual.

Therefore, with regard to the African Commission's interpretation in the course of various cases submitted by numerous complainants, can one conclude that the African system of protecting human rights is attractive? A positive response to such a question depends on the reality of the functioning of the organs and procedures of the African system, the level of appeal of which remains to be proved.

### **3 The institutional and procedural appeal of the African system of protecting human rights**

The appeal of the African procedures of human rights is marked by the debate on the pertinence and appropriateness of the fusion between the African Court of Human and Peoples' Rights and the Court of Justice of the AU. This reinforces the scepticism about the appropriateness of employing the African system, especially since the obligatory passage of the complainant through the widely criticised internal procedures is already seen as a dissuasive obstacle. If the AU wants to improve the system, would it not be better to go beyond the idea of a fusion of the two organs to enlarge the field of competence and action of the African system of protecting human rights by including a penal dimension?

#### **3.1 The dissuasive precondition of exhaustion of local remedies**

Following the example of other international human rights monitoring bodies, the African Commission can concern itself with a communication only when local remedies have been exhausted and no other international 'jurisdiction' has been approached. It is therefore a matter of

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<sup>82</sup> Ouguergouz (n 6 above) 389.

the exclusive submission of a case, not allowing the applicant to try his or her luck before all the international monitoring bodies at the same time, thus avoiding their being in competition with each other on the same case. Why should a victim turn to the African system rather than to the UN Human Rights Committee?

For Mubiala, the African Commission has become, with the end of the Cold War and the democratisation of Africa, an<sup>83</sup>

interactive mechanism that has recently been enriched with mechanisms inspired by the practice of the United Nations and the principles relating to it. It has consulted decisions of the control organs of the United Nations and the two regional Courts (European and American).

One therefore understands that<sup>84</sup>

The request that domestic remedies be exhausted prevents the Commission from becoming a higher level court, a function that has not devolved to it and for which it does not have suitable means at its disposal.

This obligatory passage before the domestic judge is perceived by numerous persons brought to trial as a dissuasive precondition in so far as the independence of the judiciary in Africa is not guaranteed. Must one be reminded that, in spite of democratisation and the affirmation of human rights in many African constitutions, 'justice remains a supervised justice, the status of which, as a recently acquired legal power, and occasional liberties do not shield it from influence and from shameful promptings?'<sup>85</sup>

The Commission has spoken out on numerous occasions to specify that<sup>86</sup>

it would be improper to insist on the complainants seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective.

It is thus impossible to force complainants to 'exhaust any local remedy which is found to be, as a practical matter, unavailable or ineffective'.<sup>87</sup> This position reinforces the Commission's interpretation according to which<sup>88</sup>

<sup>83</sup> Mubiala (n 2 above) 203.

<sup>84</sup> *'La demande d'épuisement des recours internes évite que la Commission ne devienne un tribunal de première instance, une fonction qui ne lui est pas dévolue et pour laquelle elle ne dispose pas de moyens adéquats.'* Commission Nationale des Droits de l'Homme et des Libertés v Tchad RADH 2000 343 (CADHP 1995) para 28. This paragraph is not included in the English version of the case ; see n 55 above.

<sup>85</sup> *'La justice reste une justice surveillée dont le statut de pouvoir judiciaire récemment acquis et les hardiesses occasionnelles ne la soustraient pas à l'emprise et aux sollicitations inavouables'* M Kamto 'Une justice entre tradition et modernité' in G Conac & J du Bois de Gausson (eds) *La justice en Afrique* (1990) 62.

<sup>86</sup> *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (2000) AHRLR 180 (ACHPR 1995) para 8.

<sup>87</sup> n 45 above, para 12.

<sup>88</sup> n 44 above, para 17.

in cases of serious and massive violations of human rights, and in view of the vast and varied scope of the violations alleged and the large number of individuals involved, the Commission holds that remedies need not be exhausted . . .

for it<sup>89</sup>

can absolutely not demand that the requirement of exhaustion of local remedies be applied literally to cases in which the complainant is unable to apply to the national courts for every individual complaint.

Moreover, the fact that the complainant may have serious fears for his or her safety could also justify not exhausting the internal channels of appeal.<sup>90</sup>

The complainant is no longer in the Republic of Kenya. The above condition is not based on his voluntary will — he has been forced to flee the country because of his political opinions and Student Union activities. . . . the Commission finds that the complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo for fear of his life . . .

This interpretation of the Commission can also be found in the case of *Abubakar v Ghana*:<sup>91</sup>

He escaped to Côte d'Ivoire from prison in Ghana and has not returned there. Considering the nature of the complaint it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities.

In addition, when persons have already been killed, the remedies presumed available no longer have any interest. Thus:<sup>92</sup>

The Commission takes note of the fact that the complaint was filed on behalf of people who had already been executed. In this regard, the Commission held that there were no local remedies for the complainant to exhaust. Further that even if such a possibility had existed, the execution of the victims had completely foreclosed such a remedy.

Finally, it would be impossible to exhaust the internal channels of appeal without suitable legal assistance when necessary. Thus:<sup>93</sup>

The accused should be represented by a lawyer of his choice. The purpose of this provision is to ensure that the accused has confidence in his legal counsel.

The situation is aggravated when the lawyer of the defendant is himself harassed by the powers that be. In the case of *Constitutional Rights*

<sup>89</sup> 'Ne peut pas absolument exiger que la demande d'épuisement des recours internes s'applique littéralement aux cas où le plaignant se trouve dans l'incapacité de saisir les tribunaux nationaux pour chaque plainte individuelle.' *Commission Nationale des Droits de l'Homme et des Libertés v Tchad* RADH 2000 343 (CADHP 1995) para 30. This paragraph is not included in the English version of the case; see n 56 above.

<sup>90</sup> n 55 above, paras 18-19.

<sup>91</sup> (2000) AHRLR 124 (ACHPR 1996) para 6.

<sup>92</sup> n 51 above, para 14.

<sup>93</sup> n 23 above, para 28.

*Project (in respect of Lekwot and Others) v Nigeria*, the African Commission ruled that the Charter had been violated from the moment when 'during the trials the defence counsel for the complainants was harassed and intimidated to the extent of being forced to withdraw from the proceedings'.<sup>94</sup>

Kamto thinks that it is, however, necessary to put into perspective the insurmountable character represented by the obstacle of internal justice for many persons brought to trial. He maintains that it is not enough to proclaim the known deficiencies of the justice system in Africa. Beyond the real problems of justice in Africa, 'it is right to point out the apathy of the defendant and the inefficiency of their counsels'.<sup>95</sup> In numerous African countries, the legal recognition of the applicability of international conventions (including thus the African Charter) has not awakened in defendants the passion to use this to protect their rights. Very often, their ignorance of particularly complex and formalist legal procedures makes them suspicious with regard to internal justice.

### 3.2 The uncertain impact of decisions of African human rights bodies

It should be noted that, out of the first 245 complaints registered since its creation, the African Commission has given a decision on 224. Of these, more than 50 or so are waiting to be acted upon. In certain cases, the Commission does not know the result given to its decision by the defaulting state. Admittedly, one can legitimately be proud of certain successes of the Commission, as in the case of Louis Emgba Mekongo (rehabilitated in his function as magistrate and compensated by Cameroon) or in the case of Father Diamacoune Senghor (lifting of his house arrest by Senegal). But, in the vast majority of cases, the absence of a follow-up procedure makes it impossible to ascertain any improvement to the initial situation. The victim of a violation of human rights in Africa asks a simple question: What benefit can be gained from a decision given by an organ of the African system rather than by one given by the UN, for example? In what way would it be more attractive to have a state condemned before the African Commission or the African Court? The answers to the questions posed are conclusive for any defendant. The African Commission and the African Court give mainly three types of decisions: those concerning interim measures, those concerning the admissibility of communications and those concerning the merits of cases.

Firstly, the fact that the Commission took a decision on interim mea-

<sup>94</sup> (2000) AHRLR 183 (ACHPR 1995) para 13.

<sup>95</sup> 'Il est juste de relever l'apathie des justiciables et l'inefficacité de leurs conseils' M Kamto 'Charte africaine, instruments internationaux de protection des droits de l'homme, constitutions nationales : articulations et perspectives' in Flauss & Lambert-Abdelgawad (n 8 above) 43.

tures in the case of Ken Saro-Wiwa did not prevent the execution of the leader of the Ogoni and his eight companions by the Nigeria of Sani Abacha who ignored all the latter's requests. On the other hand, in the context of the case of José Domingo Sikunda, an alleged member of UNITA, it was apparently necessary for a member of the Commission to go to Namibia to obtain the freedom of the latter who was threatened with expulsion to Angola where he feared for his life.<sup>96</sup> But Mrs Mariette Sonjaleen Bosch was not as fortunate, as she was executed by Botswana in spite of the Commission's request for a stay of execution.<sup>97</sup> However, in the context of the case of Safiya Yakubu Hussaini, the Chairperson of the African Commission successfully launched an urgent appeal to Nigeria's Head of State to ask him to intervene in the context of the death sentence pronounced against her for adultery.<sup>98</sup> Every urgent communication must indicate whether the victim's life, physical integrity or health is in imminent danger. The African Commission is authorised, by rule 111 of its Rules of Procedure, to adopt provisional measures, by asking the state concerned not to take any action liable to cause irreparable harm to the victim, while waiting for the case to be examined by the Commission. However, it does not have any power to force the state to respect provisional measures. Should the state's membership of the AU not be suspended in the event of its not respecting such a serious decision?

Secondly, the admissibility of the communication before the African Commission already implies that the request has been accepted as such by at least seven of the 11 members of the Commission, in the absence of which it would not be inscribed in the official register of communications, which is the start of the procedure. Article 55(2) makes provision for this quorum to be necessary for the examination of a communication to be accepted, which can delay the examination of a complaint in spite of its urgent nature. In the same way, the submission of a case to the African Commission must not be transformed into a slanderous operation against states. Thus, when *Ligue Camerounaise des Droits de l'Homme* described the political regime of Cameroon as '30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya' and referred to 'government barbarisms', the African Commission called such allegations insulting and declared the communication not admissible.<sup>99</sup>

What is more, all seven conditions of admissibility defined in article 56 of the African Charter must be complied with to qualify for admissibility. Among these conditions is indeed that of having exhausted

<sup>96</sup> *Interights (on behalf of Sikunda) v Namibia* (2002) AHRLR 21 (ACHPR 2002).

<sup>97</sup> *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003).

<sup>98</sup> Communication 269/2003, *Interights (on behalf of Safia Yakubu Hussaini) & Others v Nigeria*, Twentieth Activity Report (2006).

<sup>99</sup> *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997) para 13.

local remedies. In the case of *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of the Congo*,<sup>100</sup> the Commission refused to thoroughly examine the request of a Burundian complainant, illegally dismissed from his functions in the DRC and taken refuge in Togo, on the grounds that he had not taken the necessary steps, whereas it was obvious that cases like this had already been dealt with by the African Commission. Even if the Commission disputes it, this case was not very different from many similar communications where it had acknowledged the unavailability of local remedies. A refugee in Togo does not really have the means to contest an illegal act of a government before a court of the country that has violated his rights. To affirm the contrary is to live in an unreal world. Instead of hiding behind a formalism that translates into a denial of justice, the African Commission should have used the appropriate method of investigation into allegations of violations of human rights as stated in article 46 of the African Charter. When the Commission has established that violations have taken place, it makes recommendations to the state concerned, so that it may ensure that an inquiry is held into the allegations, that the victims are compensated (if need be) and that measures are taken to prevent this from happening again. Such an investigation ought to avoid rejecting numerous requests often sent by persons living in despair and not on a sufficient level to understand the whole complexity of procedures before an international authority. The Commission has already undertaken missions of investigation in Togo, Senegal, Mauritania and the Sudan. Nothing prevented it from doing so in the DRC.

One can legitimately wonder about access to the African Commission in the case of persons in distress or destitute, especially as no state makes provision for legal aid for the submission of cases to an international authority. How does one apply to the Commission if one does not have the financial resources to afford a lawyer? How could the African system, which should be in accord with an environment that is characterised by extreme poverty, contribute so that the poor are not dissuaded from applying to its authorities for lack of adequate material means? Should African states not ensure that legal aid that is available on an internal level — at least where this is the case — also be provided in the context of a procedure before the organs of the regional African system of human rights? All these are questions that will not receive any positive solution in the immediate present, but that ought, however, to make the African system of protecting human rights more appealing.

Thirdly, while the African Commission only makes 'recommendations', the African Court gives compulsory rulings. The Commission's recommendations have no authority. This is not the case for the rulings of the African Court. One author who has studied the question wants

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<sup>100</sup> (2003) AHRLR 65 (ACHPR 2003).

the African Commission, following the example of the Human Rights Committee of the UN, to be more aggressive in its approach and adopt a more restrictive style of language towards states instead of being content with vague expressions.<sup>101</sup> However, the lack of implementation of the recommendations of the Commission or of the rulings of the African Court is the most important problem that can dissuade a defendant from daring to submit a case to the organs of the African system for protecting human rights. No special procedure is provided to ensure any follow-up of the implementation of recommendations.<sup>102</sup> As for the rulings of the African Court, provision is made in article 29(2) of the Protocol of Ouagadougou for the Executive Council of the AU to ensure that the decisions given by the African Court are carried out. This in itself does not constitute an effective mechanism, given the diplomatic inertia within this authority.

The system depends on the good faith of the state found guilty of violating human rights, taking action in compliance with its sovereign commitment to respect the decisions of African authorities:

The absence of a context of monitoring and systematic evaluation of the execution of decisions, resolutions and recommendations by the states party to the Charter, makes it impossible to collect exact and exhaustive data on this subject

affirms Baricako, after ten years at the head of the Secretariat of the African Commission.<sup>103</sup> The Secretariat of the African Commission sends letters of reminder to the states whose violation of the clauses of the African Charter has been established, asking them to honour their commitments according to article 1 of the Charter, which requests that they '... recognise the rights, duties and freedoms enshrined in this Charter and ... undertake to adopt legislative or other measures to give effect to them'. The first letters are sent immediately after the adoption of the Activity Report by the Assembly of Heads of State and Government of the AU and other letters are sent as often as possible. The same is done for the compensation of victims, for it is the legislation of the defaulting state that is the norm.<sup>104</sup> This return to domestic remedies, already exhausted without success, can only awaken disinterest in the regional system for protecting human rights in

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<sup>101</sup> GJ Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 691-692.

<sup>102</sup> R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 21.

<sup>103</sup> 'L'absence d'un cadre de suivi et d'évaluation systématique de la mise en œuvre des décisions, résolutions et recommandations par les Etats parties, rend impossible la réunion des données précises et exhaustives à ce sujet', G Baricako 'La mise en œuvre des décisions de la Commission africaine des droits de l'homme et des peuples par les autorités nationales' in Flauss & Lambert-Abdelgawad (n 8 above).

<sup>104</sup> *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995) para 2.

Africa.<sup>105</sup> Would it not be appropriate to appoint a special rapporteur in charge of following up on the decisions of the regional African authorities concerned with human rights, who would have the power to offer to mediate between the defaulting state and the victim to ensure the decision is properly executed? It often happens that the victim becomes a refugee in another country. How can one then believe in a satisfactory compensation if the state from which the victim has fled prevents him or her from returning there by means of veiled intimidation? Admittedly, certain recommendations of the Commission have been carried out in good faith by the defaulting state, but what is the purpose of a decision for the injured party if it is not possible to guarantee that it will be executed?

In 1993, the Assembly of Heads of State of the Organisation of African Unity (OAU), at the request of the African Commission, approved the appointment by every state of a high ranking official responsible for relations with the African Commission. But the great majority of African states have not acted upon this resolution.<sup>106</sup> In conclusion,<sup>107</sup>

it has been stated that the African Commission has very few means at its disposal to see its decisions implemented. It has also been mentioned that the African Commission only has 11 members working part time, who can therefore not be present in all the states that are party to the Charter every time the execution of the Commission's work demands it.

### 3.3 The African Court in the African Union system

Many jurists of repute have wrongly believed that there exists a unique African conception of human rights that would be resistant to any institutionalisation of a justice of human rights.<sup>108</sup> Glélé-Ahanhanzo even hoped that<sup>109</sup>

<sup>105</sup> P Amoah 'The African Charter on Human and Peoples' Rights. An effective weapon for human rights?' (1992) 4 *African Journal of International and Comparative Law* 229.

<sup>106</sup> AHG/Res 227 (XXIX) para 4.

<sup>107</sup> 'Il a été constaté que la Commission africaine dispose de très peu de moyens pour faire exécuter ses décisions. Il a été également indiqué que la Commission africaine ne compte que 11 membres travaillant à temps partiel, lesquels ne peuvent donc pas être présents au sein de tous les Etats Parties chaque fois que l'exécution du travail de la Commission l'exige', Baricako (n 103 above) 230.

<sup>108</sup> K Vasak 'Les droits de l'homme en Afrique' (1967) 31 *Revue Juridique Indépendance et Coopération* 273-294; I Nguema 'Perspectives des droits de l'homme en Afrique: Les racines d'un défi permanent' (1990) 2(2) *Revue Universelle des Droits de l'Homme* 49-53.

<sup>109</sup> 'Le dynamisme et la doigté de la Commission africaine feront que cette dernière aide au règlement amiable, sans éclat, des litiges relatifs à la violation des droits de l'homme, ce qui aura peut-être pour conséquence de faire oublier la création d'une Cour Africaine des droits dont la nécessité ne s'imposera plus. L'Afrique ne préfère-t-elle pas la palabre?' M Glélé-Ahanhanzo 'La Charte africaine des droits de l'homme et des peuples: Ses virtualités et ses limites' (1985) *Revue de droit africain* 37.

the dynamism and tact of the African Commission will make the latter assist with the amiable and quiet settlement of litigations concerning the violation of human rights, which will perhaps lead to the creation of the African Court of Human Rights being forgotten, as there will no longer be any need for it. Doesn't Africa prefer palavers?

This conception of human rights wants to have one believe in the survival of an African culture of justice that would not approve of the legal duel. From the international judge Kéba M'baye<sup>110</sup> to an official of the UN,<sup>111</sup> this theory of the palaver tree as the African way of settling disputes is nothing but an anthropological fraud, aimed at masking malfunctions, for which African culture is neither responsible nor one of the vehicles. To tell the truth, African dictators have used this cleverly supported discourse to make people forget how their victims suffered. Today we find resurfacing, under a discourse of institutional rationalisation within the AU, the same ideas that yesterday were already seen to be nothing but an expression of a duplicity with bloodthirsty regimes.

The institutional shortcomings of the African system, characterised by a lack of a court, were solved in 1998, at the summit of the OAU in Ouagadougou (Burkina Faso), by the creation of an African Court on Human and Peoples' Rights.<sup>112</sup> While the African Commission has not completely failed in its mission, with regard to the human and financial resources placed at its disposal, and taking into account the enormous work of interpretation accomplished over the last 15 years, it still has to be proved, however, that the coming of an African Court (of which the Protocol came into force on 25 January 2004) could increase the appeal of the system. Mubiala concludes his analysis of the African Court by emphasising that:<sup>113</sup>

The creation of the African Court constitutes indubitably an important contribution to the international law of human rights. On the regional level, it constitutes an added value to the pre-existing control mechanism, ie the Commission.

The enthusiasm expressed in 1998 has for a few years been dampened by the legendary dread of African governments to submit to the decisions of an international court. Even if the African Court has only been instituted as a 'supplement' to the African Commission, one notes that

<sup>110</sup> K M'baye 'Rapport introductif sur la Charte africaine des droits de l'homme et des peuples' Actes du colloque de la Commission internationale des juristes, Nairobi, 2-4 December 1985.

<sup>111</sup> Mubiala (n 2 above) 5-18.

<sup>112</sup> S Kowouvi 'La Cour africaine des droits de l'homme et des peuples: Une rectification institutionnelle du concept de "spécificité" africaine en matière des droits de l'homme' (2004) 15 *Revue Trimestrielle des Droits de l'Homme* 757-790.

<sup>113</sup> 'La création de la cour africaine constitue indubitablement un apport important au droit international des droits de l'homme. Au plan régional, elle constitue une valeur ajoutée au mécanisme de contrôle préexistant, c'est-à-dire la Commission', M Mubiala 'La cour africaine des droits de l'homme et des peuples: Mimétisme institutionnel ou avancée judiciaire?' (1998) 102 *Revue Générale de Droit International Public* 779.

more than 40 years after the Conference of Lagos in 1961, which made provision for the creation of a tribunal in the context of an African Convention of Human Rights, the majority of African states still remain refractory to the legal process that could make them take responsibility for the violation of human rights.

On the occasion of its 3rd ordinary session in Maputo, in July 2003, the Executive Council of the AU decided that the African Court on Human and Peoples' Rights be maintained as a distinct and separate institution from the Court of Justice of the AU.<sup>114</sup> However, at its 4th ordinary session in July 2004 at Addis Ababa, the Assembly of Heads of State and Government revoked this decision, by deciding that 'the African Court on Human and Peoples' Rights and the Court of Justice should be integrated into one court'.<sup>115</sup> This decision of a fusion — the absorption of the African Court on Human and Peoples' Rights by the Court of Justice of the AU — has evoked numerous protests and formidable legal queries. Not only did the authors of the doctrine of the merger of the two courts not really explain the validity of such an operation, but justifications as to the lack of means or the institutional congestion of the AU seem to be pretexts to those who fear having to be forced to ratify the Protocol of Ouagadougou.

It is interesting to recall that the Protocol to the Constitutive Act creating the Court of Justice has not yet received a sufficient number of ratifications and that the (separate) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights came into force on 25 January 2004 after the fifteenth ratification. The Court of Justice of the AU was established by the Constitutive Act of the AU; its statute, composition and functions are defined by the Protocol of the Court of Justice of the AU, which has not yet come into force. The Court of Justice of the AU is competent to resolve disagreements between opposing member states that have ratified its Protocol, but the African Court deals with cases concerning the violations of civil and political, economic, social and cultural rights guaranteed by the African Charter and other pertinent international instruments relating to human rights. Moreover, the judges of the African Court were elected at the summit of Khartoum in January 2006.

On the occasion of the summit of Sirte in July 2005, the Assembly decided

that a draft legal instrument relating to the establishment of the merged court comprising the Human Rights Court and the Court of Justice should be

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<sup>114</sup> A Dangabo Moussa 'Chronique de la cour africaine des droits de l'homme et des peuples à la Cour de justice de l'union africaine. Histoire d'une coexistence pacifique en attendant la fusion' (2005) 76 *Revue internationale de droit pénal* 135-138.

<sup>115</sup> Assembly/AU/ Dec 45 (III).

completed for consideration by the next ordinary sessions of the Executive Council.

The Summit also decided<sup>116</sup>

that all necessary measures for the functioning of the Human Rights Court be taken, including particularly the election of the judges, the determination of the budget and the operationalisation of the Registry.

The Algerian Minister of Foreign Affairs, Mohamed Bedjaoui, former President of the International Court of Justice, was appointed to draw up the draft instrument of fusion. At the meeting of experts of the AU on 22 November 2005 in Algiers, the latter declared:<sup>117</sup>

The merger of the African Court of Human and Peoples' Rights and the Court of Justice is not an option. It is a necessity. This fusion is desirable. It is realistic and realisable.

This vision was not shared by everyone. Those — very numerous — who contested this decision think that certain Heads of State and Government take no interest in the system of protecting human rights in order to avoid discovering the confusion that such a merger would imply. This curious decision of the Assembly of the AU is based on an argument of costs linked to the existence of two separate courts within the same pan-African organisation. One can only express a real dissatisfaction as to the pertinence of such an argument. If the demand of rationality is an imperative with regard to the inadequacy of the means allocated by the member states of the AU, one cannot say with certainty that savings can only be achieved with the fusion of these courts. Should one not criticise the tedious pan-African meetings, whose real impact remains to be proved? Does pan-African bureaucracy, which is in full expansion, deserve more attention than an African Court on Human Rights, of which no credible evaluation of costs has been established to warrant getting rid of it with such uncommon speed?

With the outcry from non-governmental organisations (NGOs) and other institutions in defence of human rights, the Executive Council decided in January 2005 in Abuja (Nigeria) to refer to a meeting of government experts the draft legal instrument of merger, without prejudice to the effective establishment of the African Court.<sup>118</sup> The Council should simply have recommended the revision of the decision of July 2004. Similarly, the Chairperson of the African Commission should have demonstrated more pugnacity when faced with Heads of State who do not want to see such a tribunal established in Africa, which they imagine can only disturb their legendary tranquillity in impunity.

<sup>116</sup> Assembly/AU/Dec 83 (V).

<sup>117</sup> *'La fusion de la cour africaine des droits de l'homme et des peuples et de la cour de justice n'est pas une option. Elle est une nécessité. Cette fusion est souhaitable. Elle est réaliste et réalisable'* [http://193.194.78.233/ma\\_fr](http://193.194.78.233/ma_fr) (accessed 30 December 2005).

<sup>118</sup> EX CL/Dec165 (VI).

On 5 December 2005, in a resolution of its 38th session held in Banjul, the African Commission reiterated its preoccupation with making operational an independent and effective African Court on Human and Peoples' Rights.<sup>119</sup> Moreover, one court exists and the other is, for the moment, only virtual, for lack of sufficient ratifications.

The idea of a merger means, in the Mohammed Bedjaoui proposal, that the African Court on Human Rights becomes a specialised chamber in the jurisdictional magma of the AU. The authors of the project claim that:<sup>120</sup>

The draft text submitted for your examination has taken into account all the preoccupations expressed at previous meetings. It also has the advantage of a legal construction taking care of the cost of the recent coming into force of the Protocol creating the African Court on Human and Peoples' Rights. During the whole drafting of this project, our care and motivation have indeed been to draw up a balanced text, offering the best chances for the harmonious functioning of this new Court so that it can meet with efficiency the expectations of the member states of civil African society.

The argument of the rationalisation of means and optimisation of costs masks a desire to bury the African Court. The qualification of judges could have no link with human rights. Consequently we will witness a regression of the jurisprudence courageously developed by the African Commission over the past 15 years. It is to be regretted that Mr Bedjaoui, a jurist of international repute, did not support the argument for an independent court with its own dynamics. In the recent past, he would certainly have reached other conclusions to bring about the universality of human rights in the African context.<sup>121</sup> It is hard to imagine the International Court of Justice worrying so intensely about the violations of human rights that it would not lose the confidence of states so concerned about their commitments to international tribunals.

In spite of numerous protests raised to this project of merger, the heads of African states are not likely to revoke their decision. Consequently, if this is the sovereign will expressed by the AU, why not push rationalisation to its limit by creating another split, the better to tackle

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<sup>119</sup> Resolution adopted on 11 May 2005 in Banjul, published in the Eighteenth Activity Report of the African Commission.

<sup>120</sup> *'Le projet de texte soumis à votre examen a pris en compte l'ensemble des préoccupations exprimées à l'occasion des réunions précédentes. Il présente aussi l'avantage d'une construction juridique prenant en charge l'entrée en vigueur récente du protocole portant création de la Cour africaine des droits de l'homme et des peuples. Tout au long de l'élaboration de ce projet, notre souci et notre motivation étaient justement d'élaborer un texte équilibré, offrant les meilleurs chances d'un fonctionnement harmonieux de cette nouvelle Cour afin qu'elle puisse répondre avec efficacité aux attentes des Etats membres et de la société civile africaine.'* M Bedjaoui Discours du 21 novembre 2005 à Alger, [http://193.194.78.233/ma\\_fr](http://193.194.78.233/ma_fr) (accessed 30 June 2006).

<sup>121</sup> M Bedjaoui 'La difficile avancée des droits de l'homme vers l'universalité' *Universalité des droits de l'homme dans un monde pluraliste*, Actes du colloque organisé par le Conseil de l'Europe en collaboration avec l'Institut international des droits de l'homme, Strasbourg, 17-19 April 1989 (1990).

new issues linked to international criminal justice? On the supposition that African wisdom demands that excessive costs be avoided as far as justice is concerned, it would be just as sensible to be even more ambitious with the little one has at one's disposal.

Without prejudging the final decision of the AU, it would not be too much to envisage a court that could consist of three main sections, these being a section for disagreements between states (following the example of the International Court of Justice), a section for the protection of human rights (following the example of the European Court of Human Rights), and a section for criminal proceedings in the case of crimes against humanity, crimes of genocide, crimes of aggression and war crimes (following the example of the International Criminal Court (ICC)). Every section could then have functional autonomy, its own rules of procedure, its specialised chambers and its internal organisation in accordance with its mandate. Nothing would prevent certain judges, according to their proven professional expertise, presiding in more than one section.

Indeed, the Constitutive Act of the AU makes provision in article 4(h) for the right of intervention of the AU in the event of serious violations of human rights (genocide, crimes against humanity, war crimes). This intervention can be decided upon by the AU or solicited by the state in which the violations are taking place. Similarly, the Non-Aggression and Common Defence Pact makes provision in article 6(b): 'State parties undertake to arrest and prosecute any irregular armed group(s), mercenaries or terrorist(s) that pose a threat to any member state.' Conflicts are the cause of serious violations of human rights in Africa. Therefore, '[s]tate parties undertake to prohibit and prevent genocide, other forms of mass murder as well as crimes against humanity'.<sup>122</sup>

As the case of Hissène Habré has shown, it is unlikely that national justice will repress serious infringements of human rights. Following serious violations of human rights in Côte d'Ivoire, the NGO RADDHO called for the extension of the competence of the tribunal for Sierra Leone to Côte d'Ivoire, failing the creation of an international criminal court for this country.<sup>123</sup> Similarly, in the case of serious violations of human rights in Darfur (Sudan), the Security Council referred the situation to the ICC. However, it must be noted that the ICC can only deal with the most serious cases. What is more, numerous African states show little haste in ratifying its statute. Finally, will the ICC have sufficient means to deal with all the atrocities perpetrated in Africa?

The dynamics for improvement of African law on human rights could only be credible in so far as the African system for protecting human

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<sup>122</sup> Art 3(d) African Union Non-Aggression and Common Defence Pact.

<sup>123</sup> 'Charniers de Bouaké et de korogho: Coupable inaction face à l'impunité!' Communiqué of 3 August 2004, <http://www.raddho.africa-web.org> (accessed 30 June 2006).

rights adopts the route of material and procedural appeal that passes through the effective independence of the African Court. The African Court should be reformed to take into account the international dynamics of the criminal repression of serious mass violations of human rights and the adequate compensation for victims of such violations. Seen from this angle, the reform that has been started can contribute usefully to the positive development of the protection of human rights in Africa.

#### 4 Conclusion

The appeal of the African system of protecting human rights is not sufficient according to the evaluation made of it after 20 years of the African Charter. Ways of accessing this system are winding and steep, thus discouraging many victims from trying to follow them. However, the fact remains that the system, because it exists, contributes progressively to the emergence and consolidation of a regional protection of human rights in Africa. The limits and imperfections of the African system can be surmounted with the real will of the member states of the AU. The arguments previously evoked about African cultures should be abandoned, as the universality of human rights is not an obstacle to the diversity of cultures. However, there are universal values on which no regression can be tolerated. The work accomplished by the African Commission the last 15 years consolidates the idea of an independent court rather than that of a confused and bureaucratic merger. In default of a revocation of the decision taken by the heads of state, it is necessary to aim for a court with extended competences that would take into account situations of serious violations of human rights in Africa. Such a development is desirable if the AU places human rights at the heart of the pan-Africanism that it claims to be realising, and to preserve the African peoples from the scourges of war, fear and misery. What is more, domestic courts should participate in the work of promoting the African Charter and other international instruments on human rights. Beyond the problems of training and information of judges and lawyers, it is an invitation to place the Charter at the heart of legal practice, as African states cannot ignore their own international commitments and official proclamations.<sup>124</sup> Admittedly, priority is given to the satisfaction of the essential needs of populations who suffer poverty. It is, however, almost impossible to leave poverty behind without the real enjoyment of human rights guaranteed by an internal and an independent international justice system.

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<sup>124</sup> JD Boukongou & D Maugenest (eds) *Vers une société de droit en Afrique centrale* (2001) 396.