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African Human Rights Law Journal

As democratic practices and the protection of human rights struggle to become rooted in Africa, and an African Court of Human and Peoples' Rights is in the process of being established, the *African Human Rights Law Journal* has been launched. There is a more pressing need for a monitoring and reporting periodical in this field in Africa than ever before. The *Journal* aims to publish contributions dealing with human rights related topics of relevance to Africa, Africans and scholars of Africa. In the process, the *African Human Rights Law Journal* hopes to contribute towards an indigenous African jurisprudence. The *Journal* appears twice a year, in March and October.

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AFRICAN HUMAN RIGHTS LAW JOURNAL

Editorial

The Organisation of African Unity (OAU) adopted the African Charter on Human and Peoples' Rights (African Charter) 20 years ago, in 1981. This 20 year celebration as well as current reform processes within the OAU invite reflection about the provisions of the African Charter.

The Centre for Human Rights, University of Pretoria, organised a conference to address this topic. The conference took place from 26 to 28 March 2001. The title of the conference 'The future of the African regional human rights system' indicates its aim — to assess the need for reform of the African human rights system. This issue contains papers delivered at the conference.

Christof Heyns and Shadrack Gutto provide two perspectives on the question whether the Charter is in need of reform. Thereafter, Kenneth Acheampong and Rachel Murray discuss the substantive rights in the Charter, and possibilities for reform. The reform of procedural aspects of the Charter is considered in the contributions by Chidi Odinkalu, Julia Harrington and George William Mugwanga. Finally, Andreas O'Shea provides a critical reflection on the Protocol establishing the African Court on Human and Peoples' Rights.

In the recent developments section, Evarist Baimu provides an introduction to the African Union and its potential role in respect of human rights. The Constitutive Act of the African Union is reprinted in full.

The next issue of the *Journal*, due March 2002, will partly be devoted to the following topics: HIV/AIDS and human rights in Africa, and the establishment of the Committee implementing the African Charter on the Rights and Welfare of the Child. We also encourage the submission of shorter contributions discussing human rights related cases recently decided by domestic African courts. Contributions on these issues should reach the editors by 31 December 2001.

The financial assistance of the European Union towards the publication of this *Journal* is gratefully acknowledged.

Further information on human rights in Africa and copies of African human rights treaties are available on the Centre's web site, http://www.up.ac.za/chr

AFRICAN HUMAN RIGHTS LAW JOURNAL

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

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1 Introduction

The African regional human rights system, created under the auspices of the Organisation of African Unity (OAU), is constituted primarily by the following instruments: The African Charter on Human and Peoples' Rights of 1981[1] (African Charter or Charter), which created the African Commission on Human and Peoples' Rights (African Commission or Commission); the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969;[2] and the African Charter on the Rights and Welfare of the Child of 1990.[3] The African Commission monitors compliance by state parties with the African Charter, *inter alia* in terms of their Rules of Procedure[4] and in terms of the Reporting Guidelines for State Reports.[5] Once in force, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 1998[6] (the African Human Rights Court Protocol) will create an African regional human

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1 OAU Doc OAU/CAB/LEG/67/3/Rev 5.

2 OAU Doc CAB/LEG/24.3.

3 OAU Doc CAB/LEG/153/Rev 2.

4 ACHPR/RP/XIX.

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

6 OAU/LEG/MIN/AFCHPR/PROT (III).

rights court. The foundational document of the OAU is its Charter of 1963.[7] The OAU itself is in the process of being replaced by the African Union (AU).[8]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 Areas of possible reform of the Charter system

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

2.1 The normative provisions of the African Charter

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

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

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

14 Art 5.

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

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

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

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

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

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

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

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

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18 Women's rights are grouped with children's rights in art 18(3), suggesting that the role of women is confined to that context. For a discussion, see MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40. The language of the Charter is also strongly male oriented. Only the masculine form is used throughout. Art 42 provides for the election of a 'Chairman' and a 'Vice-Chairman'.

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

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

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

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

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

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

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

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

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

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

26 n 25 above, para 69.

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

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

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

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

2.2 Enforcement mechanisms created by the Charter and the Protocol

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

a The Commission

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

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

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

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

31 Arts 47–54.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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37 Viljoen (n 36 above) 154.

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

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

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

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

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

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

b The Court

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

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

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

43 For commentary on the creation of the Court, see GJ Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431; A Stemmet 'A future African Court for [sic] Human and Peoples' Rights and domestic human rights norms' (1998) 23 *South African Yearbook of International Law* 233; J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256; NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45 and Mutua (n 39 above). See also Murray (n 33 above) 27.

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

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

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

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

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

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

[44] Naldi & Magliveras (n 43 above) 435.

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

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

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

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

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45 Udombana (n 43 above) 90.

46 Mutua (n 39 above) 354.

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

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

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

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

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

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

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

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

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

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

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

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

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[50] Art 5(1).

In respect of states that have made the additional declaration in terms of article 34(6), individuals and certain NGOs[51] will have 'direct' access to the Court. 'Direct' in this context presumably means that they will be allowed to bypass the Commission. Granting direct access to individuals to the Court provides a high — and many will say too high — level of protection to the individual, which could be seen as threatening to state sovereignty, and result in states not making the additional declaration.

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

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

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

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

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

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

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

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

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

2.3 Other possible reforms

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

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

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

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

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

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

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

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

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

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

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

3 Conclusion

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

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

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

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

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

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

AFRICAN HUMAN RIGHTS LAW JOURNAL

The reform and renewal of the African regional human and peoples' rights system

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1 Introduction

Every social institution, like every living organism, undergoes changes necessitated either by subjective self-will and initiative or by objective circumstances and pressures lying outside of the social institution or living organism itself. The point is therefore not whether reform or change is desirable. The question to be asked relates to the extent of the change and whether the reform or change embarked upon leads to the renewal and reinvigoration of the institution, or to degeneration and ruin. The Organisation of African Unity[1] (OAU) and its human and peoples' rights system have not remained static since their establishment. However, to date changes within the African human rights system, though significant, remain minimal compared to the current initiative to qualitatively transform the OAU and to re-invent it as the African Union (AU).

This contribution comments briefly on the African Charter on Human and Peoples' Rights[2] (African Charter or Charter) and its institutional mechanisms within the broader context of the African human rights

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1 Established under the Charter of the Organisation of African Unity (OAU Charter), adopted by the Summit Conference of Independent African States, Addis Ababa, Ethiopia, on 25 May 1963, reprinted in (1963) 2 *International Legal Materials* 766. There were 32 independent African states at the time.

2 Adopted by the 18th Assembly of the Heads of State and Government of the OAU, Nairobi, Kenya, 26 June 1981; entered into force on 21 October 1986.

system. The unnecessary duplication of enforcement mechanisms is pointed out and the changes within the OAU and its human rights system are reviewed and criticised. A case is made for rationalisation of the various treaties and instruments and the mechanisms for their enforcement. The central argument is for mainstreaming the human rights system within the principal organs of the AU in order to strengthen the system. It is pointed out that to achieve this purpose, a special amendment, by way of a Protocol, to the Constitutive Act of the African Union (Constitutive Act)[3] would be necessary. The failure to mainstream the African human rights system within the OAU partly explains the weaknesses that have been experienced in the implementation and enforcement of the African regional human rights instruments. Failure to anchor the African human rights system as a principal instrument of the newly created AU is likely to reproduce the marginalisation of the collective protection and promotion of human and peoples' rights on the continent.

2 Recent developments in the African human rights system

A distinction may be made between the broader African human rights system and the narrower African Charter and the institutional machinery for its implementation and enforcement, the African Commission on Human and Peoples' Rights (African Commission or Commission). The reason for this distinction rests on the fact that there are a number of African regional human and peoples' rights instruments or generalised instruments that incorporate important rights issues but which do not fall directly within the promotion and protection mandates of the Commission.[4] Notable instruments are the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969,[5] the African Convention on the Conservation of Nature and Natural Resources of 1968; the African Charter on the Rights and Welfare of the Child of

[3] Approved in principle by the Declaration on the Establishment of an African Union that was adopted at the 4th extraordinary session of the Assembly of Heads of State and Governments, Sirte, Libya, 9 September 1999. The Constitutive Act of the AU entered into force on 26 May 2001 during the 38th anniversary of the establishment of the OAU. The Constitution of the AU is the Constitutive Act of the African Union adopted by 50 Heads of State and three Heads of Government at Lomé, Togo on 11 July 2000. Morocco was the only independent African state not represented since it suspended its participation in the OAU in 1981 in protest against the OAU's official recognition of the right of the Sahrawi people to self-determination.

[4] Art 45 African Charter.

[5] Adopted on 10 September 1969, entered into force on 20 June 1974, OAU Doc CAB/LEG 24.3.

1990,[6] the Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa of 1991;[7] and the OAU Convention on the Prevention and Combating of Terrorism of 1999.[8]

Even though some aspects of the above instruments have direct bearing on several rights recognised in the African Charter,[9] the present provisions relating to interpretation and application of the African Charter only mandate the Commission to 'draw inspiration from'[10] or 'take into consideration'[11] international law in respect of human and peoples' rights. The position of these regional instruments and other international human rights principles, norms and treaties within the African Charter enforcement mechanism could be enhanced with the entry into force of the Protocol on the Establishment of an African Court on Human and Peoples' Rights (the Court) and its subsequent establishment and operation. There is a jurisdictional anomaly between the mandate of the Commission and that of the Court. Unlike the wording of the African Charter in respect of the Commission's mandate, the Protocol defines the jurisdiction of the Court as follows:

> Article 3: Jurisdiction
> (1) The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned.
> (2) In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.
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> Article 7: Sources of Law
> The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned.

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6 Adopted in July 1990, entered into force on 29 November 1999, OAU Doc CAB/LEG 153/REV 2. The Children's Charter is reprinted in C Heyns (ed) *Human rights law in Africa 1997* (1999) 38.

7 Adopted at Bamako, Mali, 29 June 1991, reprinted in (1991) 30 *International Legal Materials* 773.

8 Adopted by the 35th ordinary session of the Assembly of Heads of State and Government, Algiers, Algeria, 14 July 1999.

9 For example, the Bamako Convention would greatly invigorate the interpretation of art 24 of the African Charter that provides for the right of all peoples to a general satisfactory environment favourable to their development. Similarly, certain rights and obligations provided for in the OAU Refugee Convention fall within the scope of art 12 of the African Charter that provides for the right to seek and obtain asylum as well as the injunction against non-expulsion of non-nationals. The Refugee Convention is, however, operationalised through the OAU Bureau for Refugees, Displaced Persons and Humanitarian Affairs which hardly connects with the African Charter enforcement regime.

10 Art 60 African Charter.

11 Art 61 African Charter.

Observers have commented on some aspects of the more expansive jurisdiction of the Court as compared to that of the Commission.[12] In the interest of greater protection and promotion of human and peoples' rights on the continent, it is my opinion that the relevant provisions in the Charter be revised so as to bring it in line with the positive approach in the Protocol. In other words, the anomaly should not be read to narrow the more recent appreciation and formulation in the Protocol. As Botswana's Appeal Court correctly observed in a case about the significance of ratifying the African Charter, there is a presumption that when states sign or ratify treaties or human rights instruments they signify their intention to be bound by and to adhere to the obligations arising from such treaties or human rights instruments even if they do not enact domestic legislation to effect domestic incorporation.[13] In other words, African states cannot in good faith argue that the regional instruments identified above that do not form part of the African Charter do not bind them or have legal consequences where they are relevant to specific rights and freedoms. To ignore the norms in binding instruments simply because they do not formally form part of the African Charter would be tantamount to reneging on the obligation to recognise the instruments entered into freely and in good faith.[14]

The duplication of enforcement mechanisms within the African human rights system is rather unfortunate and disturbing. For example, it does not make sense, given the resource constraints in Africa, that an instrument such as the African Charter on the Rights and Welfare of the Child, should have its own enforcement mechanism that duplicates the enforcement mechanism under the African Charter.[15] The rights and freedoms of children, although elaborated and expanded in the special children's charter, can easily be interpreted and enforced through the African Commission, and in future through the African Human Rights Court

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12 J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256 264; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 12 *Human Rights Quarterly* 342; I Osterdahl 'The jurisdiction *ratione materiae* of the African Court on Human and Peoples' Rights: A comparative critique' (1998) 7 *Review of the African Commission on Human and Peoples' Rights* 132 136.

13 *Attorney-General v Dow* 1994 6 BCLR 1 (Botswana), *per* Ammisah JP 27–30 and Aguda JA 43–47.

14 C Anyangwe 'Obligations of the states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625 630.

15 Art 32 of the Children's Charter establishes an African Committee of Experts on the Rights and Welfare of the Child. The Committee has a promotion and protection mandate similar to that of the African Commission, art 42. The protection mandate includes examining periodic reports by states (art 43) and receiving and determining complaints by individuals and groups as well as intestate complaints (art 44). Note that the complaints are referred to as 'communications' in both the African Charter and the Children's Charter.

as well. Similarly, the enforcement of aspects of the OAU Refugee Convention ought to be connected to the enforcement of the African Charter. Compared to many states in the world, both industrial and underdeveloped, African states are generally considered to be exemplary in the enforcement of international and regional norms and standards applicable to refugees. Despite this, there is limited scope for refugees and asylum seekers to resort to any of the African regional enforcement mechanisms to protect their rights in case of violations or threatened violations.

There have been other notable developments within the OAU and the human rights system in the pre-AU era that call for a thorough re-examination of the African human rights system within the new AU. At the OAU, there was the establishment of the somewhat moribund Mechanism for Conflict Prevention, Management and Resolution in 1993[16] and the formal entry into force on 12 May 1994 of the treaty establishing the African Economic Community (AEC).[17] The African Charter mechanism has also somehow reinvigorated itself by, among others, being sensitive to the need for balanced gender representation on the Commission.[18] From 1987 to the early 1990s, the Commission was composed only of men, many of them having limited appreciation of the disproportionate negative impact of human rights denial and violations on women and female children. This little but significant change was effected in response to strong representation from civil society.[19] The Commission has since moved on and has initiated an important process of reinforcing the African Charter with a Protocol on women's rights.[20] With the intervention of the OAU Secretariat, the

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16 Declaration on the Establishment within the OAU of the Mechanism for Conflict Prevention, Management and Resolution, adopted by the Assembly of the Heads of State and Government of the OAU at the 29th ordinary session in Cairo, Egypt, 28–30 June 1993. On the background to the institution, see BG Ramcharan 'The evolving doctrine of democratic legitimacy' (1998) 60 *Review* 182. For a critical comment on the institution see SBO Gutto 'The new Mechanism of the Organization of African Unity for Conflict Prevention, Management and Resolution, and the controversial concept of humanitarian intervention in international law' (1996) 113 *South African Law Journal* 314 and in (1996) 4 *CODESRIA Bulletin* 15; PM Mweti 'The Organization of African Unity and its role in regional conflict resolution and dispute settlement' (1999) 19 *Boston College Third World Law Journal* 578. See also CJ Bakwesegeha 'The role of the OAU in conflict prevention, management and resolution' (special issue, 1995) *International Journal of Refugee Law* 207.

17 Adopted in Abuja, Nigeria, on 3 June 1991, reprinted in (1991) 30 *International Legal Materials* 1241.

18 In June 2001 the Commission of 11 members is composed of seven men and four women. The women are Julienne Ondziel-Gnelenga (Vice-Chairperson), Florence Butegwa, Jainaba Johm and Vera Chirwa.

19 EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 16.

20 Draft Protocol to the Charter on the Right of Women of Africa adopted by the Commission at its 26th ordinary session held in Kigali, Rwanda, 1–15 November 1999, DOC/OS(XXVI)125.

Commission's Draft Protocol has been embraced by the OAU and has been elaborated and extended.[21]

Another improvement initiated by the Commission involved the revision of its Rules of Procedure in 1995.[22] This enabled the Commission's decisions and recommendations on specific complaints or communications to be published and not hidden in secrecy under the so-called 'confidentiality' clauses in the African Charter[23] and the original Rules of Procedure. Prior to this, the decisions on specific complaints were clouded in secrecy. The quality of the Commission's decisions or 'jurisprudence' improved as a result of the revision of the Rules of Procedure as the commissioners became aware that their work is subject to public scrutiny.[24]

The Commission also interpreted its mandate broadly and progressively by initiating the internationally recognised special rapporteurs mechanism that is not specifically provided for in the African Charter.[25] So far there are the following three Special Rapporteurs:

- the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions (appointed in 1994);[26]
- the Special Rapporteur on Prisons and Conditions of Detention in Africa (appointed in 1996);[27]
- the Special Rapporteur on Women's Rights in Africa (appointed in 1999).[28]

To date, only the Special Rapporteur on Prisons has proved effective, thus underscoring the important principle that the effectiveness of any law or institution is not only dependent on the legal instrumentality and financial resources alone — the expertise and commitment of the people in charge are equally critical. The Commission ought to seriously consider the possibility of appointing independent experts as special rapporteurs, in cases where expertise is lacking within the Commission

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21 See OAU Doc CAB/LEG/66.6 of 13 September 2000, Annex A. The Protocol shall only acquire legal status once it is adopted by a meeting of the Assembly of Heads of State and Government or its successor authority under the AU. For an analysis of the Draft Protocol, see MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40.

22 At its 18th ordinary session held in Praia, Cape Verde, 12–11 October 1995.

23 Art 59 African Charter.

24 The reports on the decisions of the Commission appear in, amongst others, *Review of the African Commission on Human and Peoples' Rights* (established by the Commission in 1991); Institute for Human Rights and Development in Africa, *Compilation of decisions on Communications of the African Commission on Human and Peoples' Rights: Extracts from the Commission's Activity Reports 1994–1999* (2000) and the *International Human Rights Reports* (since 1996).

25 Art 45 African Charter.

26 See Eighth Annual Activity Report of the African Commission, Annex VII.

27 See Tenth Annual Activity Report of the African Commission, Annex VII.

28 See Eleventh Annual Activity Report of the African Commission.

or in instances where the work involved may be such that the commissioners, who are all part-time, may not have the time to accomplish the complex and protracted visits and inquiries expected of special rapporteurs.

The location of the International Criminal Tribunal for Rwanda[29] in Arusha, Tanzania, and the proposed establishment of the Special International Tribunal in Freetown, Sierra Leone[30], although not strictly 'African' initiatives, are nonetheless also significant in appreciating the current status of responses to serious and gross violations and denial of human and peoples' rights in Africa. As others have argued, the trials and the resultant jurisprudence of the Rwandan tribunal in Arusha have some radiating effect on the continent.[31] In my opinion these experiences ought to point to the direction as to where Africa should go with the reform and renewal of the African human rights system under the new AU. There is a pool of expertise developing within the continent that could be tapped into to strengthen the regional human rights enforcement mechanisms.

3 The case for constitutional mainstreaming of the African human rights system within the AU

The movement from the OAU to the AU is a historical imperative. The world to which Africa belonged in the early 1960s when the OAU was created was a very different one from the world at the beginning of the twenty-first century. Not only have the objective material conditions of the world been transformed, but subjective factors such as values and the relations among people and nations have also undergone some qualitative change, both positive and negative. The OAU, despite its many weaknesses, failures and challenges, has accomplished some of its original purposes and realised the principles connected with those purposes. For example, one of its purposes was 'to eradicate all forms of colonialism from Africa'.[32] This was informed by the principle of absolute

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29 Established under the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, UN SC Res 955 of 8 November 1994.

30 Special Court for Sierra Leone, UN SC Res 1315(2000) of 14 August 2000. See background analysis and critique of the political process of establishing the Court in A Tejan-Cole 'The special court for Sierra Leone: Conceptual concerns and alternatives' (2001) 1 *African Human Rights Law Journal* 107; A Tejan-Cole 'Painful peace: Amnesty under the Lome Peace Agreement on Sierra Leone' (2000) 9 *Review of the African Commission on Human and Peoples' Rights* 238.

31 F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 18 32.

32 Art II(d) OAU Charter.

dedication to the total emancipation of African territories which were still dependent.[33] In fact, the particular purpose and principle in question were elevated to the status of peoples' rights and the obligation of the independent states in the African Charter.[34] If 'colonialism' is to be interpreted to mean classical colonialism by European states and European settler population it can be said today that this task is formally accomplished, save for the few small islands in the Indian and Atlantic oceans that are adjacent to the African continent and which could form the basis for legitimate African claims.

The rest of the original purposes and the principles informing them were, and remain, long-term or even eternal objectives and challenges. Forging unity and solidarity among African states and peoples,[35] intensifying co-operation and achieving better life for the peoples of Africa,[36] defending sovereignty and territorial integrity and independence[37] and promoting international co-operation, having due regard to the Charter of the United Nations (UN) and the Universal Declaration of Human Rights,[38] are all continuing and continuous objectives and challenges. And, naturally, there are additional new challenges that could not have been anticipated in the early 1960s.

The OAU grappled with the challenge of creating a viable regional economic and social institution that could have complemented the faltering sub-regional political and economic arrangements on the continent.[39] Although on paper the AEC was realised when its Constitution theoretically 'entered into force' as far back as 12 May 1994,[40] the AEC has not existed in practice. It is therefore important to appreciate the fact that the new AU is not a sudden invention by some so-called 'maverick' African leaders but rather a culmination of long-term efforts by all African countries to link the living-but-not-very-healthy OAU with the existing-on-paper-only AEC,[41] with a view to creating a new single organic institution that is relevant to current challenges faced by Africa.

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33 Art III(6) OAU Charter.

34 Art 20 African Charter.

35 Art II(a) OAU Charter.

36 Art II(b) OAU Charter.

37 Art II(c) OAU Charter.

38 Art II(e) OAU Charter.

39 Such as the Economic Community of West African States (ECOWAS), the revived East African Community (EAC), the Southern African Development Community (SADC), the Common Market for Eastern, Central and Southern Africa (COMESA).

40 n 17 above.

41 Some commentators have dubbed the AEC and its organs such as the African Court of Justice 'stillborn'. See J Oloka-Onyango 'Gender and conflict in contemporary Africa: Engendering the mechanism for the promotion of human rights and conflict prevention' (2000) 9 *Review of the African Commission on Human and Peoples' Rights* 1 12.

Notwithstanding the laudable efforts made so far to construct the AU as an integrated political, economic, social, cultural and legal institution capable of pushing African interests and agenda within the increasingly hostile world, it is more than apparent that there has been little thinking in the direction of mainstreaming the human rights system into the new entity. The African human rights system, especially its central instrument, the African Charter and its operational institutions, developed incrementally over the decades as subsidiary organs of the OAU. No specific constitutional changes to the OAU Charter were effected by way of amending protocols. This meant that the African human rights system remained organically linked to and operated within the framework of the OAU without necessarily becoming principal organs of the OAU. By analogy to the constitutional arrangements of and around the UN, it could be said that the African human rights system fell within the 'subsidiary organs'[42] and not the 'principal organs'.[43]

It is quite evident from the Constitutive Act of the African Union that the principal organs of the OAU and the AEC are directly incorporated, even though with some necessary adjustments, while the institutions within the African human rights system are not. The following nine principal organs of the AU are entrenched within the Constitutive Act:[44]

- the Assembly of the Union;
- the Executive Council;
- the Pan-African Parliament;
- the Court of Justice;
- the Commission;[45]
- the Permanent Representatives Committee;
- the Specialised Technical Committees;
- the Economic, Social and Cultural Council; and
- the Financial Institutions.

The provisions establishing the above enumerated organs are followed by a general provision for '[o]ther organs that the Assembly may decide to establish', in other words subsidiary bodies.

When the UN succeeded and superceded the League of Nations, the statute of the previous Permanent Court of International Justice was expressly incorporated as an integral part of the UN Charter and was annexed to the UN Charter.[46] This direct approach to incorporation, also replicated in the incorporation of the International Trusteeship

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42 Art 7(2) UN Charter.

43 Art 7(1) UN Charter.

44 Arts 5, 6, 10, 14, 17, 18, 19, 20, 21 & 22.

45 The 'Commission' contemplated in the Constitutive Act is the Secretariat of the Union (arts 1 & 20), the successor to the OAU's Secretariat, not the African Commission on Human and Peoples' Rights.

46 Arts 7(1) & 92–96 UN Charter and art 1 Statute of the ICJ.

System and the Trusteeship Council,[47] created legal, institutional and operational certainty that ought to be emulated with regards to the AHPRS in the construction of the nascent AU.

It is appropriate, but not sufficient, to make reference to the African human rights system in the 'Objectives'[48] and the 'Principles'[49] sections of the Constitutive Act. Such reference ought to be followed by the concrete incorporation of the African human rights system, especially its principal instruments and operational organs, within the AU's constitutional framework. Failure to do so has left the system within the ambit of the general category of 'other organs that the Assembly may decide to establish'. The African Commission has experienced many problems, including a lack of meaningful resourcing, especially financial and administrative support from the OAU. This is partly because it was viewed to be subsidiary to the principal mission of the OAU. Africa should not repeat this mistake.

4 Conclusion

The African human and peoples' rights system is broader than the African Charter system. The various regional human rights instruments or regional instruments incorporating provisions relevant to the promotion and protection of human and peoples' rights on the Africa continent have unfortunately not been invoked with a view to strengthening African initiatives in responding to denial and violations of human and peoples' rights in Africa. This is despite the fact that the African Charter is one of the most comprehensive international and regional human rights instruments covering civil, political, social, economic and cultural rights. The envisaged establishment of an African Court on Human and Peoples' Rights with a broader mandate than that of the African Commission will reach out to other international and regional human rights instruments. This is a welcome development.

As Africa moves from the OAU to the AU, a historic and golden opportunity is being missed — the opportunity to incorporate the African human rights system within the principal constitutional organs of the new AU. Before the AU becomes a living reality with entrenched traditions, it is suggested that the African human rights system be mainstreamed within the AU's constitutional structure. This could be done by way of a protocol that would be similar to the way in which the International Court of Justice and the trusteeship system and Trusteeship Council were incorporated within the UN in 1945.

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47 Arts 7(1), 75–85 & 86–91.

48 Arts 3(e) & (h).

49 Arts 4(l)–(o).

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Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights

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1 Introduction

Regardless of the shortcomings of the African Charter on Human and Peoples' Rights (African Charter or Charter), the efforts made to provide Africa with a continental human rights instrument are of such a commendable nature that one could easily be forgiven if one glosses over the fact that these efforts commenced in 1979, the year in which three African governments, particularly known for their egregious violations of human rights, came to a very welcome end. These were the governments of Idi Amin of Uganda, Macias Nguema of Equatorial Guinea and Jean-Bedel Bokassa of the then Central African Empire, now the Central African Republic.[1] Surely, the Organisation of African Unity (OAU) needed a continental human rights instrument in addition to those of the International Bill of Human Rights and its offshoots, to reinforce the human dignity and worth of Africans, which these repressive governments (among others that included the infamous regime of apartheid South Africa) had disregarded with utter impunity.

The framers of the African Charter made a noble beginning in providing Africa with a mechanism for ensuring the continental promotion and protection of human rights in Africa. In providing for the

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1 Amin was in office from 1971 to 1979, Nguema from 1968 to 1979 and Bokassa from 1965 to 1979.

Charter's amendment, they took cognisance of the fact that the Charter may have to be reformed in the future.[2] This paper analyses the possible reformation of the substance of the Charter in respect of civil and political rights and socio-economic rights.

2 The backdrop of the Charter's reformation

Any attempt to reform the substance of the African Charter, as with any other human rights instrument, should be posited upon or set against the backdrop of the principles of the concept of human rights. This may sound trite. However, it is worth keeping in mind when one seeks to undertake an exercise of reforming a document such as the African Charter. To start with, the Preamble of the OAU Charter reaffirms that the Charter of the United Nations (UN) and the Universal Declaration of Human Rights (Universal Declaration) provide a solid foundation for peaceful and positive co-operation among states. These two documents are referred to as worthy of due regard in the promotion of international co-operation in substantive article 2(e) of the OAU Charter. This co-operation aims at, amongst others, the promotion of respect for human rights. While the UN Charter makes copious references to the expression 'fundamental human rights',[3] the landmark Universal Declaration gives flesh and viscera to the dry bones of this expression by detailing what constitutes fundamental human rights. Thus, the OAU Charter was a precursor of the protection and promotion of human rights in Africa.

Any possible reform of the African Charter needs to be seen in the context of a number of issues which will now be discussed.

2.1 Underpinning philosophy of the Charter

According to the OAU, the drafting of the African Charter was predicated upon the following vital principles:[4]

- the specificity of African problems with regard to human rights;
- the importance of economic, cultural and social rights to developing countries;
- the total liberation of Africa from foreign domination;
- the need to eradicate apartheid;
- the link between human and peoples' rights;
- the need for a new economic order, particularly the right to self-determination.

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2 Art 68.

3 For specific references to human rights, see the following provisions of the UN Charter: the Preamble and arts 1(3), 13(1)(b), 55(c), 62(2), 68 & 76(e).

4 Rapporteur's Report OAU Doc CM/1149(XXXVII) Annex 1 p 3 paras 10 & 11.

In expatiating these principles, the Preamble of the African Charter takes into consideration the OAU Charter's stipulation that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. As discussed above, this stipulation undergirds the concept of human rights in general. These essential objectives are values, respect for which constitutes an essential precondition for the enjoyment of human rights everywhere. It is, thus, laudable for African peoples to strive to achieve their legitimate aspirations through respect for these values.

In other paragraphs, the Preamble of the African Charter highlights these principles by either recognising the imperatives of human rights in general or putting special emphasis on the problems of Africa with regard to human rights. In doing the latter, it reaffirms the solemn pledge made by African states in article 2 of the OAU Charter to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa and to promote international co-operation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

To this is tied the duty to achieve the total liberation of Africa and to secure the dignity and genuine independence of Africa through the elimination of colonialism, neo-colonialism, apartheid and Zionism. Dignity and genuine independence are also to be attained through the dismantling of all foreign military bases and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions.

Significantly, the Preamble of the African Charter takes into consideration the virtues of African peoples' historical tradition and the values of African civilisation, which should not only inspire but also characterise the African peoples' reflection on the concept of human and peoples' rights.[5] This is to emphasise that an African imprint on the concept of human rights is no anathema and the Charter therefore had to reflect this. According to the last paragraph of the Charter's Preamble, this imprint is highlighted through a firm conviction of African states to protect and promote human and peoples' rights on account of the importance traditionally attached to these rights and freedoms in Africa.

2.2 The concept of human rights

The African Charter recognises in its Preamble that '. . . fundamental human rights stem from the attributes of human beings, which justifies their national and international protection . . .'. This is the context in which Jacques Maritain, the modern Roman Catholic exponent of the concept of human rights, forcefully contends that the expression 'the

[5] Para 51 Preamble to the African Charter.

dignity of the human person' means nothing if it does not signify that the human person has the right to be respected for the very fact that he is a human being.[6] Thus, discussions on the African Charter's reformation should be posited on the general definition of human rights as given by the UN, notwithstanding the ideological and philosophical expressions of disquiet to the contrary. This is the context in which we can put the following statement made by Boutros Boutros-Ghali, in his capacity as the UN Secretary-General, at the 1993 World Conference on Human Rights held in Vienna:[7]

> The human rights that we proclaim and seek to safeguard can be brought about only if we transcend ourselves, only if we make a conscious effort to find our common essence beyond our apparent divisions, our temporary differences, our ideological and cultural barriers. In sum, what I mean to say, with all solemnity, is that the human rights we are about to discuss here at Vienna are not the lowest common denominator among all nations, but rather what I should like to describe as the 'irreducible human element', in other words, the quintessential values through which we affirm together that we are a single human community. As an absolute yardstick, human rights constitute the common language of humanity.

This 'common language of humanity' can take on board various ideological persuasions and still maintain its essence, which is to protect the human dignity and worth of the human person. The Universal Declaration was a product of such a meeting of ideological minds. Charles Malik, one of the principal drafters of that instrument has, thus, made the following comment in respect of the drafting of the Universal Declaration:[8]

> The genesis of each article, and each part of each article, was a dynamic process in which many minds, interests, backgrounds, legal systems and ideological persuasions played their respective determining roles.

This document has gone beyond the protestations made at the time of its adoption by its authors that it does not purport to be a statement of law or of legal obligation. True, as a resolution of the UN, it was deemed as having only the force of recommendation. Yet, through the repeated practices of states, including its incorporation into national constitutions, generally the supreme law of nations,[9] it is now generally perceived as

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6 J Maritain *The rights of man and natural law* (trans D Anson) (1943) 65.

7 Address by the former UN Secretary-General Boutros Boutros-Ghali at the opening of the World Conference on Human Rights at Vienna, Austria, on 14 June 1993. See UN Doc A/CONF 157/22, 12 July 1993.

8 See J Humphrey *No distant millennium – the international law of human rights* (1989) 150.

9 For example, see the Constitutions of Benin (1990), Burkina Faso (1991), Burundi (1992), Cameroon (1972), Central African Republic (1995), Chad (1993), Comoros (1992), Congo (1992), Cote D'Ivoire (1960), Equatorial Guinea (1991), Gabon (1991), Guinea (1990), Mali (1992), Mauritania (1991), Niger (1992), Rwanda (1991), Senegal (1992), Togo (1992), and Zaire (Democratic Republic of Congo, 1978), which expressly refer to the UDHR. See C Heyns (ed) *Human rights law in Africa 1996* (1996).

having ossified into customary international law and, thus, attained the force of law.[10] Thus, at the end of the day, the proffering of different ideological underpinnings of human rights does not need to be fatal to an attempt to reform the African Charter. What matters is that in the reformation process, a determined effort should be made to produce a synthesis of these ideological perceptions of the concept of human rights that upholds the essence of this concept. A UN publication has succinctly summed this up:[11]

> Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.

The issue as to what human rights are continues to bedevil the concept of human rights, though not with the same intensity as in the past.[12] The debilitating Cold War between the West and the East exacerbated the ideological and philosophical tensions that clouded a clear articulation of the concept of human rights. However, thanks largely to the fall of the Berlin Wall in 1989, these tensions have abated considerably. There exists now a more solid international effort to secure human dignity that, in spite of all these tensions, has always been considered to be the quintessence of the concept of human rights. As stated by Humphrey, one of the authors of the Universal Declaration, 'Human rights are those rights without which there can be no human dignity.'[13] Among the interdependent values that have been noted as being relevant in providing the fulcrum of human dignity are the following: respect, power, enlightenment, well-being, health, skill, affection and rectitude.[14] Any reformation of a human rights instrument such as the African Charter that takes no account of these values will not be worth the effort. This is because entailed in the expression 'human dignity' is respect for the person, honour, and moral worth of human beings. This is an important consideration in the task of the reformation of the African Charter.

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10 See *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v Iran)* (24 May 1980) ICJ Reports 3 42.

11 See United Nations *Human rights: Questions and answers* (1987) 4.

12 See eg M Cranston 'What are human rights?' in W Lacqueur & B Rubin (eds) *The human rights reader* (1979) 21; TW Wilson 'A bedrock consensus of human rights' in AH Henkin (ed) *Human dignity: The internationalisation of human rights* (1978) 61; JD van der Vyver 'The doctrine of human rights: Its historical and philosophical foundation' in D Brand *et al* (eds) *From human wrongs to human rights (Part IV)* (1995) 49; T van Boven 'Distinguishing criteria of human rights' in K Vasak (gen ed) *The international dimensions of human rights'* (1982) 49; and HJ Steiner & P Alston *International human rights in context – Law, politics, morals* (1996) 160.

13 n 8 above 20.

14 See MN Shaw *International law* (1986) 173.

2.3 Universality, interdependence and indivisibility of human rights

An equally important context in which the reformation of the African Charter should be posited is the general understanding that all human rights are universal, interdependent and indivisible. This is regardless of the fact that in translating the provisions of the Universal Declaration into treaty form in 1966, the UN ended up with two covenants, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). These Covenants do, in parallel words in their Preambles, acknowledge the necessary linkage of all human rights.[15] In 1968, two years after the adoption of these Covenants, the international community again emphasised the indivisibility of civil and political rights and economic, social and cultural rights. It did so through the Proclamation of Teheran.[16] Paragraph 13 of this Proclamation states in part:

> Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.

In 1993, the international community reiterated this perception of all human rights at the Vienna World Conference on Human Rights. In paragraph 5 of the Vienna Declaration and Programme of Action, adopted unanimously by delegates to the Conference, the international community stated:[17]

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

It follows from this that the reformation of the African Charter must take account of all human rights, that is civil and political rights, economic, social and cultural rights and solidarity rights in a holistic manner. The classic distinction between them is not always clearly made in theory and in practice.

The categorisation of human rights into different classes or generations, ascribed to the French jurist Karel Vasak,[18] does not import any rigid differentiation or compartmentalisation of human rights. Generally, the individual's enjoyment of civil and political rights is held to oblige

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15 In the third paragraph of the Preamble of both Covenants, the UN General Assembly recognises that in accordance with the Universal Declaration, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights.

16 Adopted by the International Conference on Human Rights of Teheran on 30 May 1968; reprinted in E Patel & C Watters (eds) *Human rights: Fundamental instruments and documents* (1994) 31.

17 UN Doc A/CONF 157/24, 25 June 1993.

18 n 12 above.

the state to do 'little more than to endure these entitlements'.[19] This is why these rights are considered negative rights, that is, freedom from state or governmental authority. In contrast, socio-economic rights are seen as 'positive rights', as their enjoyment calls for positive state or governmental action. However, there are times when some of these rights call for both restraint and action on the part of the government. One human right that suffices in bearing out this apparent contradiction is the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.[20] As a civil right, it theoretically demands only governmental forbearance.

However, the state has to actively ensure the realisation of this right. It must provide the public forum for such hearings. Where necessary, it must employ interpreters for the trial to proceed. Furthermore, it must ensure the independence and impartiality of tribunals or courts by, amongst others, selecting for judicial office individuals of integrity and ability with appropriate training or qualifications, securing by law the terms of office of judges, their independence, security, adequate remuneration, conditions of service and giving judges, whether appointed or elected, guaranteed tenure.[21] In short, as endorsed by the UN General Assembly:[22] 'It is the duty of each Member State [of the UN] to provide adequate resources to enable the judiciary to properly perform such functions', and also to provide the environment in which these functions may be performed without fear or favour, ill-will or affection.

2.4 Link to development

A salient aspect of the Charter's philosophy is its conviction, stressed in its Preamble, that it is essential to pay particular attention to the right to development, which is tied to the assertion of the indivisibility and association of civil and political rights and economic, social and cultural rights. The importance of this provision cannot be discounted considering the fact that the UN Declaration on the Right to Development was adopted on 4 December 1986, almost five and a half years after the adoption of the African Charter in 1981.

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19 S Marks 'Emerging human rights: A new generation for the 1980s' (1981) 33 *Rutgers Law Review* 435 438.

20 Art 14 ICCPR.

21 Principles 10, 11 & 12 of the Basic Principles on the Independence of the Judiciary adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan, Italy, from 26 August to 6 September 1985 and endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

22 As above, Principle 7.

2.5 Democracy

The last context in which the reformation of the African Charter should be placed is the concept of democracy. As it is said, 'human rights are tied to democracy'[23] and 'it is difficult to bypass a discussion of democracy in relation to human rights in the contemporary world'.[24] However, it is trite that a general agreement as to what constitutes democracy is lacking. Although generally there is a more consensual international approach towards human rights issues now than during the bleak days of the Cold War, nagging differences over such issues still remain. However, one can take solace in the fact that reference can be made to an International Bill of Human Rights, which spells out the norms generally agreed to as constituting human rights and which forms the genesis of a host of human rights instruments. There is nothing of that nature in respect of the concept of democracy; no one talks of an International Bill of Democracy.

Nevertheless, the concept remains universally popular. As Dahl notes:[25] 'In our times, even dictators appear to believe that an indispensable ingredient for their legitimacy is a dash or two of the language of democracy.'

Even General Pinochet described the political system in Chile during his notoriously repressive regime as being an 'authoritarian democracy'.[26] The nature of the language of democracy has been and continues to be a veritable source of ideological controversy for, as noted by Gitonga, '[m]ore often than not it (democracy) is used and defined in a self-interested, opportunistic and holier-than-thou fashion.'[27] Therefore, 'democracies' and 'democrats' come in all colours, shapes and sizes: Social democracy, Christian, liberal, popular, national popular democracy, African, Arab, progressive democrats, (simple) democrats, etc.[28]

General Abdulsalami Abubakar, a former military president of Nigeria, has said that '[I]t is the end of the Cold War and that now we are only one camp and that camp is democracy'.[29]

The parameters of this camp can be discerned from the reality that democracy and human rights have interlinked fates and may rightly be

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23 Steiner & Alston (n 12 above) 207.

24 Steiner & Alston (n 12 above) 659.

25 AR Dahl *Democracy and its critics* (1992) 2.

26 AK Gitonga 'The meaning and foundations of democracy' in WO Oyugi *et al* (eds) *Democratic theory and practice in Africa* (1988) 6.

27 As above.

28 As above.

29 BBC News Online, 11 April 1999. General Abubakar made this statement when he shared his thoughts on democracy and good governance with the international community in a British Broadcasting Corporation radio discussion programme on 11 April 1999. This was before he effected his pledge to hand over the reins of political power to a civilian government on 29 May 1999.

considered twins, though not identical.[30] Article 33(5) of the Constitution of Ghana of 1992 stresses this linkage in the following words:

> The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding those not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

The contention that fundamental human rights be considered inherent in a democracy also posits democracy on human dignity, the quintessence of human rights. This is the context in which Gitonga asserts: 'The quest for democracy is the quest for freedom, justice, equality and human dignity.'[31] These values, freedom, equality and justice are all necessarily entailed in the concept of human rights and, as indicated, find a common root in human dignity.

The Constitution of South Africa, 1996, notes this symbiotic relationship between the demands of democracy and human rights in section 7(1), the leading provision of chapter 2, titled 'Bill of Rights'. The section states:

> This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

At the Vienna World Conference on Human Rights, Boutros Boutros-Ghali highlighted the linkage and interplay between the concepts of human rights and democracy. He did so while expatiating on what he called the imperative of democracy. In his words, which for their germane relationship to our discussions we hereby quote extensively:[32]

> The imperative of democratisation is the last — and surely the most important — rule of conduct which should guide our work. There is a growing awareness of this imperative within the international community. The process of democratisation cannot be separated, in my view, from the protection of human rights. More precisely, *democracy is the political framework in which human rights can best be safeguarded*. This is not merely a statement of principle, far less a concession to a fashion of the moment, but the realisation that *a democracy is the political system which best allows for the free exercise of individual rights*. It is not possible to separate the United Nations promotion of human rights from the establishment of democratic systems within the international community.

In establishing these democratic systems through a reformation of the African Charter, we must take cognisance of the fact that what constitutes equality, freedom and justice, in democratic terms, is a matter determined both in the context of universal norms of human rights and the realities of specific jurisdictions. Any attempt to reform the African

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30 African Centre for Democracy and Human Rights Studies 'Human rights and democracy' (1992) 2 *African Human Rights Newsletter* 5.

31 n 26 above 2.

32 n 7 above (my emphasis).

Charter must very well appraise itself of universal norms of human rights. This underpins the obligation imposed on the African Commission on Human and Peoples' Rights (African Commission or Commission) by article 60 of the African Charter, to draw inspiration from the provisions of various African instruments on human and peoples' rights as well as other such instruments of the international community, such as the UN Charter and the Universal Declaration, in deciding the principles applicable to the interpretation of the African Charter.

The realities of African jurisdictions should also be taken into account in providing the political systems that best allow the free exercise of human rights. This should not be construed as giving those who have little or no respect for human rights a *carte blanche* to fashion such rights according to their whims and caprices. This is not a call to destroy the essence of any human right under the convenient guise of local realities. It is rather a reminder that a sincere effort should be made at the local level to provide a congenial atmosphere or environment for the realisation of human rights.

3 Civil, political, social and economic rights under the African Charter — A critique

3.1 Civil and political rights

Comments regarding civil and political rights in the Charter may better be appreciated in the context of the fundamental principles of human rights.

a Equality

The principle of equality and non-discrimination in the enjoyment of human rights is not limited to civil and political rights but underpins all human rights. As stated by the UN Human Rights Committee:[33]

> Non-discrimination, together with equality before the law and equal protection of the law without discrimination, constitutes a basic and general principle relating to the protection of human rights.

Articles 2 and 3 of the African Charter provide, in a constitutive manner, for this principle. While article 2 specifies the prohibited grounds of discrimination in human rights enjoyment, article 3 provides for the principle of equality before the law and the equal protection of the law.

The ideological and philosophical controversies over the concept of equality are legion. In the extreme, the term 'equality' has even been

[33] General comments of the Human Rights Committee on the non-discrimination clauses of the ICCPR (adopted on 9 November 1989). See J Möller 'Article 7' in A Eide *et al* (eds) *The Universal Declaration of Human Rights: A commentary* (1992) 115 129.

derided as completely vacuous.[34] In the main, the concept is perceived from two angles, the formal and the relative. Formal equality, which is also known as mathematical, absolute or numerical equality, stands for the proposition that all persons should be treated the same way in all respects. In the relative or substantive sense, it stands for what Aristotle refers to as 'equality proportionate to desert',[35] that is, differentiation in treatment proportionate to concrete individual circumstances.[36] Those opposed to the use of the concept of equality to ameliorate the circumstances of persons or groups of persons disadvantaged by invidious societal practices or inaction tend to favour the formal sense of the concept of equality. While this is the sense in which equality should be understood in the absence of any relevant differences between persons, this conception of equality can occasion tremendous injustice arising from invidious discrimination against certain persons on the basis of the societal group(s) to which they belong. It is for this reason that Dworkin, in noting that sameness of treatment does not always ensure true equality, cautions as follows:[37] 'We must take care not to use the Equal Protection Clause [of the 14th Amendment of the American Constitution] to cheat ourselves of equality.'

It is to avoid the danger of the formal sense of the concept of equality being used to do societal injustice that chapter 2 of the South African Constitution, 1996, titled 'Bill of Rights', goes beyond the concept of formal equality. In section 9(2), the Constitution states:

> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Provision is consequently made for special measures or affirmative action in respect of a wide range of people. The African Charter, on the other hand, is too restrictive as regards societal groups deserving of special measures of protection or advancement. In its article 18, it limits such measures to women, children, the aged and the disabled. These groups deserve such special measures but they are not the only ones that do. Africa's history, both past and contemporary, indicates clearly that some

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34 See P Westen 'The empty idea of equality' (1982) 95 *Harvard Law Review* 537. The thesis that equality is an empty idea has not gone unchallenged. See A D'Amato 'Is equality a totally empty idea?' (1983) 81 *Michigan Law Review* 600; K Greenawalt 'How empty is the idea of equality?' (1983) 83 *Columbia Law Review* 1167; and KL Karst 'Why equality matters' (1983) 17 *Georgia Law Review* 245.

35 *The politics of Aristotle* (Book V, i) (trans E Baker) (1946) 1301a.

36 In the International Court of Justice case of *South West Africa Cases (Second Phase)* 1966, Judge Tanaka stated, in his dissenting judgment: 'The principle of equality does not mean absolute equality, but recognises relative equality, namely, different treatment proportionate to concrete individual circumstances.' See I Brownlie (ed) *Basic documents on human rights* (1992) 568 596.

37 R Dworkin *Taking rights seriously* (1977) 239.

persons have been invidiously discriminated against and, thus, disadvantaged, on grounds such as race, national or ethnic origin and language. [38]

To sidestep the unavoidable controversy as to which groups should be included in a list of this nature, the African Charter could adopt section 9(2) of the South African Constitution. Coupled with article 2 of the Charter this would ensure the true application of the concept of equality and non-discrimination by the Charter. This, we submit, will give substantive meaning to the following contention:[39]

> The universal equality of all constitutes the central institution of human rights. It is understandable that, by virtue of its importance among human rights, equality is regarded as a virtue to be protected before any other.

b Fair trial rights

The right to have one's cause heard is a basic principle of justice. The African Charter provides for this right in article 7. However, it does so in a way that unduly limits the democratic ramifications of the right.

In spelling out the demands of the right, the article states that the right of every individual to have his cause heard 'comprises' of (a) the right of appeal, (b) the presumption of innocence, (c) the right to defence and (d) the right to a trial within a reasonable time. The use of the word 'comprises' tends to give an air of finality in respect of the demands of this right as listed by the Charter. This list is definitely not exhaustive of the imperatives of the right, especially with respect to criminal cases when a person's liberty is at stake.[40] The word 'include' could have been used to indicate the non-exhaustive nature of the imperatives of the right to have one's cause heard.

The word 'include' does appear in article 7(c), though. It grants an individual 'the right to defence, including the right to be defended by counsel of his choice'. This is not enough to spell out the demands of the right as indicated. The obligation that the African Charter places upon the African Commission to draw inspiration from international human rights instruments is just not enough to give the important right of having one's cause heard the weight that it deserves. Article 7 of the

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38 See KA Acheampong 'The African Charter and the equalisation of human rights' (1994) 12 *Scandinavian Human Rights Journal* 168.

39 I Szabo 'Historical foundations of human rights and subsequent developments' in Vasak (n 12 above) 38.

40 Other imperatives not itemised by the Charter and which relate to criminal cases include the following: the right to be informed promptly in a language that one understands of the nature and cause of the charge against him; the right of one to be given adequate time and facilities for the preparation of his defence; the right to be tried in a language that one understands or, if that is not practicable, to have the proceedings interpreted in that language; and the right to have legal counsel assigned to one by the state and at state expense if substantial justice would otherwise result, and to be informed promptly of this right.

Charter must, therefore, be amended with the insertion of the word 'include' to indicate that the imperatives of the right as given are only illustrative or a more detailed list of these imperatives must be given as appears in article 14 of the ICCPR and article 35 of the South African Constitution. Its current brevity subjects the substance of the right to ridicule.

The same can be said of the right to liberty and the security of one's person provided for by article 6 of the African Charter. It is not unknown in Africa for people to be incarcerated for political reasons conveniently dressed in the stifling garb of national security. This is especially so in the case of political opponents of governments who tend to be perceived and portrayed as criminal elements when all that they are doing is asserting their democratic right to differ with the policies of these governments. The risk is that one whose liberty is curtailed on such grounds could easily lose his most basic human right, the right to life. For that reason, it is submitted that article 6 should be amended in a way that expatiates its provision that 'in particular, no one may be arbitrarily arrested or detained'. Such expatiation should include the following:[41]

- Anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- Anyone deprived of his liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
- Anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.
- Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

c *Right to vote*

According to article 21(3) of the Universal Declaration,

> [t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections and shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The international community has reiterated this democratic basis as to governmental authority in article 25(b) of the ICCPR, which states that

41 Arts 9 & 10 ICCPR.

every citizen shall have the right and the opportunity, without unreasonable restrictions and in the absence of any of the prohibited grounds discrimination in respect of human rights,

> [t]o vote and be to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

The African Charter provides for this right in its article 13(1) as follows:

> Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

It needs not be gainsaid that in comparison with both the Universal Declaration and the ICCPR this right is vague in respect of the franchise. As article 13(1) stands, it panders to the desires of those who want to remain in political power permanently. It does not provide for periodic or genuine elections, which contribute to ensuring the accountability of governors to the governed, the ultimate political sovereign. The article's reference to 'freely chosen representatives' is no guarantee of the democratic exercise of the franchise. This is made even worse by the following rider to this expression: 'in accordance with the provisions of the law'. What law and whose law, one might ask? African governments, experience tells us, often do not appreciate electoral defeat and desperately hang on to power through all kinds of political gymnastics when all the democratic odds are heavily stacked against them. The article under consideration must be amended to take account of the provisions of the Universal Declaration and ICCPR referred to herein. This is the only way the OAU can provide the requisite leadership respecting this very troubled aspect of governance in Africa.

d Freedom of expression

Closely tied to the franchise is the right to freedom of expression. The basic functions that this right serves in a democratic society underlie the intimate relationship between the concepts of human rights and democracy. Thomas Emerson has cogently outlined these functions.[42]

> First, it is a means of assuring the individual a degree of personal self-fulfilment, enabling a person to realise his or her potentialities as a human being. Second, it is an essential process for the advancement of knowledge and the discovery of truth, providing an opportunity to hear all sides of a question and to test one's judgment by exposing it to conflicting views. Third, it is necessary in order to allow all members of the society to participate in public decision-making, furnishing them with the information and ideas vital in reaching a common judgment. And fourth, it is a method of achieving social change without resort to violence, thereby enhancing the prospects of a more adaptable and at the same time more stable society.

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42 TI Emerson 'Freedom for political speech' in B Marshall (ed) *The Supreme Court and human rights* (1982) 67.

Article 9 of the African Charter, which provides for the right to freedom of expression, does not, unfortunately, import this milieu. This article provides for the right to receive information and to express and disseminate opinions within the law. We need not repeat the arguments made in respect of the debilitating effect of the clause 'within the law'. Once again, it might be argued that the applicable principles and guidelines spelt out in articles 60 and 61 of the African Charter will democratically condition any limitation of the right. We, however, hasten to point out, though in a melancholic manner, that the African experience with this right strongly suggests that domestic law is more often than not used to stifle democratically legitimate expression of opinion, especially when such opinion is political and is deemed, by the powers-that-be, to have the potential effect of changing the occupants of State House. Such abuse is rampant around election time when opposition parties struggle to have their voices heard by the electorate. We therefore suggest the express amendment of article 9 of the Charter. Such an amendment could be along the lines of article 13(3) of the American Convention on Human Rights, 1969, which states:

> The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

As it is said in popular parlance, 'it is better to jaw-jaw than to war-war'. The OAU should, thus, give proper democratic grounding to the right to freedom of expression and in this way help to stem the resort to rebellion and even violence that tends to follow the trail of the suppression of this right. As the third paragraph of the Universal Declaration warns:

> . . . it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

e Right to property

The right to property, as provided for by article 14 of the African Charter, also needs to be revisited. Though the article guarantees the right, it further provides that the right 'may only be encroached upon in the interest of the community and in accordance with the provisions of appropriate laws'. As discussed earlier, this wide limitation clause subjects this right to arbitrariness on the part of the state. Furthermore, nothing is stated about the payment, let alone just and equitable payment, of compensation for property expropriated in the interest of the community. To make such a provision meaningful, consideration should be given to section 25(3) of the Constitution of South Africa. It states:

> The amount of the compensation and the amount and manner of payment must be just and equitable, reflecting an equitable balance between the

public interest and the interests of those affected, having regard to all relevant circumstances, including —
(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.

Furthermore, communal ownership of property should be specified alongside the general provision of the right to property. This is to reflect one of the core African traditions that the African Charter seeks to uphold. The specific protection extended to 'a person or community dispossessed of property' by section 25 of the South African Constitution seeks to underlie this tradition, which should not be made to play second fiddle to traditionally Western concepts of private ownership of property.

f Right to life

The right to life, the fulcrum of all rights, should be expatiated upon to take account of internationally agreed protections in respect of this right. Article 4 of the African Charter provides as follows:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

This provision is as brief as that of the Universal Declaration, whose article 3 states: 'Everyone has the right to life, liberty and security of person.' That is no saving grace though. In spite of the coming into force in 1989 of the Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty, the death penalty still remains on the statute books of some African states. Like abortion and euthanasia, international law appears to regard the death penalty as a matter of legitimate diversity, an issue on which international consensus cannot easily be expected and in respect of which different societies are bound to disagree. However, it should be noted that the death penalty has at times been imposed on people innocent of crimes for which they are required by law to pay the supreme penalty. It has also been used at times in a callous and immoral way by unscrupulous governments to despatch their political opponents to their untimely death. Such is the lingering suspicion surrounding the Sani Abacha military regime's hanging of the former Nigerian playwright Ken Saro Wiwa, who was well known to be a champion of the human rights of the minority Ogoni tribe of Nigeria. The current President of Nigeria, Olusegun Obasanjo, could have met a similar fate on charges that have turned out, through the confession of those who made them, to have been totally trumped up.

The finality of the death penalty should convince the OAU to consider setting out limitations upon the imposition of that sentence. Such limitations could take after those of articles 4 and 6 of the ICCPR that,

we submit, countries that have not abolished the death penalty can live with. For example, article 6(2) of the ICCPR permits countries that have not abolished the death penalty to impose it only in respect of the most serious crimes. By virtue of article 4(2) of the ICCPR, the right to life cannot be derogated from in times of public emergency. These limitations would go a long way to uphold the right to life even in the face of deep-seated disagreements over its imposition. Notwithstanding these disagreements, we urge the OAU to strongly consider adopting an additional protocol to the African Charter aiming at the abolition of the death penalty. The ratification of the Second Optional Protocol to the ICCPR by African countries could serve the same end, though.

g Other rights

The right to privacy, the right to marry and find a family, the right to nationality and the right to compensation in the event of the miscarriage of justice are civil and political rights that are also worthy of consideration by the OAU for inclusion in the African Charter.

3.2 Economic and social rights

In respect of the rationale for the provision of socio-economic rights, it has been asserted:[43]

> The main purpose of socio-economic rights is to place the state under a legal obligation to utilise its available resources maximally to correct social and economic inequalities and imbalances. It has been stressed in the literature and confirmed by practical experience that democratisation and the protection of rights can be attained only if the social and economic conditions of individuals improved. Modernisation theorists argue that economic development is critical for successful democratisation, and accordingly for the protection of rights. They hold that 'without modernisation and a minimum threshold of economic development, democracy in divided societies is hopeless'.

In other words, there is an awareness that one cannot meaningfully talk about the realisation and strengthening of democracy and human rights in the midst of social and economic deprivations arising out of a lack of economic development. This is what provides a prop for the concept of the indivisibility, interdependence and interrelatedness of all human rights that we have stressed earlier. Socio-economic rights cannot, therefore, be made to play second fiddle to civil and political rights as the reality of their practical implementation makes the traditional distinction drawn between these set of rights of little significance. This is true of all countries, more so developing ones.

The socio-economic circumstances of the overwhelming majority of Africa's peoples are such that no amount of talk about the need for

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[43] B de Villiers 'The protection of social and economic rights — International perspectives' Occasional Paper 9, Centre for Human Rights (1996) 2.

governments to allow the so-called market forces, that is supply and demand, to dictate the level of socio-economic activities, can lead to a situation in which African governments can completely wash their hands of socio-economic issues. As Van Boven asserted:[44] 'These rights are to be realized through or by means of the State. In this case, the State acts as the promoter and protector of economic and social well-being.'

The legitimate expectations that Africans have of their governments include the creation of a favourable environment for the realisation of socio-economic rights. It is, therefore, disheartening to realise that in spite of its insistence that 'the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights',[45] the African Charter provides for only few socio-economic rights. These are as follows: the right to work under equitable and satisfactory conditions (article 15); the right to receive equal pay for equal work (article 15); the right to enjoy the best attainable state of physical and mental health including medical care for the sick (article 16); the right to education (article 17); the right to freely take part in the cultural life of one's community (article 17); and the right of women, children, the aged and the disabled to special measures of protection in keeping with their physical or moral needs (article 18).

Some socio-economic rights not provided for by the African Charter include the following: the right to social security including social insurance; the right to rest and leisure; the right to food or to be free from hunger; the right to housing; the right to form a trade union and to join a trade union of one's choice; and the right to freely participate in the cultural life of one's community. That these rights are deemed to be of progressive realisation based upon available resources should not deter the OAU from including them in the African Charter. In any case, some socio-economic rights that demand progressive realisation are already catered for in the Charter. Furthermore, as noted earlier, not all socio-economic rights are positive rights in the sense that they are realisable only when the state acts. For example, state action is not necessary for the exercise of the right to form and to join trade unions and the right to free choice of employment. The latter right, the right to free choice of employment, should be made an adjunct of the right to work that article 15 of the African Charter provides for as one's human dignity is not upheld by being compelled to take up a job.

As discussed earlier, not all civil and political rights can be described as negative rights in the sense that they require no governmental action for their realisation. For example, the right to a fair trial and the right to vote do require state action for their realisation. Even the right to life is no longer perceived as a civil right in strict terms. It is now seen both in

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44 Van Boven (n 12 above) 49.

45 Para 8 Preamble to the African Charter.

a negative sense, thus imploring a hands-off policy on the part of the state, and a positive sense, which warrants state intervention or action. Respectively, these perceptions are known as opposition to negation of life and affirmation of life. The opposition to the negation of life looks at life as a civil and political right while the affirmation of life does so from the point of view of socio-economic rights. In this regard, a UN publication has stated:[46] 'The worth of life . . . is the fountain-head for all other ideals and values . . . This implies not only opposing the negation of life, but also positive and affirming aspects.'

The positive and affirming aspects of life look at issues such as environmental deterioration, the water crisis, health, housing, and employment. Without them, the civil and political aspects of life have little or no meaning at all.

4 Conclusion

I do not suggest that the analysis we have made respecting civil, political, social and economic rights in the African Charter precludes any further discussions of the Charter in this regard. I have merely presented an opinion as to how the substance of the African Charter can be reformed in respect of these rights so that the Charter may be responsive to the imperatives of the concept of human rights.

The adoption of the Charter was a noble undertaking, showing a sincere effort on the part of the OAU to put continental Africa firmly on the human rights map. The Charter should, however, seek to become a living instrument that accommodates the realities and imperatives of human rights. This is the only way by which the Charter will attain the legitimacy of law and become a beacon of human rights for the people of Africa who, in so many ways and for quite some time in history, have had their human dignity shredded at the international, regional and national levels. This is the context in which any discussion or analysis of the African Charter should be seen.

In the infamous American case *Dred Scott v Sanford*,[47] the American Supreme Court determined that American Negroes were 'beings of an inferior order and so far inferior that they had no rights which the white man was bound to respect'.[48] To the Court, 'this opinion was fixed and universal' and 'was regarded as an axiom in morals as well as politics, which no one thought of disputing, or supposed to be open to

46 United Nations *Human rights and social work* (1994) 8.

47 60 US 393 (1857).

48 n 47 above 407.

dispute'.[49] In emphasising this opinion, the Court stated: 'This stigma of the deepest degradation was fixed upon the whole race.'[50] Today, the American Constitution and all its laws apply to American Negroes, though traces of invidious discrimination still remain at the informal level of social relations.

Apartheid perfected the nauseating art of desecrating the human rights of people on the basis of race. Dictatorial and oppressive African governments, like those of Idi Amin, Macias Nguema and Jean-Bedel Bokassa, have disregarded the principle that the human person has an inherent worth and dignity that must be protected and upheld through unflinching respect for human rights. These incidences highlight the urgency with which the African Charter should be reformed so as to meaningfully protect the individual from governmental excess and demeaning societal practices still prevalent in Africa. If left unchecked, these abuses could well lead Africa to the state of nature where, as Thomas Hobbes asserts, 'the life of man' (read Africans) will become 'solitary, poor, nasty, brutish and short'.[51]

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49 As above.

50 n 47 above 409.

51 T Hobbes *Leviathan* (1947 — reprinted from the edition of 1651) 97.

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A feminist perspective on reform of the African human rights system

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1 Introduction

There have been concerns expressed about the manner in which the rights of women are dealt with in international human rights law. It is argued that women's rights are human rights and that they should be mainstreamed in the general human rights instruments. On this basis, some argue that to consider them in separate instruments and therefore to segregate them, is not appropriate.[1] They argue that documents such as the Draft Protocol on Women's Rights[2] detract from the principle that human rights treaties, such as the African Charter on Human and Peoples' Rights (African Charter or Charter), should be for all.[3] On the other hand, it is claimed, a certain amount of attention focused specifically on women's rights is necessary as 'women were excluded from all

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1 K Mahoney 'Theoretical perspectives on women's human rights and strategies for their implementation' (1996) 21 *Brooklyn Journal of International Law* 799 841; S Wright 'Human rights and women's rights: An analysis of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women' in K Mahoney & P Mahoney (eds) *Human rights in the 21st century: A global challenge* (1993) 75.

2 This is due to go before an experts meeting of the OAU in 2001 before being adopted by Council of Ministers and Assembly of Heads of State and Government in 2002.

3 See GA Resolution A/RES/53/120, 10 February 1999, Follow-up to the Fourth World Conference on Women and full implementation of the Beijing Declaration and Platform for Action, 53rd session; Vienna Declaration and Programme of Action, World Conference on Human Rights, UN Doc.A/CONF.157/23 (1993), Part I, para 28 confirms that women's rights are 'an inalienable, integration and indivisible part of universal human rights'; T Meron 'Editorial comments: Enhancing the effectiveness of the prohibition of discrimination against women' (1990) 84 *American Journal of International Law* 213; A Gallagher 'Ending the marginalisation: Strategies for incorporating women into the United Nations human rights system' (1997) 19 *Human Rights Quarterly* 283.

aspects and levels of international structures and policy making' and 'it would be inconceivable to challenge a concern about the rights of people belonging to a racial, religious or indigenous group on the grounds that they are simply people too'.[4]

So how has the African Charter and the African Commission on Human and Peoples' Rights (African Commission or Commission) dealt with women's rights? This article will first consider whether the Commission has mainstreamed women's rights into its work before examining more theoretical perspectives on whether the way in which the Charter is actually formulated restricts its ability to protect women.

On the face of it, the Charter does not seem to accord any particular mention of women, any more than other international human rights instruments have done.[5] The only provisions are the non-discrimination clause in article 2 prohibiting discrimination on the basis of sex, among other things, and the requirement in article 18(3) that states eliminate 'every discrimination against women and also ensure the protection of the rights of women', in conjunction with the rights of the family and the child. However, a consideration of the Charter's inclusion of what are perceived to be its more unusual provisions and the way in which the Charter as a whole has been interpreted offers some hope for women's rights.

2 Promotion and protection of the rights of women

The African Commission's approach to women's rights indicates both an attempt to highlight the concerns but also to mainstream debate into its existing procedures. In regard to the former, the African Commission has taken several initiatives to specifically focus on the position of women. In 1998 it appointed Commissioner Ondziel-Gnelenga to the position of Special Rapporteur on Women's Rights. This is a positive development which brought attention to the situation of women in Africa and has the potential to ensure that such concerns are integral to

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4 BE Hernández-Truyol 'Women's rights as human rights rules, realities and the role of culture: A formula for reform' (1996) 21 *Brooklyn Journal of International Law* 605 617.

5 For example, the European Convention on Human Rights, art 12 provides for a right of 'men and women or marriageable age' to marry and found a family; art 14 prohibits discrimination on the basis of sex, among other grounds. The American Convention on Human Rights, art 1 prohibits discrimination on the basis of sex and other grounds; art 4(5) prohibits capital punishment being imposed on pregnant women; art 17(2) recognises the right of men and women of marriageable age to marry and raise a family. The International Covenant on Civil and Political Rights, art 2 includes a non-discrimination clause; art 3 is specifically directed towards 'equal right of men and women to the enjoyment of all civil and political rights'; art 6(5) prohibits the death penalty being imposed on pregnant women; art 23(2) provides the right of men and women to marry and found a family; and art 26 provides for equality before the law and prohibition of discrimination on the basis of sex and other grounds.

all of the Commission's work. It is a shame, however, that little concrete action has been taken by the Rapporteur since her appointment.[6] In the same vein, the Commission also has just adopted a Draft Protocol on the Rights of Women, although this is yet to be fully operational, requiring additional approval, adoption by the Organisation of African Unity (OAU) and ratification by states.[7] The Draft Protocol draws upon the UN instruments and others and develops them further with some progressive provisions.

Thus, attempts by the Commission to focus on the rights of women specifically have been made, although arguably their results have been limited. What is also important is the extent to which the Commission considers such actions to have dealt adequately with women's rights or whether it believes it must mainstream such rights into its procedures as a whole.

The picture of the extent to which the African Commission has dealt with women's rights as human rights in the Charter is mixed. Certainly, the African Commission is the most representative of all regional human rights bodies, with four out of its eleven commissioners being women. There is also a provision for equal gender representation to be taken into account not only in the nomination but also in the appointment of women to the African Court.[8] This is in contrast to there being no women on the seven member Inter-American Commission or Court of Human Rights and only eight of the 40 judges of the European Court of Human Rights are women. Furthermore, women are only around a sixth of the total membership of the UN Human Rights Committee and a ninth of the Committee on Economic, Social and Cultural Rights. While placing women on the Commission may be argued to be a token gesture and will not necessarily guarantee better protection of women's rights in general, it does, however, indicate at least a willingness by the OAU to take concrete action in this respect.

Similarly, in its state reporting procedure the Commission has raised the issue of women as something upon which states should be focusing.[9] The original Guidelines for state reporting had a specific section on

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6 This is partly due to limited funding, although there have been concerns that what funding was provided was not used appropriately. The Commissioner, for example, spent several months in Europe researching literature on women's rights, when some argued it would have been more appropriate for her to be visiting African countries.

7 Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [Final Version], 13 September 2000, CAB/LEG/66.6; reprinted in (2001) 1 *African Human Rights Law Journal* 53.

8 Art 12(2) of the Protocol reads: 'Due consideration shall be given to adequate gender representation in the nomination process.' Art 14(3) notes that 'In the election of the judges, the Assembly shall ensure that there is adequate gender representation'.

9 Art 62 of the Charter requires states to submit reports on the legislative and other measures they have taken to implement provisions of the Charter. States are to submit reports every two years to the Commission.

women's rights[10] and the amended guidelines require states also to report specifically on 'what is the state doing to improve the conditions of . . . women'.[11] Now, the commissioners seem to ask questions consistently about the rights of women during the examination of state reports.[12] Other special rapporteurs have also considered the rights of women in their mandate.[13]

This approach has not been reflected, however, in the Commission's communication procedure.[14] There have been very few cases that either touch upon or relate directly to the rights of women. One explanation is that non-governmental organisations (NGOs) may have failed to submit such cases for the attention of the Commission. There are, for example, only 16 of the NGOs that have observer status before the Commission that focus specifically on women's rights.[15] Another reason

10 Guidelines for national periodic reports, Second Annual Activity Report of the African Commission on Human and Peoples' Rights 1988–1989, Annex XII, para VII. These noted the reporting requirements of the UN Convention on the Elimination of All Forms of Discrimination Against Women and also that reports on women's rights should be submitted to the African Commission given that 'discrimination against women in Africa is of such widespread occurrence', para VII.2. It called on states to report on the 'actual, general, social, economic, political and legal framework within which a state party approaches the elimination of discrimination against women in all its forms . . .; any legal and other measures adopted to implement the Convention or their absence . . .; whether there are any institutions or authorities which have as their task to ensure that the principle of equality between men and women is complied with in practice and what remedies are available to women who have suffered this discrimination; the means to promote and ensure the full development and advancement of women . . .'. It also requires that reports 'reveal obstacles to the participation of women on an equal basis with men in the political, social, economic and cultural life of their countries, and give information on types and frequencies of cases of non-compliance with the principle of equal rights. The reports should also pay due attention to the role of women and their full participation in the solution of problems and issues which are referred to in the preamble and which are not covered by the articles of the Convention', paras VII.8–VII.9.

11 It also includes children and the disabled in this list, Amendment of the general guidelines for the preparation of periodic reports by states parties, DOC/OS/27 (XXIII), para 5.

12 R Murray 'Report on the 1998 sessions of the African Commission on Human and Peoples' Rights' *Human Rights Law Journal* (forthcoming); R Murray 'Report on the 1997 sessions of the African Commission on Human and Peoples' Rights' (1998) 19 *Human Rights Law Journal* 169.

13 For example, the Special Rapporteur on Prisons and other Conditions of Detention, Commissioner Dankwa, has noted in his reports issues such as whether there are female sections at prisons, *Report on Visit to Prisons in Zimbabwe,* Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex VI.

14 Arts 55–59.

15 Out of a total of 236. Status of Submission of NGO Activity Reports as at 30 September 2000, DOC/OS (XXVIII)/182b. This is not because the Commission has rejected more applications from women's organisations but is due to the lack of women's organisations in Africa as a whole. The Commission has also not necessarily encouraged women's organisations specifically to apply for observer status.

may be the limited extent to which the Charter is known to African women generally, at all levels of society, but particularly the majority of women who live in rural areas, who are not educated or who do not work outside of the home.

The only situation in the Commission's protective mandate where women's rights have specifically been raised has been in relation to Mauritania.[16] On its visit to the country in 1997 the Commission met with the Secretary for Women from the government as well as an NGO, the Mauritanian League for the Defence of Women's Rights (LMDDF), and dealt with the specific concerns of groups representing widows who argued that no prosecutions had been undertaken in relation to soldiers of a particular ethnic group who had been killed. The Commission also paid particular attention in its report to violations of rights of women in general and noted that:[17]

> [A]lthough they appear to be in decline, the traditional forms of treatment of women remain serious causes of concern, in most cases in isolated, rural communities. Such treatment comprises the feeding by force of adolescent girls and female genital mutilation. These practices are widely condemned by international health experts because their effects are harmful to the physical and psychological health of their subjects.

The Commission noted that female genital mutilation 'continues to be widespread among all the ethnic groups of the country with the exception of the Wolofs'. Furthermore, 'the problems linked to early marriage, polygamy and divorce constitute a source of concern for the protection of women's rights in Mauritania where the traditions of the family prevail'. It noted women's participation in the economic sector of the country but that 'they are notable for their absence in political and legal life'. It thus concluded, without making any specific reference to particular rights, that 'the promotion of women's rights is deficient in the country and merits a particular attention'. At the end of the report the Commission found, among other things, that the issue of widows was still unresolved, but disappointingly does not mention women's rights any further.

Similarly, in subsequent communications against the country,[18] listing actions such as prisoners being beaten and burnt and women being raped, it held that:[19]

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16 *Report of the Mission to Mauritania of the African Commission on Human and Peoples' Rights*, Nouakchott 19–27 June 1996, Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex IX.

17 n 16 above para 5.

18 Communications 54/91, 61/91, 98/93, 164/97 to 196/97 & 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, Thirteenth Annual Activity Report.

19 n 18 above para 118.

> [T]he government did not produce any argument to counter these facts. Taken together or in isolation, these acts are proof of widespread utilisation of torture and of cruel, inhuman and degrading forms of treatment and constitute a violation of article 5. The fact that prisoners were left to die slow deaths . . . equally constitutes cruel, inhuman and degrading forms of treatment prohibited by article 5 of the Charter.

The above discussion is a rather superficial look at what the Commission appears to have done for women. The aim of this paper is, however, to concentrate on more theoretical concerns, to ask whether the way in which the Charter has been drafted itself limits the promotion and protection of women's rights. In this respect, it is worth considering, from a feminist perspective, the very basis on which the Charter, and more generally international human rights law, is formed.

3 Feminist perspectives on international law

Feminist writers and others have argued that international law is male biased.[20] The dominant discourse thus fails to take account of those outside its parameters and hence there are viewpoints which are neglected from the mainstream debate. The argument is that such marginalised viewpoints are those of women and that international human rights law as it is presently formulated does not take account of their situation, 'feminine views name what is absent in the thinking and social activities of [men], what is relegated to "others" to think, feel and do'.[21]

This dominant group thus commands the discourse on human rights and international law, as has been argued:[22]

> The dominant position [of men] is not just their control of international legal institutions but follows from the fact that they created modes of thought, figures of speech by which these institutions understood and by which international law is operated and developed.

This ensures that the views of the marginalised group do not succeed and their position as subordinate is maintained. In this way control can be maintained over women and this prevents them from questioning the role that men play in human rights themselves or arguing that it should be changed.

International law (and international human rights law), it is argued by feminist theories, is based on opposing dichotomies. It is argued that such an approach fails to take account of a much wider experience beyond traditional male perspectives. Thus, it is argued, human rights

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20 See the seminal article by H Charlesworth *et al* 'Feminist approaches to international law' (1991) 85 *American Journal of International Law* 613.

21 S Harding *The science question in feminism* (1986) 186.

22 K Ginther 'Re-defining international law from the point of view of decolonisation and development of African regionalism' (1982) 26 *Journal of African Law* 49 59.

has been posited in contrasting terms such as state/individual, war/peace, public/private as though these were clear divides into which issues could clearly be separated. The argument is that such an approach neglects the position and experience of women. These dichotomies suggest that international human rights law can be approached in terms of either/or and this neglects the benefits of the two extremes.[23] The result is that one of the extremes is deemed secondary and irrelevant.[24]

I have argued,[25] and want to develop this further here, that this is not the approach of the African system, and the African Commission is a useful indication of a way to view the human rights system from a more holistic perspective. It indicates a willingness to move beyond such strict dichotomies, which is also central to the protection of the rights of women. A number of examples can be taken as explanations:[26]

3.1 Public/private

There are strong arguments from feminist writers that international human rights law with its traditional focus on the state as against the individual, only concentrates on the public relationship and fails to account for the private domain, namely the relationship between individuals.[27] Human rights law traditionally imposes duties on the state towards the individual; individuals themselves are not under human rights law accountable towards other individuals.

Feminist writers argue that this approach reflects the male domain and male perspective in which human rights law as we know it was developed and that many violations of the rights of women occur in the domestic setting.[28] So, for example, has torture in international human rights law been considered to apply to situations where state agents are the perpetrators of the violence. It has not been traditionally related to private individuals inflicting harm against others in the domestic

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23 N Lacey 'Theory into practice? Pornography and the public/private dichotomy' in A Bottomley & J Conaghan (eds) *Feminist theory and legal strategy* (1993) 93 99 states that the law is 'structured around pairs of ideas which are opposed in the sense that the attribution of one excludes the other'.

24 Harding (n 21 above) 165 argues that that some matters are usually associated with women and thus deemed irrelevant, namely, emotion as opposed to reason; others as opposed to self; subjectivity as opposed to objectivity.

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

26 These are all illustrated in the book, referred to above.

27 C MacKinnon *Towards a feminist theory of the state* (1989); K Goodall 'Public and private in legal debate' (1990) 18 *International Journal of Social Law* 445; E Schneider 'The violence of privacy' (1992) 23 *Connecticut Law Review* 973; K Engle 'After the collapse of the public/private distinction: Strategising women's rights' in D Dallymeyer (ed) *Reconceiving reality: Women and international law* (1993).

28 See Engle, as above. See also A Clapham *Human rights in the private sphere* (1993) 352.

setting.[29] Women are often abused in their own homes/domestic setting, at work, by their relatives or persons known to them. Yet one is classified as torture in international law whereas the latter, being carried out by non-state agents, is not.[30] There is no difference between these positions which would justify the different treatment. As Clapham notes:[31]

> There should be protection from all violations of human rights and not only when the violator can be directly identified as an agent of the state. . . . This could be legally justified by a dynamic interpretation which considered the general evolution of international law. . . . This is not the same as advocating the abolition of the notions of public and private.

The African Commission has in fact been willing to go beyond this divide, and a few examples are worth noting in relation to the position of women. Its Draft Protocol on the Rights of Women, following the precedent of the UN's Convention for the Elimination of All Forms of Discrimination Against Women, applies to both the 'public and private sphere' or 'all spheres'. It recognises that violence against women can occur in private settings as well as the public domain and treats both as equal of the protection of human rights. Similarly, the Commission has required the state to consider the private aspects of work[32] and recognise the value of work in the home.[33]

3.2 Civil and political rights/economic, social and cultural rights

Another example of a dichotomy which neglects the position of women is the separation of rights between civil and political rights and economic, social and cultural rights. In the same way, one can argue that this divide has relegated the latter to being of less importance[34] and

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29 Engle argues that 'concentrating too much on the public/private distinction excludes important parts of women's experiences. Not only does such a focus often omit those parts of women's lives that figure into the 'public', however that gets defined, it also assumes that 'private' is bad for women. It fails to recognise that the 'private' is a place where may have tried to be and that it might ultimately afford protection to (at least some) women', Engle (n 27 above) 143.

30 MacKinnon (n 27 above).

31 Clapham (n 28 above) 134.

32 Paras B.54(b) & II.8 Guidelines for national periodic reports.

33 See below.

34 See FP Hosken 'Toward a definition of women's human rights' (1981) 3 *Human Rights Quarterly* 2; C Bunch 'Women's rights as human rights: Toward a revision of human rights' (1990) 12 *Human Rights Quarterly* 488; B Stark 'Nurturing rights; An essay on women, peace and international human rights' (1991) 13 *Michigan Journal of International Law* 144; J Kerr 'The context and the goal' in J Kerr (ed) *Ours by right: Women's rights as human rights* (1993); AO Ilumoka 'African women's economic, social and cultural rights: Toward a relevant theory and practice' in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 307.

this impacts on the extent to which they are protected.[35] As Craven notes:[36]

> The reason for making the distinction between first and second generation rights could be more accurately put down to the ideological conflict between East and West pursued in the arena of human rights during the drafting of the Covenants . . . The fact of separation has been used as evidence of the inherent opposition of the two categories of rights. In particular, it has led to the perpetuation of excessively monolithic views as to the nature, history and philosophical conception of each group of rights . . . Of greater concern, however, is that despite the clear intention not to imply any notion of relative value by the act of separating the Covenants, it has nevertheless reinforced claims as to the hierarchical ascendance of civil and political rights.

In addition, using the public/private divide, one can challenge the traditional distinction that is drawn between civil and political rights and economic, social and cultural rights. It is suggested that a reason why some nations have been so wary of accepting economic, social and cultural rights may not just have been to do with the expense that their implementation would impose. It is argued that violations of the rights such as the right to work and health (although not necessarily education) required state intervention in matters where the violator was not the state but a private employer or individual. Recognising that states should intervene in such areas advocates an interventionist approach that does not sit comfortably with the protection of the private sphere or with the free market values held by a liberal state. There is no indication in the Charter that economic, social and cultural rights are treated differently from civil and political rights and the African Commission has, however, been willing to require state intervention in numerous areas.

Furthermore, whereas it has been argued that the International Covenant on Economic, Social and Cultural Rights defines rights in terms

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35 'The shocking reality is that states and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights', statement by the Committee on Economic, Social and Cultural Rights to the 1993 Vienna World Conference, UN Doc E/C 12/1992/2 83.

36 M Craven *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development* (1995) 8.

of a male perspective,[37] the African Commission seems to have gone beyond this in its development of these rights. For example, article 13 of the Draft Protocol on the Rights of Women states that women are to have 'equal opportunities to work'. The Draft Protocol also contains provisions covering remuneration, working conditions, dismissal[38] and equal pay for equal work for women.[39] The Commission has required states to report on 'equal opportunity for promotion' including 'measures adopted in the public and private sectors including those relating to working conditions, salaries, social security, career possibilities and continuing education for teaching staff'.[40] It has required states to indicate their social security schemes including maternity benefits[41] and equal access to educational opportunities.[42]

The Commission appears to have gone further by not just applying economic, social and cultural rights to women, but by recognising the specific impact they can have on women. Thus, under the Draft Protocol on the Rights of Women states should also 'create conditions to promote and support the occupations and economic activities dominated by women, in particular, within the informal sector' and 'encourage the establishment of a system of protection and social insurance for women working in the informal sector'.[43] It goes beyond the circle of salaried women, to require that states 'recognise the economic value of the work of women in the home' and to 'recognise motherhood and the upbringing

37 Charlesworth argues that although economic, social and cultural rights 'might be thought by their very nature to transcend the public/private dichotomy', the way in which they are defined in the International Covenant on Economic, Social and Cultural Rights 'indicates the tenacity of a gendered public/private distinction in human rights law. The Covenant creates a public sphere by assuming that all effective power rests with the state . . . The Covenant, then, does not touch on the economic, social and cultural context in which most women live', namely under the domination of men. She argues that the right to work is defined in the public sphere and the right to food 'has been elaborated in a way that offers little to women'; H Charlesworth 'What are ''women's international human rights''?' in Cook (n 34 above) 58 74–76.

38 In addition, the Commission has required states to report in relation to arts 16 and 18 of the Charter on maternity protection, including pre-natal and post-natal protection; assistance to working mothers; paid leave; leave with social security benefits; guarantees against dismissal and measures in favour of working mothers who are self-employed or participating in family enterprise (para II.A.29 Guidelines for national periodic reports).

39 Para II.6 Guidelines for national periodic reports.

40 Paras B.54(b) & II.8 Guidelines for national periodic reports.

41 Paras II.17 & 18 Guidelines for national periodic reports.

42 For example, art 12 of the Draft Protocol on the Rights of Women provides that states should eliminate discrimination against women and references to stereotypes and take positive action to increase literacy rates, promote education and training for women and girls and promote the retention of girls in schools and training institutions.

43 Arts 13(e) & (f) Draft Protocol on the Rights of Women.

of children as a social function for which the state, the private sector and both parents must take responsibility'.[44] The Commission has thus recognised a wider definition of work which takes account of the experiences of women and goes beyond the public sphere aspects of work which may be still male dominated.

It is disappointing, however, that despite these interpretations, comparatively little attention has been paid by the African Commission to such economic, social and cultural rights when compared with civil and political rights. One of the reasons for this may be lack of cases being submitted by NGOs. This does not always account for the lack of jurisprudence, however. The Commission should take such opportunities dynamically, as should NGOs who should start to consider these rights in their submission of cases and require the Commission to make some pronouncements. Although the Commission does not appear to have been willing to follow the old divide between economic, social and cultural rights and civil and political rights and does not permit states to argue their lack of resources as a reason for failing to comply with civil and political rights nor economic, social and cultural rights, it has not fully exploited the opportunity to interpret these rights.

3.3 Duties/rights

Connected to the notion of public/private has been the often perceived dichotomy between rights and duties. It has been argued that the traditional view of human rights law, where only states are responsible, is no longer valid for the reason that 'in practice it is impossible to differentiate the private from the public sphere. Even if we can distinguish between the two, such difficult distinctions leave a lacuna in the protection of human rights and can in themselves be particularly dangerous.'[45]

The assumed dichotomy that underlies much of the literature on international human rights law and the African system in particular implies the opposition between traditional and Western approaches and between male and female. This leads to assumptions that duties are only owed to the state and thus may infringe rights. A lack of understanding of the African notion of community confuses the ideology on which the Charter is based, which sees duties as being directed towards the community or the family rather than the state, in contrast to the collectivist approach of a socialist ideology. Thus, duties complement, rather than detract from, human rights. It is common knowledge that one of the unique features of the Charter is its inclusion in detail of the duties of individuals.[46] The African Commission itself has made it clear that it has not permitted states to use duties in this way. The Commission

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44 Arts 13(h) & (I) Draft Protocol on the Rights of Women.

45 Clapham (n 28 above) 94.

46 Arts 27–29.

has recognised that there is no derogation clause in the Charter and that the only legitimate reasons for limiting rights and freedoms are found in article 27(2) of the Charter, namely 'the rights of others, collective security, morality and common interest'. The limitations must be 'strictly proportionate' and 'absolutely necessary' and may 'not erode the right'. Nigeria has attempted to use this provision on several occasions and its arguments have been rejected by the Commission. The Commission found, for example, that restrictions imposed on newspaper houses for no other reason than to punish criticisms of the government were not legitimate limitations for the purposes of article 27(2).[47]

Similarly, the African Commission has been willing to consider duties of non-state actors and violations of the rights by other individuals. From the point of view of women, the Commission has indicated in its Draft Protocol that human rights protection should be accorded to them in the private sphere, as noted above. In the Draft Protocol it also indicated that the perpetrators of violence against women should be brought to account.[48] Thus, although it has not gone as far as using the individual duties provisions in its Charter to say that actions can be brought against private persons through its own procedures, it is imposing an obligation on the state to take action under the name of human rights.[49] In its amended guidelines on state reporting, the Commission requests from states 'what is being done to ensure that individual duties are observed'.[50] Thus, in general, the Commission has held that there is a duty on all not to use violence,[51] and has required states to protect their citizens against domestic violence.[52] It has also addressed recommendations to non-state entities such as 'manufacturers of anti-personnel mines' to be 'conscious of the dangers and destructions caused by the use of their products'.[53]

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

48 Art 5(c) Draft Protocol on the Rights of Women.

49 The original Guidelines for national periodic reports required that 'every individual shall observe the duties enunciated' in art 29 and that states should provide 'a full report on each of the duties', para VI.6.

50 Para 7 Amendment of the General Guidelines.

51 'The Commission . . . condemns the use of violence in South Africa to settle disputes by any body in South Africa and in particular the recent massacre of 18 peoples', Final Communiqué of the 10th ordinary session, Banjul, The Gambia, 8–15 October 1991, para (a).

52 Commissioners have asked such questions during state reporting procedures, see Danish Centre for Human Rights *African Commission on Human and Peoples' Rights Examination of state reports: Gambia, Zimbabwe, Senegal, 12th session, October 1992* (1995) 25.

53 Resolution on Anti-Personnel Mines, Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex VIII, para 4.

It is hoped that the Commission will use these unusual provisions to be dynamic and progressive, knowing that it has a flexible enough instrument and the mandate to do so.

3.4 Individual/community

Another dichotomy traditionally viewed in international human rights law has been that between the community and the male individual. Western and male approaches would argue that human rights are vested in the individual and not in groups, and would see the community as a threat to the rights of the individual.[54] In contrast, the African/feminist approach has argued that they are not in conflict with each other but that 'a dialogue and permanent equilibrium should exist between the individual and the social group to which he belongs'.[55] As Kiwanuka argues, 'the individual is not totally aloof, irresponsible and opposed to the society. This is to say that the people of Africa are "community bound" rather than individualistic.'[56]

Thus peoples' rights in international human rights law, with their community focus, have been perceived as having less status than 'first' or 'second generation' rights and where they have been accepted, it is argued that they have been interpreted from a perspective which fails to take account of the experience of women. For example, some have argued that the way in which self-determination has been interpreted[57]

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54 For a discussion on the issue of community see R Kiwanuka 'The meaning of peoples' rights in the African Charter on Human and Peoples' Rights' (1988) 80 *American Journal of International Law* 80 82.

55 EG Bello 'The African Charter on Human and Peoples' Rights. A legal analysis' (1985–86) 194 *Hague Recueil* 9 25.

56 ML Balanda 'The African Charter on Human and Peoples' Rights' in K Ginther & W Benedek (eds) *New perspectives and conceptions in international law: An Afro-European dialogue* (1994) 139. See also G Triggs 'The rights of peoples and individual rights: Conflict or harmony' in J Crawford *Rights of peoples* (1988) ch 9.

57 C Chinkin 'A gendered perspective to the international use of force' (1992) 12 *Australian Yearbook of International Law* 279 280 notes that 'there is a fundamental contradiction between the notion of self-determination as meaning the right of "all people" to "freely determine their political status and freely pursue their economic, social and cultural status" and the continued domination and marginalisation by one sector of the population in the nation state of another sector. Colonisation has been universally condemned by the international community as being about domination, oppression, exploitation, aggression and power and therefore per se constituting a threat to the maintenance of international peace and security.' She continues on 281: '[T]he role of women under colonialism is in many ways symbolic of the domination of the colonised within a colonial society.'

perpetuates the notion of a patriarchal state.[58] As Gardham has argued:[59]

> On this analysis the right of self-determination is just part of the existing power structure and has nothing to offer women. Liberation movements, moreover, are no less patriarchal in their structure and operations than established states.[60]

To take an example, it has been argued that the right to development 'is an example of how the international legal order privileges a male perspective and fails to accommodate the realities of women's lives'.[61] Thus Charlesworth has argued that the UN Declaration on the Right to Development[62] fails to account for women, as its approach to involving women in the development process is argued to be only a 'token consideration'. Thus, 'an assumption of the international law of development is that underdevelopment is caused by a failure to meet the model of a capitalist economy. Development means industrialisation and westernisation.'[63] Thus, it is believed that the right to development despite being formulated in 'neutral language does not challenge the

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58 J Gardham 'A feminist analysis of certain aspects of international humanitarian law' (1992) 12 *Australian Yearbook of International Law* 265 notes at 268 that 'the concept of self-determination of peoples has as its aim the achievement of the Western patriarchal state. The patriarchal state is regarded by feminists as both creating and perpetuating the oppression of women.' According to C MacKinnon 'Feminism, Marxism, method and the state: Towards feminist jurisprudence' (1983) 8 *Signs: Journal of Women in Society* 625 644: '[T]he liberal state coercively and authoritatively constitutes the legal order in the interests of men as a gender, through its legitimising norms, forms, relation to society and substantive policies.'

59 Gardham (n 58 above) 269.

60 Chinkin (n 57 above) 284 notes 'Third world feminists coming from this tradition of struggle against colonialism and foreign domination are drawing the political connections between what occurs at home and the international structures; the same forces that operate to maintain marginalisation and oppression of women at home operate internationally in actions by stronger states against weaker states. The methods used are also identical — rape, battering, aggression, economic exploitation, rendering invisible'. Moreover, 'the pursuit of self-determination as an abstract political goal has not terminated oppression and domination of one part of society by another. States are patriarchal structures not solely in the sense of exclusion of women from elite positions and decision-making roles, but also in the assumptions as to the concentration of power and control in an elite and the domestic legitimation of the use of force to maintain that control' (285). The African Commission in some respects has taken a traditional approach to self-determination stressing that the principle of *uti possidetis* is to be respected and that secession should, as a general rule, not be permitted; Communication 75/92, *Katangese Peoples' Congress v Zaire*, Eighth Annual Activity Report; *Report on Mission of Good Offices to Senegal*, Tenth Annual Activity Report.

61 H Charlesworth 'The public/private distinction and the right to development in international law' (1992) 12 *Australian Yearbook of International Law* 190 194.

62 General Assembly Resolution 41/128 (1986).

63 Charlesworth (n 61 above) 60 196–7. The Declaration merely notes in art 8 that '[e]ffective measures should be undertaken to ensure that women have an active role in the development process'.

pervasive, and detrimental, assumption that women's work is of a lesser order than men's. The right thus rests on and reinforces a public/private distinction based on gender. The effect is not only to deny the fruits of development to Third World women but also to exacerbate their already unequal position.'[64]

Again, the African Charter is unique in its inclusion among its provisions, of a number of peoples' rights. The African Commission has paid some attention to these rights and, in relation to the right to development, has reaffirmed that it 'is an inalienable human right by virtue of which every human person is entitled to participate in, contribute to and enjoy the economic, social, cultural and political development of the society'.[65] It has interpreted this in relation to women specifically in its Draft Protocol on the Rights of Women in Africa stating that 'women shall have the right to fully enjoy their right to sustainable development', requiring states to[66]

> take all appropriate measures to (a) ensure that women participate fully at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes; (b) facilitate women's access to land and guarantee their right to property, whatever their marital status; (c) facilitate women's access to credit and natural resources through flexible mechanisms; (d) take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and (e) ensure that in the implementation of trade and economic policies and programmes such as globalisation, the negative effects on women are minimised.

It also includes other provisions on the right of women to participate in the determination of cultural policies,[67] be involved in management of the environment,[68] and calls on states to 'reduce military expenditure significantly in favour of spending on social development, while guaranteeing the effective participation of women in the distribution of these resources'.[69] It is also apparent that the education of women is essential to this process.[70]

The Commission has also recently been willing to use the provisions on peoples' rights to suggest that protection should be increased for minority groups within a particular state. Thus, the Commission declared in its recent decision against Mauritania that domination of one section of society by another was a violation of peoples' rights. The Commission considered the possibility that article 19, and the right of all peoples to

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64 Charlesworth (n 61 above) 203.

65 Resolution on the African Commission on Human and Peoples' Rights, Seventh Annual Activity Report, Annex XV.

66 Art 19 Draft Protocol on the Rights of Women.

67 Art 17(1).

68 Art 18(2)(a).

69 Art 11(3).

70 Charlesworth (n 61 above) 202.

be equal with the same respect and same rights, may apply to black Mauritanians:[71]

> At the heart of the abuses alleged in the different communications is the question of the domination of one section of the population by another. The resultant discrimination against Black Mauritanians is, according to the complainants the result of a negation of the fundamental principle of equality of peoples situated in the African Charter and constitutes a violation of its article 19.

It also held that there could be a violation of article 23(1) and the right of all peoples to national and international peace and security with the attacks against Mauritanian villages.[72]

The Commission thus appears to be willing to go beyond traditional notions of what might constitute a people, to apply the concept to oppressed groups. It is argued that the concept of a people might apply to women[73] and this is something the African Commission has been willing, at least, to imply. In its Draft Protocol on Women's Rights it has applied the rights of peoples to women, namely that women should have a right to international and national peace and security, under article 23, a right to live in a healthy environment in accordance with article 24 and, as seen above, the right to development as provided by articles 21, 22 and 24 of the Charter.[74]

3.5 Cultural relativism/universality

Throughout much of the international debate of international human rights law is the dichotomy between universality and cultural relativism.

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71 Communications 54/91 *et al* (n 18 above) para 142. Unfortunately the Commission was not able to find a violation in this particular case, although it is not clear why. 'The Commission must admit however that the information made available to it does not allow it to establish with certainty that there has been a violation of article 19 of the Charter along the lines alleged here. It has nevertheless identified and condemned the existence of discriminatory practices against certain sectors of the Mauritanian population.'

72 'As advanced by the Mauritanian government, the conflict through which the country passed is the result of the actions of certain groups for which it is not responsible. But in the case in question, it was indeed the Mauritanian public forces that attacked Mauritanian villages. And even if they were rebel forces, the responsibility for protection is incumbent on the Mauritanian state, which is a party to the Charter . . . The unprovoked attacks on villages constitute a denial of the right to live in peace and security', para 140.

73 As Chinkin argues: '[W]omen have never been viewed as ''peoples'' for the purposes of the right to self-determination and, given the assumptions about the content and implications of that right, they never will or should be. Unfortunately the international community recognises only the right of ''peoples'' to self-determination and self-determination is in practice most frequently linked to the notion of independence and statehood', Chinkin (n 56 above) 289. See also A Scales 'Militarism, male dominance and law: Feminist jurisprudence as oxymoron?' (1989) 12 *Harvard Women's Law Journal* 25.

74 Arts 11, 18 & 19 Draft Protocol on the Rights of Women.

In this respect it is often perceived as difficult to reconcile issues of gender and culture.[75] Thus, the Charter has been criticised for placing women's rights within the provision relating to the family, article 18, and for the potential that these rights will be rendered subject to article 61 and the duty placed on the Commission, in interpreting the Charter, to take into consideration 'African practices consistent with international norms of human and peoples' rights, customs generally accepted as law . . .'. This could be seen as a rather simplistic argument. As has been argued in relation to Muslim values as being contrary to the rights of women, the arguments are not straightforward. It might not be religion that is to blame for the inequality of women but instead 'patriarchal attitudes, cultural norms, and male-dominated juristic traditions [which] have played a role in denying women their basic human rights'.[76] Although little has been said by the African Commission on such issues, it has made it clear that the provisions in the Charter prevail over inconsistent customs,[77] in relation to women's rights for example stating in the Draft Protocol on the Rights of Women that states should 'prohibit all harmful practices which affect the fundamental rights of women and girls and which are contrary to recognised international standards . . .'.[78]

It would be useful if the Commission developed such issues further. It can use gender as a window through which common grounds can be stressed:[79]

> Gender is a particularly well-suited point of reference for the reconstruction of the flawed, monocular scheme precisely because it encompasses vital and often ignored issues of race, ethnicity, nationality, culture, language, color, religion, ability (physical and mental), socio-economic class and sexuality . . . it affords a sharp focus within the macrocosm of international law. Virtually every society . . . evidences some form of gender discrimination or subjugation. Sex inequality is a global reality.

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75 E Brems 'Enemies or allies? Feminism and cultural relativism as dissident voices in human rights discourse' (1997) 19 *Human Rights Quarterly* 136.

76 M Monshipouri 'The Muslim world half a century after the Universal Declaration of Human Rights: Progress and obstacles' (1998) 16 *Netherlands Quarterly of Human Rights* 287 309.

77 In Communications 48/90, 50/91, 52/91 & 89/93, *Amnesty International; Comité Loosli Bachelard; Lawyers' Committee for Human Rights; Association of Members of the Episcopal Conference of East Africa* v *Sudan*, Thirteenth Annual Activity Report, the Commission held that 'when Sudanese tribunals apply Shari'a, they must do so in accordance with the other obligations undertaken by the State of Sudan. Trials must always accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish', para 73.

78 Art 6 Draft Protocol on the Rights of Women. 'Harmful practices' are defined in the Draft Protocol, art 1(e) as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health and bodily integrity'.

79 Hernández-Truyol (n 4 above) 613.

4 Reform of the Charter?

So, would it be appropriate to suggest any reforms of the Charter from a feminist perspective? On a general basis, it is submitted that whilst the Draft Protocol is a welcome development and a strong indication of the Commission's willingness to pay attention to women's rights, the Draft Protocol should be used more generally as the Commission's authoritative interpretation of the Charter. In this respect, the Commission should ensure that it is not used by states that have not ratified the Draft Protocol to argue that they are not bound by its provisions. Further, in this vein, the Commission must ensure that the existing provisions of the Charter and existing mechanisms are strengthened for women, such as use of the communications procedure, in the same manner in which the state reporting procedure has been used recently. Women's rights must be mainstreamed within the African Charter as a whole.

As indicated, however, the debate about the rights of women must go beyond a mere discussion of the application of provisions of the Charter, and examine whether the Charter itself must be reformed. In this respect, this article hopes to have presented the argument that, unlike many international human rights instruments, from a feminist perspective, the African Charter indicates a more holistic approach which is not grounded in opposing dichotomies which are, it is argued, the result of a system dominated by the male perspective. It thus has gone beyond the public/private divide and other divides which open the possibility of women's rights being taken seriously.

In this respect, some points about the future direction of the Commission are worth making. Firstly, it has shown itself to be innovative in certain aspects and it is essential if the Commission could continue this and use these provisions to develop the notion of duties to enhance the protection of rights, rather than, as the traditional argument would presume, detract from them. It could use these provisions to emphasise the responsibilities of non-state entities not only to continue more extensively and forcefully its practice of applying the Charter to the private sphere in relation to the rights of women, but also to apply such duties to other non-state entities wielding power. In the same way, the Commission should strengthen notions of community, by continuing to develop its jurisprudence on peoples' rights to groups subject to discrimination. Its recent case law against Mauritania indicates a willingness to move beyond the traditional Western/male perspective towards a focus more on power than state and thus that such rights could be useful for other vulnerable groups.

The conclusion is that I would not, therefore, advocate, on a feminist basis, a change to the provisions of Charter itself but instead urge the Commission to build upon its wide-ranging provisions and powers. NGOs also have a responsibility to submit cases using the Charter to its full potential.

One should then, however, take this further and advocate that other international, non-African bodies should look and learn from the approach of the African Commission. The African Commission has moved beyond a strict dichotomous approach that underlies much of international human rights law and in this way has offered hope for the protection of the rights of women. The reason why it has done this, however, may have less to do with its conscious desire to advance the protection of women's rights, than with its own willingness to offer an alternative to Western ideology. It has been argued throughout this paper that a feminist perspective argues that international human rights law is formulated by men and so, as indicated by opposing dichotomies approaches, fails to take account of the position of women. It is thus fundamentally flawed. The same argument can be applied from non-Western and thus African perspectives: 'The role of women under colonialism is in many respects symbolic of the domination of the colonised within a colonial society.'[80] Thus, international human rights law is not only male biased, but also Western biased, created by European states. As a result, their dominant position has ensured that the voice of women, and of Africa, is not considered relevant or valid to the debate or development of human rights law. The views and perspectives of the African bodies are marginalised to the extent that international literature on human rights and UN bodies does not often cite the jurisprudence and statements of African institutions. From the point of view of the international community it would seem that Africa has a lot of catching up to do, and that there is little if anything that it could contribute to the development of human rights law as a whole.

Because of the history of the continent of colonisation and imposition of European values and structures onto Africa, it is a mixture of these different influences. The African Commission reflects this mixture and is therefore useful in terms of developing human rights law to take account of this 'other', non-Western/non-male view. It offers a method by which non-Western countries' challenges to international law could enlighten and refocus the principles of international law as they now stand. It can thus challenge whether international human rights law as it is presently formulated is indeed universal.[81] The approach of the African Commission has been to move away from these unhelpful dichotomies inherent in human rights law towards a more holistic approach that takes account of a variety of perspectives. In this respect it not only offers the possibility

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80 Chinkin (n 57 above) 281. For more detailed discussion on this issue see Murray (n 25 above).

81 'Unless the experiences of women contribute directly to the mainstream international legal order . . . international human rights law loses its claim to universal applicability: it should be more accurately characterised as international men's rights law'; H Charlesworth 'Human rights as women's rights' in J Peters & A Wolper *Women's rights. Human rights: International feminist perspectives* (1995) 103 105.

of better protection and recognition of women's rights, but also offers something to the international community as a progressive way in which rights could be interpreted.

The most common criticism in the West of the African human rights system is not that it is too radical, but that it is not doing anything. No one is aware of the Commission's activities. While the lack of respect accorded to the Commission so far could be partly explained by the unwillingness of international bodies to consider the Commission as having anything to offer, it is also, arguably, partly due to the fault of the Commission itself which has not disseminated its work as widely and as freely as it could have done. Clearly, therefore, the Commission must be more public at all levels in its activities, disseminate its opinions and decisions and do this while such opinions are relevant, not many years later. Commissioners themselves must be committed to their decisions and the respect that should be accorded to the Commission, must take their task seriously.

In turn, the international community, the UN, regional bodies and writers must also be more willing to draw upon African material in their discussion and development of human rights law. They must accord it more respect rather than dismissing it as irrelevant, primitive or behind. It is these unusual aspects of the Charter that are essential to a developing international human rights law that is truly universal and truly reflective of all persons in the world. This is where the African Commission, as its Charter is not constrained by some of the wording of other international documents, can take a dynamic role and push this forward, challenging notions of human rights, the international human rights system and rather than make this a weakness, make it a strength. Respect in itself will help to ensure respect from others. What does seem to be essential is that the Commission is taken seriously and takes itself seriously. It needs to move beyond this perception that it is still catching up, and move towards recognising that it occupies a valid place on the international scene, and that others can learn something from it.

AFRICAN HUMAN RIGHTS LAW JOURNAL

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

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1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 Art 56(6) African Charter.

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

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

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

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

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

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

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

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

2 The African regional human rights system and its critics

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

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

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

21 As above.

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

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

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

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

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

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

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

26 Naldi & Magliveras (n 18 above) 432.

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

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

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

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

31 As above.

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

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

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

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

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

34 Art 30 African Charter.

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

36 Art 42(2).

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

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

39 Welch (n 38 above) 115.

40 Welch (n 38 above) 113.

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

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

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

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41 As above.

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

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

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

45 Robertson (n 33 above) 63.

46 As above.

47 Naldi & Magliveras (n 18 above) 456.

48 As above.

49 Robertson (n 33 above) 62.

50 Robertson (n 33 above) 63.

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

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

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

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

3 Background to and structure of the reform debate

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

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

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

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

54 Murray (n 20 above) 1.

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

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

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

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

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

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

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

57 Gittleman (n 29 above) 398.

58 Murray (n 20 above).

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

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

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

4 Reform through the cases: Crystallising the advances

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

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

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

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

63 Art 46.

64 n 61 above.

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

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

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

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

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

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

67 Odinkalu (n 52 above) 327.

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

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

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

4.2 Admissibility requirements

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

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

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

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

72 Art 55 African Charter.

73 As above.

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

75 Odinkalu (n 32 above) 402.

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

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

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

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

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

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

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

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

4.3 Substantive rights, including economic, social and cultural rights

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

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

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

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

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

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

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

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

86 See Odinkalu (n 52 above) 358–365.

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

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

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

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

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

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

90 See Odinkalu (n 52 above).

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

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

93 n 82 above.

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

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

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

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

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

4.4 Political rights and claw-back clauses

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

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

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

97 As above.

98 As above.

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

100 As above.

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

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

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

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

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

4.5 Remedies

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

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

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

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

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

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

4.6 Delay in deciding cases

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

5 Taking reform seriously

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

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

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

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

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

109 Thirteenth Annual Activity Report paras 13–17.

110 Welch (n 38 above).

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

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

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

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

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

112 n 5 above.

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

114 Art 42(2) African Charter.

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

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

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

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

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

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

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

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

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

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

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

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

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

AFRICAN HUMAN RIGHTS LAW JOURNAL

Special rapporteurs of the African Commission on Human and Peoples' Rights

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1 Introduction

Since its inception, the African Commission on Human and Peoples' Rights (African Commission or Commission)[1] has appointed three special rapporteurs. The first, the Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions,[2] was appointed in 1994. The second, the Special Rapporteur on Prisons and Conditions of Detention in Africa,[3] was appointed in 1996. The third, on the Conditions of Women in Africa,[4] was appointed in 1999.

The practice of appointing special rapporteurs was well-established in the United Nations (UN) long before the African Commission began doing the same.[5] What is striking about these appointments in the African system is that the African Charter on Human and Peoples' Rights (African Charter or Charter), which sets out the African Commission's mandate, provides no explicit provision for them.

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1 Established under art 30 of the African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3/Rev 5 (entered into force 21 October 1986), reprinted in (1982) 21 *International Legal Materials* 59.

2 Eighth Annual Activity Report of the African Commission, Annex VII.

3 Tenth Annual Activity Report of the African Commission, Annex VII.

4 Eleventh Annual Activity Report of the African Commission.

5 At the moment, the UN has 14 special rapporteurs, appointed under the auspices of the UN Human Rights Commission. It also has three independent experts, two special representatives of the Secretary-General, two working groups, one representative of the Secretary-General and one expert.

The specific procedures of the African Commission provided for in the Charter are those of examination of communications (state and non-state, articles 47 to 59)[6] and state periodic reporting (article 62).[7] Article 45 sets out the general functions of the Commission as promotion, protection, interpretation, and anything else the Organisation of African Unity (OAU) Heads of State and Government asks it to do, in that order.[8] Article 42(2) states that '[t]he Commission shall lay down its Rules of Procedure', which it has done.[9] But where the Charter has proved too vague, simply unworkable, or inadequate, the Commission has moved beyond the text.

The African Commission's practice of appointing special rapporteurs is therefore an innovation, and should be seen in the context of the Commission's innovations generally. In other instances where the Charter is vague but its mandate is broad, the Commission has had to fill procedural vacuums. This has happened with regard to concrete procedural issues, information gathering, and the conduct of informal negotiations.

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6 Arts 45–54 set out general procedures for the Commission to hear 'communications from states'; arts 55–59 set out a general procedure for the Commission to hear 'communications other than those from states'. Especially as regards the non-state communications, the Charter is ambiguous on such basic points as to whether the Commission may consider any communications other than those dealing with grave and massive violations. See also arts 56 & 59.

7 Art 62 reads: 'Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.'

8 Art 45 reads: 'The functions of the Commission shall be:

1. To promote human and peoples' rights and in particular:
   (a) to collect documents, undertake studies and researches in African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to Governments;
   (b) to formulate and lay down, principles and rules aimed at solving legal problems related to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation;
   (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights
2. Ensure the protection of human and peoples' rights under the conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.'

9 Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted on 6 October 1995.

Specifically, in relation to the article 55 communications procedure,[10] the Commission has held hearings, heard witnesses, taken decisions and recommended specific remedies. The Commission has also made innovations with respect to taking investigatory missions.[11]

What makes the appointment of special rapporteurs distinct from other practical, procedural innovations, and a bolder step for the Commission than the elaborations of the communication procedure or its practice of taking missions, is that special rapporteurs are not clearly or logically required to fulfil the Commission's mandate, nor a necessary elaboration of a Charter-mandated procedure. Rather, they are a new initiative altogether. The question may be asked: What was the Commission's justification for this initiative, and what was the void that the Commission was trying to fill?

I argue that, in order to gain credibility, the Commission has had to move beyond the manifest inadequacy of the provisions of the Charter. But the appointment of special rapporteurs has held a combination of pitfalls for the Commission, linked to, or even duplicating, the very structural defects of the African system that it is trying to overcome. Against this background, I will examine the work of the Commission's three special rapporteurs, the factors contributing to their success or failure, and the implications of this for the future of the practice of appointing special rapporteurs and the African system as a whole.

2 Context of an innovation

From the time of its creation, the African Commission has had to struggle to gain the confidence of those in the human rights community. Firstly,

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10 Arts 55–59, cited above, do not indicate eg if the Commission should hold hearings on communications or not; what evidence it is permitted to hear, and what, if any, remedies it is permitted to recommend. For an in-depth discussion of recent developments in the art 55 procedures, see CA Odinkalu *et al* 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' (1998) 20 *Human Rights Quarterly* 235–280.

11 Commissioners have always been expected to take 'promotional' missions to the countries for which they are responsible. In the early 1990s, the question of missions came up in relation to several communications which appeared to give evidence of serious and massive violations; the Commission wished to take missions before deciding the communications. Thus, missions were eventually taken to Mauritania, Senegal, Sudan, and Nigeria, but not to investigate the allegations in the communications *per se*. Reports were published of the missions to Mauritania and Senegal (see Ninth Annual Activity Report of the Commission). All states visited were ultimately condemned in relation to the communications submitted against them, but the role the missions played in bringing about these decisions will always be unclear. See eg decisions on Communication 48/90, *Amnesty International v Sudan;* Communication 50/91, *Comité Loosli Bachelard v Sudan*; Communication 52/91, *Lawyers Committee for Human Rights v Sudan;* Communication 89/93, *Association of Members of the Episcopal Conference of East Africa v Sudan,* Thirteenth Annual Activity Report.

the drafting procedures and the text of the African Charter were seen as reflecting the will of undemocratic governments, by definition antithetical to real protection of human rights.[12] Secondly, the commissioners elected by the Assembly of Heads of State and Government were not seen as truly independent, many retaining professional positions in which they represented their governments.[13] Thirdly, the OAU failed to provide the necessary material means and personnel. Until 1992, there was no lawyer at the Commission's Secretariat other than the Secretary, and since then staffing has been erratic at best.[14]

The textual confusions of the Charter and the reluctance of some commissioners to confront states, in the early years caused tension between the Commission's duty to promote the rights in the African Charter, and its duty to protect. Promotion received emphasis. Some commissioners have expressed discomfort with the article 55 procedure and stressed that the Commission is only a 'quasi-judicial' organ at best.

By 1994, however, the Commission began to standardise and expand its activities. It had been in operation for over five years.[15] It had examined nine state periodic reports[16] and had granted observer status to 133 non-governmental organisations (NGOs). The most active of these NGOs attended sessions regularly, and enjoyed considerable influence with the Commission, submitting draft resolutions to it for adoption[17] and other suggestions for its action.

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12 M Mutua 'The African human rights system in a comparative perspective: The need for urgent reformulation' (1992) 44 *The Nairobi Law Monthly* 27–30. Similarly, Commissioner Dankwa at the 18th session in 1995 said: 'The Charter was conceived at a time when human rights was unmentionable on our continent' (transcript of the 18th session of the African Commission on Human and Peoples' Rights, on file with the Institute for Human Rights and Development).

13 Of the 11 commissioners elected to the first Commission in 1987, the following were state employees: A Mokama was the Chief Justice of Botswana, A Gabou was the Interior Minister of Congo, HR Kisanga was a judge in Tanzania, M Chipoya was a civil servant in Zambia and Y Ndiaye a judge in Senegal.

14 When the first legal officer appointed resigned after serving for a few months, there was again a gap of nearly three years before another was appointed.

15 The Commission actually began operation in 1987, with the first session held in Addis Ababa.

16 Danish Centre for Human Rights *The African Commission on Human and Peoples' Rights Examination of state reports (1991–1993)* (1995). The countries whose state reports were examined by 1994 were Rwanda, Togo, Libya, The Gambia, Zimbabwe, Tunisia, Ghana, Nigeria and Senegal.

17 The NGO workshop held before the 14th session in December 1993 called on the Commission to act and make public statements on extrajudicial executions. They called for the establishment of an emergency mechanism and recommended that the Commission appoint a Special Rapporteur on Extrajudicial Executions. See International Commission of Jurists *The participation of NGOs in the work of the African Commission on Human and Peoples' Rights. A compilation of basic documents* (1996).

Amnesty International was one of the most involved observer NGOs. It was one of the first four NGOs to be granted observer status, in 1988. Amnesty International sent a representative from the International Secretariat in London to virtually all the African Commission's sessions. Needless to say, Amnesty International also had enormous experience in working with organs of the UN.

At the Commission's 14th session, held in Addis Ababa in 1993, Amnesty International proposed that the Commission appoint a Special Rapporteur on Extrajudicial Executions in Africa.[18] The Commission discussed the proposal in its public session and decided to defer the decision until the 15th session. In the meantime, the Commission instructed Commissioner Youssoupha Ndiaye of Senegal to contact the then Special Rapporteur of the UN on Extrajudicial Executions, Bacre Waly Ndiaye, also a Senegalese, to share his working methods with the Commission, presumably so that the Commission could have some idea of what kinds of activities and resources would be required.[19]

At the 15th session of the African Commission, Commissioner Ndiaye reported that the UN Special Rapporteur had met with him in Dakar and provided him with 'all the relevant documentation on his work' — presumably, copies of his mandate and reports he had produced.[20] Commissioner Ndiaye voiced the opinion that, given that the UN had had a Special Rapporteur on Summary or Arbitrary Executions since 1982, and had produced a total of 12 reports, the Commission should not duplicate this work. He also noted that the UN Special Rapporteur was administratively assisted by two staff members at the UN Centre for Human Rights in Geneva, 'one of whom is full-time', and that a similar arrangement would have to be made for a special rapporteur of the African Commission.[21]

In the discussion that followed, no opinion was expressed that appointing a special rapporteur was outside the Commission's mandate. Commissioner Ndiaye recognised that it was not provided for in the African Charter, but stated: 'We must go beyond the content of the Charter itself, and we must try to see . . . more courageous terms.' Subsequent commentators have argued that the appointment of special rapporteurs

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18 See statement of Amnesty International to the 15th session of the African Commission on Human and Peoples' Rights, April 1995, on file with Amnesty international.

19 Transcripts of the 14th session of the African Commission on Human and Peoples' Rights, on file with the Institute for Human Rights and Development.

20 UN special rapporteurs are appointed by resolution. The UN Special Rapporteur on Summary or Arbitrary Executions produces an annual report which is submitted to the Human Rights Commission.

21 Transcript of the 15th session, on file with the Institute for Human Rights and Development in Africa.

can be justified under article 46, which allows for 'any appropriate method of investigation'.[22]

The apparent lack of concern over mandate may have been due to the fact that the appointment of special rapporteurs is so common within the UN system, in which the UN Human Rights Commission freely appoints special rapporteurs without any text specifically authorising it to do so. Most commissioners were familiar with this practice. Appointing a special rapporteur may thus have seemed quite simple and straightforward. The African Commission may not have been consciously mimetic, but assumed that it had comparable powers to the UN Human Rights Commission.

Another element that may have hastened the Commission's decision to appoint a Special Rapporteur on Extrajudicial Executions was the situation in Rwanda. Amnesty International had proposed that the special rapporteur concentrate on extrajudicial executions in countries in conflict. The 15th session was held in April 1994, just as the massacres in Rwanda were beginning. The Commission apparently had several communications under the procedure in article 55 pending against Rwanda, but did not feel comfortable in taking a decision on them at that time.[23] The Commission limited itself to adopting a resolution on Rwanda.[24] Six months later, by the time of the 16th session, the worst of the Rwanda massacres were over, leaving more than half a million dead.[25] There was understandable frustration both within and without the Commission that the only African human rights body had failed to act in any concrete way.

In summary, in the face of overwhelming human rights violations, seminars, conferences and resolutions appear manifestly insufficient. Special rapporteurs may seem to be more responsive to violations, but also more proactive and simultaneously less threatening to states than the examination of cases brought by individuals.

The only real controversy was whether or not the African Commission could appoint special rapporteurs who were not members of the Commission. Commissioner Umozurike from Nigeria expressed the view

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22 EG Bello 'The African Charter on Human and Peoples' Rights: A legal analysis' (1985–86) 194 *Hague Recueil* 9 79.

23 Communications 27/89, 49/91 & 99/93, *Organisation Mondiale Contre La Torture & Others v Rwanda,* Tenth Annual Activity Report. The communications alleged serious and massive violations between 1990 and 1992. A report was submitted at the same time by Amnesty International detailing such violations as widespread massacres, extrajudicial executions and arbitrary arrests against the Tutsi ethnic group. The Commission finally decided in 1996 that the facts constituted serious or massive violations of the Charter.

24 Seventh Annual Activity Report of the African Commission, Annex XII 93. See also Press Release, Annex XIII 94.

25 Human Rights Watch *Leave no one to tell the story* (1999), <http://www.hrw.org/reports/1999/rwanda> (accessed on 22 March 2001).

— pointing as evidence to how few promotional visits commissioners had been able to undertake — that no commissioner had the time to travel as much as would be required of the special rapporteur, so an outside person should be found who could 'collect the information, to work with a commissioner'.[26] He was quickly outvoted by those who thought that appointing an outside person was not within the competence of the Commission; that in essence outsiders could not be 'trusted'; and that paying an outside 'consultant' would be expensive. Such a course of action would also imply that commissioners were not competent.[27]

It is interesting to find this reluctance so widespread among members of the Commission. On the other hand, the UN, which was supposedly their model for the institution of special rapporteurs, always appointed outside experts. Others proposed that while the holder of the title would be a commissioner, the rapporteur should have a professional, paid assistant.

The decision to appoint special rapporteurs only from within the African Commission may have been the result of unspoken unease about whether the Commission was within its powers or not. As long as the Commission appointed one of its own members, the work of the special rapporteur would be impossible to wholly separate from the work of a Commissioner, which sometimes is quite broad. In fact, it is questionable how much significance the act of appointing a special rapporteur from within the Commission has had. As we shall see, there was no provision made for expenses, and no written mandate until some time after the fact.

In the end, it was decided to appoint a special rapporteur from within the Commission. The Commission made its selection behind closed doors[28] and the name was not publicly announced until the 16th session.[29] For this reason, there are differing accounts given of when the special rapporteur was appointed. The first official documents attesting to his appointment date from the 16th session.[30]

The first Special Rapporteur of the African Commission, on Summary, Arbitrary and Extrajudicial Executions, was Commissioner Hatem Ben Salem of Tunisia, who was also at the time Vice-Chairperson of the Commission. It will never been known what criteria were applied in his selection, but language was mentioned as one, [31] and the decisive factor

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26 Transcript of the 15th session (n 21 above).

27 As above.

28 The Commission's sessions consist of both open and closed meetings. Open meetings can be attended by anyone, while closed meetings are limited to the Commission and any individuals it summons for discussion of a specific item.

29 Transcript of the 16th session of the Commission, on file with the Institute for Human Rights and Development in Africa.

30 Final Communiqué of the 16th session, ACHPR/RPT/XVI.

31 16th session transcript (n 29 above). Commissioner Ben Salem speaks Arabic, French and English.

was probably the willingness of the individual. All commissioners have full-time jobs elsewhere, and even the minimum duties of commissioners were frequently not carried out.[32] In this context, the Commission must have been eager to appoint any commissioner who assured it of their willingness to undertake extra duties. One can perhaps say that Commissioner Ben Salem volunteered.

3 The Special Rapporteur on Extrajudicial Executions

An institution had been established, but what, exactly, was the Special Rapporteur supposed to do, and how was it to work? From the outset, there was a fundamental lack of clarity on these questions. This could be explained by the uneasiness on the part of the Commission about the implications of appointing a special rapporteur. This uneasiness also explains the strange carelessness or even resistance evidenced at the 16th session of the Commission to put the special rapporteur's mandate in writing.[33]

In the public discussion of the Special Rapporteur at that session, Commissioner Badawi read from the report of the 15th session,[34] which merely specified that:

> Mr Hatem Ben Salem was appointed as Special Rapporteur on Extrajudicial Executions, and will report on the budget. Rwanda was to occupy primary importance. Consideration of the communication on Rwanda was postponed until the next session, pending the report of the Special Rapporteur.

The report recorded the decision of the Commission at the time of appointing Commissioner Ben Salem as being that 'the Special Rapporteur should work in areas which would work to complement the work of the UN instead of duplicating it . . .'.

Commissioner Badawi made the point that the 15th session report sets out the work of the Special Rapporteur in only the most general terms, and that terms of reference were needed. Commissioner Ben Salem stated his intention not to submit reports listing extrajudicial executions, saying that such a submission would duplicate the work of the UN Special Rapporteur and furthermore was an inadequate response to

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32 To be fair to commissioners, part of the failure to carry out promotional visits could have been due to lack of funds and administrative support in making the arrangements. The Raoul Wallenberg Institute provided funding for the Commission's missions, but the Commission's weak secretariat made accessing these funds difficult.

33 Transcript of the 15th session (n 21 above).

34 At the close of each session the Commission produces two documents: a session report, which is confidential, and a final communiqué, which is a public document distributed to all NGOs with observer status. The printed text of the session report is thus unavailable and knowledge of the report is limited to what was read by Commissioner Badawi in the public meetings of the 16th session.

extrajudicial executions. This agreement suggests that he was to submit no reports at all.

The Chairperson proposed that Commissioner Ben Salem should come to the next session with written proposals for his work. Commissioner Ben Salem protested somewhat that his mandate was already clear. Finally, another commissioner was assigned the task of drafting terms of reference.[35]

The Special Rapporteur's own vision of how he intended to carry out his mandate was founded on the assumed futility of written reports. Instead, he proposed that he would take up specific cases referred to him by NGOs and he would contact the governments concerned, in an effort to obtain compensation for the families of victims. He implicitly criticised the work of the UN as merely counting the dead. While denying that a substantial budget was required for the work, he called upon NGOs to provide him with information on 'cases, not hundreds and hundreds, but a few specific ones' for his potential intervention.

This proposal, made at the 16th session, received a generally positive reception, but several NGOs mentioned the importance of fighting impunity and preventing extrajudicial executions, as well as compensating them. Informal means of obtaining compensation, they emphasised, should not come at the expense of prosecution of those responsible for extrajudicial executions, which was closely linked with preventing future executions. The need to assign a staff member in the Secretariat of the Commission to assist the Special Rapporteur was raised by Commissioner Umozurike, but was not followed up.[36]

The terms of reference for the Special Rapporteur were, one would suppose, put forth at the 17th session, held in Lomé in April 1995, one year after the African Commission's decision to appoint the Special Rapporteur and six months after the appointment of Commissioner Ben Salem had been made public. However, there was no public discussion of the work of the Special Rapporteur at the 17th session, and no mention of the Special Rapporteur appeared in the Ninth Annual Activity Report, which was finalised at that session.[37] The only mention made of his work was in a statement by Amnesty International[38] criticising the lack of progress, and drawing a somewhat defensive response. It was a year

35 Commissioner Janneh even stated that he had proposed the drafting of terms of reference at the previous session and been overruled. He was appointed to draft the Terms of Reference.

36 16th session transcripts (n 29 above).

37 Each year at its odd-numbered sessions, the Commission prepares its annual activity reports, which it is required to submit to the Assembly of Heads of State and Government of the OAU, which meets once a year in June or July and approves the report.

38 Statement of Amnesty International to the 17th session of the African Commission on Human and Peoples' Rights, on file with Amnesty International.

since the Special Rapporteur had been appointed and there had been no written report. Clearly, the urgency of extrajudicial executions and the hopes of the NGO community notwithstanding, the work was off to a slow start.

The problems that were to dog the Special Rapporteur for the remainder of his mandate, such as having the original two-year mandate renewed three times, were already abundantly apparent. It became difficult to submit reports.

Firstly, the Special Rapporteur had no expertise in the subject, no concrete notion of how to proceed, and no written mandate to guide him. Even when NGOs sent in specific information on allegations of extrajudicial executions, the process of contacting, let alone negotiating with, governments presented insurmountable difficulties.

The second problem was that there were no material means — financial or administrative — made available to the Special Rapporteur, even for writing and sending faxes and making phone calls. The Secretariat of the African Commission proved manifestly incapable of playing the role of administrative arm for the Special Rapporteur's activities. No portion of the Commission's budget was dedicated to his work.

Thirdly, the Special Rapporteur was professionally ill-placed to pursue investigations of, or negotiations with, African governments. At the time of his appointment he was a mayor. In 1997 he was appointed the Tunisian ambassador to Senegal. His diplomatic career continued to flourish, and he was subsequently posted to Turkey and Switzerland. Although superficially these positions might have seemed as presenting him with abundant opportunities to know and influence African governments, in practice the nature of his duty to represent his own state made it extremely difficult if not impossible for him to appear at other times in the guise of an independent rapporteur.

Any of these three problems, occurring individually, might have been overcome. If the Special Rapporteur had had the necessary expertise, or a clearly articulated mandate, he might have been more able to raise funds for his mandate and also to separate his diplomatic work from his work as special rapporteur. If he had had administrative support and a budget given by the Commission or an active donor, he might have been able to develop the necessary expertise, or hire an expert to work under him. Finally, if the Special Rapporteur had been more independent from his government and had the will to conduct his mandate seriously, he might have both identified resources and developed the necessary experience.

For the next several years of his mandate, however, there was little or no change in the Special Rapporteur's performance. At the 18th session, held in Cape Verde in October 1995, the report of the NGO workshop held just prior to the African Commission's session to discuss its work specified:

> The recommendation of the workshop with regard to the role of the African Commission Special Rapporteur, was that there should be an early warning system, and a record of extrajudicial executions should be opened. A committee of NGOs should be established to keep this register. . . .

Later in the course of the session, the representative of Amnesty International stated that:[39]

> We were encouraged by the remarks of the Special Rapporteur of the African Commission on Extrajudicial Executions that he will begin work soon. Amnesty International is willing to provide any assistance which our resources permit. We hope the Special Rapporteur will be able to undertake a visit to Rwanda before the 19th session.

Although apparently positive, this statement was actually a cause for concern. It had been two years since the Special Rapporteur was appointed and little work had been done.

The mandate of the Special Rapporteur, a one page, five point document, finally appeared in the Tenth Annual Activity Report of the Commission, made public in 1996.[40] In brief, the Special Rapporteur was charged with compiling lists of executions; investigating extrajudicial executions with an eye to prosecution; and informing the Commission of situations in which extrajudicial executions were likely to occur, so that it might try to get the OAU to act. He was able to encourage states to prosecute perpetrators and compensate victims of families; and to attempt setting up a compensation mechanism within the Commission.[41]

The Sixth Annex to the Tenth Annual Activity Report which contains this mandate is significant in that it is the first and last written report made public on the work of the Special Rapporteur on Extrajudicial

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39 Transcripts of the 18th session of the African Commission, on file with the Institute for Human Rights and Development in Africa.

40 Tenth Annual Activity report.

41 The full text of the mandate is as follows (Tenth Annual Activity Report of the Commission, Annex VI):

1. To propose the implementation of a reporting system on cases of extrajudicial, summary and arbitrary execution in African states, specifically by keeping a register containing all information as to the identity of the victims.
2. To follow up, in collaboration with government officials, or failing that, with international, national or African NGOs, all enquiries which could lead to discovering the identity and extent of responsibility of authors and initiators of extrajudicial, summary, or arbitrary executions.
3. To suggest the ways and means of informing the African Commission in good time of the possibility of extrajudicial, summary or arbitrary executions, with the goal of intervening before the OAU Summit.
4. To intervene with States for trial and punishment of perpetrators of extrajudicial summary or arbitrary executions, and rehabilitation of the victims of these executions.
5. To examine the modalities of creation of a mechanism of compensation for the families of victims of extrajudicial, summary or arbitrary executions, which might be done through national legal procedures, or through an African compensation fund.

Executions. In addition to his mandate, Annex VI contains information on the Special Rapporteur's priorities, such as children, women, demonstrators and human rights activists and political opponents. It explains the late appearance of the terms of reference, noting that they were only adopted at the 18th session (October 1995) and concedes that the Special Rapporteur had not yet begun work due to the fact that[42]

> [a]ll the parties together believed that it was imperative that the Special Rapporteur have minimum means, independent of the Secretary to the Commission, with the object of fulfilling his task in the best conditions . . .

and that

> [t]hese conditions were not fulfilled until the beginning of 1996, thanks to a clarification of the mandate of the Special Rapporteur and to the logistical support of the North-South Centre of the Council of Europe, and the Swiss Directorate of Co-operation in Development and Humanitarian Aid.

The funding received illustrates that, although it may have been irresponsible of the African Commission to appoint a special rapporteur without making any provision for the funding of his activities, lack of material resources cannot be blamed as the sole, or even central, reason for the absence of activities undertaken. In addition to several donors who would have been willing to assist, the Special Rapporteur negotiated with several NGOs to assist him in different aspects of his mandate. Eventually, these collaborations all foundered on the reluctance or inability of the Special Rapporteur to devote the necessary energy and consistency to his work.[43]

In the following years, a certain routine was established. The Special Rapporteur consistently attended sessions[44] and delivered verbal reports, but these were generally restricted to descriptions of the difficulties he

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42 Tenth Annual Activity Report (n 3 above) Annex VI.

43 Interights undertook a study for him on the modalities of providing compensation for the families of victims, (on file with Interights) and for a few years he was in discussions with the African Centre for Democracy and Human Rights Studies, based in Banjul, to provide him with assistance. Annex VI of the Tenth Annual Activity Report mentions HURIDOCS as offering advice on the setting up of a database of executions. Finally, in 1998, he entered into a co-operation with the Institute for Human Rights and Development in Africa. This collaboration yielded a report on the special rapporteur's activities in 1999, which inexplicably was never annexed to an activity report of the Commission.

44 The only session that the special rapporteur did not attend was the 19th session, held in Ouagadougou in April 1996. It was pointed out at this session that his mandate would expire if not renewed, and that the special rapporteur had not sent any official word to the session on whether or not he wanted to continue in his mandate. The 2nd extraordinary session of the Commission, held in Kampala in December 1995 to consider the human rights situation in Nigeria, had decided that the special rapporteur on extrajudicial executions should accompany the Commission's planned mission, and that if the present rapporteur were discontinued it would be necessary to appoint another in order to comply with the decision of Kampala. The Commission decided to renew his mandate.

was encountering, and accounts of his attempts to co-operate with NGOs.[45] NGOs, in particular Amnesty International, routinely delivered statements expressing willingness to support the Special Rapporteur. They were also concerned over the lack of discernable achievements. Over the years, Ben Salem was mentioned as being committed to missions in Nigeria, Djibouti, Chad, Burundi, Rwanda, the Democratic Republic of Congo and Sierra Leone. However, none of these missions took place. After consultations with Rwandan refugees in Dakar, he compiled a list of over 1 000 names of Rwandans summarily executed during the genocide, but no public written record exists of this work.

The Special Rapporteur did explain at the 20th session that he felt it was improper to distribute written reports at sessions that had not yet been approved by the Commission. At one session he said he had submitted a written report and expressed surprise that the Annual Activity Report contained no report of his, as was required in his mandate. In 1999 the Institute for Human Rights and Development in Africa prepared a report for him that also, mysteriously, never appeared in an activity report nor was distributed at a session.

Ironically, the Commission had appointed the Special Rapporteur on Extrajudicial Executions in order to improve its credibility — to be seen to be doing something on an urgent issue. Yet the work of the Special Rapporteur on Extrajudicial Executions turned into a tragedy of missed opportunities to take real action, inflicting further damage to the Commission's credibility. The Commission was unable to overcome the general obstacle of lack of resources. It confirmed some critics' worst fears that commissioners were more concerned with the sensitivities of governments than with addressing the arbitrary killing of citizens.

As late as the 28th session in October 2000, the Special Rapporteur was blaming his inability to produce a report on the refusal of governments to permit him to visit the countries he wanted to visit. At the same time, he spoke in favour of the appointment of a Special Rapporteur on the Rights of Human Rights Defenders.[46] During the inter-session period, he resigned the office of Special Rapporteur on Extrajudicial Executions. This was announced at the end of the 29th session in April 2001, and the final communiqué of this session makes no mention of the appointment of a replacement.

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45 Transcripts of discussions at sessions show that support for the work of the Special Rapporteur was offered by the African Centre for Democracy and Human Rights Studies; Amnesty International; HURIDOCs; Interights; Penal Reform International; and the Institute for Human Rights and Development in Africa.

46 Transcripts of the 28th session of the African Commission on Human and Peoples' Rights, on file with the Institute for Human Rights and Development in Africa.

4 The Special Rapporteur on Prisons and Conditions of Detention in Africa

Although the experience of the Special Rapporteur on Extrajudicial Executions was a source of frustration for all concerned from the beginning, the inauguration of the new mechanism served as an inspiration for those working on other specific issues to lobby the African Commission for other thematic rapporteurs. Quite naturally, the appointment of a special rapporteur became a kind of benchmark, a measure of the importance the Commission attached to particular issues and also, inevitably, of the status of the advocates for a certain theme.

As early as the 17th session in 1995, two additional Special Rapporteurs were being requested, one on Prisons and Conditions of Detention, the other on Women. Having not even approved the terms of reference for Commissioner Ben Salem and already coming under criticism for the slow start of his activities, the Commission deferred a decision on both.

The prime mover behind the proposal that the Commission should appoint a 'Special Rapporteur on Prisons and Conditions of Detention in Africa' was the Paris-based NGO, Penal Reform International (PRI). This NGO is devoted to improving prison conditions worldwide and advocates alternatives to incarceration. PRI was among the earlier holders of observer status with the African Commission.

At the 18th session NGO forum, considerable discussion was devoted to the proposal for a new special rapporteur. The participating NGOs adopted in principle the notion of a Special Rapporteur on Prisons.[47] Still, the Commission did not react and no appointment was made at the 18th session. There must have been some discussion of special rapporteurs in the closed meetings of the session, since the terms of reference for the Special Rapporteur on Extrajudicial Executions were finally adopted. One can imagine that appointing another special rapporteur so soon would have seemed over-ambitious.

PRI persisted, demonstrating consummate knowledge of how to lobby the Commission. The proposal for a Special Rapporteur on Prisons was reiterated in a letter to the Chairperson submitted in advance of the 19th session.[48] A draft resolution fixing the terms of reference was submitted for adoption at the 19th session itself, along with a list of names of outside experts who could be appointed to the position.

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47 In the past, resolutions from the NGO workshops were regularly tabled at the Commission's session, and many of them were adapted and adopted by the Commission. This practice has largely ceased in recent years, with there being now no presumption that products of the NGO workshop will be taken up in such a direct way by the Commission.

48 Transcripts of the 19th session of the African Commission on Human and Peoples' Rights, on file with the Institute for Human Rights and Development in Africa.

It was clear that PRI understood very well the root of the problems of the Special Rapporteur on Extrajudicial Executions. It knew how to avoid them, and how to convince the Commission that this experience would be completely different from that of the first special rapporteur. Foremost among the Commission's concerns was the issue of money. As the Chairperson said at the 19th session, with reference to the Special Rapporteur on Prisons:[49] '[O]nce bitten, twice shy . . . we should bear it in mind provisions of article 23 of the Rules of Procedure . . . that is before the Commission approves something leading to expenditure, the Secretary establishes a provisional budget for this proposal.'

PRI therefore raised funds to support the Special Rapporteur's work, and this was well known to the African Commission. PRI provided a comprehensive package, in the form of the draft terms of reference, a budget and candidates. All that was needed was for the Commission to approve the appointment of a special rapporteur.

Possibly even more important than the willingness of PRI to provide funds was its willingness to supervise the work. During discussions at the 19th session, PRI was asked to undertake tasks that were clearly the responsibility of the Commission. With respect to the list of proposed outside experts, the chairperson asked PRI:[50] 'Have you contacted these people to see if they would be willing?' If the Commission had any intention of appointing them, it should have done so itself.

The proposal of specific activities and the willingness of PRI to spearhead their implementation were no doubt an impetus and a reassurance to the Commission. Before the appointment of the Special Rapporteur on Prisons, both the Special Rapporteur and the Commission as a whole knew exactly what his work would entail, and that material and administrative resources were there to see that it was carried out. This was in striking contrast to the Special Rapporteur on Extrajudicial Executions, who was given almost no guidance by the Commission until long after his appointment. He rejected outright the model of practice of the UN and was unable to convincingly propose an alternative mode of practice, and there were no resources to implement it.

49 As above.
50 As above.

A quick comparison reveals that the terms of reference of the Special Rapporteur on Prisons are nearly three times as long as those of the Special Rapporteur on Extrajudicial Executions.[51]

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[51] The Special Rapporteur was mandated in his terms of reference to 'examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights and to

3.1 examine the State of the prisons and conditions of detention in Africa and make recommendations with a view to improving them;

3.2 advocate adherence to the Charter and international human rights norms and standards concerning the rights and conditions of persons deprived of their liberty, examine the relevant national law and regulations in the respective States Parties as well as their implementation and make appropriate recommendations on their conformity with the Charter and with international law and standards;

3.3 at the request of the Commission, make recommendations to it as regards communications filed by individuals who have been deprived of their liberty, their families, representatives, by NG0s or other concerned persons or institutions;

3.4 propose appropriate urgent action.

4 The Special Rapporteur shall conduct studies into conditions or situations contributing to human rights violations of prisons deprived of their liberty and recommend preventive measures. The Special Rapporteur shall co-ordinate activities with other relevant Special Rapporteurs and Working Groups of the African Commission and United Nations.

5 The Special Rapporteur shall submit an annual report to the Commission. The report shall be published and widely disseminated in accordance with the relevant provisions of the Charter

. . .

7 The Special Rapporteur shall seek and receive information from States Parties to the Charter, individuals, national and international organizations and institutions as well as other relevant bodies on cases or situations which fall within the scope of the mandate described above.

8 In order to discharge his mandate effectively the Special Rapporteur should be given all the necessary assistance and co-operation to carry out on-site visits and receive information from individuals who have been deprived of their liberty, their families or representatives, form governmental or non-governmental organizations and individuals.

9 The Special Rapporteur shall seek co-operation with State Parties and assurance from the latter that persons, organizations, or institutions rendering co-operation or providing information to the Special Rapporteur shall not be prejudiced thereby.

10 Every effort will be made to place at the disposal of the Special Rapporteur resources to carry out his/her mandate

. . .

11 In order to establish his/her mandate in the first two years, the Special Rapporteur shall focus on the following activities, while paying special attention to problems related to gender:

11.1 Make available an evaluation *of the conditions of detention in Africa* highlighting the main problem areas. This should include areas such as: prison conditions; health issues; arbitrary or extra-legal detention or imprisonment; treatment of people deprived of their liberty; and conditions of detention of especially vulnerable groups such as: refugees, persons suffering from physical or mental disabilities, or children.
The Special Rapporteur shall draw on information and data provided by the States.

Although PRI stated its preference for the appointment of an 'independent expert', that is a non-commissioner, the Commission did not depart from its previous precedent, and Commissioner Victor Dankwa from Ghana was appointed Special Rapporteur at the 20th session.[52] At the same session it was agreed in principle to appoint a Special Rapporteur on Women, but no one was named. Instead, the Commission 'decided to consider the proposals pertaining to this issue in its forthcoming session as will be submitted by its working group'. The contrast between the handling of the two matters can only be due to the fact that funding was immediately available for the Special Rapporteur on Prisons to begin work. The Special Rapporteur on Women had numerous NGO advocates, but no institution was willing to assume entire responsibility in the manner that PRI had done.

It is hard to over-emphasise the contrast between the functioning of the first and second Special Rapporteurs. With respect to each of the difficulties outlined above which hampered the work of the Special Rapporteur on Extrajudicial Executions, the position of the Special Rapporteur on Prisons was different.

Firstly, PRI provided the necessary expertise and concrete framework for action. In early January 1997, less than three months after the Special Rapporteur was appointed, the president of PRI, Ahmed Othmani, and the Secretary of the African Commission held consultations with Commissioner Dankwa in Banjul, The Gambia, for four days. A programme of activities was set out that was to involve two country missions a year.[53] Although the mandate of the Special Rapporteur was quite broad, his core activity became these missions. His first mission, to Zimbabwe, was undertaken in February 1997, less than four months after his appointment. Travel arrangements, meetings with officials, background legislation, identifying the prisons he was to visit, *per diem*, hotel reservations, the provision of an assistant to accompany Commissioner Dankwa, the subsequent drafting of a report, its publication and distribution were all foreseen and arranged.

Secondly, the resources for all these were provided by donors and administered by PRI. The budget for the Special Rapporteur's activities for the first year, as reported in the Tenth Annual Activity Report, was

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11.2 Make specific recommendations with a view to improving the prisons and conditions of detention in Africa, as well as reflect on possible early warning mechanisms in order to avoid disasters and epidemics in places of detention.
11.3 Promote the implementation of the Kampala Declaration.
11.4 Propose revised terms of reference if necessary, at the end of this two-year period to the African Commission and an overall programme for the following stage.'

52 Final Communiqué of the 20th session.

53 *Report of the Special Rapporteur on Prisons and Conditions of Detention* to the 21st session of the African Commission on Human and Peoples' Rights, 15–24 April 1997, Nouakchott, Mauritania. Included in the Tenth Annual Activity Report of the African Commission (n 3 above) Annex VII.

$40 000, of which $25 000 was 'travel and related expenses', obviously for the missions. The Special Rapporteur was also given funding to recruit an assistant who worked with him in Ghana.[54]

Of paramount importance, however, was the commitment of Commissioner Dankwa to undertake the activities agreed to. Even with administrative assistance, the job of Special Rapporteur added a heavy burden of travelling and writing to his other duties as a professor. Between 1995 and 1997, he was also Vice-Chairperson of the African Commission. As attested to by the reports he produced, he did indeed undertake the two missions a year as foreseen in his programme of activities.[55] After each mission, a mission report of substantial detail was published, describing the prisons visited, officials met and the legal background. The reports contain recommendations for governments as well. They usually appear in two languages, English and French. Copies were made freely available at sessions of the Commission, rather than annexed to activity reports of the Commission.

The conclusion is clear: Membership of the Commission does not, *per se*, make it impossible to undertake the work of a special rapporteur. A more difficult, yet more critical criterion to measure is the energy and independence of the individual concerned. All the funding and administrative support would not have produced results had the Special Rapporteur on Prisons not been willing to travel a considerable part of the year and undertake the rather unpleasant task of frequenting prisons, and publish his findings, which would likely be displeasing to the governments in question. It would seem that there was a productive combination of expertise, resources and will.

The experiment was thus a gamble that paid off. Those who might have been prepared to condemn the Commission and its work could see, at the very least, prison doors consistently opening to the Special Rapporteur. It is not known how many states carried out his recommendations. But Commissioner Dankwa clearly devoted time and attention to the problem of prison conditions in Africa, which was not being done by any other organ. The credibility of the Commission was thus, to a degree, burnished.

In October 1999, at the 26th session in Rwanda, Commissioner Dankwa was elected Chairperson of the African Commission for a two year term. At the 28th session, held in Benin in 2000, he resigned his

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54 Indeed, at a subsequent session the special rapporteur lamented that his assistant, paid by donors, earned more than himself, a law professor at University of Legon, Ghana.

55 His missions included Zimbabwe, Mali (August 1997), Mozambique (December 1997), Madagascar (February 1998), Mali (second visit, December 1998), The Gambia (June 1999), Benin (August 1999) and Central African Republic (June 2000). Reports of all these missions, except to Madagascar, are available in English, French and Portuguese. The Gambian report is also available in Arabic.

position as Special Rapporteur. A consensus seemed to be growing that being a special rapporteur was incompatible with holding other offices on the Commission, simply because of the time commitment required. Commissioner Dankwa was replaced by Commissioner Vera Chirwa of Malawi, who, at the time of writing, has not yet undertaken a single mission, but continues to enjoy the support of PRI. Interestingly, the 26th session also saw the resignation of Commissioner Julienne Ondziel-Gnelenga of Congo-Brazzaville from the position of Vice-Chairperson. She still holds the office of Special Rapporteur on Women, to which I now turn.

5 The Special Rapporteur on Women

By the time of the 23rd session in April 1998, the African Commission had achieved two examples of how the mechanism of special rapporteurs could operate. The reasons for the contrast must have been obvious to the members of the Commission, although they were only indirectly alluded to in public sessions.

In considering the appointment of a Special Rapporteur on Women, the Commission showed minimum cognisance of the lessons it should have learnt. It waited over a year after the appointment of the Special Rapporteur on Prisons, before naming Commissioner Julienne Ondziel-Gnelenga as the third Special Rapporteur. This was surely due to the fact that, although numerous NGOs spoke out in favour of the appointment of a special rapporteur, none came forward with the complete package that PRI had offered. There were no clear terms of reference, funding and an offer of administrative assistance. Indeed, it is a bit mystifying that the Commission appointed Commissioner Ondziel when it did, at the 23rd session, since so much was still lacking.

The impetus might have been provided by the ongoing discussions of a protocol to the African Charter that would address the rights of women. A nearly infinite process of meetings and revisions was under way, and Commissioner Ondziel, along with Commissioner Dankwa, was on the Commission's working group on the subject. The mandate of the Special Rapporteur on Women was defined so that the Rapporteur would study women's rights in Africa. The Rapporteur was also to propose new guidelines on women's rights for the state reporting procedure. The Rapporteur would also assist governments in preparing policies to protect women's rights, and work towards harmonising initiatives on women's rights in Africa. The Rapporteur would furthermore finalise the Draft Protocol on the Rights of Women and report to the Commission.[56]

[56] The full text is as follows:

'1 Conduct a study on the situation of the rights of women in Africa.

Yet, as could have been expected, the experience was all too reminiscent of that of the Special Rapporteur on Extrajudicial Executions. Commissioner Ondziel presented a 'preliminary' report six months after her appointment and then an 'activity report' at the 25th session; but neither of these reports found its way into an activity report of the African Commission. By the 26th session she reported receiving a printer and computer from the International Centre for Human Rights and Democratic Development of Montreal, Canada. She had also undertaken an 'information and awareness' mission to Liberia, funded by Women in Law and Development in Africa (WILDAF).[57] Yet, she had received no budget from the Commission, and no administrative assistance from the Secretariat.

Although Commissioner Ondziel presented her report to the 26th session of the Commission, along with one at the following session, these did not make their way into the Thirteenth Annual Activity Report and thus technically remain restricted documents. While she called upon NGOs to convey to her information on the status of women, no NGO absent from the session would have had any way of knowing about her mandate, although she mentioned using the opportunity of attending sessions and conferences to set up 'focal points' which presumably would feed her information.

In her activity report to the 27th session, held in Algiers in April 2000, she mentions two specific cases of violation of women's rights, both from Zimbabwe, brought to her attention by two NGOs, which she was trying to follow up, although one of them, concerning a woman sentenced to death for murder, was only coincidentally about women.

She also reported that the Montreal-based International Centre for Human Rights and Democratic Development had granted her an additional 30 000 Canadian dollars. Later in the year, the Centre began to pay an assistant, who began work at the Secretariat in Banjul, then

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2 Come up with guidelines for the preparation and consideration of States Parties periodic reports on the situation of the rights of women to enable the Commission to achieve enhanced monitoring of the application of the African Charter.

3 Assist African governments in the preparation and implementation of policies of the promotion and protection of women's rights.

4 Work in collaboration with NGOs, other organisations and agencies engaged in the promotion and protection of women's rights with a view to harmonising initiatives on women's rights in Africa. In this regard, the Special Rapporteur shall collaborate with the Special Rapporteur of the United Nations, of the African Commission and of other regional systems.

5 Finalise the drafting of the draft protocol on the rights of women and follow the process of adoption.

6 Report to the Commission as well as any recommendations for the improvement of the situation of women's rights in Africa.'

57 *Report of Activities of the Special Rapporteur on the Rights of Women in Africa*, 26th ordinary session, DOC/OS/(XXVI)/124.

moved to Lomé to work with Commissioner Ondziel. She reported on two missions, one to Rwanda and one to Burundi, but, in contrast to the lengthy and detailed reports of the Special Rapporteur on Prisons, Commissioner Ondziel's missions merit only a few pages in her overall report and have not been circulated separately.

Commissioner Ondziel was absent from the 28th session, held in Benin in October 2000, although she did send notice to the 28th session that she was resigning her position as Vice-Chairperson, evidence of a growing consensus that being a special rapporteur is incompatible with holding other offices within the Commission.

Interestingly, in a report she specified that the mission of the Special Rapporteur on Women is to extend for four years. However, Commissioner Ondziel's term as commissioner expired this year, and the OAU Assembly of Heads of State and Government did not re-elect her (in July 2001). This could once again reopen the question of whether the Commission may have special rapporteurs who are not members, since Commissioner Ondziel may be willing to continue as Special Rapporteur. Only the Commission's decision at the 30th session in October 2001 will resolve these questions.

6 Conclusion

As evidenced by the widely varying experiences described above, attempts of the African Commission to break out of its procedural straitjacket have not always been successful. In reality, it is not so much the African Charter that hampers the African Commission's effectiveness, but lack of resources and, most critical of all, lack of will.

The attempt by the Commission to designate special rapporteurs in order to circumvent the constraints of the institution as a whole can only meet with success where the individual chosen has greater willingness than the Commission to devote energy to the task and to risk states' displeasure. Where this willingness exists, resources can be found and used profitably. Unfortunately, the Commission's choice of special rapporteurs from within its ranks has only highlighted the disparate nature of commissioners' commitment to the institution and human rights in general.

The mechanism of special rapporteurs may thus have a positive impact in the thematic areas for which dedicated rapporteurs happen to be chosen. It will be worse than ineffective where this is not true, merely serving to heighten the cynicism with which the Commission is viewed. Special rapporteurs are thus no panacea. The Commission would do better to try to first ensure the independence of its members, secure sufficient funding for all the activities it would like to undertake, and ensure the administrative capacity of its Secretariat to cater for these.

AFRICAN HUMAN RIGHTS LAW JOURNAL

Examination of state reports by the African Commission: A critical appraisal

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1 Introduction

The adoption on 27 June 1981 of the African Charter on Human and Peoples' Rights (African Charter or Charter),[1] which anchors the African regional human rights system, was an important step towards the protection of human rights on the African continent. However, while the contribution of regional human rights systems in Europe and the Americas to the global system established under the auspices of the United Nations (UN) is widely accepted, this is not the case in respect of the African system.

Virtually all African states have been and continue to be the most egregious human rights violators, rendering human rights illusory in the daily lives of the majority of people in Africa. Changes in some African states have created room for optimism. One thinks here of movements towards democratisation and constitutionalism, such as those in South Africa, Malawi, Uganda and Namibia. However, generally human rights conditions remain critically precarious on the continent. Even within largely 'democratic' or 'liberal' African states, governments have acted and continue to act in ways antithetical to their international human rights obligations. This perennial state of affairs continues to illuminate the challenge of the African regional human rights system.

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1 Adopted by the Eighteenth Assembly of Heads of State and Government of the Organisation of African Unity (OAU) at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc CAB/LEG/67/3/Rev 5 (1981), reprinted in (1982) 21 *International Legal Materials* 52 and I Brownlie (ed) *Basic documents on human rights* (1992) 551. The Charter has been ratified by all the OAU's 53 member states, the last to ratify being Eritrea.

Doubts about the adequacy of the regional African human rights system are multi-faceted, surrounding not only the normative, but also the institutional and procedural aspects of the African Charter.[2] The Charter may be applauded for its significant contribution to the human rights corpus, including its codification of all three categories of rights,[3] the innovative concept of peoples' rights,[4] the imposition of duties on individuals,[5] but even these and other aspects raise various controversies. For instance, commentators point to 'claw-back' clauses as undermining or watering down the contents of the rights, saying that they invest states with unfettered powers to restrict human rights.[6] Other commentators

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2 See generally H Steiner & P Alston *International human rights in context: Law, politics and morals* (1996) 689; M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for social and economic rights in Africa' (1995) 26 *California Western International Law Journal* 1; 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* 226; CE Welch 'The African Commission on Human and Peoples' Rights: A five-year report and assessment' (1992) 14 *Human Rights Quarterly* 43.

3 The Charter brings together the three dimensions of human rights under one roof, namely, civil and political rights, economic, social and cultural rights and 'peoples' rights', sometimes also called collective or solidarity rights.

4 These are rights which an individual can only enjoy in a collective sense, as a member of the community. See W Benedek 'The rights of peoples: The main issues' (1991) 16(56) *Bulletin of Australian Society of Legal Philosophy* 71–79; RN Kiwanuka 'The meaning of 'peoples' in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80. Under the Charter, peoples' rights include: equality of all peoples (art 19); the right of all peoples to existence and to self-determination (art 20); the right to permanent sovereignty over wealth and natural resources (art 21); the right to development (art 22); the right to peace and security (art 23); and the right to a general satisfactory environment (art 24).

5 These duties are towards his or her family and society, the state and the international community. See African Charter arts 27–29.

6 A *prima facie* interpretation of the claw-backs clauses may mean that the guarantees in the Charter are subject or equated to the domestic law of states parties. See F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa 1997* (1999) 50. Also, it may mean that the content of domestic laws restricting the rights may not be impugned. State parties are given more or less unlimited powers to determine the nature and extent of the limitations to the rights as distinguished from both the European and American human rights instruments which require states to limit rights *as necessary in a democratic society*. See arts 8–11 of the European Convention on Human Rights and arts 15 & 16 of the American Convention of Human Rights. The jurisprudence of the African Commission rejects the notion that states have unfettered powers to limit the rights in the Charter. The Commission has clarified the implications of claw-back clauses in the Charter, more specifically with respect to the right to freedom of association in art 10(1) of the Charter. Under this article, the right to freely associate is conditional on the requirement that one abides by the 'law' enacted by the states. Without defining the standards such domestic law must conform to, the clause may be interpreted as conferring unfettered powers on states to infract the right to free association. The Commission, however, has rejected this interpretation. In its resolution on the right to associate (adopted at its 11th session), the Commission calls on states

point to the potential abuse of the language in which duties are phrased.[7]

Even more critical are the doubts about the effectiveness and adequacy of the African Charter's enforcement system. The African Charter creates the African Commission on Human and Peoples' Rights (African Commission or Commission) as the primary institution to supervise state parties' compliance,[8] but certain aspects of the African Charter tend to limit the African Commission's competence.[9]

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not to 'enact provisions which would limit the exercise of this right'. The resolution stresses that states' regulation of the right to associate should be consistent with their obligations under the Charter. It follows that no-party or single-party regimes are infractions of the freedom of political association, assembly and speech. Through the communications procedure, the Commission has also strictly interpreted limitations to rights. In Communication 103/93, *Alhassan Abubakar v Ghana*, Tenth Annual Activity Report, the Commission strictly construed the claw-back clause in art 6, holding that a state is not absolved from liability by merely stating in general terms that the complainant violated some law and was arrested and detained under such law without providing substantive information to support such allegations.

7 See generally R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667. For an extensive justification for the rights–duties conception, see generally Mutua (n 2 above).

8 Art 30 of the African Charter. The Commission was inaugurated on 2 November 1987. See Second Annual Activity Report of the African Commission on Human and Peoples' Rights para 4.

9 For instance, the Commission is not conferred with the power to enforce its decisions. Under art 59, the Assembly of Heads of State and Government may veto the findings of the Commission. The Charter is silent on whether or not the Commission's decisions are binding, prompting some analysts to argue that they are declaratory and recommendatory in nature. See eg G Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431 432; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342 348. The Commission's decisions possess legal significance, and states should comply with them in good faith on the basis of the international law principle of *pacta sunt servanda*. But the absence of an explicit provision on the powers of the Commission to issue binding and enforceable judgements means that compliance with the Commission's decisions depends more on the good faith of the state in question. The Commission's protective mandate includes adjudication of both inter-state (arts 47–54) and individual communications (art 55). Individual communications are essential in redressing violations, but many states do not co-operate in enforcing the Commission's findings. See IAB El-Sheikh 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' (1997) 9 *African Journal of International and Comparative Law* 943 945. Through activism and creativity, the Commission has sought to address these limitations, but its effectiveness is still hindered by the above factors. The activism and creativity of the Commission includes: enhancing publicity of the Commission's work beyond the fetters of art 59 of the Charter; interaction and partnership with non-governmental organisations (NGOs) both local and international; augmenting the Commission's protective mandate by adjudicating cases alleging also isolated and not only massive violations of human rights; flexibility towards admissibility requirements laid down in art 56 of the Charter; drawing upon international human rights law; strictly construing claw-back clauses; appointment of special rapporteurs and carrying out

The basic functions of the African Commission are both promotional and protective, but the latter mandate is limited by various provisions of the African Charter.[10] More concretely, the Charter entrusts the African Commission with three principal functions: examining state reports,[11] considering communications alleging violations of human rights from both individuals and states,[12] and a so-called interpretative function aimed at expounding the African Charter.[13]

The African Commission started off cautiously and continues to face several challenges. Over time it has become an important instrument for the promotion and protection of human rights in Africa. In analysing the functioning of the Commission, this article disagrees with those advocating its abolition, and supports relentless efforts to strengthen it and the African system as a whole. The article evaluates the functioning of the African Commission with regard to the examination of state reports, and assesses the role of this function in the promotion of human rights in Africa. It identifies factors inhibiting the effectiveness of state reporting and presents proposals for improving the system of examining state reports.

2 The African Commission's legal competence to examine state reports

While obligating states to submit biennial reports on the legislative and other measures adopted to give effect to the African Charter, the African Charter failed to identify the organ competent to review these reports.[14] This omission created the possibility that a body composed of either independent experts, such as the African Commission, or government representatives, such as the Organisation of African Unity Assembly of Heads of State and Government (OAU Assembly), or the Council of

on-site visits to states parties; recommending remedies for violations of the rights in the Charter; and attempts by the Commission to carry out follow-ups of its decisions. See generally GW Mugwanya 'Realising universal human rights norms through regional human rights systems: Reinvigorating the African system' (1999) 10 *Indiana International and Comparative Law Review* 34 43–45; Viljoen (n 6 above) 54.

10 Viljoen (n 6 above).

11 Art 62 African Charter.

12 Arts 47 & 55 African Charter.

13 Art 45(3) African Charter.

14 The American Convention on Human Rights (1969) and European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) do not require states to submit regular reports, but various UN human rights instruments requires states to submit regular reports, and mandate specific organs to deal with these reports. See generally T Buergenthal *International human rights in a nutshell* (1995) 21–247; P Alston 'Critical appraisal of the UN human rights regime' in P Alston (ed) *The United Nations and human rights: A critical appraisal* (1992) 1.

Ministers (OAU Council of Ministers) could be mandated to receive and examine state reports.[15] Allowing a 'political' body lacking independence, impartiality and human rights virtuosity to review reports would have undermined the benefits of state reporting. Inspired by the latter conviction, the African Commission at its 3rd session adopted a resolution requesting the OAU Assembly to entrust it with the task of reviewing state reports.[16] The African Commission rightly noted that 'it [was] the only appropriate organ of the OAU capable not only of studying the said periodic reports, but of making pertinent observations to state parties'.[17] In response to the African Commission's request, the OAU Assembly entrusted the Commission with the task of considering state reports.[18]

3 Guidelines for reporting and examining state reports

Under article 62 of the African Charter states are obliged to submit biennial reports on legislative and other measures they adopted in order to give effect to the provisions of the Charter. These reports are presented to the Commission for examination.

When the African Commission began its examination of state reports, it had no clear procedure. The Commission has now evolved a practice of examining state reports, although each examination may still have a distinct character, influenced by the framework set out by each state's report, the background and the preparation of the state representative. The Commission's practice in considering state reports may be summarised as follows:[19]

- A member of the African Commission is assigned as 'special rapporteur' with respect to the state whose report is to be examined. The special rapporteur usually drafts the questions to be asked.
- These questions are then sent to the state before the report is considered.

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15 Some analysts argue that the omission was intentional, so as not to jeopardise ratification. See eg CE Welch *Protecting human rights in Africa* (1995) 154; Viljoen (n 6 above) 56.

16 First Annual Activity Report of the Commission (1987–1988) 28.

17 n 16 above 28.

18 Second Annual Activity Report of the Commission (1998–1989) 20.

19 Viljoen (n 6 above) 95–96; F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the South' (2000) 44 *Journal of African Law* 110; E Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 90–107; Danish Centre for Human Rights *The African Commission on Human and Peoples' Rights Examination of state reports: Egypt and Tanzania (11th session)* (1995) 7.

- At the session, the chairperson or the special rapporteur initiates the report's examination proceedings.
- Thereafter, the state's representative introduces the report.
- This is followed by observations and questions of the special rapporteur.
- Other members of the African Commission also address questions and observations to the state representative.
- The state representative is granted an opportunity to prepare a response.
- After the response from the state representative, the African Commission summarises the proceedings and usually a note of thanks is made to the state representative.

The Commission scrutinises the report to determine the extent to which the state has taken steps to comply with the African Charter, the problems faced, and the ways to overcome them. State reporting, as the chairperson of the Commission has stressed,[20]

> [i]s a non-contentious and non-judgmental proceeding allowing states to present a comprehensive picture of the human rights situation in a country and engage in constructive dialogue with the Commission with a view to assist states to enhance their human rights standards.

Through this dialogue the difficulties to the realisation of human rights and possible ways to address them are identified.[21] Thus, states benefit from advice on how to improve their human rights situation from independent international experts.

The UN Committee on Economic, Social and Cultural Rights has highlighted the purposes of state reporting which may also inspire the state reporting mechanism under the African system. These objectives are to:[22]

- ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity;
- ensure that the state party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territories or under its jurisdiction;
- provide the basis for the elaboration of clearly stated and carefully

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20 R Murray 'Report on the 1997 sessions of the African Commission on Human and Peoples' Rights — 21st and 22nd sessions: 15–25 April and 2–11 November 1997' (1998) 19 *Human Rights Law Journal* 181.

21 The African Commission on Human and Peoples' Rights *State reporting procedures* Information Sheet 4 5–7.

22 Committee on Economic, Social and Cultural Rights: *Report on the 3rd session* (6–24 Feb 1989) UN Doc E/1989/22 165–185.

targeted policies and to enable the government to demonstrate that such principled policy-making has in fact been undertaken;
- facilitate public scrutiny of government policies and to encourage the involvement of the various sectors of society in the formulation, implementation, and review of the relevant policies;
- provide a basis on which the state party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realisation of the obligations contained in the International Covenant on Economic, Social and Cultural Rights;
- enable the state party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realise progressively the rights in the Covenant;
- enable the Commission and the state party to facilitate the exchange of information among states to develop a better understanding of the common problems faced by states and a fuller appreciation of the possible measures to be taken to promote the effective realisation of each of the rights contained in the Covenant.

The African Commission itself has spelt out the advantages or benefits of state reporting, including:[23]

- Through the reporting system the implementation of the African Charter by states within their domestic systems is monitored. Through the examination of state reports, the African Commission is afforded the opportunity to understand the problems encountered by states in transforming the Charter into reality, and the Commission may make recommendations which may be taken by states to address the problems and promote effective realisation.
- The reporting system enables states to constantly check the whole government machinery as it requires all relevant government institutions and departments to evaluate legal regulations, procedures and practices in terms of the provisions of the Charter.
- State reporting permits the African Commission to collect information on common experiences, both good and bad, from state parties so that states may learn from each other.

On the basis of the above, states should be honest in their reporting, presenting the true picture of their human rights situation in order to benefit from the good offices of the African Commission.

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[23] The African Commission on Human and Peoples' Rights *State reporting procedure* Information Sheet No 4 6–7.

Like UN treaty bodies, the Commission has drawn up guidelines for national periodical reports.[24] These guidelines are intended to aid state parties to submit reports that are clear, organised, adequate in scope and sufficient in detail.[25] However, unlike guidelines issued by UN treaty bodies, which are brief and are arranged in the order of the specific rights in each instrument, the African Commission's first guidelines were voluminous and not arranged in a similar order. Instead, they were arranged under six subject matters, namely: civil and political rights; economic and social rights; peoples' rights; elimination of all forms of racial discrimination; suppression of apartheid; and elimination of all forms of discrimination against women. The Commission has subsequently issued additional simplified guidelines.[26]

The initial guidelines have shortcomings, but they may be credited for clarifying some ambiguous provisions of the African Charter, and for deepening normative understanding thereof. For instance, while the Charter has no derogation clause, the guidelines require states to report on whether there is a provision in their laws for derogation and under what circumstances derogations are possible.[27] Moreover, the guidelines are detailed on the information states must furnish to demonstrate that they have taken appropriate measures to give effect to individual and group rights, thereby deepening the normative understanding on the scope of these rights and the obligations of states. For instance, as regards peoples' rights to equality under article 19, the guidelines require states to state the constitutional framework which protects the different sections of national community.[28] Thus, to comply with the African Charter, states are under an obligation to proscribe tendencies of some sections of the community dominating others.

In reporting on the right to self-determination in article 20, states are required to provide information on legislative and administrative machinery ensuring that all communities are allowed full participation in political activities and equal opportunities in the economic activities of their country.[29] Thus, independent African states are to guarantee the right

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24 Guidelines on national periodic reports, Second Annual Activity Report of the African Commission on Human and Peoples' Rights Annex XII. These guidelines are reprinted in G Naldi *Documents of the Organisation of African Unity* (1992) 155. After serious debates over these guidelines, the Commission adopted the simplified guidelines as summarised below. See Viljoen (n 19 above) 111–113.

25 Ankumah (n 19 above) 82.

26 See generally Viljoen (n 19 above) 112–113.

27 Guideline II 4(i). However, without laying down detail as to what standards states must conform to when they derogate from their obligations or the circumstances that must exist before derogations are made, this reporting requirement is inadequate.

28 Guideline III (2).

29 Guideline III (4)(i).

to self-determination. Denying certain communities the right to participate in the political or economic activities of the country amounts to oppression and violates the right to self-determination.

Guideline III (11), dealing with reporting on peoples' right to a satisfactory environment, amplifies the provisions of article 24. Guideline III (11) provides that the aims of article 24 are to protect the environment and keep it favourable for development (thereby incorporating the concept of sustainable development in environmental protection); to establish a system to monitor effective disposal of waste in order to prevent pollution and to obligate nations to co-operate to prohibit and penalise disposal of waste on African soil by any company. The guideline further defines the obligation of state parties by requiring them to furnish certain information in their initial and periodical reports.

The guidelines require state parties to indicate in their initial reports the principal legislative and other measures taken to fulfil the intention of the African Charter regarding the prohibition of pollution and efforts to prevent international dumping of toxic waste or other waste from industrialised countries. For their periodical reports, the guidelines require state parties to indicate continuation of development to curb waste and removal of pollution on land, water and air. State parties are also required to furnish information with respect to the right to take part in cultural life under article 17(2) of the Charter. The guidelines define in detail the obligations state parties are to discharge in order to give effect to the right.[30]

Additionally, the guidelines clarify the scope of economic and social rights as well as the obligations resting on state parties. For instance, in respect of the right to work under article 15 of the Charter, the guidelines require state parties to provide information on free choice of means of living, protection from arbitrary termination of employment and also to indicate policies they have pursued to achieve steady economic and social development and full employment.[31] In order for state parties to comply with the right to work, they are to take steps to ensure the right to equal pay for equal work, the right to safe and healthy working conditions, equal opportunity for promotion, rest, leisure, limitation on working hours and holiday with pay.[32]

Despite the African Charter's omission of trade union rights in its guarantee of free association under article 10 and the right to work in article 15, the guidelines require state parties to report on the right to form trade unions, the right of trade unions to federate and function freely, and the right of workers to strike.[33]

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30 Guideline III (11) & (14).
31 Guideline II (4).
32 Guideline II (6).
33 Guideline II (10).

The guidelines have clarified and deepened the normative understanding of the Charter. Moreover, in their initial and periodical reports on economic and social rights, the guidelines require state parties to report on various protection mechanisms, including the right to social security and social insurance, the right to protection of the family, the right to the highest attainable standard of physical and mental healthy, the right to education, the right to compulsory primary education and the right to economic development.[34]

4 Analysis

Since its 9th session in March 1991, when it considered the reports of Libya, Rwanda and Tunisia, up to the end of its 25th session in April 1999, the African Commission has had occasion to examine reports of 21 countries.

The Commission has had opportunity to address various human rights issues affecting different African countries.[35] The examination of state reports has served as a forum for wide-ranging discussions that give a valuable indication on how the African Commission gives normative understanding to the African Charter through interpretation of its provisions.

Infrequent and inadequate reporting by states, however, has undermined the role of reporting in realising human rights in Africa. A decade since the Charter took effect in respect of the majority of state parties, only 24 of the 53 state parties to the Charter had submitted reports; only four states had submitted second reports and only Zimbabwe had submitted a third report. No state had submitted a fourth report. Many state parties had not yet submitted their first reports which were long overdue.[36] By the 25th session, there were over 200 state reports due.

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34 Guidelines II (A)–(B).

35 See generally Ankumah (n 19 above) 79–109; Viljoen (n 6 above) 91–102.

36 These states are Botswana, Burkina Faso, Central African Republic, Cameroon, Chad, Comoros, Congo, Côte d'Ivoire, Djibouti, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Sahrawi Arab Democratic Republic, Sao Tomé and Principe, Sierra Leone, Somalia, Swaziland, Tanzania, and Zambia. See Eleventh Annual Activity Report of the African Commission on Human and Peoples' Rights Annex II (Status of Submission of State Reports) 68th ordinary session of the OAU Council of Ministers 1–6 June 1998 CM/208 (LXVIII). For a summary of the status on submission of state periodical reports under art 62 of the Charter between March 1987 to the 21st session of the Commission, 15–25 April 1997, see Viljoen (n 6 above) 92–94; Murray (n 20 above) 181–184. At the 21st session, the Commission examined the initial report for Sudan, and combined the second and third reports of Zimbabwe. For a summary of the status on submission of state periodic reports under art 62 of the Charter as at the 25th session, see Annex III, Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights, 24th and 25th ordinary sessions, 26 April to 5 May 1999, Banjul, The Gambia, <http://www1.umn.edu/humanrts/africa/12thannex3.html> (accessed 4 August 2001).

Partly because of the failure to submit reports, the African Commission has not fully succeeded in enhancing the protection and promotion of human rights through the examination of state reports. Reasons for the lack of compliance by states with their reporting obligations include a general lack of political will on the part of state parties; secondly the fact that state parties have to file reports under other international human rights instruments to which they are signatories; and thirdly the lack of a co-ordinated effort between state departments and the complexity of the first reporting guidelines issued by the African Commission.

Additionally, many of the reports filed have revealed a lack of seriousness in carrying out introspective self-evaluation. An example is Nigeria's report (of six pages in total) which consisted of a few brief remarks and a photocopy of the table of contents of its partially suspended constitution.[37] Commissioners, however, have expressed satisfaction with some reports, such as those of The Gambia, Mozambique and Algeria.[38] Even those so-called good reports, however, may be imperfect in view of the fact that they are being compared with totally inadequate reports from other countries. Moreover, some countries may use comparatively good quality reports to conceal their poor human rights records.[39]

The African Commission does not issue 'concluding comments' or a 'concluding evaluation' of state reports. Individual commissioners express views in the course of examining state reports but no uniform position is taken by the Commission on the various issues raised. The examination of state reports usually ends with profuse thanks or encouragement to the state representative. The Commission does not adequately advise state parties on how to improve their human rights situations.[40] The Commission needs to remedy these anomalies in order to enhance the impact of the state reporting procedure in protecting and promoting human rights in Africa.

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37 Viljoen (n 6 above) 95.

38 Viljoen (n 6 above) 95. See also Ankumah (n 19 above) 90–107.

39 Viljoen (n 6 above) 95.

40 In examining South Africa's report, the set of questions prepared by the African Commission's rapporteur, Commissioner Rezzag-Bara, as well as information supplied to the Commission by South African NGOs, enabled the Commission to identify several issues affecting South Africa's human rights regime, including the *status quo* of the African Charter in South Africa's legal system, the role of customary law and its relation to human rights, realising 'compulsory' education when this education is not free, the independence of the Independent Electoral Commission, the funding of political parties, the effectiveness of the National Crime Prevention Strategy, police brutality, measures to reduce the number of trail-awaiting prisoners, the role of victims in the administration of justice, the role and powers of the Council of Traditional Rulers, the structure of the legal profession and the rationalisation of courts. Ideally the Commission should have advised South Africa on these issues by adopting concluding comments or concluding views. See generally Viljoen (n 19 above) 110. Initially the UN Human Rights Committee examining reports under art 40 of the ICCPR used not to adopt concluding comments or concluding views about state

5 Proposals to invigorate state reporting

State reporting under the African system is essential to the promotion and protection of human rights, but its effectiveness is undermined by several factors which need to be remedied. While the first guidelines for state reporting played an important role, they were deficient in some respects.

The guidelines were too detailed, lengthy and in some areas repetitive and unnecessarily complex. Additionally, the first guidelines were not arranged in a logical and coherent manner. The simplified guidelines follow a more logical sequence and more clearly provide for state parties to report on each right and duty enshrined in the African Charter. Furthermore, as regards racial and gender discrimination, while the first guidelines should be commended for drawing inspiration from similar guidelines adopted by the UN organs under the UN Convention Against Racial Discrimination (CERD) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the simplified guidelines are quite precise in requiring states to report on actions they have taken to protect vulnerable groups. With regard to women, state parties should comprehensively report on the predicaments that afflict women on the continent, including female genital mutilation, domestic violence and the abuse of widows.

In the course of examining state reports, the African Commission should avoid spending too much time on technical issues and be decisive on issues. For instance, whether or not a state representative must attend the session when a state's report is examined, is an issue that has in the past caused the postponement of examination of state reports.[41] This issue has remained unresolved. The issue of the suitability of the representative (whether he or she should possess technical legal expertise) has also caused delays and confusion, and the Commission has not yet decisively resolved these.[42] The Commission should not require specific qualifications of state representatives and may proceed to consider a state's report in the absence of its representative to avoid a backlog of

reports, but from 1992 it changed this practice to issue Agreed Final Comments at the conclusion of the consideration of each report. These comments also contain recommendations to the state on the possible actions to take to improve its compliance with human rights obligations under the Covenant. According to the Committee, Agreed Final Comments serve the following purposes: (a) to make each state's experience available for the benefit of all state parties in order to promote their further implementation of the Covenant; (b) to draw their attention to insufficiencies disclosed by a large number of reports; (c) to suggest improvements in the reporting procedure and to stimulate the activities of these states and international organisation in the promotion and protection of human rights. See Report of the Human Rights Committee A/36/40 107.

41 Such as those of Nigeria and Benin. See Viljoen (n 6 above) 98.

42 Viljoen (n 6 above) 98.

reports. The Commission should then send its comments to the state and require a state's response on unanswered issues.

The frequent non-attendance of government representatives causing the examination of state reports to be postponed, and at times the non-attendance of commissioners assigned as rapporteurs in respect of the state reports leading to a waste of time while looking for substitutes, are creating a backlog.[43] The limited time available to the commissioners at each session, coupled with delays arising from the failure of the Secretariat to translate the reports in all the official languages of the Commission, aggravate the situation.[44] The Commission should fight these problems relentlessly.

The benefits of the state reporting procedure may be enhanced by affording sufficient time to the examination of each report. Compared to other international human rights bodies, the African Commission disposes of reports very quickly, initially in approximately 45 minutes.[45] The Commission has made efforts to remedy this, but more needs to be done to allow state representatives adequate time to respond.[46] On several occasions, the practice pursued by the Commission is one of asking a series of questions to the representative, followed by 'a statement in defence' of the report.[47] The danger is that the representatives will not be able to give definite answers to each of the questions, and may omit pertinent issues. A question-answer approach should be adopted.

Moreover, the African Commission may enhance the impact of the state reporting mechanism by frequently referring to the information presented to it by non-governmental organisations (NGOs) as well as alternate reports. NGOs should not only participate in the processes of preparing state reports, but should also be encouraged to supplement these reports, thereby providing the Commission with additional information. They should also be present at the examination of state reports. The fact that states are aware that NGOs are present and ready to furnish the Commission with information may check dishonest or incomplete state reporting, besides putting pressure on states to remedy violations to avoid embarrassment before the Commission. The Commission has only so far to a very limited extent taken cognisance of alternate reports.

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43 Viljoen (n 6 above) 100.

44 Viljoen (n 6 above) 102.

45 As above.

46 The UN Human Rights Committee usually allows state representatives a day to prepare replies. See M O'Flaherty 'The reporting obligations under article 40 of the International Covenant on Civil and Political Rights: Lessons to be learned from the consideration by the Human Rights Committee of Ireland's first report' (1994) 16 *Human Rights Quarterly* 515 517.

47 Viljoen (n 6 above) 100.

The Commission should also create a follow-up mechanism to deal with unanswered queries or unsatisfactorily answered questions by state representatives during the examination of state reports. A follow-up is possible if the Commission issues concluding comments and if NGOs are encouraged to monitor how state parties implement these recommendations in practice.

At the end of the examination of each state report the African Commission should endeavour to make a general evaluation of the report and issue concluding comments. Such an approach not only enables the Commission to suggest improvements in the human rights practice of the state in question, but its recommendations are made available for the benefit of other states. Moreover, concluding comments supplement the Commission's elaboration of the African Charter's norms and deepen the normative understanding of the Charter. While the views expressed by each individual commissioner in the course of examining state reports are informative, they are not sufficient to provide a uniform position or opinion of the Commission as a whole on various issues the Commission confronts in the examination of state reports. These issues include the death sentence,[48] the implications of state domination of the media to freedom of expression and the press, the legality of proscribing publications that propagate the views of political parties and the *status quo* of special tribunals other than regular courts to the right to a fair trial.[49]

Infrequent reporting by state parties has also limited the role of state reporting. The African Commission may deal with non-co-operative states through the appointment of special rapporteurs to investigate the human rights situation in countries and make recommendations on how to improve them. In addition, the Commission may request state parties with overdue reports to submit reports presented to UN treaty bodies, examine them and seek clarification or supplementary reports where necessary. The use of special rapporteurs may not only invigorate state reporting, but may also serve as an alternative to state reporting. In addition, they also play an important protective function.

The African Commission has in the past relied on article 46 of the African Charter[50] to appoint special rapporteurs and carry out on-site

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48 For instance, this issue arose in the Commission's examination of the reports of The Gambia and Senegal at the Commission's 12th session, and one commissioner, Beye, emphasised that he was personally opposed to the death penalty. See Viljoen (n 6 above) 106.

49 These are some of the issues for instance that arose in the Commission's examination of The Gambia's second report at the Commission's 16th session. See generally African Society of International and Comparative Law *Report on the 16th Session* (1996) 36–42.

50 Art 46 of the African Charter mandates the Commission to resort to any appropriate means of investigation.

missions to state parties, but this system needs strengthening. While the use of special rapporteurs in the African system is not yet fully developed, and is hindered by financial constraints,[51] it constitutes an important method for the protection of human rights. Special rapporteurs in the African system seem to have wide mandates,[52] although they may be inhibited by restrictions on publicity.

The African Commission has also enhanced its protective mandate through initiating on-site visits or missions of good offices to the state parties. These on-site visits may also be essential in serving as an alternative to state reporting. The essence of these missions is to try to secure an amicable resolution of communications that the Commission has declared admissible, but the Commission may effectively use it to get information on the state's human rights problem. In the case of Mauritania, on receipt of communications against that state which revealed 'disturbing violations of human rights',[53] the Commission sent a fact-finding mission to Mauritania with a view to finding an amicable resolution to put an end to the situation.[54] Other missions have been carried out in Senegal, Burundi, Sudan and Nigeria.[55]

During these missions, the commissioners can carry out an in-depth study of the problem, meet with parties, engage in constructive dialogue with a view to resolving the problem, and make recommendations on

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51 The Commission relies on funding from NGOs and other institutions. See Ninth Annual Activity Report 7.

52 For instance, the mandates of both the Special Rapporteur on Extrajudicial or Arbitrary Executions and the Special Rapporteur on Prisons and Conditions of Detention encompass taking preventive measures and also promoting state compliance with international human rights norms and standards. See *Report on Extra-Judicial, Summary or Arbitrary Executions* (by Hatem Ben Salem, Special Rapporteur) Tenth Annual Activity Report Annex VI, and *Report of the Special Rapporteur on Prisons and Conditions of Detention to the 21st Session of the African Commission on Human and Peoples' Rights* Tenth Annual Activity Report, as above, Annex VII. At the 22nd session, the Special Rapporteur on Extrajudicial or Arbitrary Executions reported, among others, his attempt to intervene on behalf of an individual in the Comoros. The Comoros, however, executed the individual. He also reported on his futile request to the UN Commissioner for Human Rights, asking that the Special Rapporteur of the African Commission be part of the mission of the UN Committee investigating executions in Zaïre. See generally Murray (n 20 above) 176. Although these attempts were futile, they demonstrate the role the African system can play. There is a need to widely publicise states' non-compliance as this may serve as a shame and may pressure states into compliance.

53 *Report of the Mission to Mauritania of the African Commission on Human and Peoples' Rights* 19–27 June 1996, Tenth Annual Activity Report, Annex IX.

54 As above. It was further stressed by the head of the mission that the goal was not to decide whether what was encountered was wrong or right, but above all to listen to all sides with the objective of bringing clarification to the Commission in its contribution to the search for an equitable solution through dialogue.

55 See generally Viljoen (n 6 above) 60; D Shelton 'The promise of regional human rights systems' in BH Weston & SP Marks (eds) *The future of international human rights* (1999) 385.

the course of action. On-site missions increase the public knowledge of the regional system and the mere presence of human rights officials from an intergovernmental organisation may deter violations.[56] On the above basis, on-site missions may not only be used to strengthen state reporting, but may also constitute an alternative system of reporting.[57]

Owing to challenges facing the above mechanisms, especially the lack of sufficient funding, the African Commission may wish to consider adopting the so-called 'review of implementation'[58] procedure even in the absence of a state report. Under this procedure, the Commission obtains independent information such as from NGOs, reports submitted by that country to UN bodies and their comments, about the implementation of the African Charter by the state in question. Thereafter, a state representative is invited for a dialogue with the Commission. These proactive methodologies have the potential of dealing adequately with state parties that fail to submit reports.

6 Conclusion

The examination of state reports by the African Commission has the potential of enhancing respect for human rights in Africa. The Commission has undertaken issue-analysis and deepened the normative understanding of the African Charter through its guidelines to state reporting, but several problems continue to inhibit the effectiveness of state reporting. These problems need to be addressed to improve the system of state reporting rather than abandoning the system in its entirety. The Commission's regular reviews of the enforcement of human rights in countries are essential in encouraging states to carry out self-examination and in enabling it to scrutinise reports to determine state compliance with the African Charter.

State reporting may enable the Commission to offer advice to states on how to improve their human rights situations. Moreover, states not complying with the Charter may be exposed to international embarrassment. The presence of NGOs at the examination of state reports and their alternate reports may help to put pressure on state parties not to make misrepresentations in their reports. State parties may take steps to remedy violations to avoid international embarrassment.

Efforts are needed, however, to encourage states to file their reports regularly. There is also a need for the Commission to enhance its role by issuing concluding comments. If at the end of examining each state's report, concluding comments and recommendations are made in

56 Shelton (n 55 above) 385.
57 Viljoen (n 6 above) 61.
58 Viljoen (n 19 above) 117.

respect of areas for improvement, when the Commission next considers a report of that country, these comments and recommendations could provide the basis upon which to evaluate a state's efforts, if any, to improve its human rights record. Thus, concluding comments and recommendations may play a vital role in the Commission's follow-up efforts.

With improved state reporting, a backlog of unexamined state reports may aggravate the situation over time. The African Commission needs to establish procedures to deal with such backlogs. As noted above, the Commission should proceed to consider a state's report in the absence of its representative to avoid backlog of reports. The Commission should then send its comments to the state and requiring a state's response on unanswered issues. Because the Commission also deals with individual communications, which may reduce the time available to state reports, it needs to adopt procedures that dispose of communications expeditiously.

AFRICAN HUMAN RIGHTS LAW JOURNAL

A critical reflection on the proposed African Court on Human and Peoples' Rights

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1 Introduction

The background to the agreement for the establishment of a human rights court for Africa is by now well known.[1] The idea was initially debated in 1961 at the same conference at which the 'Law of Lagos' was adopted. Such a court was apparently deliberately omitted from the provisions of the African Charter on Human and Peoples' Rights (African Charter or Charter) concluded 20 years later, despite the adoption of such courts in Europe and America.[2] There was nonetheless agreement to establish a quasi-judicial protective body similar to the United Nations Human Rights Committee. This body would lack any ability to render binding or enforceable decisions. This body would be called the African Commission on Human and Peoples' Rights (the African Commission

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1 See J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256 257–258; M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342 352; A O'Shea 'A Human Rights Court in an African context' (2001) *Commonwealth Law Bulletin* (forthcoming); A Stemmet 'A future African Court for Human and Peoples' Rights' (1998) 23 *South African Yearbook of International Law* 233 234.

2 Arts 38–56 European Convention on Human Rights and Fundamental Freedoms of 1950; Arts 52–73 American Convention on Human Rights of 1969.

or Commission),[3] a useful tool for the promotion of human rights but a largely ineffective mechanism for the protection of human rights.[4]

The eventual re-consideration of the idea of a court in 1994 was a reaction to a growing sense of the inadequacy of the protection offered by the present system. The Assembly of Heads of State and Government requested the Secretary General of the Organisation of African Unity (OAU) to call upon government experts to:[5]

> ponder in conjunction with the African Commission on Human and Peoples' Rights over the means to enhance the efficiency of the Commission in considering particularly the establishment of an African Court on Human and Peoples' Rights.

This request eventually culminated in the conclusion of the Protocol establishing the African Court on Human and Peoples' Rights in 1998.[6] It was, however, a presumptive question. Why should it have been assumed that the establishment of a court was a likely solution to the problem of the inefficiencies of the Commission? By asking government experts to focus on the question of the establishment of a court, their attention might have been drawn away from the Commission itself and how its performance may have been improved. A court may or may not have been the answer or the complete answer. The presumptive nature of the question is perhaps reflected in the fact that a draft document on a court was produced only just over a year later.

There are a number of arguments that can be and have been raised against the establishment of the proposed court or a court at all. In the following sections, the merits of these arguments will be examined with a view to reflecting seriously on this significant and inevitable step in the development of an African human rights system.

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3 Arts 30–59 African Charter on Human and Peoples' Rights of 1981; see generally EA Ankumah *The African Commission on Human and Peoples' Rights: Powers and procedures* 1996; E Bello 'The mandate of the African Commission on Human and Peoples' Rights' (1988) 1 *African Journal of International Law* 31; F Viljoen 'Review of the African Commission on Human and Peoples' Rights: 21 October 1986 to 1 January 1997' in C Heyns (ed) *Human rights law in Africa 1997* (1999) 47; K van Walvaren 'African Commission on Human and Peoples' Rights' (1993) 11 *Netherlands Quarterly of Human Rights* 116.

4 See generally W Benedek 'The African Charter and the African Commission on Human and Peoples' Rights: How to make it more effective' (1993) 11 *Netherlands Quarterly of Human Rights* 25; Mutua (n 1 above) 345–346; CE Welch 'The African Commission on Human and Peoples' Rights: A five-year report and assessment' (1992) 14 *Human Rights Quarterly* 43.

5 *Report of Government Experts Meeting*, AHG/Res 230, 30th ordinary session of the Assembly of Heads of State and Government, Tunis, Tunisia, June 1994, cited in IAB El-Sheikh 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory note' (1997) 9 *African Journal of International and Comparative Law* 943 (n 1).

2 Objections to the idea of a court of human rights for Africa

The first assumption implicit in the 1994 request of the Assembly of Heads of State and Government of the OAU is that the concept of a court of human rights is in principle a good idea for Africa. Although obvious to some, it is hard to take this assertion as a foregone conclusion when the OAU has itself avoided the issue for more than 30 years and only two other regions of the world have felt it necessary to establish such a body. Furthermore, a number of states have supported the international human rights movement by becoming parties to regional and global human rights treaties, but have simultaneously refrained from acceding to the necessary protocol or making the necessary declaration to establish the competence of a judicial body to receive individual complaints.[7] Although these trends can be partly explained by the reluctance of states to expose themselves to international scrutiny, their stance is not always devoid of principled explanation.

One of the least acceptable explanations for the rejection of the idea of a court is a cultural one. According to this argument, a human rights court has no place in Africa because African tradition dictates that Africans resolve their disputes through amicable settlement.[8] I have addressed the deficiencies in this argument elsewhere,[9] but essentially it fails to have regard to the inequality of bargaining power between governments and their citizens. It also ignores the factual reality of an almost complete failure on the part of some African societies to settle their differences amicably and with respect for human rights.[10]

Another objection is one that views the matter from both a national and an insular perspective. This argument rests on the premise that there are adequate mechanisms for the protection of human rights on a national level. It may be said that at national level a constitution with

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[6] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, reprinted in (1998) *ICJ Review* (special issue) 227.

[7] Eg as at 25 March 2001, only 98 out of the 147 parties to the International Covenant on Civil and Political Rights of 1966 have become party to the First Optional Protocol, thereby accepting the jurisdiction of the Human Rights Committee to accept individual communications.

[8] UO Umozurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 902 909. This idea that Africans settle matters by discussion was promoted to justify one party democracy: see K Wiredu 'Democracy and consensus in African traditional politics: A plea for a non-party polity' in EC Eze (ed) *Postcolonial African philosophy* (1997) 303.

[9] O'Shea (n 1 above).

[10] The Rwandan genocide is an extreme, but clear illustration: See African Rights *Rwanda: Death, despair and defiance* (1995).

a bill of rights exists. That bill of rights reflects all the important provisions of human rights treaties and may be enforced through a constitutional court that will give primacy to the constitution and the bill of rights. What need is there then for yet another body to perform this identical judicial function? The South African Constitutional Court may serve as an example. The Constitutional Court applies the Constitution that incorporates most of the content of the African Charter and arguably goes further.[11] Other decisions, rulings and legislation may be declared unconstitutional if they infringe the Bill of Rights.[12] The Court itself operates in a very similar fashion to the proposed African Court. It consists, like the African court, of 11 judges,[13] its decisions are final and binding[14] and its judges are in practice selected from personalities that have struggled for the protection of human rights and fundamental freedoms.

Naturally, not every African state can boast this level of judicial protection of human rights,[15] but the need for a court should not be confined to the need to compensate for the lack of an effective constitutional court within certain states. There are justifications for regional protection over and above national guarantees. A constitution is not merely a document for the protection of human rights, but also reflects the needs of the state as determined by the constitution-making processes. This national interest may need to be balanced against the bill of rights by constitutional court judges. This balance and its resulting limitation on human rights may offend internationally accepted standards for the protection of human rights and should therefore be subject to international judicial scrutiny.

A pertinent illustration of this on the national level is the South African Constitutional Court's decision on the constitutionality of amnesty.[16] When it was argued that the South African amnesty provisions violated the right of access to court and certain provisions of international humanitarian law, the Court promptly reminded itself that it was concerned, not with the international legality of amnesty, but its legality in terms of the South African Constitution.[17] Since the epilogue to the interim Constitution had expressly provided for amnesty, it was difficult for the Court to uphold that it was unconstitutional or contrary to the

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11 Secs 7–39 Constitution of the Republic of South Africa Act 108 of 1996.

12 Secs 2 & 167 South African Constitution.

13 Sec 167(1) South African Constitution.

14 Sec 167(3)(c) South African Constitution.

15 See J Allain & A O'Shea 'African disunity? Comparing human rights law and practice in the north and south of Africa' (2001) 22 *Human Rights Quarterly* (forthcoming).

16 *Azanian Peoples' Organisation (AZAPO) & others v President of the Republic of South Africa & others* 1996 (4) SA 671 (CC).

17 *Per* Mahomed DP at 688.

Bill of Rights. Only a regional or global human rights body could have objectively measured the South African amnesty provisions against internationally accepted standards of human rights protection.

The other difficulty presents itself when the national courts prove to be ineffective in the enforcement of their decisions or their ability to remain impartial without being subject to harassment or dismissal. In Zimbabwe the courts rendered decisions upholding the right to property. The executive and enforcement organs of the state, however, failed to respect these decisions. In these circumstances, a regional body could potentially provide its stamp of international disapproval.

Apart from these limitations to the national process, a regional body has the advantage of setting regional standards in an area of law that is by nature controversial and uncertain in its particulars.

Perhaps the most forceful argument against any form of regional judicial intervention in human rights protection is one of resource allocation. African states rank among the poorest in the world. African communities are ravaged by poverty, lack of adequate health care services and scant infrastructure. There are also a plethora of mass human rights violations across the continent. Governments with necessarily limited resources must fund any regional initiative. They have no other option than to prioritise. In the context of human rights, it may be argued, the priority must lie with the promotion of human rights, as opposed to its protection in individual cases.[18] Resources should, according to this argument, be concentrated on building a human rights culture though education and activities. This must be especially so when the returns from individual human rights protection prove to be of limited value.

While this type of argument deserves serious consideration, it has to be admitted that there is no one solution to the problem of human rights in Africa. The African Commission has indeed had a largely promotional role, but the human rights situation in Africa remains shocking. No one component for the effective protection of human rights can be completely sacrificed because of limited resources. However, this aspect will be expanded upon in the next section to argue that while the need for a judicial body is undisputed, the specifically proposed form of that body in the Protocol to the African Charter may be inappropriate in the circumstances.

3 The desirability of a two-tier protective mandate

There is a growing consensus among academics and governments that an effective judicial mechanism for the protection of human rights is

[18] A similar argument was employed in the *AZAPO* case (n 16 above), in order to justify a limitation on the right of access to the national courts: especially at 695.

both desirable and necessary in the African context, as elsewhere. The complete rejection of the protective function of the African human rights system is no longer tenable. However, serious questions may be raised in relation to the actual solution adopted in terms of the Protocol to the African Charter. This is especially so with respect to what the Court achieves in terms of improving upon the work of the Commission or to the proposed relationship between the Commission and the Court.

It has been persuasively argued by Makau Mutua that the mere establishment of a court will not serve to eradicate the deficiencies of the African human rights system of protection.[19] It is argued that this must be accompanied by a radical revision of the provisions of the African Charter and a clear division of labour that completely removes the protective function from the mandate of the Commission.

Mutua therefore raises both normative and institutional objections to the proposed court. While the African Charter provides much room for manoeuvre, it is not clear why this should in itself constitute an objection to the establishment of the court in its proposed form. Presumably, the Court can itself, through creative reasoning, redress any potential deficiencies resulting from the ambiguities and 'claw-back' clauses in the Charter. There is much in the rules on the interpretation of treaties that would enable the Court to do so. In particular, a treaty must be interpreted in the light of its object and purpose, as well as the context and words used.[20] Further, a court is entitled to have regard to subsequent treaty developments in the interpretation of a human rights treaty.[21] This the Court is of course specifically invited to do by the Protocol, which allows it to interpret and apply other treaties to which the member states are parties.[22] Mutua's fear of the implications of a conservative bench can always be rectified through a further protocol, as he suggests in relation to women's rights,[23] without the need of delaying the establishment of the Court until such changes have been effected.

Mutua's institutional objection to the relationship between the Commission and the Court focuses on the concern that the Court should be seen to be independent from the Commission, which has failed in its mandate. He notes that:[24]

> it is absolutely critical that the Court be, and be perceived as, separate and independent from the African Commission to avoid burdening it with the severe image problems and the anaemia associated with its older sibling.

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19 Mutua (n 1 above).

20 Art 31(1) Vienna Convention on the Law of Treaties of 1969.

21 Art 31(3).

22 Art 7 Protocol to the African Charter.

23 n 1 above 360; in fact such a Protocol is likely to come into effect.

24 As above.

His proposal for rectifying this problem is a clear division of labour between the Commission and the Court such that the Court has the exclusive protective mandate.[25] Save that the Commission should continue to administer the reporting mechanism, this result may be necessary for other fundamental reasons.

Firstly, and most obviously, it is questionable whether it is a rational allocation of resources to have two separate organs with a judicial mandate. What would this dual system add to the ineffectiveness of the Commission's decisions that could not be equally achieved by simply taking over those cases? Although such a solution was adopted in the European and Inter-American systems,[26] the system was designed so that only the Commission could receive individual communications and that the matter could only be taken before the Court by the Commission.[27] It should also be borne in mind that neither system is plagued with the level of financial restriction imposed on an African system for the protection of human rights. The African Commission has been severely hampered by inadequate resources.[28] The Commission's Secretariat has reportedly depended on external financial assistance from the European Union and the UN Voluntary Fund for Advisory Services.[29]

Secondly, this two-tier system is bound to adversely affect the length of delays in the final resolution of matters. It has been noted that a complainant has to wait in the region of three years for a matter to be heard by the Human Rights Committee, while complainants had to wait a staggering five years until a hearing in the former two-stage European system.[30]

It is the increasing caseload and consequent extended length of proceedings in the European system that led to Protocol 11 to the European Convention on Human Rights and Fundamental Freedoms.[31]

This Protocol amended the Convention to the extent that the machinery of the Commission and the Court would be fused into a single court. This move was felt to be all the more necessary because of the expansion in the membership of the Council of Europe.[32] The African system has

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25 As above.

26 See the European Convention on Human Rights and Fundamental Freedoms of 1950; American Convention on Human Rights of 1969.

27 n 26 above, art 48 & art 61 respectively.

28 W Benedek 'The judiciary and human rights in Africa: The Banjul Seminar and the Training Workshop for a Core of Human Rights Advocates of November 1989' (1990) 11 *Human Rights Law Journal* 247 250.

29 Welch (n 4 above).

30 L Heffernan 'A comparative view of individual petition procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights' (1997) 19 *Human Rights Quarterly* 78 111.

31 Signed 11 May 1994 (1994) 33 *International Legal Materials* 943.

32 See the official website of the European Court of Human Rights: <http://www.echr.coe.int> (accessed 31 July 2001).

to potentially deal with matters from 53 member states of the OAU. This number could increase to 54 or more in the case of future secessions. Most of these states have a greater landmass and population enduring frequent and intrusive violations of their rights.

It is not even certain to what extent the proposed African Court as part of a two-sided machine can be said to rectify the deficiencies of the African Commission. As Mutua comments:[33] A human rights court will only be useful if it genuinely seeks to correct the shortcomings of the African human rights system and provides victims of human rights violations with a real and accessible forum in which to vindicate their basic rights.

Both organs may receive inter-state complaints, but these represent a most theoretical avenue for the effective protection of human rights. The experience of the African Commission has demonstrated that African states will very rarely bring formal judicial or quasi-judicial proceedings against other African states for the treatment of their own citizens.[34] Similar trends are reflected in the operation of the Human Rights Committee and the European Commission on Human Rights. While the Human Rights Committee has apparently never received such a complaint, the European Commission and Court have received some.[35] Therefore, the central basis for the effective protection of human rights is the individual complaint. Neither organ has the automatic competence to receive individual communications and render binding decisions in relation to them. The African Commission can receive individual complaints but cannot render binding decisions. For its part the African Court can render binding decisions but can only deal with complaints from individuals and NGOs when a state has made a declaration accepting that competence.[36]

The explanation offered for this conditional system for the receipt of individual communications is that it might otherwise be difficult to acquire the necessary number of ratifications from African states.[37] Yet, since the primary purpose of setting up the Court was to ameliorate deficiencies in the operation of the African Commission, one might question the usefulness of securing parties whose citizens cannot directly take advantage of the system.

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33 n 1 above 357.

34 It was noted in 1998 that there had been no such complaint before the Commission in its entire history: see CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' (1998) 20 *Human Rights Quarterly* 235 238.

35 See eg *Ireland v United Kingdom* ECHR (18 January 1978) 25 Ser A; *Denmark v Greece; Norway v Greece; Sweden v Greece; Netherlands v Greece* (1969) 12 *Yearbook of the European Court of Human Rights* 1.

36 Arts 5(3) & 34(6) Protocol to the African Charter.

37 El-Sheikh (n 5 above) 947.

None of this is to say that the African Commission should cease to exist or that the Court should not come into existence. In one sense it is desirable that a two-tier system should be retained for the promotion and protection of human and peoples' rights. Clearly, the Commission potentially plays a very significant role in the promotion of human rights, which is essential in the African context and nicely complements the protective role of the Court. The difficulty comes in justifying a protective and judicial as opposed to promotional function for the Commission and the Court, when this would entail one possessing the snout and the other the tail.

4 The Commission and the Court: An unresolved dichotomy

These objections to the adoption of a two-tier system in respect of the protective function of the African system deal with the general difficulties of such a system in the African context, having regard to the respective powers of the two bodies. In the light of such considerations one would expect the Protocol to set out clearly the relationship between the Commission and the Court in a manner that reveals the desirability of this model. It does not.

In fact, the relationship between the two organs is only dealt with in the most general terms, which give little if any hint as to how the machinery actually works. The difficulty created by such ambiguity is demonstrated by the Commission's mandate in terms of the African Charter. The seasoned visitor to the provisions of the Charter will be familiar with the bald assertion in article 45 that the Commission must 'ensure the protection of human and peoples' rights under conditions laid down by the present Charter'. This apparently broad mandate is accompanied by more specific directions in article 58 requiring the Commission to draw special cases to the attention of the Assembly of Heads of State and Government. Such cases are those revealing the existence of a series of serious and massive violations of human and peoples' rights. In cases of this nature the Assembly of Heads of State and Government may request the Commission to undertake an in-depth study. These provisions led to a debate over whether the African Commission in fact had any competence to consider individual communications alleging violations that did not reveal a series of serious and massive violations of human and peoples' rights.[38] Although the Commission clearly interpreted the African Charter in a manner that permitted it to deal with other individual communications, the

[38] Benedek (n 4 above) 31; Odinkalu & Christensen (n 34 above) 235 239–244.

framework for the functioning of the Commission had apparently not been clearly set out from the outset.

If now the same level of ambiguity pertains to the relationship between Court and Commission, then this indicates that the implications of a two-tier system for administering the protective function of the African system have not been clearly thought out. How in such circumstances can the member states of the OAU be sure of its desirability?

A perusal of the provisions of the Protocol confirms such ambiguity incontrovertibly. Article 2 provides for the basic principle of 'complementarity' as between the Court and the Commission. Accordingly, it provides: 'The Court shall, bearing in mind the provisions of this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights . . .'.

This statement represents little more than an acknowledgment that both organs shall retain a protective mandate and operate in harmony as far as possible. Article 8 also speaks of 'the 'complementarity' between the Commission and the Court', when it directs the Court to address the issue in its rules of procedure. International criminal lawyers will be familiar with the principle of 'complementarity' as it applies to the proposed International Criminal Court.[39] This principle represents the idea that the international court and national court jointly retain jurisdiction to try perpetrators of crimes covered by the jurisdiction of the international court. In this context the idea of 'complementarity' makes perfect sense because neither the international court nor the national courts will be the best or possible forum for dealing with all cases. This might arise from political constraints and/or the sheer number of cases involved.

It is not clear what the justification for the duplication of roles represented in the notion of 'complementarity' could be in the context of a regional court for the protection of human rights, assuming the essential functions and the nature of the parties are identical. It should be remembered that in the European and American models the essential functions and nature of the parties were not identical, since individuals could not access those courts directly. It might be argued that the Commission would operate as a kind of filter for cases so that the Court only hears those cases that are admissible and significant for the development of human rights jurisprudence. However, this purpose may be served in another way without vesting the protective function in both the Commission and the Court. The Human Rights Committee operates as a single body, but it makes use of working groups to give preliminary

[39] Preamble & art 1 Statute of the International Criminal Court (1998) 37 *International Legal Materials* 999.

consideration to the question of admissibility.[40] Likewise, one finds mechanisms adopted in national courts and international tribunals that serve to screen the admissibility of appeals. Thus, for instance, in the International Criminal Tribunal for Rwanda, when deciding whether a preliminary motion falls within the category of a challenge based on jurisdiction, a three, as opposed to five, judge bench of the Appeal Chamber will sit. It will decide, usually on paper, whether the notice of appeal falls within that category.[41]

There would seem to be no reason in principle why the African Court could not adopt a similar procedure rather than simply sharing the caseload with the African Commission. One difficulty with this suggestion with respect to the Court as elaborated in the Protocol is that the Court consists of part-time judges. Given the prestige of the position of a judge of an international tribunal there would seem to be no logical justification for this aspect of the functioning of the Court in any event. It has been pointed out that this might adversely affect the integrity and independence of the Court.[42]

The Protocol adopts an unusual formula for determining the admissibility of an application that would appear to involve a possible three or four way movement of the docket in ping-pong fashion. Article 6 stipulates that when the Court is deciding on the question of admissibility, it may request the opinion of the Commission 'which it shall give as soon as possible'. Where the opinion of the Commission has been requested, and once it has been received, the Court will rule on admissibility. Thereafter, assuming the application to be admissible, the Court may decide to refer the case back to the Commission in any event. This apparently convoluted procedure may be contrasted with the procedures in terms of the European and Inter-American systems (Protocol 11 to the European Convention aside) where, since the matter can only be brought to the Court through the Commission, it makes the preliminary decision on admissibility. The matter may be raised again before the Court but there is essentially only one movement of the case between the Commission and the Court. If the opinion of the Commission is sought, the Court will not have to wait for it, but it will be given during the course of the proceedings before the Court.

In terms of how the workload is shared between the Court and the Commission, the Protocol adopts a framework procedure which is certainly novel, but of questionable value. It states that 'the Court may

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[40] See Adoption of the Rules of Procedure of the Committee in accordance with article 39 of the Covenant (Rules 79–97), UN GAOR, Human Rights Committee, 1st session, UN Doc CCPR/C/L.2/Add.2 (1977).

[41] Rule 72(H) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (February 2000).

[42] See Mutua (n 1 above) 356.

consider cases or transfer them to the Commission'.[43] This procedure necessarily comes about because an individual or state may approach the Commission or the Court, and the choice would appear to be entirely in their hands. There is no way of predicting which cases will start with the Commission or which cases will start with the Court. Consequently, the Court must act as its own filter and channel some cases back to the Commission. This clearly demonstrates the inefficiency of a two-tier system where both organs may receive the same type of application.

The scant provisions dealing with the relationship between the Commission and the Court give insufficiently clear guidance on how the machinery will operate in practice. Indeed, such guidance as there is serves to enlighten one as to the potential inefficiencies and length of proceedings under this future two-tier system. One is left entirely unconvinced as to the wisdom of retaining the existing framework for the Commission and then juxtaposing a court.

The Protocol recognises that the mechanism needs further clarification and refinement, but refrains from filling this gap. It is left to the Court itself to lay down in its rules of procedure 'the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court'.[44]

It is of course common for the founding instruments of international tribunals to leave it to the tribunal to adopt its own rules of procedure and evidence. It is even frequently the case that it will set out such a loose framework that much of what counsel would need to know about the functioning of the tribunal would be found in these rules, to be developed after the establishment of the tribunal. This can be said to be the case for the European Court of Human Rights and Fundamental Freedoms,[45] the Inter-American Court on Human Rights,[46] and the International Criminal Tribunals for the Former Yugoslavia[47] and for Rwanda.[48] This is not the case with the International Criminal Court where the contracting parties vested the task in the hands of a group of experts and where such rules were subject to adoption.

Nevertheless, where a matter is structural in nature and goes to the very heart of the rationale for the machinery, one would expect the matter to be clearly thought out and set out in the founding document. By leaving this task to the judges, the Protocol confers on them a

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[43] Art 6(3) Protocol to the African Charter.

[44] Art 8.

[45] Art 4 European Convention on Human Rights and Fundamental Freedoms.

[46] Art 60 American Convention on Human Rights.

[47] Art 15 Statute of the International Tribunal for the Former Yugoslavia (1993) *International Legal Materials* 1192.

[48] Art 14 Statute of the International Tribunal for Rwanda (1994) *International Legal Materials* 1598.

quasi-political function and imposes on them a burden that might be perceived to render them ultimately responsible for the failure of the machinery. This is not only an unfair burden for the judicial officers to bear. It is also entirely inappropriate and constitutes an incredible leap of faith that somehow and in some way this poorly thought-out concept will find a way to work in an acceptable manner.

5 Conclusion

It is quite understandable that the perceived deficiencies in the African Commission on Human and Peoples' Rights should lead to an initiative to rectify those problems. It is perhaps unfortunate that the group of experts that produced the first draft of the Protocol was not simply asked this, without being given the particular mandate with respect to the Court. This might have led to a broader analysis of the problem at its roots. In the event, a specific request in relation to the Court was made and events rocketed in that direction from the inception of the consideration of the problem.

Since the first consideration of the Court in 1961, the issue remained effectively dormant for some 30 years. Then from the point of resurgence, a first draft appeared a year later and a treaty was concluded three years after that in 1998. The time frame and circumstances were not radically different from those of the parallel development of an international criminal court. In that case the work of the late 1940s had to be suspended because of the Cold War and was not re-ignited until 1992, when the General Assembly of the United Nations requested the International Law Commission to produce a draft statute. This was done in 1994 and four years later, in 1998, the Statute of the International Criminal Court was concluded.

Yet somehow a comparison of the results in both cases, admittedly dealing with different subject matter, highlights a substantial contrast in the thoroughness of evaluation and formulation. One cannot help feeling that the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court of Human and Peoples' Rights has been somewhat rushed.

As a concept it is laudable. There can be no doubt that a human rights court is not only a good idea for Africa, but that it has also become practically essential for it. There are also aspects of the Protocol, including in particular the potential access of individuals and NGOs, which must be applauded, although this is a qualified gain given the need for a declaration of acceptance from states. The Court is a significant milestone in the protection of human and peoples' rights in Africa. In fact, it is so significant that it had to be the best it could be. This is where a serious question mark still remains. Given the wealth of experience to draw from in the European and Inter-American models and the

developments they have gone through, has the Protocol really revealed a model that represents the best possible formula for Africa?

There has been a total failure to adequately question and examine the appropriateness of pairing the protective function of the Court with the existing protective function of the Commission. There has further been a failure to adequately justify and clarify the proper relationship between the Court and the Commission.

The Commission's lack of teeth combined with the Court's absence of guaranteed access for interested parties may prove to be a particular thorn in the side of the workability of the machinery. Everything will depend largely on the political will of states to make the necessary declarations accepting individual and NGO access.

It is also foreseeable that the Court might face almost insurmountable problems in terms of the length of proceedings and the ability to make a meaningful impact on improving upon the acknowledged inefficiencies of the Commission in its protective function.

Nonetheless, there is probably no turning back now. There is probably no more time for thought or reflection and it is now a question of damage control. There can be little doubt, however, that in years to come the member states of the African Union will be forced to a similar conclusion reached by the Council of Europe that the protective function would be more efficiently housed in one body.

AFRICAN HUMAN RIGHTS LAW JOURNAL

The African Union: Hope for better protection of human rights in Africa?

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Historically it may well turn out that the transmutation of the OAU into the African Union is as important as the United Nations replacing the failed League of Nations after World War II

Tajudeen Abdul-Raheem**

1 Introduction

The end of the Cold War was a turning point for Africa. It generated hopes for greater prospects of peace, development and integration in the world economy. It also marked the start of a new epoch, in which Africa lost the strategic value it had to the world superpowers and thus became increasingly marginalised both politically and economically. The post-Cold War era also marked the beginning of globalisation, 'a complex set of developments often operating in contradictory, oppositional or even conflictual manner'.[1] Globalisation was ushered in with promises of progress and prosperity for all.[2] But globalisation also poses serious threats to the sovereignty, cultural and historical identities of the

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** Secretary-General of the Pan-African Movement, based in Kampala, Uganda in an article entitled 'An idea whose time has come' *BBC Focus on Africa Magazine* July–September 2001 48.

1 J Oloka-Onyango 'Globalisation in the context of increased incidents of racism, racial discrimination and xenophobia' Working Paper of the United Nations Sub-Commission on the Promotion and Protection of Human Rights 22 June 1999 (E/CN4/Sub2/1999/8) para 2.

2 Algiers Declaration adopted by the Assembly of the Heads of State and Government during the 35th ordinary session held on 12–14 July 1999 in Algiers, Algeria. AHG/Decl1 (XXXV). The Declaration is reprinted in (1999) 11 *African Journal of International and Comparative Law* 788.

people of Africa and it gravely undermines Africa's development prospects.[3] It is becoming clearer that African countries cannot effectively face the challenges of globalisation as single political entities. Globalisation can only be met through a politically and economically unified Africa.

At the same time, it is also becoming widely recognised that economic and social development cannot be achieved without peace and stability. Peace and stability can only thrive in an environment where human rights are respected. Thus the connection between human rights and development and its linkage to regional integration in the context of globalisation are increasingly acknowledged.

This paper focuses on the place of human rights in economic and political integration efforts on the African continent, particularly in the newly established African Union (AU or Union).[4] The paper is divided into three parts. The first part traces the history of the African unity in pre- and post-colonial Africa as expressed politically in the Organisation of African Unity (OAU) and economically in various regional economic blocs and the African Economic Community (AEC). The second part examines the provisions of the Constitutive Act of the AU with a view of ascertaining the extent to which the Union is more than a mere change of name of the OAU/AEC. The third part compares the protection of human rights in the AU with that in the OAU/AEC.[5]

2 Background: African unity in historical perspective

2.1 African unity before 1963

The idea of African unity or Pan-Africanism is not new.[6] It has occupied the minds of individuals in African communities since the end of the last

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3 As above.

4 The African Union was established by the Constitutive Act of the African Union (the Act) which entered into force on 26 May 2001. The Act is reprinted in (2000) 12 *African Journal of International and Comparative Law* 629 and in the Annexure at the end of this article.

5 The two bodies, the OAU and AEC, are dealt with together in this paper because since the establishment of the AEC by the Abuja Treaty in 1994, the two have been existing side by side although the OAU overshadowed the AEC. In practice this was reflected by the holding of parallel summits of the OAU and the AEC. For example the recent summit held in Lusaka was the 37th ordinary session of the OAU and at the same time the 5th ordinary session of the AEC.

6 A prominent African historian and political scientist, Ali Mazrui, defines Pan-Africanism as a system of values and attitudes that favour the unity and solidarity of Africans and of people of African ancestry. See O Agyeman *Nkrumah's Ghana and East Africa: Pan-Africanism and African Interstate Relations* (1992) 11. On Pan-Africanism see C Legum *Pan Africanism: A short political guide* (1962); K Nkrumah *Africa must unite* (1963); R Cox *Pan-Africanism in practice: PAFMECSA, 1958–1964* (1964); J Nyerere *Freedom and unity: Uhuru na umoja; A selection from writings and speeches, 1952–1965* (1968); A Jacques-Garvey *Philosophy and opinions of Marcus Garvey* (1968); V Thompson *Africa and unity: The evolution of Pan-Africanism* (1969); G Padmore *Pan-Africanism or*

century. This idea was eloquently expressed by Pan-Africanists in the diaspora such as William Dubois and George Padmore.[7] At the end of the World War II, the idea of Pan-Africanism took the form of demands for self-government for African peoples. African leaders, many of whom had participated in various Pan-Africanist congresses went on to lead independence struggles in their respective countries.[8] With independence, Pan-Africanism became a banner under which the idea of African unity was promoted as a way for Africans to regain dignity and economic strength in the post-colonial era.[9]

The first concrete steps towards the realisation of African unity were made in the early 1960s when most African countries had gained their independence. Efforts to unite the newly independent countries led to the development of two rival groups (Brazzaville and Casablanca) which had differing opinions as to the ends and means to achieve the African unity.[10] On the one hand, the Brazzaville group (later the Monrovia group), made up mostly of ex-French colonies, represented a gradualist approach and advocated a loose unity, under one umbrella, while retaining national sovereignty. On the other hand, the Casablanca group composed of countries such as Ghana, Morocco, Guinea and Algeria, had a more radical approach involving the creation of the federation of African states with joint institutions and even a joint military command.[11] It was King Haile Selassie of Ethiopia who finally managed to get these two groups together in Addis Ababa to discuss the best way to realise the African unity. The outcome of this meeting of 32 African heads of states was a compromise, an institution named the Organisation of

Communism (1972); and C Amate *Inside the OAU: Pan-Africanism in practice* (1986).

7 A Chanda 'The Organization of African Unity: An appraisal' (1989–92) 21–24 *Zambia Law Journal* 1.

8 Jomo Kenyatta and Kwame Nkrumah, who would later lead Kenya and Ghana to independence, were some of the key organizers of the historic 1945 Pan-African Congress in Manchester which brought together Africans, Black Americans and West Indians of African descent. See Agyeman (n 6 above) 12.

9 Chanda (n 7 above) 4.

10 GJ Naldi *The Organisation of African Unity* (1999) 2.

11 At about the same time the former colonial masters in Africa, the European states, were in process of establishing their own union through the Treaty of Rome — signed in 1958 — which established the European Economic Community. The idea proposed by Nkrumah was more progressive than that of Europe in that it advocated for even stronger political and economic union. On account of the benefits — such as peace, security and prosperity — that have accrued to the European states one imagines tremendous strides that Africa could have made by now if it had already then embraced wholeheartedly the idea of a United Government of Africa.

African Unity.[12] The OAU Charter represented both views but used the vision of the Monrovia group as its core.[13]

2.2 Consolidating the idea of African unity in the OAU: 1963–1999

Despite the creation of the OAU, some African leaders, particularly Kwame Nkrumah of Ghana, felt that Africa needed a stronger union than the one that had been realised in the OAU.[14] Therefore he advocated for an even stronger union of African states. Nkrumah made his last efforts to influence his fellow leaders to establish a union government for the whole of independent Africa during the OAU summit held in Accra, Ghana in 1965. The idea evoked suspicion and animosity from a substantial number of African heads of state.[15] These leaders were not about to give up their hard-fought independence and recently acquired presidential status for the sake of a continental union. The removal of Kwame Nkrumah from power through a military *coup d'etat* in 1966 seemed to have ended the discussion about one government for African states for a while.

In the period between 1966 and 1999 efforts were made to realise African unity through the means of economic integration. This was expressed theoretically in a number of OAU declarations, resolutions and plans of actions that were adopted between 1968 and 1980, and in concrete terms in the formation of several sub-regional economic blocs.

The desire to realise African economic integration is clearly articulated in a number of resolutions, decisions and declarations adopted by the OAU Assembly of the Heads of State and Government in Algiers (1968), Addis Ababa (1970), Addis Ababa (1973) and Libreville (1977). To these could be added 'the Monrovia declaration of commitment on the guidelines and measures for national and collective self-reliance in economic and social development for establishment of a new international order', which called for the creation of the African Economic Market as a prelude

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12 The OAU was established by the OAU Charter which was adopted by a conference of heads of state and government in Addis Ababa on 25 May 1963. The OAU Charter is reprinted in 3 *International Legal Materials* 1116 and in I Brownlie (ed) *Basic documents in international law* (1983) 76.

13 M Munya 'The Organisation of African Unity and its role in regional conflict resolution and dispute settlement: A critical evaluation' (1999) *Boston College Third World Law Journal 537* 582.

14 It should be recalled that on the eve of the founding of the OAU, Nkrumah made an impassioned speech in which he argued for the formation of a union government of African states with a common market, currency, monetary zone, central bank, system of defence, citizenship, foreign policy and continental communication system. The speech is reprinted in *New African* January 2000 381 18–25.

15 After a failure to establish a union government at the Accra summit of 1965, Nyerere said he had heard one head of state expressing relief that he was happy to be returning home to his country while still the head of state. See *New African* January 2000 381 28–31.

to an African Economic Community, and the Lagos Plan of Action and Final Act of Lagos of 1980, which envisaged the creation of an African Economic Community by the year 2000.[16]

This was also a period when African states were making efforts to achieve economic integration by establishing organisations and institutions in various sub-regions in Africa. A large number of these organisations and institutions, also known as Regional Economic Communities (REC), have been created, some with overlapping mandates.[17] Some of the key RECs include Economic Community of West African States (ECOWAS) in West Africa; Economic Community of Central African States (ECCAS) in Central Africa; Common Market for East and Southern Africa (COMESA) in East and Southern Africa; East African Community (EAC) in East Africa; Southern African Development Community (SADC) in Southern Africa and Arab Maghreb Union (AMU) in North Africa.

The idea of continental economic integration was concretised in the Treaty Establishing the African Economic Community (Abuja Treaty),[18] which was adopted under the auspices of the OAU on 3 June 1991 and which entered into force on 12 May 1994 after the requisite number of ratifications was attained.[19] The treaty envisages the establishment of the African Economic Community as an integral part of the OAU. This will be done gradually in six stages over a transitional period not exceeding 34 years.[20] Departing from other regional economic treaties, the Abuja Treaty envisions the establishment of the AEC as a goal that should be achieved through encouraging the formation of sub-regional economic bodies, which would eventually amalgamate to create the AEC.[21]

The entry into force of the Abuja Treaty created a situation whereby

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16 See the Preamble to the Abuja Treaty cited below.

17 Subregional economic integration is a special theme of two consecutive volumes of the *African Yearbook of International Law*. See (1999) 7 *African Yearbook of International Law* 3–81 particularly the articles by Ndulo (on SADC), Kessie (on ECOWAS) and Kaahwa (on EAC). See also (1998) 6 *African Yearbook of International Law* 3–150 especially the article by Gondwe (on COMESA). For an examination of the potential role of the subregional economic institutions in promotion and protection of human rights, see F Viljoen 'The realisation of human rights in Africa through subregional institutions' (1999) 7 *African Yearbook of International Law* 185.

18 Reprinted in (1993) 1 *African Yearbook of International Law* 227; (1991) 3 *International Legal Materials* 1241; (1991) 3 *African Journal of International and Comparative Law* 792.

19 OAU 'The African Economic Community' <http://www.oau-oua.org/document/documents/AEC.htm> (accessed 31 July 2001). As at 31 July 2001 all OAU member states with the exception of Eritrea had signed the Abuja Treaty and 45 OAU member states had ratified the treaty. OAU CAB/LEG/28.1.

20 Art 6(1) Constitutive Act. For a thorough analysis of the provisions of the Abuja Treaty, see B Thompson 'Economic integration in Africa: A milestone — The Abuja Treaty' (1993) *5 African Journal of International and Comparative Law* 743.

21 While criticising the various attempts to achieve regional economic integration in Africa as having failed to achieve continental fusion, Mistry argues that the Abuja Treaty is useful in that it provides mechanisms to assure a measure of consistency across subregions in their integration measures. P Mistry 'Africa's record of regional cooperation and integration' (2000) 99 *African Affairs* 553 570.

the OAU co-existed with the AEC. In a way the OAU started operating on the basis of both the OAU Charter and Abuja Treaty. This eventually created a need for an institution that would combine the OAU's political nature and the AEC's economic nature. At the same time, the end of the millennium led to a sense of urgency among African leadership to reposition the OAU in order to set the African continent as a whole on a firm path to development and peace in the new millennium.[22] It was in this context that the Libyan leader Muammar Gaddafi called a meeting to discuss the formation of a 'United States of Africa'.

2.3 New attempts in 1999: Developments towards adoption of the Constitutive Act of the African Union

Forty-four African leaders met in Libya from 8 to 9 September 1999 at an extraordinary summit of the OAU called by Muammar Gaddafi, to discuss the formation of a 'United States of Africa'.[23] The theme of this summit was 'Strengthening OAU capacity to enable it to meet the challenges of the new millennium'. At this meeting the African leaders adopted the Sirte Declaration[24] which called for the establishment of an African Union, the shortening of the implementation periods of the Abuja Treaty and the speedy establishment of all institutions provided for in the Abuja Treaty, such as the African Central Bank, the African Monetary Union, the African Court of Justice and the Pan-African Parliament.[25] The details of the drafting of this Union was to be left to the legal experts who were instructed to model it on the European Union, taking into account the Charter of the OAU and the Treaty Establishing the African Economic Community.[26] The declaration further stated that the decision to establish the AU had been reached after 'frank and extensive discussions'.[27]

The OAU legal unit then drafted the Constitutive Act of the African Union (the Act). The draft Act was debated in a meeting of legal experts and parliamentarians and later at a ministerial conference held in Tripoli

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22 'The adoption of the Sirte Declaration and subsequently the Constitutive Act of the AU must be viewed as part and parcel of the endeavour which has the ultimate objective of enhancing unity, strengthening cooperation and coordination as well as equipping the African continent with a legal and institutional framework which would enable Africa to gain its rightful place in the community of nations.' *Report of the Secretary-General on the implementation of the Sirte Decision on the African Union* (EAHG/Dec1 (V)) Council of Ministers 74th ordinary session/9th ordinary session of the AEC 2–7 July 2001 Lusaka, Zambia CM/2210 (LXXIV) para 5.

23 (1999) 36 *Africa Research Bulletin* 13677.

24 OAU Doc EAHG/Dec1 (IV) Rev 1, reprinted in (1999) 7 *African Yearbook of International Law* 411.

25 Para 8(ii) Sirte Declaration.

26 (1999) 36 *Africa Research Bulletin* 13678.

27 Para 8 Sirte Declaration.

from 31 May to 2 June 2000.[28] The involvement of the African parliamentarians was intended to ensure that the Union becomes more closely connected with the people.[29] The Act was adopted by the OAU Assembly of Heads of State and Government in Lomé in July 2000.[30] All members of the OAU had signed the Act by March 2001,[31] and therefore the OAU Assembly at its 5th extraordinary summit held in Sirte, Libya from 1 to 2 March 2001 declared the establishment of the AU.[32] However, to fulfil the legal requirements for the Union, the Constitutive Act had to be ratified by two-thirds of the member states of the OAU.[33] This was achieved on 26 April 2001 when Nigeria became the thirty-sixth OAU member state to deposit its instrument of ratification of the Constitutive Act of the AU with the OAU Secretary-General.[34] The AU became a legal and political reality a month thereafter, on 26 May 2001, when the Constitutive Act entered into force.[35] The Constitutive Act of the AU is annexed to this article.

3 The Constitutive Act of the African Union

The process towards the establishment of the AU ran concurrently with efforts to develop a blueprint for African development in the 21st century. The blueprint in place is known as the New African Initiative[36]

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28 Para 247, OAU Secretary-General report <http://www.oau-oua.org/LOMÉ2000/ENGLISH% 20INTRO%Note%20SG.htm> (accessed 31 July 2001). According to this report the most important aspect of the debate was the nature and form of the African Union. On this issue the Ministerial Conference underscored the need to establish the African Union in keeping with the Pan-African vision of the OAU founding fathers.

29 That notwithstanding, criticism has been voiced on the lack of direct involvement of civil society and the masses in the debates regarding the formation of the Union. The criticism was voiced by a number of participants during a public lecture on the African Union given by Prof Tiyanjana Maluwa, the Legal Counsel of the OAU, and attended by this writer in November 2000 at the University of Pretoria, South Africa.

30 36th ordinary session of the Assembly held in Lomé, Togo 10–11 July 2000.

31 OAU 'Decision on the Africa Union' 5th OAU extraordinary session of the Assembly of the Heads of State and Government 1–2 March 2001 Sirte, Libya EAHG/Dec1–4 (V).

32 As above.

33 The Constitutive Act of the Africa Union entered into force 30 days after the deposit of the instruments of ratification by two-thirds of the members of the OAU. See art 28 Constitutive Act.

34 OAU 'The Constitutive Act of the African Union attains the legal requirement for entering into force' Press release No 52/2001 at <http://www.oau-oua.org/oau_info/pressrelease/ PRESS%20RELEASE%20NO%2052-%202001.htm> (accessed 31 July 2001).

35 As at 31 July 2001, 44 OAU member states have ratified and deposited the instruments of the ratification in accordance with art 27(2) of the Act and seven countries have informed the OAU secretariat that they have ratified the Act and that the instruments of ratification will be deposited with the General Secretariat in due course. Only two member states, namely the Democratic Republic of Congo and Madagascar, are yet to ratify the Act. See OAU CAB/LEG/23.15/Vol.IX paras 1–3.

and it is a result of a merger between the Millennium Partnership for African Recovery Programme (MAP) developed by President Thabo Mbeki of South Africa and the Omega Plan developed by President Abdoulaye Wade of Senegal. The AU provides a structural framework supporting the implementation of the New African Initiative. The New African Initiative could be seen as the fuel that fires the engine of the AU.

The AU is loosely modelled on the European Union. It is intended to become a pan-African body with strong political and economic ties that would replace the OAU. But is the AU a new organisation or just the same old OAU with a new name? An analysis of the salient features of the Union will now be conducted by comparing the provisions of the Act with those of the OAU Charter in order to establish the extent to which the AU is in fact a new organisation.

3.1 Objectives and principles of the Union

Article 2 of the Act establishes the AU. The AU is more comprehensive in its objectives than the OAU. It has 14 objectives,[37] nine more than those the OAU aimed to achieve. Of these, four are repetitions of those of the OAU, namely, achieving African unity; defending sovereignty, territorial integrity and independence of African states; encouraging international co-operation; and, achieving a better life for the peoples of Africa.[38] For obvious reasons, the OAU's goal of eradicating all forms of colonialism from Africa is left out in the Act.[39]

The Union is to be guided by 16 principles,[40] again nine more than those of the OAU. However, only four of the seven guiding principles of the OAU found their way into the Act. These are sovereign equality of member states, non-interference in the internal affairs of states, peaceful settlement of disputes and condemnation of political assassination and subversive activities.[41] Among the new principles, the prohibition of the use (or threat of the use of force) is a recent addition copied from the UN Charter.[42] Others, for instance the principle of sacrosanctity of the colonial borders, reflect the developments in the OAU in the 38 years of its existence.[43] Still others, for example the right of the Union to

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36 The New African Initiative is available on the Internet at <http://www.polity.org.za/govdocs/ misc/mapomega.html> (accessed 31 July 2001).

37 Art 3 Constitutive Act.

38 Arts 2(a), 2(c), 2(e) & 2(b) OAU Charter and arts 3(a), 3(b), 3(e) & 3(k) Constitutive Act.

39 Art 2(d) OAU Charter.

40 Art 4 Constitutive Act.

41 The OAU principles of respect for sovereignty and territorial integrity of states, emancipation of dependent African territories and non-alignment are left out.

42 Art 2(4) UN Charter.

intervene in a member state pursuant to a decision by the Assembly in respect to grave circumstances, namely war crimes, genocide and crimes against humanity and the right of member states to request intervention from the Union in order to restore peace and security, reflect developments in international law in general.[44] Additional novel principles in the Act include gender equality, participation of the African peoples in the activities of the Union, a common defence policy for the African continent, self-reliance, social justice, peaceful co-existence of member states and respect for democratic principles, human rights, the rule of law and good governance.

3.2 Organs of the Union: Their composition, role and functioning

Article 5(a) of the Act enumerates the organs of the Union. They are the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialised Technical Committee, the Economic, Social and Cultural Council and financial institutions. The Assembly of the Union, the Executive Council, the Commission and the Specialised Technical Committees are equivalent to the Assembly of the Heads of State and Government, the Council of Ministers, General Secretariat and Specialised Commissions in the OAU institutional structure. The OAU's Commission of Mediation, Conciliation and Arbitration is left out in the African Union. The Pan-African Parliament, the Court of Justice and the Economic Social and Cultural Council have equivalent structures in the African Economic Community. The Union's Permanent Representative Committee and Financial Institutions are new institutions.

Articles 6 to 9 deal with the Assembly. They describe issues such as its composition, its meetings, decision making within the Assembly, quorum for meetings and the powers and functions of the Assembly. The Assembly is composed of the Heads of State and Government and meets at least once a year. As the supreme organ of the Union, the Assembly determines the common policies of the Union; monitors the implementation thereof; establishes any organ of the Union; and receives, considers and takes decisions on reports and recommendations of other organs of the Union.

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43 This principle was developed in the Cairo Declaration of 1964. The same could be said of other Union guiding principles such as condemnation and rejection of unconstitutional changes of government, which was stated in the OAU summit in Algiers, Algeria in 1999.

44 These two principles are based on a new and controversial doctrine of humanitarian intervention. For further details on this doctrine see FK Abiew *The evolution of the doctrine and practice of humanitarian intervention* (1999).

The Executive Council is the subject of articles 10 to 13. It is composed of Ministers of Foreign Affairs and meets at least twice a year for ordinary sessions. The Executive Council has two main functions: First, to co-ordinate and take decisions on policies in areas of common interest to member states including, among other things, foreign trade; energy, industry and mineral resources; education, culture, health and human resource developments; and social security. Its second function is to consider issues referred to it and monitor the implementation of policies formulated by the Assembly. A similar organ, albeit in a different name — the Council of Ministers — was provided for in the OAU Charter and the Abuja Treaty.[45]

Articles 14 to 16 delineate the establishment, composition, functions and meetings of Specialised Technical Committees. Seven committees dealing with diverse issues such as rural economy and agricultural matters; trade, customs and immigration matters; and health, labour and social affairs are to be established. The Specialised Technical Committees shall be composed of ministers or senior officials responsible for sectors falling within their respective areas of competence. These committees are tasked to carry out five major functions including the preparation, harmonisation and supervision of projects and programmes of the Union and follow-up and evaluation of the implementation of the decisions taken by the organs of the Union. The OAU Charter did not provide for specialised committees. However, the Abuja Treaty provided for the same institutions.[46]

To ensure the full participation of African people in development and economic integration of the continent, article 17 of the Act establishes the Pan-African Parliament. The Court of Justice of the Union is provided for under article 18 of the Act. The Court will be seized with matters of interpretation arising from the application or implementation of the Act.[47] Article 19 provides for the establishment of the Union's financial institutions, namely the African Central Bank, the African Monetary Fund and the African Investment Bank. The Act provides in very clear terms that the composition, powers, organisation and rules of the above institutions will be defined in a protocol relating thereto. In other words, distinct protocols will have to be adopted by the Union to establish the Pan-African Parliament, the Court of Justice of the Union and each of the abovementioned financial institutions.[48] So far there have been

45 Arts 12–15 OAU Charter and 11–13 Abuja Treaty.

46 Arts 25–27 Abuja Treaty.

47 Art 20 Constitutive Act.

48 While the OAU Charter provided for neither the Pan-African Parliament nor the Pan-African Court of Justice, the Abuja Treaty envisages the establishment of both institutions. See the Abuja Treaty; arts 14 & 18. However, neither of the two treaties provided for the establishment of the African continental financial institutions.

developments towards the establishment of only one of these institutions, the Pan-African Parliament.[49]

The Commission of the Union is composed of the Chairperson, his or her deputies and the commissioners and assisted by the necessary staff.[50] The Commission of the Union is the Secretariat of the Union. The Union will also have a Permanent Representatives Committee composed of the permanent representative to the Union and mandated to prepare the work of the Executive Council. Finally, the Economic, Social and Cultural Council, an advisory body composed of different social and professional groups of member states, shall be established.[51] The functions, powers, composition and organisation of the three institutions stated above shall be determined by the Assembly.

Article 5(b) of the Act makes it clear that the list of the AU organs provided for in article 5(a) of the Act is not exhaustive. The organs that we have enumerated above are not the only AU organs. According to article 5(b) of the Act, the term 'African Union organs' includes 'other organs that the Assembly may decide to establish'. Using this provision, the OAU Assembly meeting in Lusaka recently decided to 'incorporate

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49 These developments are due to the fact that the process was already underway to establish the Pan-African Parliament within the AEC. The OAU General Secretariat drafted the protocol on the Pan-African parliament. The draft was referred to experts from member states that met in April 2000. This was followed by the discussion at both parliamentary and ministerial levels in May 2000. The ministerial conference requested the OAU Secretariat to make some amendments. The amended draft was discussed at the first meeting of the African parliamentarians on the establishment of the African parliament held in Pretoria in November 2000. Then it was considered by the preparatory meeting of the OAU Council of Ministers in February 2001, see OAU 'Report of 73rd ordinary session of the Council of Ministers' 22–26 February 2001 Tripoli, Libya OAU Doc CM/Rpt (LXXIII) para 103. The amended draft protocol was finally adopted by the OAU Assembly in March 2001. See OAU 'Decision on the Draft Protocol on the Treaty Establishing the African Economic Community relating to the Pan-African Parliament', 5th extraordinary session of the Assembly of the Heads of State and Government 1–2 March 2001 Sirte, Libya EAHG/3 (V) para 2.

50 Art 20 Constitutive Act. This organ is equivalent to the General Secretariat in the OAU Charter (arts 16–18) and the Abuja Treaty (arts 21–23).

51 Art 21 Constitutive Act. The OAU Charter did not provide for such a body, but the Abuja Treaty provided for an equivalent organ named the Economic and Social Commission. See arts 15–17 Abuja Treaty. The OAU Assembly has decided that in view of the establishment of the Economic, Social and Cultural Council, the Economic and Social Commission provided for in the Abuja Treaty would cease to exist at the end of transitional period between OAU/AEC to the AU. The transitional period from the OAU/AEC to the AU is one year from July 2001. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' 37th ordinary session of the Assembly of Heads of State and Government July 2001 Lusaka, Zambia AHG/Dec1 (XXXVII) para 7(b).

the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution as one of the organs of the Union'.[52]

The OAU Assembly of the Heads of State and Government mandated the Secretary-General of the OAU to undertake necessary consultation with member states with a view to working out the modalities and guidelines for the launching of the organs of the Union.[53] The summit made it clear that in undertaking this task priority has to be given to the key Union organs, namely the Assembly, the Executive Council, the Commission and the Permanent Representatives Committee.[54]

3.3 General and transitional provisions

Article 23 of the Act delineates the measures that should be taken against states that fail to comply with decisions and policies of the Union or defaults in the payment of its contributions to the budget of the Union.[55]

4 The Union and human rights

It has been argued that the successful enforcement of human rights in Africa will depend, in part, on the development of economic integration among states on the continent.[56] This alone could justify the welcoming of the establishment of the AU, which is the highest level of economic integration that African states could aspire to, by members of the human

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52 To that end the OAU Assembly requested the Secretary-General to undertake a review of the structure, procedures and the working methods of the Central Organ including the possibility of changing its name. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) para 8. The Central Organ had been established as a constituent part of the OAU mechanism for prevention, management and resolution of conflict in Africa by the Assembly of Heads of State and Government meeting in Cairo, Egypt in 1993. See Declaration of the Assembly of the Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution, reprinted in (1994) 6 *African Journal of International and Comparative Law* 158.

53 OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) para 4.

54 In this respect, the OAU Assembly mandated the Secretary-General in consultation with member states to submit proposals regarding the structure, functions and powers of the Commission (n 51 above para 5).

55 This provision was informed by the desire to ensure that the Union does not inherit the OAU's negative legacy of resource deprivation arising from the failure of member states to meet their financial obligations.

56 C Heyns & F Viljoen 'An overview of international protection of human rights in Africa' (1999) 15 *South African Journal of Human Rights* 425 433. These authors argue that as a general rule the international enforcement of human rights depends for its success on the existence of, among other factors, a web of trade relations between the respective states because only where these exist can their potential severance in cases where human rights violations come to light constitute a real threat to coerce the states to adhere to human rights principles.

rights community. The Act itself, however, also contains provisions that put human rights on the agenda of the AU.

4.1 Human rights provisions in the Constitutive Act of the African Union

The provisions of the Preamble and those that set out the objectives and principles of the Act include human rights in very clear terms. The Preamble of the Act states that African leaders are 'determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.[57] Two of the objectives of the AU, as defined in the text, incorporate human rights issues in very explicit manner. Article 3(g) provides that the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter or Charter) and other relevant human rights instruments is an objective of the Union.[58] Similarly, the promotion of democratic principles and institutions, popular participation and good governance are also some of the objectives of the Union.

At least five of the fundamental principles of the Union could be said to embody human rights provisions. Respect for democratic principles, human rights, the rule of law and good governance are described as some of the principles of the Union.[59] Article 4(c) of the Act guarantees the right of African peoples to participate in the activities of the Union.[60] Other guiding principles of the AU that have human rights implications include promotion of gender equality, the promotion of social justice to ensure balanced economic development, and condemnation and rejection of unconstitutional changes of government.[61]

The objective of the Union to promote popular participation and the corresponding principle of participation of African peoples in the activities of the Union find concrete expression in the proposed Pan-African Parliament and the Economic, Social and Cultural Council. The proposed Parliament will initially be elected by national parliaments. The institution of the Pan-African Parliament introduces an element of representation in a pan-African body, which the OAU never had.[62]

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57 Para 10 Preamble to the Act.

58 There is a similar provision in art 3(g) of the Abuja Treaty, although as a principle and not an objective as is the case in the Act.

59 Art 4(m) Constitutive Act.

60 The establishment of the Pan-African Parliament is said to be geared towards ensuring the full participation of African peoples in the development and economic integration. See art 17 Constitutive Act.

61 Arts 4(l), 4(n) & 4(p) Constitutive Act.

62 See T Abdul-Raheem 'An idea whose time has come' *BBC Focus on Africa Magazine* July–September 2001 48.

Similarly, the Economic, Social and Cultural Council will be composed of different social and professional groups of the member states of the Union.[63] The African civil society will find it easier to put pressure on these two representative bodies to make progress on diverse issues such as human rights, free movement of people in the Union and other trade issues.[64]

Article 30 states in very precise terms that a government that shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union. This provision embodies the Algiers Summit decision on unconstitutional changes in Africa.

4.2 Human rights enforcement mechanisms and the African Union

The African human rights system is centred on the African Charter and is designed to operate within the OAU institutional framework.[65] Its enforcement mechanism comprises the African Commission on Human and Peoples' Rights (African Commission or Commission) and to be established African Court on Human and Peoples' Rights (African Court). Given the role of the two institutions in the African human rights scene, it is important to establish their status within the AU.

During its April 2001 session, the African Commission took note of the imminent entry into force of the Act of the AU and decided to initiate a discussion on the place of the African Charter in the African Union.[66] It is instructive to note that the Constitutive Act of the AU makes reference to the African Charter in its objectives.[67] However, the Act is silent on the African Commission. The Assembly of the Head of State and Government meeting in Lusaka in July 2001 did not adopt a decision recognising the African Commission as one of the organs of the Union.[68]

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63 Art 22 Constitutive Act. At the recently held Lusaka OAU summit, the OAU Assembly emphasised the importance of involving African NGOs, socio-economic organisations, professional associations and civil society in general in Africa's integration process as well as in the formulation and implementation of programmes of the African Union. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) para 7.

64 See Abdul-Raheem (n 62 above) 48.

65 The African Charter was adopted by the OAU Assembly of the Heads of State and Government in Nairobi on 27 June 1981 and entered into force on 21 October 1986. The text of the Charter is reprinted in (1982) 21 *International Legal Materials* 58.

66 Final Communiqué of the 29th ordinary session of the African Commission on Human and Peoples' Rights 23 April–7 May 2001, para 10. The Commission adopted a resolution on the African Charter and the AU.

67 Art 3(h) Constitutive Act.

68 Incidentally in the same summit, the OAU Assembly did adopt a decision in which it recognised the Mechanism for Conflict Prevention, Management and Resolution as an organ of the AU. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) paras 8(a) & (b).

The African Court has not yet been established. Yet, given the likelihood that it would be established in the near future, it is appropriate to take up the issue regarding its status in the African Union too. The Lusaka summit again has not given any guidance on this issue and the matter is open for debate and speculation. Particularly important in this regard is the question as to which institution takes over the role of the Council of Ministers in enforcing judgments of the African Court of Human Rights. This issue has been clarified in neither the Constitutive Act nor by the recent OAU summit in Lusaka.

The other issue that may be of interest is the role that the African Court of Justice could play in the enforcement of human rights obligations. The European equivalent of the African Court of Justice, the European Court of Justice, has played a significant role in the development of human rights in Europe.[69] If the European model of political and economic integration is any guide on this matter, the African Court of Justice could, in a similar way, play a significant role in advancing human rights in the continent in conjunction with the African Court.[70] The Protocol on the African Court of Justice is yet to be drafted. However, it would be interesting to see how the African Court of Justice will relate to the African Court in the Protocol and in practice.

5 Conclusion

The AU cannot be said to be radically different in qualitative and quantitative terms from the OAU/AEC.[71] The Union, however, has a more explicit human rights focus than the OAU/AEC.[72] In a sense it could be

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69 For more information on the role of the European Court of Justice in human rights protection see L Woods 'The European Union and human rights' in R Hanski & M Sukksi (eds) *An introduction to the international protection of human rights* (1999) 351–367.

70 The potential human rights mandate of this court is explored in CM Peter 'The proposed African Court of Justice — jurisprudential, procedural, enforcement problems and beyond (1993) 1 *East African Journal of Peace and Human Rights* 117.

71 The AU evolves from the combination of OAU and AEC. The institutions that the Union establishes are to a large extent similar to those that the OAU/AEC had set out to establish albeit in a more gradual process. Therefore what the Union actually sets out to achieve is to fast-track the process of economic integration that had been set in motion by the OAU/AEC. This view finds support in para 7 of the Preamble to the Act which states that the African leaders are 'convinced of the *need to accelerate the process* of implementing the African Economic Community in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalisation' (my emphasis).

72 This is not surprising given the fact that the OAU was established at the time when human rights were considered to be internal matters and outside the purview of an intergovernmental body. Although the AEC was established in a period when human rights were on international agenda, its objectives were more restrictive than those of the Union as they were principally economic in nature. The Union however has been established at the time when human rights are foremost concepts in international relations.

argued that the AU is an attempt to unite the ideals of African unity and human rights on the continent. The progressive nature of the AU regarding human rights is clear in the Preamble of the Constitutive Act and in its objectives and guiding principles. Furthermore, the provision on the establishment of the Pan-African Parliament and the Economic, Social and Cultural Council offers hopes of more involvement of African people in the activities of the Union than was the case in the OAU.[73] But in order for these provisions to have the desired impact there is a need to equip the organs, structures and mechanisms of the AU to effectively implement these provisions so as to realise the goal of fully integrating the human rights framework in the activities of the AU.

The retention in the Constitutive Act of the principle of non-interference in the internal affairs of member states which, on the main, accounts for the failure on the part of the OAU to address human rights violations in the continent, is a cause for concern. One could argue that the principle of non-interference has been watered down so much in recent years as to pose no threat to human rights protection efforts. In any event, there are other principles such as the right of the Union to intervene and the respect of human rights that would balance it out. However, the principle of Union intervention is restricted to situations of genocide and crimes against humanity. Yet most of the violations of human rights in Africa do not reach those grievous levels and thus they are outside the purview of intervention.

Experience has shown that treaties and regional institutions by themselves do not necessarily translate into better protection of human rights unless accompanied by political will. In the final analysis, while the Constitutive Act contains elaborate human rights provisions, the extent to which the Union will be more protective of human rights will depend on the political will of the states to give effect to those ideals, the progressive interpretation of the Act by the African Court of Justice and the leadership by the African Commission and Union organs in championing the human rights cause on the continent.

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73 The intention to bring the Union closer to the African people is reaffirmed by the Lusaka summit of the OAU Heads of State and Government which acknowledges the member states' primary responsibility of popularising the African Union and urges the member states to take the necessary steps to ensure that the Union is truly a community of peoples. The summit further requested the OAU General Secretariat and regional communities to undertake complementary actions to popularise the Union. See OAU 'Decision on the implementation of the Sirte summit decision on the African Union' (n 51 above) para 6.

ANNEXURE: CONSTITUTIVE ACT OF THE AFRICAN UNION*

We, Heads of State and Government of the Member States of the Organization of African Unity (OAU):

INSPIRED by the noble ideals which guided the founding fathers of our Continental Organization and generations of Pan-Africanists in their determination to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States;

CONSIDERING the principles and objectives stated in the Charter of the Organization of African Unity and the Treaty establishing the African Economic Community;

RECALLING the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation;

CONSIDERING that since its inception, the Organization of African Unity has played a determining and invaluable role in the liberation of the continent, the affirmation of a common identity and the process of attainment of the unity of our continent and has provided a unique framework for our collective action in Africa and in our relations with the rest of the world;

DETERMINED to take up the multifaceted challenges that confront our continent and peoples in the light of the social, economic and political changes taking place in the world;

CONVINCED of the need to accelerate the process of implementing the Treaty establishing the African Economic Community in order to promote the socio-economic development of Africa and to face more effectively the challenges posed by globalization;

GUIDED by our common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples;

CONSCIOUS of the fact that the scourge of conflicts in Africa constitutes a major impediment to the socio-economic development of the continent and of the need to promote peace, security and stability as a prerequisite for the implementation of our development and integration agenda;

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* CAB/LEG/23.15. The Constitutive Act was adopted on 11 July 2001 and entered into force 26 May 2001.

DETERMINED to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law;

FURTHER DETERMINED to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively;

RECALLING the Declaration which we adopted at the Fourth Extraordinary Session of our Assembly in Sirte, the Great Socialist Peoples' Libyan Arab Jamahiriya, on 9.9.99, in which we decided to establish an African Union, in conformity with the ultimate objectives of the Charter of our Continental Organization and the Treaty establishing the African Economic Community;

HAVE AGREED AS FOLLOWS:

Article 1
Definitions

In this Constitutive Act:

'Act' means the present Constitutive Act;
'AEC' means the African Economic Community;
'Assembly' means the Assembly of Heads of State and Government of the Union;
'Charter' means the Charter of the OAU;
'Commission' means the Secretariat of the Union;
'Committee' means a Specialized Technical Committee of the Union;
'Council' means the Economic, Social and Cultural Council of the Union;
'Court' means the Court of Justice of the Union;
'Executive Council' means the Executive Council of Ministers of the Union;
'Member State' means a Member State of the Union;
'OAU' means the Organization of African Unity;
'Parliament' means the Pan-African Parliament of the Union;
'Union' means the African Union established by the present Constitutive Act.

Article 2
Establishment

The African Union is hereby established in accordance with the provisions of this Act.

Article 3
Objectives

The objectives of the Union shall be to:

(a) achieve greater unity and solidarity between the African countries and the peoples of Africa;

(b) defend the sovereignty, territorial integrity and independence of its Member States;
(c) accelerate the political and socio-economic integration of the continent;
(d) promote and defend African common positions on issues of interest to the continent and its peoples;
(e) encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human rights;
(f) promote peace, security, and stability on the continent;
(g) promote democratic principles and institutions, popular participation and good governance;
(h) promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments;
(i) establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations;
(j) promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
(k) promote co-operation in all fields of human activity to raise the living standards of African peoples;
(l) coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union;
(m) advance the development of the continent by promoting research in all fields, in particular in science and technology;
(n) work with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent.

Article 4
Principles

The Union shall function in accordance with the following principles:
(a) sovereign equality and interdependence among Member States of the Union;
(b) respect of borders existing on achievement of independence;
(c) participation of the African peoples in the activities of the Union;
(d) establishment of a common defence policy for the African continent;
(e) peaceful resolution of conflicts among Member States of the Union through such appropriate means as may be decided upon by the Assembly;

(f) prohibition of the use of force or threat to use force among Member States of the Union;
(g) non-interference by any Member State in the internal affairs of another;
(h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity;
(i) peaceful co-existence of Member States and their right to live in peace and security;
(j) the right of Member States to request intervention from the Union in order to restore peace and security;
(k) promotion of self-reliance within the framework of the Union;
(l) promotion of gender equality;
(m) respect for democratic principles, human rights, the rule of law and good governance;
(n) promotion of social justice to ensure balanced economic development;
(o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities;
(p) condemnation and rejection of unconstitutional changes of governments.

Article 5
Organs of the Union

1 The organs of the Union shall be:
(a) The Assembly of the Union;
(b) The Executive Council;
(c) The Pan-African Parliament;
(d) The Court of Justice;
(e) The Commission;
(f) The Permanent Representatives Committee;
(g) The Specialized Technical Committees;
(h) The Economic, Social and Cultural Council;
(i) The Financial Institutions;
2 Other organs that the Assembly may decide to establish.

Article 6
The Assembly

1 The Assembly shall be composed of Heads of States and Government or their duly accredited representatives.
2 The Assembly shall be the supreme organ of the Union.
3 The Assembly shall meet at least once a year in ordinary session. At the request of any Member State and on approval by a two-thirds

majority of the Member States, the Assembly shall meet in extraordinary session.

4 The Office of the Chairman of the Assembly shall be held for a period of one year by a Head of State or Government elected after consultations among the Member States.

Article 7
Decisions of the Assembly

1 The Assembly shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States of the Union. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.

2 Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Assembly.

Article 8
Rules of Procedure of the Assembly

The Assembly shall adopt its own Rules of Procedure.

Article 9
Powers and Functions of the Assembly

1 The functions of the Assembly shall be to:
   (a) determine the common policies of the Union;
   (b) receive, consider and take decisions on reports and recommendations from the other organs of the Union;
   (c) consider requests for Membership of the Union;
   (d) establish any organ of the Union;
   (e) monitor the implementation of policies and decisions of the Union as well as ensure compliance by all Member States;
   (f) adopt the budget of the Union;
   (g) give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace;
   (h) appoint and terminate the appointment of the judges of the Court of Justice;
   (i) appoint the Chairman of the Commission and his or her deputy or deputies and Commissioners of the Commission and determine their functions and terms of office.

2 The Assembly may delegate any of its powers and functions to any organ of the Union.

Article 10
The Executive Council

1 The Executive Council shall be composed of the Ministers of

Foreign Affairs or such other Ministers or Authorities as are designated by the Governments of Member States.

2 The Executive Council shall meet at least twice a year in ordinary session. It shall also meet in an extra-ordinary session at the request of any Member State and upon approval by two-thirds of all Member States.

Article 11
Decisions of the Executive Council

1 The Executive Council shall take its decisions by consensus or, failing which, by a two-thirds majority of the Member States. However, procedural matters, including the question of whether a matter is one of procedure or not, shall be decided by a simple majority.

2 Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Executive Council.

Article 12
Rules of Procedure of the Executive Council

The Executive Council shall adopt its own Rules of Procedure.

Article 13
Functions of the Executive Council

1 The Executive Council shall coordinate and take decisions on policies in areas of common interest to the Member States, including the following:
   (a) foreign trade;
   (b) energy, industry and mineral resources;
   (c) food, agricultural and animal resources, livestock production and forestry;
   (d) water resources and irrigation;
   (e) environmental protection, humanitarian action and disaster response and relief;
   (f) transport and communications;
   (g) insurance;
   (h) education, culture, health and human resources development;
   (i) science and technology;
   (j) nationality, residency and immigration matters;
   (k) social security, including the formulation of mother and child care policies, as well as policies relating to the disabled and the handicapped;
   (l) establishment of a system of African awards, medals and prizes.

2 The Executive Council shall be responsible to the Assembly. It shall

consider issues referred to it and monitor the implementation of policies formulated by the Assembly.

3 The Executive Council may delegate any of its powers and functions mentioned in paragraph 1 of this Article to the Specialized Technical Committees established under Article 14 of this Act.

Article 14
The Specialized Technical Committees
Establishment and Composition

1 There is hereby established the following Specialized Technical Committees, which shall be responsible to the Executive Council:
   (a) The Committee on Rural Economy and Agricultural Matters;
   (b) The Committee on Monetary and Financial Affairs;
   (c) The Committee on Trade, Customs and Immigration Matters;
   (d) The Committee on Industry, Science and Technology, Energy, Natural Resources and Environment;
   (e) The Committee on Transport, Communications and Tourism;
   (f) The Committee on Health, Labour and Social Affairs; and
   (g) The Committee on Education, Culture and Human Resources.

2 The Assembly shall, whenever it deems appropriate, restructure the existing Committees or establish other Committees.

3 The Specialized Technical Committees shall be composed of Ministers or senior officials responsible for sectors falling within their respective areas of competence.

Article 15
Functions of the Specialized Technical Committees

Each Committee shall within its field of competence:
   (a) prepare projects and programmes of the Union and submit it to the Executive Council;
   (b) ensure the supervision, follow-up and the evaluation of the implementation of decisions taken by the organs of the Union;
   (c) ensure the coordination and harmonization of projects and programmes of the Union;
   (d) submit to the Executive Council either on its own initiative or at the request of the Executive Council, reports and recommendations on the implementation of the provisions of this Act; and
   (e) carry out any other functions assigned to it for the purpose of ensuring the implementation of the provisions of this Act.

Article 16
Meetings

Subject to any directives given by the Executive Council, each Committee shall meet as often as necessary and shall prepare its Rules of Procedure and submit them to the Executive Council for approval.

Article 17
The Pan-African Parliament

1 In order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan-African Parliament shall be established.
2 The composition, powers, functions and organization of the Pan-African Parliament shall be defined in a protocol relating thereto.

Article 18
The Court of Justice

1 A Court of Justice of the Union shall be established.
2 The statute, composition and functions of the Court of Justice shall be defined in a protocol relating thereto.

Article 19
The Financial Institutions

The Union shall have the following financial institutions whose rules and regulations shall be defined in protocols relating thereto:

(a) The African Central Bank;
(b) The African Monetary Fund;
(c) The African Investment Bank.

Article 20
The Commission

1 There shall be established a Commission of the Union, which shall be the Secretariat of the Union.
2 The Commission shall be composed of the Chairman, his or her deputy or deputies and the Commissioners. They shall be assisted by the necessary staff for the smooth functioning of the Commission.
3 The structure, functions and regulations of the Commission shall be determined by the Assembly.

Article 21
The Permanent Representatives Committee

1 There shall be established a Permanent Representatives Committee. It shall be composed of Permanent Representatives to the Union and other Plenipotentiaries of Member States.
2 The Permanent Representatives Committee shall be charged with the responsibility of preparing the work of the Executive Council and acting on the Executive Council's instructions. It may set up such sub-committees or working groups as it may deem necessary.

Article 22
The Economic, Social and Cultural Council

1 The Economic, Social and Cultural Council shall be an advisory

organ composed of different social and professional groups of the Member States of the Union.

2 The functions, powers, composition and organization of the Economic, Social and Cultural Council shall be determined by the Assembly.

Article 23
Imposition of Sanctions

1 The Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates for any position or post within the Union or to benefit from any activity or commitments, therefrom.

2 Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Article 24
The Headquarters of the Union

1 The Headquarters of the Union shall be in Addis Ababa in the Federal Democratic Republic of Ethiopia.

2 There may be established such other offices of the Union as the Assembly may, on the recommendation of the Executive Council, determine.

Article 25
Working Languages

The working languages of the Union and all its institutions shall be, if possible, African languages, Arabic, English, French and Portuguese.

Article 26
Interpretation

The Court shall be seized with matters of interpretation arising from the application or implementation of this Act. Pending its establishment, such matters shall be submitted to the Assembly of the Union which shall decide by a two-thirds majority.

Article 27
Signature, Ratification and Accession

1 This Act shall be open to signature, ratification and accession by the Member States of the OAU in accordance with their respective constitutional procedures.

2 The instruments of ratification shall be deposited with the Secretary-General of the OAU.

3 Any Member State of the OAU acceding to this Act after its entry into force shall deposit the instrument of accession with the Chairman of the Commission.

Article 28
Entry into Force

This Act shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States of the OAU.

Article 29
Admission to Membership

1 Any African State may, at any time after the entry into force of this Act, notify the Chairman of the Commission of its intention to accede to this Act and to be admitted as a member of the Union.

2 The Chairman of the Commission shall, upon receipt of such notification, transmit copies thereof to all Member States. Admission shall be decided by a simple majority of the Member States. The decision of each Member State shall be transmitted to the Chairman of the Commission who shall, upon receipt of the required number of votes, communicate the decision to the State concerned.

Article 30
Suspension

Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.

Article 31
Cessation of Membership

1 Any State which desires to renounce its membership shall forward a written notification to the Chairman of the Commission, who shall inform Member States thereof. At the end of one year from the date of such notification, if not withdrawn the Act shall cease to apply with respect to the renouncing State, which shall thereby cease to belong to the Union.

2 During the period of one year referred to in paragraph 1 of this Article, any Member State wishing to withdraw from the Union shall comply with the provisions of this Act and shall be bound to discharge its obligations under this At up to the date of its withdrawal.

Article 32
Amendment and Revision

1 Any Member State may submit proposals for the amendment or revision of this Act.

2 Proposals for amendment or revision shall be submitted to the Chairman of the Commission who shall transmit same to Member States within thirty (30) days of receipt thereof.

3 The Assembly, upon the advice of the Executive Council, shall examine these proposals within a period of one year following notification of Member States, in accordance with the provisions of paragraph 2 of this Article.

4 Amendments or revisions shall be adopted by the Assembly by consensus or, failing which, by a two-thirds majority and submitted for ratification by all Member States in accordance with their respective constitutional procedures. They shall enter into force thirty (30) days after the deposit of the instruments of ratification with the Chairman of the Commission by a two-thirds majority of the Member States.

Article 33
Transitional Arrangements and Final Provisions

1 This Act shall replace the Charter of the Organization of African Unity. However, the Charter shall remain operative for a transitional period of one year or such further period as may be determined by the Assembly, following the entry into force of the Act, for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union and all matters relating thereto.

2 The provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community.

3 Upon the entry into force of this Act, all necessary measures shall be undertaken to implement its provisions and to ensure the establishment of the organs provided for under the Act in accordance with any directives or decisions which may be adopted in this regard by the Parties thereto within the transitional period stipulated above.

4 Pending the establishment of the Commission, the OAU General Secretariat shall be the interim Secretariat of the Union.

5 This Act, drawn up in four (4) original texts in the Arabic, English, French and Portuguese languages, all four (4) being equally authentic, shall be deposited with the Secretary-General of the OAU and, after its entry into force, with the Chairman of the Commission who shall transmit a certified true copy of the Act to the Government of each signatory State. The Secretary-General of the OAU and the Chairman of the Commission shall notify all

signatory States of the dates of the deposit of the instruments of ratification or accession and shall upon entry into force of this Act register the same with the Secretariat of the United Nations.

IN WITNESS WHEREOF, WE have adopted this Act.

Done at Lome, Togo, this 11th day of July 2000

Recent publications

Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law* Elsevier Science BV Amsterdam, The Netherlands vol 1 4 (Q–Z) (2000) 1 650 pages

Phenyo Rakate
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The *Encyclopaedia of Public International Law* (EPIL) is published under the auspices of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Federal Republic of Germany. The Encyclopaedia is the predecessor of the *Worterbuch des Volkerrechts* edited by the German scholar, Karl Strupp between the First and Second World Wars. Soon thereafter a revised edition of the *Wortebuch des Volkerrechts* appeared in the years 1960–1962.

The EPIL was initially published in 12 instalments between 1981 and 1984 with articles arranged in alphabetical order from A to Z. The 12 instalments had supplementary addenda containing indexes and biographical references. Later the work was brought together in four volumes with a continuous alphabetical arrangement. The four volumes were published in the years 1992 (volume 1 (A–D)), 1995 (volume 2 (E–I)) and 1997 (volume 3 (J–P)). The volume under review published in 2000 is a continuation and a completion of the consolidation of the 12 instalments.

The consolidation includes an update of the original articles together with other new articles. The EPIL brings together articles written by over 450 contributors, some of whom are renowned scholars of public international law from different background and major legal systems around the world. In the whole EPIL consolidated edition, there are 1 317 articles. In volume 4 (Q–Z) there are 17 new articles. There are also in this volume some 168 addenda to previously existing articles.

The EPIL is an enormous publication covering a wide range of areas and topics in the field of public international law from international law concepts, international institutions, international environmental law, international tribunals and judicial decisions of international courts such

as the International Court of Justice (ICJ) in The Hague, Netherlands. The consolidated volume does not only reproduce articles from the 12 instalments, but also cover new developments in international law such as the International Criminal Tribunal for Rwanda and Yugoslavia and the International Tribunal for the Sea.

International lawyers having a keen interest in international law developments in the African continent will find the EPIL a useful reference book. The complexity and dynamics of inter-state conflicts in Africa and Eastern Europe in the post-Cold War era have generated debates on issues of humanitarian intervention, state sovereignty and the doctrine of self-determination of nations. For example, it appears there is often a contradiction between, on the one hand, the doctrine of self-determination of nations and *utis possidetis* on the other. The modified Latin American doctrine of *utis possidetis ita possideatis* is articulated in the 1963 OAU Charter (article 3(3)). The doctrine conflates boundary and territorial questions by assuming as a governing principle that boundaries must be as they were at the time of declaration of independence. A number of articles in this volume provide a scholarly analysis of judicial decisions by the ICJ on the border and territorial disputes in Africa (for example Burkina Faso, Mali, Morocco and Western Sahara) and attempt to reconcile the gap between the two principles.

The EPIL is a learned contribution parallel to none in the field of modern international law. The fact that the EPIL has been written in English, although most contributors are German scholars, makes the volume accessible to a wide range of readership. The present volume, like the previous volumes, is meticulously researched with cross-references, which makes it easy to use. It is a scholarly yet lucidly written work. The EPIL is a valuable collection necessary to researchers and scholars of public international law.

AFRICAN HUMAN RIGHTS LAW JOURNAL
GUIDE FOR CONTRIBUTORS

Contributions should preferably be e-mailed to

fviljoen@hakuna.up.ac.za

but may also be posted to:

The Editors
African Human Rights Law Journal
Centre for Human Rights
Faculty of Law
University of Pretoria
Pretoria
South Africa
0002

All correspondence, books for review and other communications should be sent to the same address.

The editors will consider only material that complies with the following requirements:

- The submission must be original.
- The submission should not already have been published elsewhere.
- Papers should average between 5 000 and 10 000 words (including footnotes) in length.
- If the manuscript is not sent by e-mail, it should be submitted as hard copy and in electronic format (MS Word).
- The manuscript should be typed in Arial, 12 point (footnotes 10 point), 1½ spacing.
- Authors of contributions are to supply their university degrees, professional qualifications and professional or academic status.
- Footnotes must be numbered consecutively. Footnote numbers should be in superscript without any surrounding brackets.

The manuscript will be submitted to a referee for evaluation. The editors reserve the right to change manuscripts to make them conform with the house style, to improve accuracy, to eliminate mistakes and ambiguity, and to bring the manuscript in line with the tenets of plain legal language.

The following general style pointers should be followed:

- First reference to books: eg UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 21.
- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Watters (n 34 above) 243.
- Use UK English.

- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text. Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used.
- Words in a foreign language should be *italicised*.
- Numbering should be done as follows:
  1
  2
  3.1
  3.2
  a.
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than thirty words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms — 'constitution', but when a specific country's constitution is referred to, capitals are used — 'Constitution'.
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* for additional aspects of house style.

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CHART OF RATIFICATIONS: OAU HUMAN RIGHTS TREATIES

Position as at 30 June 2001

	African Charter on Human and Peoples' Rights	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74		
Angola	02/03/90	30/04/81	11/04/92	
Benin	20/01/86	26/02/73	17/04/97	
Botswana	17/07/86	04/05/95		
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98
Burundi	28/07/89	31/10/75		
Cameroon	20/06/89	07/09/85	05/09/97	
Cape Verde	02/06/87	16/02/89	20/07/93	
Central African Republic	26/04/86	23/07/70		
Chad	09/10/86	12/08/81	30/03/00	
Comoros	01/06/86			
Congo	09/12/82	16/01/71		
Côte d'Ivoire	06/01/92	26/02/98		
Democratic Republic of Congo	20/07/87	14/02/73		
Djibouti	11/11/91			
Egypt	20/03/84	12/06/80	09/05/01	
Equatorial Guinea	07/04/86	08/09/80		
Eritrea	14/01/99		22/12/99	
Ethiopia	15/06/98	15/10/73		
Gabon	20/02/86	21/03/86		
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99
Ghana	24/01/89	19/06/75		
Guinea	16/02/82	18/10/72	27/05/99	
Guinea-Bissau	04/12/85	27/06/89		
Kenya	23/01/92	23/06/92	25/07/00	
Lesotho	10/02/92	18/11/88	27/09/99	
Liberia	04/08/82	01/10/71		
Libya	19/07/86	25/04/81	23/09/00	
Madagascar	09/03/92			

	African Charter on Human and Peoples' Rights	OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Malawi	17/11/89	04/11/87	16/09/99	
Mali	21/12/81	10/10/81	03/06/98	10/05/00
Mauritania	14/06/86	22/07/72		
Mauritius	19/06/92		14/02/92	
Morocco		13/05/74		
Mozambique	22/02/89	22/02/89	15/07/98	
Namibia	30/07/92			
Niger	15/07/86	16/09/71	11/12/96	
Nigeria	22/06/83	23/05/86		
Rwanda	15/07/83	19/11/79	11/05/01	
Sahrawi Arab Democratic Rep	02/05/86			
São Tomé and Príncipe	23/05/86			
Senegal	13/08/82	01/04/71	29/09/98	29/09/98
Seychelles	13/04/92	11/09/80	13/02/92	
Sierra Leone	21/09/83	28/12/87		
Somalia	31/07/85			
South Africa	09/07/96	15/12/95	07/01/00	
Sudan	18/02/86	24/12/72		
Swaziland	15/09/95	16/01/89		
Tanzania	18/02/84	10/01/75		
Togo	05/11/82	10/04/70	05/05/98	
Tunisia	16/03/83	17/11/89		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01
Zambia	10/01/84	30/07/73		
Zimbabwe	30/05/86	28/09/85	19/01/95	
TOTAL NUMBER OF STATES	**53**	**45**	**25**	**5**