

## Article

# **Toward the African Court on Human and Peoples' Rights: Better Late Than Never**

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*I like the dreams of the future better than the history of the past.*

—Thomas Jefferson

### INTRODUCTION

The establishment of an African Court on Human and Peoples' Rights is a landmark development in the field of international human rights law. On June 9, 1998, in Ouagadougou, Burkina Faso, the Assembly of Heads of State and Government of the Organization of African Unity (OAU) adopted a Protocol to the African Charter on Human and Peoples' Rights ("Protocol").<sup>1</sup> The Protocol, signed by thirty

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1. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU

of the fifty-two Member States of the OAU on the same day,<sup>2</sup> establishes an African Court on Human and Peoples' Rights to supplement the existing protections afforded by the African Commission on Human and Peoples' Rights.<sup>3</sup>

<sup>2</sup> The text of the Protocol was received with enthusiasm by representatives of African governments attending the meeting and euphoria by the sectors of civil society that have long pressed for, and long awaited, its adoption. The Protocol, the product of the collective efforts of civil society at the national, regional, and international levels, opens the door to more effective human rights protection in the African region. With its adoption, Africa joins the ranks of the European and Inter-American regional human rights systems in providing judicial guarantees at the regional level for the protection of human rights in the continent.

<sup>3</sup> Massive and systematic violations of basic human rights have continued to be committed in the independent African states despite the throwing off of colonial rule in the 1950s and 1960s. In 1981, in response to growing human rights pressure at home and from abroad, African heads of state adopted the African Charter on Human and Peoples' Rights ("Banjul Charter").<sup>4</sup> The Charter enshrines generous human rights guarantees, including the rights to life, integrity, human dignity, liberty, security, non-discrimination, and a fair trial. It also guarantees freedom of conscience, religion, association, assembly, and movement, as well as the rights to property, fair wages, health, education, family, a healthy environment, and economic, social and cultural development.<sup>5</sup> To guarantee these rights, the Charter provides for the establishment of an African Commission on Human and Peoples' Rights ("Commission") to promote, protect, and interpret the human rights provisions enshrined in the Charter.<sup>6</sup> Conspicuously absent from the Charter, however, has been a Court.<sup>7</sup> Standing alone, the

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Doc. OAU/LEG/EXP/AFCHPR/PROT(III) [hereinafter Protocol]. The text was adopted unmodified from the Draft Protocol reprinted in 9 AFR. J. INT'L & COMP. L. 953 (1997).

2. The thirty States are Benin, Botswana, Burkina Faso, Burundi, Federal Islamic Republic of Comoros, Republic of Congo, Côte d'Ivoire, Federal Democratic Republic of Ethiopia, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea-Bissau, Liberia and Great Socialist People's Libyan Arab Jamahiriya. Others are Malawi, Mali, Mauritius, Namibia, Rwanda, Senegal, Seychelles, Sierra Leone, South Africa, Sudan, United Republic of Tanzania, Togo, Tunisia, Zambia, and Zimbabwe.

3. Fifteen ratifications are required, however, for the Protocol to enter into force. See Protocol, *supra* note 1, art. 34(3). As of March 2000, three countries have ratified the Protocol: Senegal, Burkina Faso, and Gambia. See OAU Doc. CAB/LEG/66.5.

4. African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982) (entered into force Oct. 23, 1986) [hereinafter Banjul Charter].

5. See Banjul Charter, *supra* note 4, arts. 1–26.

6. See *id.* art. 45.

7. The OAU, in adopting the Banjul Charter, flatly rejected the inclusion of a human rights court in the African regional human rights system. It did so despite the inclusion of a Court in both the European and Inter-American regional systems at the time, and despite early calls for the establishment of such a court pursuant to the adoption of the

2000]

*Toward the African Court*

47

Commission has proved incapable of sustaining the legitimacy and relevance necessary to be an effective body for the protection of human rights in Africa. It is, and was created to be, a paper tiger.

In this Article I argue that nothing short of an African Human Rights Court will effectively protect the human rights guaranteed in the Banjul Charter. As the omission of a Court has undermined public confidence in the African human rights system, its immediate establishment will advance the cause and course of the Banjul Charter. For the Court to be truly effective, however, Africans must ensure that it is not handicapped with the same deficiencies and weaknesses that have beset the Commission. A look at the background, structure, and framework of the African system for the protection of human rights is, therefore, necessary to refocus attention on the mechanisms and procedures that should be avoided in the creation of new African human rights machinery.

Part I of this Article addresses the background and legal framework of the African system for the protection of human and peoples' rights, focusing on the human rights situation in Africa and the constituent instruments of the African regional human rights system. This will be followed with a discussion, in Part II, of the African Commission, its record to date, and its deficiencies and fault lines. Part III discusses the origins of the Court, including initial arguments against its establishment, and the processes leading to the adoption of the Protocol. Part IV outlines the features of the new court, including its composition, jurisdiction, remedial authority, and relationship with the Commission. Part V discusses the obstacles to an effective Court, and suggests proposals for making the Court an effective instrument for the protection of human and peoples' rights in the African continent. I conclude that, while the establishment of an African Court of Human Rights is not a panacea to the widespread human rights problems in the African continent, it is an essential step in the historic process of ensuring judicially enforceable, effective recourse to Africans who have been denied their basic rights as human beings within their domestic jurisdictions.

## I. THE AFRICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS: BACKGROUND AND FRAMEWORK

### A. *Human Rights in Africa: A Serious Problem*

The African continent has come along way over the past fifty years

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Banjul Charter. Indeed, as early as 1961, 194 judges, lawyers, and scholars from 23 African countries had convened in Lagos, Nigeria under the aegis of the International Commission of Jurists for the African Conference on the Rule of Law to call for the "creation of a court of appropriate jurisdiction" to safeguard human rights in the African continent. See Law of Lagos, Jan. 7, 1961, para. 4, *reprinted in* 3 J. INT'L COMM'N JURISTS 9 (1961).

in establishing a human rights framework, institutions, and structure at the national and regional level. Nevertheless, while the discourse of human rights has increasingly been spoken by the governments of African states over the past several decades, this rights rhetoric—with few exceptions—has not been translated into rights reality.

### 1. *Rights Rhetoric*

Human rights are guaranteed in the political constitutions of almost all independent African States.<sup>8</sup> The Constitutions of Burkina Faso, Cameroon, Côte D'Ivoire, Egypt, Gabon, Gambia, Ghana, Guinea, Liberia, Libya, Malawi, Morocco, Nigeria, Rwanda, Senegal, Tanzania, Togo, and Zambia, to mention but a few, all contain lofty human rights provisions.<sup>9</sup> At independence, the French-speaking African states invariably declared, in the preambles to their constitutions, adherence to the principles of democracy and human rights as defined in the Declaration of the Rights of Man and the Citizen of 1789<sup>10</sup> and in the Universal Declaration of Human Rights of 1948.<sup>11</sup> The Guinean Constitution, for example, provides for equality before the law, non-discrimination, freedom of opinion, assembly and association, the right to social security and personal liberty as well as due process of law.<sup>12</sup> The English-speaking African countries took similar steps. Every constitution promulgated in Nigeria, for example, contains fundamental human rights provisions. Chapter IV of the 1999 Constitution guarantees the rights to life, personal liberty, due process, dignity of the person and of family life, freedom of thought, expression, assembly and of movement as well as non-discrimination.<sup>13</sup> The Constitutions of Benin, Kenya, South Africa and Uganda have contained similarly strong human rights protections.<sup>14</sup>

Institutional protections essential for the enjoyment of human

8. At independence, the influence of European legal philosophy dominated (and still dominates) the national judicial systems in most African States. The Spanish legal system dominates, for example, in Equatorial Guinea while the Portuguese legal system dominates in Angola and Mozambique. The British common law system is predominant in all former British colonies such as Nigeria. The French legal system predominates in the French speaking African territories with the exception of Zaire, which was formerly under Belgian colonial administration.

9. See, e.g., HUMAN RIGHTS LAW IN AFRICA 1996 (Christof Heyns ed., 1996) (discussing human rights protections enshrined in laws of African countries as of Jan. 1, 1996); HUMAN RIGHTS LAW IN AFRICA 1997 (Christof Heyns ed., 1999) (same, as of Jan. 1, 1997).

10. Declaration of the Rights of Man and the Citizen (1789) (Fr).

11. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. 127 (Supp. 1949).

12. GUINEA CONST. arts 7–11.

13. NIG. CONST. *available at* <<http://www.nigerianguillaria.com/Constitution1.htm>>.

14. See, e.g., HUMAN RIGHTS LAW IN AFRICA 1996, *supra* note 9, at 29–34, 175–85, 339–49, 371–88 (describing human rights protections in constitutions of Benin, Kenya, South Africa, and Uganda, respectively), *as updated in* HUMAN RIGHTS LAW IN AFRICA 1997, *supra* note 9, at 127, 180–85, 245–74, 291–96 (same).

rights, such as an independent judiciary, were also constitutionally established. The constitutions of Ghana, Kenya, Nigeria and those of many other African States contained detailed rules and procedures for the protection of human rights. The institution of the Ombudsman, mandated to investigate complaints arising from administrative malpractice against individual citizens, was also created in certain countries such as Tanzania, Uganda, Senegal, Ghana, and Nigeria. In 1987, Togo went further to establish an autonomous National Human Rights Commission to protect and promote human rights by organizing seminars and symposia to educate the population about its rights and by expressing views and recommending measures to better protect human rights in the country.<sup>15</sup> Nigeria followed suit in 1995, creating a National Human Rights Commission “to facilitate Nigeria’s implementation of its various treaty obligations.”<sup>16</sup>

African states have also been active in the ratification of, or accession to, human rights conventions. All fifty-three Member States of the OAU have now ratified the Banjul Charter,<sup>17</sup> the last two ratifying countries being Ethiopia and Eritrea.<sup>18</sup> Many states, such as Nigeria and Benin, have gone further to incorporate the Charter into domestic law.<sup>19</sup> At the same time, most African states have ratified the International Covenant on Civil and Political Rights (ICCPR)<sup>20</sup> as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>21</sup> In fact, as of May 2000, forty-three African States had ratified the ICCPR while forty-two had ratified the ICESCR.<sup>22</sup> Large numbers of African States are also parties to the Women’s Convention,<sup>23</sup> Race Convention,<sup>24</sup> and Children’s Convention.<sup>25</sup> Through the OAU,

9

15. See TOGO CONST. art. 156.

16. See National Human Rights Commission Decree No. 22 of 1995 (Nig.), pmbl.

17. See *Twelfth Annual Activity Report (1998-99)*, Afr. Comm’n Hum. and Peoples’ Rts., 24th-25th Ordinary Sess., annex 1, OAU Doc. CAB/LEG/67.1 (1999), available at <<http://www1.umn.edu/humanrts/africa/12thannex1.html>> (listing dates of signing, ratification or accession, and date of deposit of instruments of ratification or accession of all States Parties to the Banjul Charter as of Mar. 31, 1999).

18. Ethiopia ratified the Charter on June 15, 1998 while Eritrea ratified on Jan. 14, 1999. *Id.*

19. See, e.g., African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap. 10, in LAWS OF THE FEDERATION OF NIGERIA 77 (1990); HUMAN RIGHTS LAW IN AFRICA 1996, *supra* note 9, at 29 (reporting on incorporation of Banjul Charter into Constitution of Benin).

20. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

21. International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

22. See UNHCR, *Treaty Bodies Database* (visited Jun. 15, 2000) <<http://www.unhcr.ch/tbs/doc.nsf>> (providing status of ratification by treaty).

23. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter Women’s Convention]. As of May 15, 2000, 47 African States had ratified CEDAW. Sao Tome and Principe is a signatory.

24. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969)

African States have also adopted their own regional human rights conventions on the rights of both children<sup>26</sup> and refugees.<sup>27</sup>

## 2. *Rights Reality*

Despite this express codification of human rights norms in the domestic legal systems of African states, large-scale, unprecedented breaches of human rights have repeatedly occurred in Africa since independence.<sup>28</sup> Reports of extra-judicial executions, massacres, disappearances, torture, arbitrary detention, and political surveillance and harassment are documented throughout the region.<sup>29</sup> Violations of the rights to health, education, food, water, housing, environment, and employment security are equally rampant, though underreported in the human rights literature.<sup>30</sup>

These violations often take place in a context of near total impunity. Because many African States lack an independent judiciary,<sup>31</sup> restrict

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[hereinafter Race Convention]. As of May 15, 2000, 44 African States had ratified the Race Convention. Benin is a signatory.

25. Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Annex, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990). As of May 15, 2000, 51 African States had ratified the Children's Convention.

26. See African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (1990). As of November 1999, it had been ratified by 16 African countries.

27. See OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force June 20, 1974). As of May 31, 1999, it had been ratified by 44 African countries. See *Report of the Secretary-General on the Status of Signature/Ratification of OAU Treaties as at 31st May 1999*, OAU Doc. CM/2122 (LXX).

28. The worst records may have been set in Bokassa's Central African Republic (1966–1979), Marcias Nguema's Equatorial Guinea (1969–1979), Idi Amin's Uganda (1971–1979), Mobutu Sese Seko's Zaire, apartheid South Africa, Sani Abacha's Nigeria, and, most recently, Rwanda, Burundi, Congo, Liberia, and Sierra Leone. In 1999, 16 African countries were embroiled in war.

29. See, e.g., AMNESTY INT'L, AFRICA UPDATE: A SUMMARY OF HUMAN RIGHTS CONCERNS IN SUB-SAHARAN AFRICA (1999), available at <<http://www.amnesty.org/ailib/aipub/1999/AFR/10100299.htm>> (reporting on worst human rights abuses in 25 African states between Sept. 1998–Mar. 1999); AMNESTY INT'L, THE TEARS OF ORPHANS: SUDAN (1995); ARTICLE 19, KENYA: POST-ELECTION POLITICAL VIOLENCE (1998). For a listing of all Amnesty International's publications on human rights abuses in African states since 1996, see <<http://www.amnesty.org/ailib/countries/index.html>>. For those of Human Rights Watch, see <<http://www.hrw.org/reports98/publctns.htm>>.

30. See, e.g., HUM. RTS. WATCH, FAMINE IN SUDAN: THE HUMAN RIGHTS CAUSES (1999); HUM. RTS. WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATION IN NIGERIA'S OIL PRODUCING COMMUNITIES (1999); HUM. RTS. WATCH, ABUSE OF UNDOCUMENTED MIGRANTS, ASYLUM SEEKERS, AND REFUGEES IN SOUTH AFRICA (1999).

31. Lack of judicial independence is a serious problem in many African states, particularly where appointment, remuneration, promotion, and removal of judges are made by military fiat. Between 1984–1999 in Nigeria, for example, judges of the High Courts, Courts of Appeal and the Supreme Court were appointed by the heads of the various supreme military ruling authorities, without the approval of any democratic body.

the free press,<sup>32</sup> respond to political opposition with violence,<sup>33</sup> and suffer from widespread corruption,<sup>34</sup> citizens often lack effective recourse to challenge abusive government action. Without legal or political accountability, state agents may, and often do, abuse their power at will. The adoption of the Banjul Charter in 1986, and the functioning of the African Human Rights Commission, has not changed this persistent reality.

Indeed, violence and human rights abuse has exploded in the African continent in the 1990s. In Rwanda, as many as three-quarters of a total Tutsi population of one million were systematically killed in the Rwandan genocide of 1994.<sup>35</sup> In neighboring Burundi, at least 200,000 people, most of them civilians, have been killed since Tutsi paratroopers kidnapped and killed the country's first democratically elected president, a Hutu, in October 1993.<sup>36</sup> It is estimated that the current conflict in the Democratic Republic of Congo has claimed as

12

32. See, e.g., HUM. RTS. WATCH, WORLD REPORT 2000 (2000), *Africa section available online at* <<http://www.hrw.org/hrw/wr2k/Africa.htm#TopOfPage>> (reporting that independent journalists are "routinely detained, beaten, or forced into exile" in African countries and face particular risks in conflict zones); AMNESTY INT'L, LIBERIA: CRACKDOWN ON MEDIA SIGNALS FURTHER REPRESSION OF HUMAN RIGHTS DEFENDERS (2000), *available at* <<http://www.amnesty.org/news/2000/13400100.htm>> (discussing gross abuses against journalists); *Corruption Flourished in Abacha's Regime*, WASH. POST, June 9, 1998, at A1 (noting that Nigerian journalists are often jailed for writing on government corruption).

33. Within less than four decades, there have been 82 violent changes of government in Africa, including 67 military coups, in which 20 African Presidents were killed. Since the beginning of 1999, Africa has witnessed three military coups—in Sierra Leone (Jan.), Niger (Apr.), and Côte d'Ivoire (Dec.)—in which one President was killed. See *Women in Conflict Situations in Africa*, AFR. HUM. RTS. NEWSLETTER (Afr. Centre for Democracy & Hum. Rts. Stud.), July–Sept. 1999, at 1; AFR. TOPICS, Jan.–Mar. 2000, at 29, 15; *1st Popularly Elected Chief Ousted by Military in Niger*, L.A. DAILY NEWS, Jan. 28, 1996, at N21, *available in* 1996 WL 6544566. See generally Tunguru Huaraka, *The Effects of Military Coups d'Etat and Regimes on Human Rights in Africa*, 26 ARCHIV DES VOLKERRECHTS 49 (1988). As Adebayo Adedeji, a Nigerian economist and former executive-secretary of the U.N. Economic Commission for Africa, notes: "People will never comprehend Africa's crisis so long as they continue to assume that it is mainly an economic one. . . . What we confront in Africa is primarily a political crisis, albeit with devastating economic consequences." *Hard to Learn, Easy to Break*, THE ECONOMIST, Sept. 7, 1996, at S4.

34. As Afe Babalola has noted: "It is [] an open secret that there are some African Heads of State, past or present, whose assets in various parts of the globe, if valued[,] would be more than the yearly earnings of their respective countries." Afe Babalola, *Legal and Judicial System and Corruption*, in AFRICA LEADERSHIP FORUM, CORRUPTION, DEMOCRACY AND HUMAN RIGHTS IN WEST AFRICA 93, 94 (A. Aderinwale, ed., 1994). This is most certainly the case with both Mobutu Sese Seko, former president of Zaire, and General Sani Abacha, former military dictator of Nigeria. See, e.g., *OAU Peace Initiative in Congo*, THE GUARDIAN (Nig.), May 19, 2000; *Corruption Flourished in Abacha's Regime*, WASH. POST, June 9, 1998, at A1; Tom Masland et al., *The Lost Billions*, NEWSWEEK, Mar. 13, 2000, at 38.

35. See, e.g., HUM. RTS. WATCH, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA (1999), *available at* <<http://www.hrw.org/reports/1999/rwanda/>>.

36. See, e.g., *Forty-Three Killed in Burundian Army Attack Africa*, L.A. TIMES, Jan. 8, 2000, at A12; AMNESTY INT'L, BURUNDI: ARMED GROUPS KILL WITHOUT MERCY (1996).

many as 100,000 lives and many more displaced.<sup>37</sup> Civilians were brutally killed and tortured in conflicts between opposing forces in Somalia,<sup>38</sup> Liberia,<sup>39</sup> Angola,<sup>40</sup> South Africa,<sup>41</sup> Zaire,<sup>42</sup> and, very recently, in Sierra Leone.<sup>43</sup> Simple border disputes have also erupted into needlessly violent military confrontation between Cameroon and Nigeria<sup>44</sup> as well as Ethiopia and Eritrea.<sup>45</sup> The result has been humanitarian crisis, with food and supplies being cut off to desperate civilian populations, and a massive outflow of refugees from many African countries, including the Democratic Republic of Congo, the Congo Brazzaville, Sudan, Somalia, Burundi, Sierra Leone, Guinea

37. See, e.g., Simon Robinson Blukwa, *Poverty and Civil War Conflict in the Democratic Republic of Congo is reviving Old Ethnic Rivalries and bringing Death and Misery to Some of Africa's Poorest People*, TIME, Feb. 21, 2000, at 27.

38. See, e.g., AMNESTY INT'L, AMNESTY INTERNATIONAL ANNUAL REPORT 1997, at 283, 283-85 (1997) (reporting on acts of torture, murder, and rape carried out against unarmed civilians by Somalia's warring militias), available at <<http://www.amnesty.org/ailib/aireport/ar97/AFR52.htm>> [hereinafter AI REPORT 1997].

39. See, e.g., AMNESTY INT'L, LIBERIA: TIME TO TAKE HUMAN RIGHTS SERIOUSLY—PLACING HUMAN RIGHTS ON THE NATIONAL AGENDA (1997), available at <<http://www.amnesty.org/ailib/aipub/1997/AFR/13400597.htm>> (discussing Liberia's protracted seven-year civil war, during which an estimated 200,000 people were killed); *One Baby, One Car Government*, AFR. NEWS SERV., Mar. 31, 2000, available at 2000 WL 18240478 (reporting that civil war killed 10 percent Liberian population).

40. See, e.g., HUM. RTS. WATCH, ANGOLA UNRAVELS: THE RISE AND FALL OF THE LUSAKA PEACE PROCESS (1999), available at <<http://www.hrw.org/reports/1999/angola>> (describing Angola's return to open warfare in Dec. 1998, and the consequent indiscriminate killing and forced displacement of civilian populations).

41. See, e.g., S. AFR. TRUTH & RECONCILIATION COMM'N, FINAL REPORT, vol. 1, ch. 6, para. 21 (Oct. 29, 1998) available at <<http://www.polity.org.za/govdocs/commissions/1998/trc/1chap6.htm>> (reporting over 38,000 allegations of gross violations of human rights, of which nearly 10,000 were killings).

42. In September 1996, fighting broke out in Zaire between Tutsi-led Zairian armed groups, apparently supported by the Rwandese Government, and Zairian government soldiers acting in conjunction with the former Rwandese government forces and militia, with hundreds of casualties. See, e.g., AI REPORT 1997, *supra* note 38, at 270-71, 342-45 (1997).

43. See, e.g., HUM. RTS. WATCH, SIERRA LEONE: GETTING AWAY WITH MURDER, MUTILATION, AND RAPE (1999), available at <<http://www.hrw.org/hrw/reports/1999/sierra/>> (documenting massacres of civilians gathered in houses, churches, and mosques, after rebel forces took control of Freetown in Jan. 1999); Yinka Akinsulure-Smith, *Bring Peace to Sierra Leone Now*, ST. PETERSBURG TIMES, May 16, 2000, available at 2000 WL 8921558 (reporting that U.N. officials estimate that Sierra Leone has the highest rate of sexual violence in the world, with thousands of women and girls raped and killed, or abducted and forced to live as sexual slaves by rebel groups in country's recent civil war).

44. The dispute over the Bakassi peninsula, over which both States claim sovereignty, is now before the International Court of Justice at the Hague.

45. Ethiopia and Eritrea have engaged in a bloody two-year war over a rocky 155-square-mile piece of land called the Virga triangle along Ethiopia's northwestern border. See *New Eritrean Attack Reported Against Ethiopia*, CNN, June 10, 1998 (visited May 30, 2000) <<http://www.cnn.com/WORLD/africa/9806/10/ethiopia.eritrea/index.html>>; *Ethiopia, Eritrea Fight Over Red Sea Port*, CNN, June 3, 2000 (visited May 30, 2000) <<http://www.cnn.com/2000/WORLD/africa/06/03/horn.africa.02/>>. Military analysts estimate that over 120,000 people have been killed in the fighting and the war has created a humanitarian crisis for persons on both sides of the border. *Id.*



Bissau, Angola, Senegal<sup>46</sup> and, most recently, Eritrea.<sup>47</sup> Indeed, the United Nations High Commissioner for Refugees classifies Sierra Leone, Somalia, Sudan, Liberia and Burundi as five of the top ten refugee producing countries in the world.<sup>48</sup>

Political persecution of critics, political opponents, journalists, and human rights activists is also a flagrant practice in many African states. Recent reports from Rwanda, for example, document the repeated human rights violations to which critics of the Rwandese government, including human rights activists and journalists, have recently been subjected—including arbitrary arrests, ill-treatment, and attempted extra-judicial execution.<sup>49</sup> Similar situations of political persecution are occurring in Algeria, Kenya, Liberia, Zambia, Sierra Leone, and many other African countries.<sup>50</sup> In his final report to the African Human Rights Commission, Commissioner Ben Salem, the Special Rapporteur on Extra-judicial Executions in Africa, indicted such countries as Rwanda, Burundi, Chad, Comoros, and the Democratic Republic of Congo for state-sponsored extrajudicial executions and “disappearances.”<sup>51</sup>

Endemic state corruption also leads to systematic abuse of social, economic, cultural, and environmental rights of large majorities of people. In Nigeria, government graft pervades almost every aspect of life and dominates the lucrative oil industry. Multinational corporations in the Niger Delta, for example, openly engage in criminal mining of oil in collaboration with the government. As a result, oil exploitation has created serious ecological problems, destroying local environments and, as such, the *very means of livelihood* of the people in the region. Existing national laws are inadequate to address state and corporate

46. See *The Human Rights Situation in Africa*, Afr. Comm'n on Hum. and Peoples' Rts., 26th Ordinary Sess., at 2, OAU Doc. DOC/OS(XXVI)/129 (1999).

47. See *Exodus of Up to 1 Million Refugees Overwhelms Eritrea: Evacuees Flee Ethiopian Attacks*, CNN, May 20, 2000 (visited June 1, 2000) <<http://www.cnn.com/2000/WORLD/africa/05/20/eritrea.01/>> (reporting on humanitarian crisis caused by flight of up to 1 million Eritreans from Ethiopian offensive).

48. See UNHCR & Refugees, *UNHCR by Numbers* tbl.3 <<http://www.unhcr.ch/un&ref/numbers/table3.htm>> (listing origin of 10 largest refugee populations in world), *statistics taken from UNHCR, REFUGEES AND OTHERS OF CONCERN TO UNHCR—1998 STATISTICAL OVERVIEW* (1999), available at <<http://www.unhcr.ch/statist/98oview/intro.htm>>. The African Centre for Democracy and Human Rights reports that Africa has 6 of the 10 major refugee generating countries in the world, the top 6 being Sierra Leone with 440,000, Somalia with 374,000, Eritrea with 320,000, Burundi with 300,000, and Angola with 225,000 as of early 1999. See *Women in Conflict Situations in Africa*, *supra* note 33, at 1.

49. See, e.g., HUM. RTS. WATCH, *WORLD REPORT 1998: RWANDA* (1998), available at <[http://www.hrw.org/hrw/worldreport/Africa-10.htm#P816\\_217123](http://www.hrw.org/hrw/worldreport/Africa-10.htm#P816_217123)> (describing abuses against journalists, human rights monitors, and other human rights and humanitarian aid organization personnel).

50. See, e.g., HUM. RTS. WATCH, *WORLD REPORT 2000* (2000), *Africa overview* available at <<http://www.hrw.org/hrw/wr2k/Africa.htm#TopOfPage>> (overviewing political and human rights situation in African region); HUM. RTS. WATCH/AFR., *BEHIND THE RED LINE: POLITICAL REPRESSION IN SUDAN* (1996).

51. See OAU Doc. DOC/OS/43 (XXIII).

infringements of basic subsistence rights,<sup>52</sup> and court orders, where they conflict with government and multinational interests, are routinely disobeyed.<sup>53</sup>

This contemptuous attitude of the State and private companies to court orders has led to a situation where citizens have lost faith in the judiciary and, consequently, resort to self-help on a regular basis—leading to further human rights abuse. The Niger Delta, the most marginalized and exploited area of Nigeria, for example, is also the area with the highest rate of crime and human rights abuse in the nation. Reports of riots, kidnappings, shutting down of flow-stations, killings, maiming, fire accidents, bans, and military operations are reported almost daily in the press.<sup>54</sup> The same breakdown in the rule of law, and consequent resort to violent self-help on the part of local communities, can be seen throughout the region where effective recourse to dispute resolution bodies are denied.

Manifestly, human rights abuse is a serious and pervasive problem in the African continent that domestic courts are often not structurally equipped to handle. As is apparent from this brief discussion, domestic judicial institutions are not enough to guarantee the human rights enshrined in national constitutions, domestic legislation, and international law. Additional mechanisms are clearly needed for effective response.

52. Though recognized in the Nigerian Constitution, social and economic rights are constitutionally relegated to non-justiciable “objectives” of state policy rather than subjective rights. See NIG. CONST. ch.II (1999) (“Fundamental Objectives and Directive Principles of State Policy”); see also NIG. CONST. ch.II § 6(6)(c) (1999) (“The judicial powers . . . shall not, except as otherwise provided by this Constitution, extend to . . . the fundamental objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.”).

53. See generally INT’L COMM’N OF JURISTS, NIGERIA AND THE RULE OF LAW: A STUDY (1996). In the case of *Chief Joel Anaro v. Shell Petroleum Development Company Nigeria*, suit Nos. W/72/82, W/16/83, W/17/83, W/20/85, RCD/36/89 (unreported), for example, a Nigerian court found a multinational oil company liable under Nigerian law—for negligence and breach of statutory duties—for oil spillages that affected fish-ponds, fish channels, mangrove swamps, farm lands, riverines, as well as lakes and streams belonging to local communities. The Court held that the plaintiffs were entitled to damages and compensation for loss of income from fishing rights, domestic animals, destruction of fishing grounds and materials, and awarded them ₦30.5 million. Backed by the military government, Shell Petroleum Company, nevertheless, refused to pay, leaving the aggrieved without any further legal redress. See *Law Report*, LIVING (Living Env’t Def. Programme, Shelter Rts Initiative, Nig.), Apr.–Jun. 1998, at 20–21.

54. See, e.g., N.J. Udombana, *The Law Relating to Socio-Economic Rights and the Situation in Nigeria: A Critical Analysis of the Niger Delta*, 24 THE LAW. (Nig.) 22, 41 (1999). The trade journal *Nigeria’s Oil & Gas Monthly* routinely runs stories on the activities of local youth in the Niger Delta who have no other recourse to fight corporate abuses than to engage in violence. See, e.g., *Youths Disrupt Shell Petroleum Development Operations in Port Harcourt*, NIGERIA’S OIL & GAS MONTHLY, Sept. 1998, at 5; *Ijaw Youths Hijack Oil Company Helicopter*, NIGERIA’S OIL & GAS MONTHLY, Dec. 1998, at 6; *Ijaw Youths Plan to Sack Oil Workers From Their Area*, NIGERIA’S OIL & GAS MONTHLY, Jan. 1999, at 8; *Warri Refinery and Petrochemical Company (WRPC) Vandalised*, NIGERIA’S OIL & GAS MONTHLY, Jan. 1999, at 9.

B. *Framework and Structure of the African Regional Human Rights System*

If national systems are not working to protect basic human rights, the essential question then becomes why has the regional system not stepped in to make a difference? The answer lies in the structure and framework of the regional system itself. The African system is composed of two framework instruments—the OAU Charter and the Banjul Charter—and a Commission to promote and protect the rights enshrined in the latter. While these instruments have represented important steps forward in the creation of a regional human rights system, they contain fundamental flaws, both normatively and structurally, that inhibit their ability to effectively protect human rights in the continent. These flaws must be constantly kept in mind as the new Court comes into being to prevent the Court from following in its predecessor's untimely footsteps.

17

1. *The Charter of the Organization of African Unity*

The Organization of African Unity (OAU) is the official regional political body of all African States. It was created on May 25, 1963 with the adoption of the Charter of the Organization of African Unity ("OAU Charter")<sup>55</sup> by a Conference of Heads of State and Government of thirty-two independent African states in Addis Ababa, Ethiopia. Although the OAU Charter was clearly intended to be read in conjunction with the United Nations Charter and the Universal Declaration of Human Rights,<sup>56</sup> the protection of individual human rights against government abuse was not the motivating impulse behind the Charter. Rather, inspired by the anti-colonial struggles of the 1950s, the Organization was dedicated primarily to the eradication of colonialism and the condemnation of abuse of the rights of Africans by non-Africans, such as in the case of apartheid. The OAU strengthened the anti-colonial lobby in the United Nations and gave material and diplomatic support to the liberation movements. As such, it "represents concrete achievement of the pan-African movement."<sup>57</sup> Through the OAU, the emergent African

18

55. Charter of the Organization of African Unity, May 23, 1963, 47 U.N.T.S. 39, 2 I.L.M. 766 (1963) [hereinafter OAU Charter]. The text of the OAU Charter is available at the OAU's official website <<http://www.oau-oua.org/>>.

56. The preamble to the OAU Charter reaffirms African states' adherence to the principles of those two international human rights instruments, asserting that "the inalienable right of all people to control their own destiny" and "freedom, equality, justice, and dignity" are the essential objectives of the Organization. *Id.* pmb. It further calls for unity to assure the "welfare and well-being" and the "total advancement of [African] peoples in all spheres of human endeavor." *Id.* Article II(1)(e), which enumerates the Organization's purposes, also makes reference to state adherence to the U.N. Charter and the Universal Declaration.

57. Osita C. Eze, *The Organization of African Unity and Human Rights: Twenty-Five Years After*, 14 NIG. J. INT'L AFF. 154, 158–59, (1988).

states created a political bloc to facilitate intra-African relations meant to forge a regional approach to Africa's relationships with external powers. It was not, however, meant to question the actions of African governments themselves vis-à-vis their own populations.

19 In conformity with the anti-colonial sentiments that gave rise to the OAU, the Organization's Charter places a premium on the defense of "sovereignty, [] territorial integrity, and independence."<sup>58</sup> This principle, enshrined as one of the fundamental purposes of the Organization, was viewed as essential in order to consolidate African states' hard-won independence and struggle against neo-colonialism in all its forms.<sup>59</sup> Yet, ironically, the same anti-colonial sentiments that made the OAU such an effective political body in the drive toward independence, have been mobilized just as effectively to stifle the human rights potential of the Organization. Indeed, the concept of defending sovereignty and independence implied non-interference in the internal affairs of member States.<sup>60</sup> This non-intervention principle, enshrined in Article III(2) of the OAU Charter,<sup>61</sup> has been a foundation stone of the Organization, a rule regarded as sacrosanct, to which States have rigidly adhered. In fact, the body was born "in a context of nearly untrammelled state sovereignty, in which heads of states sought sedulously to safeguard the independence so recently won."<sup>62</sup>

20 This strong emphasis on sovereignty has contributed to the reluctance of Member States to seriously pursue human rights promotion and enforcement. There has been a persistent unwillingness among member states to criticize one another in the face of flagrant human rights abuse. Former OAU President Sekou Toure's assertion that the OAU was not "a tribunal which could sit in judg[ment] on any member state's internal affairs," was typical of the Organization's early understanding of its role.<sup>63</sup> Referring to article III(2), another early commentator affirmed that "with regard to breaches of human rights,

58. See Banjul Charter, *supra* note 4, art. II(1)(c).

59. See *id.* art. III(3) (declaring "[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence" as one of the fundamental principles of the Organization).

60. See generally A.B. Akinyemi, *The Organisation of African Unity and the Concept of Non-Interference in Internal Affairs of Member-States*, 46 BRIT. Y.B. INT'L L. 393 (1972-73); Obi Okongwu, *The OAU Charter and the Principle of Domestic Jurisdiction in Member-States*, 13 INDIAN J. INT'L L. 589 (1973). Cf. U.N. CHARTER art. 2, para. 7 ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . .").

61. See OAU Charter, *supra* note 55, art III(2) (declaring "[n]on-interference in the internal affairs of States" as one of the fundamental principles of the Organization).

62. Claude E. Welch, Jr., *The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 43 (1992).

63. U.O. Umzurike, *The African Charter on Human and Peoples' Rights*, 77 AM. J. INT'L L. 902, 903 (1983) [hereinafter Umzurike, *African Charter*]. Umzurike notes that this self-prohibition was "not so much to protect [Member States'] legitimate states' rights as to fend off international concern for gross abuses of human rights in some African states." *Id.* at 903.

even of a grave nature such as genocide, the OAU has been bogged down by the domestic jurisdiction clause.”<sup>64</sup> The OAU Charter facilitated this unwillingness by not providing for any enforcement mechanism to uphold its principles. Rather, it merely emphasized cooperation among Member States and the peaceful settlement of disputes through negotiation, mediation, and conciliation.<sup>65</sup>

Indeed, until recently, the OAU never condemned a single state for its ruthless treatment of its people—not even Jean Bedel Bokassa of Central African Republic, Marcias Nguema of Equatorial Guinea, nor Idi Amin of Uganda, who, though responsible for the mass expulsion of 20,000 British Asians and the brutal killing of 300,000 Ugandans in 1972, became OAU Chairman in 1976.<sup>66</sup> While these African dictators were in power, the OAU turned a blind eye to their repressive regimes.<sup>67</sup> Increasing political repression, denial of political choice, restrictions on freedom of association, and other human rights violations met with rare murmurs of dissent from within the OAU. Some massive human rights abuses in the context of armed conflict have drawn muted responses by adjacent states with OAU approval.<sup>68</sup> But these were never enough; they came from the periphery, not the center.

The explanation for this hands-off approach is clear. On the one hand, the non-intervention principle of the OAU Charter strongly militates against denunciation of human rights abuses undertaken within the territorial boundaries of a Member State. On the other, and perhaps more importantly, the OAU has historically been led by heads of state who themselves have been responsible for massive human rights abuses. Inter-state condemnation of human rights violations is not likely in such a context. As a result, the OAU has historically been little more than “a mutual admiration club”: Member States were

64. See U.O. Umozurike, *The Domestic Jurisdiction Clause in the OAU Charter*, AFR. AFF. (London), Apr. 1979, at 197, 202.

65. See OAU Charter, *supra* note 55, art. II(2) (calling for coordination and harmonization of member states’ policies to achieve the Charter’s purposes); art. III(4) (announcing “peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration” as a principle of the Organization); art. VII(4) (creating the Commission of Mediation, Conciliation and Arbitration to accomplish the purposes of the Charter); art. XIX (“Member States pledge to settle all disputes among themselves by peaceful means and, to this end decide to establish a Commission of Mediation, Conciliation and Arbitration . . .”).

66. Idi Amin was forced into exile in Saudi Arabia when Tanzanian forces, responding to an earlier Ugandan invasion, not only expelled the invaders from Tanzanian territory but continued up to the Ugandan capital, Kampala, where a new government was installed by rebel groups.

67. See, e.g., Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples’ Rights*, 31 HOW. L.J. 643, 645 (1988); Umozurike, *African Charter*, *supra* note 63, at 903 (noting that massacres of thousands of Hutu in Burundi in 1972–73, as well as repressive regimes in Uganda, Equatorial Guinea, and Central African Republic, “were neither discussed nor condemned by the OAU, which regarded them as matters of internal affairs”).

68. See Umozurike, *African Charter*, *supra* note 63, at 902–03 (noting exceptions of Tanzania, Zambia, and Mozambique among OAU states in willingness to criticize gross human rights abuses in neighboring states).

expected to see nothing, hear nothing, and say nothing. The result was apathy and irresponsible silence.

23

This history calls for the establishment of an independent and impartial African Court of Human Rights, with a clear mandate to protect individuals against abuses by state agents. Only such a body—institutionally removed from the influence of inter-state politics and protected from criticisms of “external intervention in domestic affairs” by a strong universalist mandate to ensure the protection of human rights for all persons within the African region—will be able to provide the protections necessary to ensure the rights embodied in the OAU Charter.

2. *The African Charter on Human and Peoples’ Rights (“Banjul Charter”)*

24

It took another twenty years after the adoption of the OAU Charter to establish an explicit human rights instrument for the region. Proposals to establish an African Charter on Human and Peoples’ Rights were first forwarded in 1961 at the African Conference on the Rule of Law in Lagos, Nigeria. The Conference, organized by the International Commission of Jurists (ICJ), convened almost two hundred judges, lawyers, and scholars from twenty-three countries to discuss enforcement mechanisms for the protection of human rights in the newly independent states of Africa. At the end of the Conference, the participants adopted the Law of Lagos, which declared:

[I]n order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of *adopting an African Convention of Human Rights* in such a manner that the Conclusions of this Conference will be safeguarded by the *creation of a court* of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.<sup>69</sup>

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In 1966, the U.N., in cooperation with the government of Senegal, organized a Seminar on Human Rights in Developing Countries, which culminated in a call for an African Convention that would encourage and secure the protection of human rights.<sup>70</sup> With the urging of several African States, the U.N. Commission on Human Rights continued to call for the establishment of regional human rights machinery for the African continent throughout the late 1960s and 1970s, sponsoring additional conferences on the topic in Cairo (1969), Addis Ababa (1971),

69. See Law of Lagos, *supra* note 7, para. 4 (emphasis added).

70. See U.N. Doc. ST/TAO/HR/25.

Dar-es-Salaam (1973), and Dakar (1978).<sup>71</sup> In 1977, the U.N. General Assembly appealed “to States in areas where regional arrangements in the field of human rights do not yet exist to consider agreements with a view to the establishment within their respective regions of suitable regional machinery for the promotion and protection of human rights.”<sup>72</sup> In September 1979, the U.N. once again convened a conference, this time in Monrovia, to address the issue of human rights protections with special reference to Africa. The conference produced the “Monrovia Proposals for Setting-up of an African Commission on Human Rights.”<sup>73</sup>

Meanwhile, the Assembly of Heads of State of the OAU had adopted a resolution calling on the Secretary-General to “organize as soon as possible in an African Capital a restricted meeting of highly qualified experts to prepare a preliminary draft of an African Charter on Human Rights providing, *inter alia*, for the establishment of bodies to promote human rights.”<sup>74</sup> The OAU, as a regional body, was thus beginning to give the idea of regional human rights enforcement machinery more serious consideration. It set up a working group chaired by Justice E.K. Wiredu of Ghana to make further proposals for the establishment of an African human rights charter and commission. The Wiredu proposals formed the basis, in part, of the draft charter prepared by the Keba M'baya Committee at the request of the OAU Secretary-General and discussed at three OAU ministerial conferences in Dakar in 1979 and in Banjul in 1980 and 1981.

In 1981, the OAU finally adopted the African Charter on Human and Peoples' Rights (Banjul Charter),<sup>75</sup> a milestone in the evolution of human rights protection at the regional level in Africa. The Banjul Charter, seen by some as “[t]he newest, the least developed or effective, the most distinctive and the most controversial of the regional human rights regimes,”<sup>76</sup> was the first major African contribution to the global human rights discourse. It represents an attempt to defeat the “efforts by votaries of sovereignty and the *domain reserve* to shield abuse of human rights by state officials through the argument that how a state

71. See U. OJI UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* 26 (1997).

72. G.A. Res. 32/127, U.N. GAOR, 32nd Sess., Supp. No. 45, at 149, U.N. Doc. A/32/45 (1977). In 1967, Nigeria had proposed to the U.N. Human Rights Commission that the U.N. establish regional human rights commissions where none existed. An 11 member ad hoc study group thought that such commissions should be set up by members of the region themselves and not imposed from outside. See U.N. Doc. E/CN.4/966, paras. 41–44 (1968).

73. See *U.N. Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa*, U.N. Doc. ST/HR/SER.A/4 (1979). Both the draft and final Monrovia Proposals are reprinted in B.G. Ramcharan, *The Travaux Préparatoires of the African Commission on Human Rights*, 13 HUM. RTS. L.J. 307, 310–14 annexes II–III (1992).

74. Assembly of Heads of State and Gov't, 16th Ordinary Sess., OAU Res. AHG/Dec.115(XVI) (1979).

75. See Banjul Charter, *supra* note 4.

76. HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 689 (1996).

treats its nationals was its exclusive business.”<sup>77</sup> While an important step forward, the attempt was not entirely successful, as several provisions were maintained to shield states from full accountability for violating the human rights of those in their jurisdictions.

The Charter, designed to function within the institutional framework of the OAU, establishes a system for the protection and promotion of human rights. Its provisions, reflecting the influence of U.N. human rights instruments, have a stronger resemblance to the International Bill of Rights than to either the European or Inter-American Conventions on Human Rights.<sup>78</sup> The Charter is different from the European and Inter-American human rights systems in several respects: the Charter recognizes *duties* as well as *rights*; it codifies *peoples’* as well as *individual* rights; and protects *economic, social, and cultural* rights in addition to *civil and political rights*.<sup>79</sup>

These distinguishing characteristics stem from the drafters’ intention that the Charter reflect and emphasize the influence of African traditions—to take “as a pattern, the African philosophy of law” and to be designed to “meet the needs of Africa.”<sup>80</sup> As was declared at one of the final drafting meetings, “As Africans, we shall neither copy, nor strive for originality, for the sake of originality. We must show imagination and effectiveness. We could get inspiration from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civili[z]ation and the real needs of Africa.”<sup>81</sup>

As the region with the highest level of poverty and underdevelopment, the Charter made a point of enshrining economic, social, and cultural rights—often seen by Africans “as a component for redressing the colonial heritage typified by governments for and by the minority against the majority”<sup>82</sup>—in addition to traditional civil and political rights.<sup>83</sup> Thus, while Articles 2 through 13 guarantee civil and

77. Akin Oyeboode, *U.N. and the Protection of Human Rights in Africa*, in AFRICA AND THE U.N. SYSTEM: THE FIRST FIFTY YEARS 86 (G.A. Obiozor & A. Ajala eds., 1998).

78. See Theo van Boven, *The Relations Between Peoples’ Rights and Human Rights in the African Charter*, 7 HUM. RTS. L.J. 183, 186–90 (1986).

79. See generally Obina Okere, *The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141 (1984); Weston et al., *Regional Human Rights Regimes: A Comparison and Appraisal*, 20 VAND. J. TRANSNAT’L. L. 585 (1987).

80. *Meeting of Experts for the Preparation of the Draft African Charter on Human and Peoples’ Rights*, at 1, OAU Doc. CAB/LEG/67/3/Rev.

81. *Id.* at 5 (quoting address by former President Senghor of Senegal to the meeting of African experts preparing the preliminary draft of the Charter on Nov. 28, 1979). The full address is reproduced in P. KUNIG ET AL., REGIONAL PROTECTION OF HUMAN RIGHTS BY INTERNATIONAL LAW: THE EMERGING AFRICAN SYSTEM 121 (1985).

82. U.O. Umozurike, *The Present State of Human Rights in Africa*, 1 CALABAR L.J. 62, 81 (1986).

83. This emphasis on the indivisibility, universality and inter-dependence of all human rights was recently reiterated in the Algiers Declaration, OAU Assembly of Heads of State and Gov’t, 35th Ordinary Sess., Res. AHG/Dec.1(XXXV), OAU Doc. DOC/OS(XXVI)INF.17a (1999). On the eve of the Assembly, mayors, leaders, and representatives of local governments of the African continent met in Algiers to adopt their own Algiers Declaration declaring their commitment to fight poverty and exclusion of all



political rights such as the right to life, personal integrity, equality before the law, freedom of assembly, information, movement, association and non-discrimination, Articles 14 through 18 go further to guarantee the rights to property, work, fair wages, education, participation in cultural life, and the best attainable state of physical and mental health. They also include the rights to family life, protection of the child and the aged, and non-discrimination against women, a major problem in traditional African society.

Reflecting the traditional African focus on collectivities, the Charter also parts ways with the European and Inter-American human rights conventions by providing for *group* rights in addition to individual rights.<sup>84</sup> Articles 19 through 24 include the rights to self-determination, to the equality of peoples and the non-domination of one people by another, and to the right to dispose of natural wealth and resources in the interest of the people.<sup>85</sup> Other provisions include the right to recover dispossessed property, the right to adequate compensation, to cultural development, to international peace and security, and to a general environment favorable to development.

Finally, the Charter distinguishes itself from its regional counterparts by enshrining individuals' *duties* to society in addition to their *rights*.<sup>86</sup> These duties are owed to the family, society, the state, and even to the international community. They include individual duties to respect others without discrimination, to develop the family, to serve the nation, to pay taxes, and to promote African unity.<sup>87</sup>

Member States of the OAU that have ratified the Charter have the obligation to "recognize" the rights, duties, and freedoms enshrined in

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sorts. The text is available at <[http://www.wacap-forum.ch/2Alger2\\_a.htm](http://www.wacap-forum.ch/2Alger2_a.htm)>.

84. The word "peoples" is used in eight of the ten preambular paragraphs of the Banjul Charter. When drafting the Charter at the 1979 OAU summit conference in Monrovia, some States, especially Guinea Republic and Madagascar, had insisted that the proposed Charter include peoples' rights. Consequently, the conference resolved that a "human and peoples' rights Charter" would be drafted. See OAU Doc. Dec.415 (XVI) Rev. 1 (1979). Cf. U.N. CHARTER arts. 1 & 55; ICESCR, *supra* note 21, art. 1; ICCPR, *supra* note 20, art. 1 (referring to "peoples" with respect to self-determination). See generally Van Boven, *supra* note 78 (discussing "peoples' rights" in the Banjul Charter).

85. "Third generation" rights, and the rights of peoples, have received increasing rhetorical affirmation at the international level. See, e.g., Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), 17 U.N. GAOR Supp. No. 17, at 15, U.N. Doc. A/5217 (1962); Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), 24 U.N. GAOR Supp. No. 30, at 49, U.N. Doc. A/7630 (1969); Declaration on the Right to Development, G.A. Res. 41/128, annex, 41 U.N. GAOR Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986); Draft Declaration of Principles on Human Rights and the Environment (1994), available at <<http://www1.umn.edu/humanrts/instree/1994-dec.htm>>.

86. While neither the European nor American human rights conventions include *duties* under its protective mandate, a long set of *duties* are provided for in the American Declaration on the Rights and Duties of Man, a non-binding instrument in the Inter-American human rights system. See American Declaration of the Rights and Duties of Man, OAS Res. XXX (1948), reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1, at 17 (1992).

87. See Banjul Charter, *supra* note 4, arts. 27–29. There is, however, no provision in the Charter for enforcement of such duties against individuals.

the Charter and to “undertake to adopt legislative or other measures to give effect to them.”<sup>88</sup> States are also required to promote and ensure respect for the rights guaranteed by the Charter “through teaching, education and publication” and to ensure that these rights “as well as corresponding obligations and duties are understood.”<sup>89</sup> They have the duty to “guarantee the independence of the Courts” and to “allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights [set forth in the] Charter.”<sup>90</sup> The parties thus recognize, by these undertakings, that individuals have rights as human beings, and agree to give effect to those rights in their domestic legal order.

Several aspects of the Charter, however, have drawn heavy criticism for their tendency to dilute the human rights protections enshrined therein. Particular attention has been drawn to the so-called “claw-back” clauses<sup>91</sup> in the Charter and to the lack of effective enforcement mechanisms. Ironically, both of these aspects allow governments to effectively ignore the Charter’s human rights mandate by resort to the very Charter itself. The “claw-back” clauses in the Charter, for instance, permit the routine breach of Charter obligations for reasons of public utility or national security and confine many of the Charter’s protections to rights *as they are defined and limited by domestic legislation*.<sup>92</sup> This effectively allows governments to determine the scope of human rights protections themselves. Claw-back clauses are attached to a large number of the rights enshrined in the Banjul Charter, limiting them by the following phases:<sup>93</sup>

- “except for reasons and conditions previously laid down by law”<sup>94</sup>
- “subject to law and order”<sup>95</sup>
- “within the law”<sup>96</sup>

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88. *Id.* art. 1.

89. *Id.* art. 25.

90. *Id.* art. 26.

91. The term “claw-back” clause was first used by Professor Rosalyn Higgins to refer to a limitation clause “that permits, in normal circumstances, breach of an obligation for a specified number of public reasons.” The term is distinguished from a derogation clause *stricto sensu*, which allows suspension or breach of certain obligations only in circumstances of war or public emergency. Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT’L L. 281, 281 (1976–77).

92. See, e.g., Banjul Charter, *supra* note 4, art. 6. (“No one may be deprived of his freedom *except for reasons and conditions previously laid down by law.*”) (emphasis added); see also Claude E. Welch, Jr., *The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 46 (1992) (noting that “[c]riticism is levelled particularly at ‘claw-back’ clauses that essentially confine the Charter’s protections to rights as they are defined in national law”).

93. See Emmanuel Bello, *The Mandate of the African Commission on Human and Peoples’ Rights*, 1 AFR. J. INT’L L. 31, 55 (1988).

94. Banjul Charter, *supra* note 4, art. 6 (right to liberty and security).

95. *Id.* art. 8 (freedom of conscience and religion).

- “provided that he abides by law”<sup>97</sup>
- “subject to the obligation of solidarity provided for in Article 29”<sup>98</sup>
- “subject only to necessary restrictions provided for by law in particular those enacted in the interests of national security, the safety, health, ethnics and rights and freedoms of others”<sup>99</sup>
- “provided he abides by law”<sup>100</sup>
- “in accordance with the laws of those countries and international conventions”<sup>101</sup>
- “in accordance with the provisions of the law”<sup>102</sup>
- “in accordance with the provisions of appropriate laws”<sup>103</sup>

By contrast, most international human rights conventions contain specific derogation clauses. Under these clauses, certain rights are declared non-derogable under all circumstances while precise conditions and legal requirements for permissible derogation are laid out for others.<sup>104</sup> There is little room for arbitrariness under such well-defined standards, whereas the opportunities for discretionary abuse under the Charter’s “claw-back clauses” are broad and well-used.

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Perhaps the greatest weakness of the Banjul Charter, however, was its failure to provide for an institutional safeguard in the form of a judicial organ in the African system. Disregarding the recommendations of the Lagos Conference in 1961 and repeated proposals and recommendations over the following twenty years, the Charter did not establish a Court for the enforcement of human rights. It established, instead, the *African Commission on Human and Peoples’ Rights* as the major OAU instrument for ensuring the observance of the rights in the Banjul Charter. The Commission, however, has proved manifestly incapable of protecting the basic human rights of Africans.<sup>105</sup>

36

96. *Id.* art. 9(2) (freedom of opinion).

97. *Id.* art. 10(1) (freedom of association).

98. *Id.* art. 10(2) (freedom of association).

99. *Id.* art. 11 (right to free assembly).

100. *Id.* art. 12(1) (freedom of movement and residence).

101. *Id.* art. 12(3) (right to asylum).

102. *Id.* art. 13 (right to participation in government).

103. *Id.* art. 14 (right to property).

104. *See, e.g.,* American Convention on Human Rights, Nov. 22, 1969, art. 27, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36 (1970) (entered into force July 18, 1978) (governing when states may permissibly suspend the guarantees of the Convention).

105. *See, e.g.,* CHRISTOF HEYNS, SOUTH AFRICA AND A HUMAN RIGHTS COURT FOR AFRICA 3 (1994) (noting that the African Commission “has not yet made a significant practical impact on the protection of human rights in Africa”); *infra* text accompanying note 141.

## II. THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: BARK BUT NO BITE

37

In the area of protection of human rights, the Commission stands as a toothless bulldog. The Commission can bark—it is, in fact, barking. It was not, however, created to bite. After more than a decade of existence, the Commission can barely be said to have made any significant contribution to human rights protection in the African continent. Below, after describing the Commission, I consider some of the Commission's greatest weaknesses—both structurally and normatively—before turning, in the next Part, to how these deficiencies led to popular and institutional demands for an African Court of Human Rights. In Part V, I refer back to these weaknesses in suggesting how actions can be taken to ensure that a similar fate does not befall the new African Court of Human Rights.

### A. *Structure and Functions of the African Commission on Human and Peoples' Rights*

38

The Banjul Charter created the African Commission on Human and Peoples' Rights with the mandate to “promote human and peoples' rights and ensure their protection in Africa”<sup>106</sup> through the promotion, protection, and interpretation of the provisions of the Charter.<sup>107</sup> Inaugurated on November 2, 1987,<sup>108</sup> the Commission consists of eleven members, each elected for six-year renewable terms.<sup>109</sup> These members are elected by secret ballot by the OAU Assembly of Heads of State and Government, from a list of persons nominated by States Parties to the Charter.<sup>110</sup> Each member serves in her or his personal capacity,<sup>111</sup> while not more than one national of the same African State may serve on the Commission at any one time.<sup>112</sup>

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The Commission has three primary functions: to *promote*, to *protect*, and to *interpret* the provisions of the Banjul Charter.<sup>113</sup> In terms of

106. Banjul Charter, *supra* note 4, art. 30.

107. *See id.* art. 45.

108. The Commission adopted its Rules of Procedure in 1988, revising them in 1995 “in order to fill some gaps, remove some bottle-necks and correct some mistakes.” UMOZURIKE, *supra* note 71, at 70. *See generally* E.V.O. Dankwa, *Commentary on the Rules of Procedure of the African Commission on Human and Peoples' Rights*, in PROCEEDINGS OF THE SECOND ANNUAL CONFERENCE OF THE AFRICAN SOCIETY OF INTERNATIONAL AND COMPARATIVE LAW 29 (1990). The text of the Rules of Procedure of the African Commission on Human and Peoples' Rights is available at <[http://www.oau-oua.org/oau\\_info/rules.htm](http://www.oau-oua.org/oau_info/rules.htm)> and in UMOZURIKE, *supra*, at 293 app.B.

109. *See id.* arts. 31, 36.

110. *See id.* art. 33. Persons nominated are to be “from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights.” *Id.* art. 31(1).

111. *See id.* art. 31(2).

112. *See id.* art. 32.

113. *See* Banjul Charter, *supra* note 4, art. 45(1)–(3). The Charter also instructs the

*promotion*, the Commission is empowered to collect documents, undertake studies and research, organize seminars and symposia, disseminate information, make recommendations to Governments, encourage national and local human rights institutions, enunciate principles and rules, and cooperate with other African and international human rights institutions.<sup>114</sup>

Pursuant to these powers, the Commission conducted missions to four States between 1996 and 1997: Senegal, Mauritania, Sudan, and Nigeria.<sup>115</sup> The Commission has undertaken similar missions to Togo, Zimbabwe, Mali, Lesotho and Botswana and, in April 1999, was authorized to undertake a mission to Angola, Democratic Republic of Congo, Tanzania, and Zambia to monitor and assess the situation of refugees, returnees, and displaced persons.<sup>116</sup> The Commission has also appointed Special Rapporteurs<sup>117</sup> and cosponsored a number of seminars and international conferences with other international organizations, such as UNESCO, the International Commission of Jurists, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Penal Reform International, and International Observatory of Prisons.<sup>118</sup> These conferences have covered such themes as community work, economic, social, and cultural rights, HIV/AIDS in African prisons, and women's rights in Africa.<sup>119</sup> The Commission also took part in a number of conferences that led up to the Second World Conference on Human Rights in Vienna in 1993 and participated in the conference itself.

Second, the Commission is empowered to *interpret* the provisions of the Banjul Charter whenever it is so requested by "a State party, an institution of the OAU, or an African Organization recognized by the OAU."<sup>120</sup> Pursuant to Articles 60 and 61 of the Charter, this interpretation must be undertaken in light of international human rights law, such as that enshrined in other African human rights

Commission to "[p]erform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government." *Id.* art. 45 (3).

114. *See id.* art. 45(1).

115. The Commission did not carry out investigations from 1987 until 1995.

116. *See* OAU, Press Release No. 34/99 (visited Jun. 2, 2000) <<http://www.oau-oua.org/document/press/press14.htm>>.

117. The Commission has, for example, taken up an NGO proposal and appointed a Special Rapporteur on extra-judicial, summary or arbitrary executions to address endemic problems such as impunity. *See* AI Report 1997, *supra* note 38, at 56. In 1996, the Commission appointed a Special Rapporteur on prisons to make recommendations to improve the appalling prison conditions in many African states. *See id.* In one Nigerian case, a Nigerian Court reduced death sentences to terms of imprisonment partly as a result of an intervention made by the Commission. *See Registered Trustees of the Constitutional Rights Project v. The President of the Federal Republic of Nigeria & 2 Others*, Judgment of the High Court of Lagos State (Nig.), Suit No. M/102/93 (1993) (unreported).

118. *See, e.g., Eleventh Annual Activity Report (1997-98)*, Afr. Comm'n on Hum. and Peoples' Rts., 22nd-23rd Ordinary Sess., at 5, para. 22, OAU Doc. DOC/OS/43 (XXIII), available at <<http://www1.umn.edu/humanrts/africa/11thannualrpt.html>> (listing seminars and international conferences cosponsored by Commission in 1997-98).

119. *Id.*

120. Banjul Charter, *supra* note 4, art. 45(3).

instruments, the U.N. Charter, the OAU Charter, the UDHR, and other specialized conventions ratified by States Parties. This interpretational mandate is an important, albeit severely underused, power of the Commission given the ambiguity of so many of the Charter's provisions—particularly regarding the legal scope of provisions related to *group rights, duties, and economic, social and cultural rights*, which have not had the benefit of significant interpretation in any regional or international human rights forum.<sup>121</sup>

42 Finally, the Commission has the *protective* mandate to “[e]nsure the protection of human and peoples’ rights under conditions laid down by the [Banjul] Charter.”<sup>122</sup> To protect these rights, the Charter provides for the reception of “communications” (i.e., complaints) of human rights violations by both States Parties to the Charter and private individuals, including NGOs.<sup>123</sup> Following consideration of a complaint, the Commission is required to prepare a report stating the facts and its findings, and to transmit that report to the States concerned and to the Assembly of Heads of State and Government.<sup>124</sup> Thereafter the fates of the reports are left to the competence and conscience of Heads of State and Government.

## B. *Structural Deficiencies*

43 Despite its seemingly broad mandate and powers, the Commission suffers from many structural infirmities. Indeed, while purportedly created to “protect” human rights in the region, the Commission lacks any enforcement power or remedial authority. At the same time, it is handicapped by confidentiality clauses that restrict public access to, and awareness of, the Commission’s work. Lack of resources, leading to loss of independence, also substantially limits the Commission’s ability to function as an effective human rights institution.

### 1. *Lack of Effective Access to Commission by Individuals*

44 The Charter provides that the functions of the Commission shall be to “[e]nsure the protection of human and peoples’ rights *under conditions laid down by the present Charter*.”<sup>125</sup> The “conditions laid down,” however, significantly restrict the ability of individuals to seek

121. The exception, perhaps, is economic and social rights, which have benefited from the interpretation and guidance of the U.N. Committee on Economic, Social and Cultural Rights. This body monitors States Parties’ compliance with the International Covenant on Economic, Social and Cultural Rights.

122. Banjul Charter, *supra* note 4, art. 45(2).

123. See *id.* arts. 47–51. For reports of communications considered by the Commission, see INST. FOR HUM. RTS. & DEV., COMPILATION OF DECISIONS ON COMMUNICATIONS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE’S RIGHTS (1999).

124. See Banjul Charter, *supra* note 4, art. 52.

125. *Id.* art. 45(2) (emphasis added).

recourse to the Commission. Indeed, for the Commission to examine private complaints—as opposed to inter-state complaints—a number of enumerated requirements must exist and the Commission must, by a majority, agree to examine it.<sup>126</sup> Pursuant to Article 56, such communications shall only be heard if they: indicate their authors, *even if the latter request anonymity*; are compatible with the OAU Charter or Banjul Charter; are not written in disparaging or insulting language directed against the State concerned, its institutions, or the OAU; are not based exclusively on news media reports; are sent after domestic remedies have been exhausted; are submitted within a “reasonable period”; and do not deal with cases settled by these States in accordance with the principles of the U.N. Charter, OAU Charter or the Banjul Charter.<sup>127</sup> These requirements, along with the Commission’s ability to exclude petitions by majority vote, allow substantial discretion in picking and choosing amongst complaints to be considered by the Commission. This discretion is particularly worrisome where lack of political independence is at issue.

By contrast, few procedural requirements exist for inter-state complaints.<sup>128</sup> The cynicism of this discrepancy is revealed by the fact that States are the least likely of parties to seek vindication of human rights through the Commission. This reality has been borne out by both the African and Inter-American regional systems, in which not a single interstate complaint has ever been filed despite decades of work and heavy caseloads reaching into the tens of thousands for the latter.

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## 2. No Enforcement Power: Disregard by States Parties

As a powerful Commission might challenge the credibility of African political leaders in their respective countries, the OAU Heads of State were reluctant to grant the Commission a significant role in protecting human rights. The Commission was envisaged almost exclusively as a body to *promote* human rights.<sup>129</sup> It cannot award damages, restitution or reparations. It is not empowered to condemn an offending State; it can only make recommendations to the parties. It was, and still is, vested with very few powers. Consequently, blatant disregard of the Commission’s recommendations, orders, and pronouncements by Member States has become the norm in Africa, a situation acknowledged regretfully by the Commission.<sup>130</sup> Two recent examples

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126. See *id.* arts. 55–56.

127. *Id.* art. 56.

128. The only traditional procedural requisites that exist are those of notice and exhaustion of domestic remedies.

129. Claude E. Welch, Jr., *The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 49 (1992).

130. Noting a decrease in the number of complaints filed with it, the Commission wrote in its Eleventh Annual Activity Report that “the non-compliance by some States parties with the Commission’s recommendations affects its credibility and may partly

are illustrative.

On October 31, 1995, Ken Saro-Wiwa, a Nigerian environmental rights advocate and leader of the Movement for the Survival of the Ogoni Peoples (MOSOP), and eight of his kinsmen<sup>131</sup> were sentenced to death by a Special Tribunal for Civil Disturbances.<sup>132</sup> The African Human Rights Commission was immediately alerted by the Constitutional Rights Project (CRP), a nongovernmental human rights advocate in Nigeria. The CRP submitted an emergency supplement to an earlier complaint alleging that the Nigerian government had violated the Banjul Charter, including Article 7's guarantee of a fair trial. The CRP then filed an application for a stay of execution before the Federal High Court of Nigeria.<sup>133</sup> In response, the Secretariat of the African Commission immediately faxed a note verbale to prominent authorities of Nigeria and the OAU invoking emergency provisional measures and asking that the executions be delayed until the Commission had considered the pending case and discussed it with the Nigerian authorities.<sup>134</sup> Flagrantly disregarding the African Commission's jurisdiction, Sani Abacha's Provisional Ruling Council confirmed the sentences on November 7 and proceeded to execute the activists on November 10.<sup>135</sup>

In a similar though more recent case, Amnesty International informed the Commission on April 23, 1998 that the Rwandese authorities had announced that twenty-two persons charged and convicted for their alleged participation in the 1994 genocide would be executed the following day. Amnesty International charged that the twenty-two prisoners were not given a fair trial in conformity with international legal standards and that, consequently, their execution would violate Articles 4 (life) and 7 (fair trial) of the Banjul Charter.

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explain that fewer complaints are submitted to it." *Eleventh Annual Activity Report, supra* note 118, para. 38.

131. MOSOP represents the rights of those who lived in oil producing areas of Ogoni land. Saro-Wiwa's kinsmen were Saturady Dobe, Felix Nuata, Nordu Eawo, Paul Levura, Daniel Gbokoo, Barinem Kiobel, John Kpunien and Baribor Bera.

132. The tribunal was established under the Civil Disturbances (Special Tribunals) Decree No. 2 of 1987.

133. *See* Suit No. FHC/L/CS/1279 (Nig.).

134. The note verbale was sent to the Ministry of Foreign Affairs of Nigeria, the Secretary General of the OAU, the Special Legal Advisor to the Head of State, the Ministry of Justice of Nigeria, and to the Nigerian High Commission in the Gambia. It pointed out that as the case of Mr. Saro-Wiwa and the others were before the Commission, and the government of Nigeria had invited the Commission to undertake a mission to that country during which the communications would be discussed, the executions should be delayed until the Commission had discussed the case with the Nigerian authorities.

The African Commission is authorized to adopt provisional measures to avoid irreparable harm to the victim of an alleged violation of the Banjul Charter under Revised Rule 111 of the Commission's Rules of Procedure. *See* Rules of Procedure, *supra* note 108, rule 111.

135. *See* Communication Nos. 137/94 *International Pen vs. Nigeria*, 139/94 *Constitutional Rights Project vs. Nigeria*, 154/96 *Interights (on behalf of Ken Saro-Wiwa Jr) vs. Nigeria*, 161/97 *Civil Liberties Organization vs. Nigeria*.



The Commission immediately sent a letter to the Rwandese authorities. It reminded them of their undertaking under the Charter and appealed to them to suspend the executions pending the Commission's consideration of the matter. In spite of this appeal, the executions were carried out as scheduled. The Commission was, once again, left with no other option than to perform a *post-mortem*; it issued a statement condemning the executions.<sup>136</sup>

Another example of the general disregard for the Commission's jurisdiction among African States is the state reporting system. Under Article 62 of the Banjul Charter, each State Party undertakes to submit a report *every two years* on the legislative and other measure it takes to give effect to the rights and freedoms enshrined in the Charter. The presentation of reports is a process that can be used to stem the tide of conflict, and even avoid wars, as potential causes of conflict can be detected and responded to early. Regrettably, however, the reporting system has been anything but satisfactory: as of May 31, 1999, twenty-eight State Parties had not submitted a single report to the Commission since their ratification of the Charter.<sup>137</sup>

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### 3. *Invisibility of Commission Work: Confidentiality Requirements*

The Commission is further rendered impotent by the confidentiality and lack of transparency in which it conducts so much of its work. Article 59(1) of the Banjul Charter provides that "[a]ll measures taken within the provisions of the present Chapter shall remain *confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide*."<sup>138</sup> Accordingly, the decision on whether to publicize a human rights violation on the part of an African State is reserved to the discretion of her sister States in the OAU Assembly, who may be responsible for similar abuses. The restrictiveness of the provision is further heightened when read with Article 58, which provides that the Commission need not involve the OAU Assembly of Heads of State and Government at all unless the individual complaint

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136. See *African Commission Condemns Executions in Rwanda*, AFR. COMM'N ON HUM. & PEOPLES' RTS. NEWSLETTER (Banjul), Oct.-Dec. 1998, at 4.

137. See *Twelfth Annual Activity Report*, *supra* note 17, annex III, available at <<http://www1.umn.edu/humanrts/africa/12thannex3.html>> (listing status of submission of periodic state reports to African Commission as of May 5, 1999). The defaulting countries and their dates of ratification of the Banjul Charter are: Botswana (July 17, 1986), Burundi (July 28, 1989), Cameroon (Jun. 20, 1989), Central African Republic (Apr. 26, 1986), Comoros (Jun. 1, 1986), Congo (Dec. 9, 1982), Democratic Republic of Congo (July 20, 1987), Côte d'Ivoire (Jan. 6, 1992), Djibouti (Nov. 11, 1991), Equatorial Guinea (Apr. 7, 1986), Gabon (Feb. 20, 1986), Guinea-Bissau (Dec. 4, 1985), Kenya (Jan. 23, 1992), Lesotho (Feb. 10, 1992), Liberia (Aug. 4, 1982), Madagascar (Mar. 9, 1992), Malawi (Nov. 17, 1989), Mauritania (Jun. 14, 1986), Niger (July 15, 1986), Uganda (May 10, 1986), Sahrawi Arab Democratic Republic (May 2, 1986), Sao Tome & Principe (May 23, 1986), Sierra Leone (Sept. 21, 1983), Somalia (July 31, 1985), Swaziland (Sept. 15, 1995), and Zambia (Jan. 19, 1984). The reports of Ethiopia and Eritrea are not yet due.

138. Banjul Charter, *supra* note 4, art. 59(1).

reveals "a series of serious or massive violations" of rights.<sup>139</sup>

51 The Commission has interpreted the confidentiality provision quite restrictively, conducting most of its proceedings in secret, insulated from public scrutiny and awareness. Indeed, until 1994 the Commission interpreted Article 59 as expressly prohibiting the publication of communications and its decisions.<sup>140</sup> This aspect of the Commission's activities has been strongly criticized by NGOs and human rights advocates. Ellen Johnson Sirleaf, presidential candidate in Liberia's 1997 electoral race, spoke the minds of countless Africans when she asserted:

[The Commission] is generally unknown and invisible; it is regarded with suspicion by those who do know of it; and 'as seen from the eyes of a casual observer,' it is not performing. I don't know of any cases that you [the Commission] have resolved related to any of the major human rights problems recently affecting our continent.<sup>141</sup>

52 The Commission, consequently, has been accused of not taking a stand, publicly and unambiguously, on pressing human rights issues. Even some of the Commission's relative successes have gone unnoticed because of its restrictive interpretation of the confidentiality clause. This invisibility has exposed the Commission to charges of ineffectiveness, unpredictability, and lack of vision, initiative, and vigor. It has undermined public confidence in the Commission's relevance.

#### 4. *Lack of Independence*

53 The Commission also lacks the institutional independence necessary to be effective as a regional human rights institution. Its proceedings are heavily dependent on the Heads of State and

139. *Id.* art. 58. If that is the case, the Assembly "may then request the Commission to undertake an in-depth study of these cases, and make a factual report, accompanied by its finding and recommendations." *Id.*

140. See Chidi Anselm Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures*, 20 HUM. RTS. Q. 235, 277 (1998). The Seventh Activity Report of the Commission, adopted by the OAU Assembly in June 1994, made information on the first 52 communications decided by the Commission available for the first time. This information included a summary of the parties to the communication, the factual background, and the Commission's summary decision. With the adoption of the Commission's subsequent two annual reports, the Commission went a step further and issued full texts of its final decisions. *Id.* Currently, while decisions may be published by the Commission, permission must first be obtained from the OAU Assembly of Heads of State and Government. See Banjul Charter, *supra* note 4, art. 59(1).

141. See STEINER & ALSTON, *supra* note 76, at 704 (excerpting summaries of comments of participants as published in FUND FOR PEACE, PROCEEDINGS OF THE CONFERENCE ON THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 27 (1991)).

Government. At the same time, some of those serving as Commissioners simultaneously hold important governmental positions, which may be a source of conflict of interest in their ability to function as independent experts. Between 1987 to 1993, for example, Moleleki D. Mokama of Botswana and Alexis Gabou of Congo served as Attorney-General and Minister of Interior in their respective countries while simultaneously serving in the capacity of Commissioner.<sup>142</sup> A number of Commissioners have also held ministerial positions under notoriously repressive governments and may be responsible for human rights abuses themselves.

As has been widely observed, the Commission is “largely ignored by the Council and Assembly (although it could be mandated to undertake in-depth studies into serious or massive human rights violations).”<sup>143</sup> As Justice Lihau points out, “[i]t is unlikely that the Commission will be permitted to take the initiative in presenting documented charges to the Conference of Heads of State and Government, except perhaps in those instances where it is in the interests of governments to permit the Commission to do so.”<sup>144</sup> It is, therefore, not surprising that the Commission has played such a docile role as the Assembly of Heads of State and Government have included the likes of Eyedema, Mobutu, Babangida, Abacha, Doe, Habre, and other major human rights violators.

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##### 5. *Lack of Resources*

Closely related to the Commission's lack of independence and ineffectiveness is its lack of financial resources. The Commission is grossly underfunded by the OAU and suffers from poor working methods.<sup>145</sup> The size of the continent and the number of countries that the Commission must monitor mean that its current level of human and material resources is inadequate for effective promotion. “With one Commissioner, working part time and responsible for promoting the Charter in three to five countries, the chances for effective promotion are few.”<sup>146</sup>

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During the presentation of its Third Annual Activity Report to the Assembly of Heads of State and Government in July 1990, the Commission, through its Chairman, brought the plight of the

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142. See EVELYN A. ANKUMAH, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS* 18 (1996). Prior to his leaving the Commission, Mr. Mokama was appointed as Chief Justice of Botswana. *Id.*

143. AI REPORT 1997, *supra* note 38, at 56.

144. Justice Ebua Lihau, *Comments on the Banjul Charter*, HUM. RTS. INTERNET REP., Nov. 1986, at 12, 14.

145. Efforts to uncover the current financial position of the Commission were unsuccessful; the Commission does not publish its financial position for public knowledge. This further hampers efforts at pressing the OAU for greater financial support for the Commission.

146. UMOZURIKE, *supra* note 71, at 72.

Commission to the fore: "Our promotional responsibilities are very wide but we have not the resources for them. Our facilities in some respects are still rudimentary. We have no library yet. We are therefore seeking help in acquiring the facilities, to enable us to perform effectively."<sup>147</sup>

57 This seems to be the perpetual plight of the Commission; indeed, during the presentation of its Eleventh Annual Activity Report for 1997/98, the Commission regretted that it had to suspend several projects due to financial problems.<sup>148</sup> Without adequate funding from the OAU, the Commission is forced to rely on donations from abroad.<sup>149</sup>

### C. Normative Deficiencies

58 In addition to its structural deficiencies—which may be remedied only by changes of attitude in the OAU and/or by amendment to the Banjul Charter—the Commission also suffers from normative deficiencies in the posture it appears to have discretionarily adopted in interpreting and undertaking its mandate. As Ankumah notes, "[t]he substantive and procedural weaknesses surrounding the work of the African Commission are largely a result of the Commission's inability or unwillingness to interpret the Charter to its maximum effect."<sup>150</sup> The Commission has consistently demonstrated timidity in interpreting its powers under the Banjul Charter. This can be seen in its lack of boldness in interpreting its own role, in publicizing abuses in the press, and in its interpretation of the Charter provisions.

59 First, the Commission has declined to take on an active role in adjudicating disputes and unequivocally condemning abusive behavior, preferring to see itself as a *mediator* rather than as a *protector* of human rights. In a number of its decisions, the Commission has itself stated that the "*main goal* of the communications procedure . . . is to initiate a positive dialogue, resulting in an *amicable resolution* between the complainant and the state concerned."<sup>151</sup> The desire to reach a friendly settlement has thus often overshadowed the Commission's mandate to protect victims from human rights abuse by States. Many

147. *Third Annual Activity Report (1988-90)*, Afr. Comm'n on Hum. and Peoples' Rts., 26th Ordinary Sess., in AFR. COMM'N ON HUM. AND PEOPLES' RTS., 1 ANNUAL ACTIVITY REPORTS 114 (1998).

148. See *Eleventh Annual Activity Report*, *supra* note 118, at 9, para. 40.

149. European institutions, such as the European Union and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, have been particularly strong sponsors of the African Commission. The United Nations Centre for Human Rights has also provided financial support. See *Eighth Annual Activity Report (1994-95)*, Afr. Comm'n on Hum. and People's Rts., 31st Ordinary Sess., OAU Doc. ACHPR/RPT/8/Rev.1 (1995).

150. ANKUMAH, *supra* note 142, at 196.

151. See, e.g., *Ninth Annual Activity Report*, Comm'n on Hum. and People's Rts., at 6, Res. AHG/207 (XXXII) (including decisions on communications nos. 25/89 *Free Legal Assistance Group v. Zaire*, 47/90 *Lawyers Committee for Human Rights v. Zaire*; 56/91 *Union Interafricaine des Droits de l'Homme vs. Zaire*, 100/93 *Les Temoines de Jehovah vs. Zaire*) (emphasis added).

human rights violations—for example, where disappearance, torture, or death are involved—are not amenable to friendly settlement.

The pursuit of friendly settlement under such circumstances, preventing the Commission from making forceful statements of culpability in the press, has undermined the Commission's credibility and valence in the African continent. There appears to be no logical reason for interpreting the "main goal" of the communications procedure as attaining a friendly settlement. Such an understanding flies in the face of the express words of the Charter, which neither mentions friendly settlement as part of the Commission's mandate<sup>152</sup> nor permits the Commission to seek a friendly settlement where doing so might conflict with respect for human rights.<sup>153</sup>

The Commission has also failed to use its wide powers to interpret the Banjul Charter in a progressive manner consistent with current international standards. This is particularly true in regard to interpreting the scope of the Charter's derogation clauses, the confidentiality clause, and provisions such as those relating to economic, social, and cultural rights, duties, and group rights.

In conclusion, the Commission, as currently empowered under the Banjul Charter, is not capable of guaranteeing and protecting human rights. Hampered by an inability to back up its recommendations, the Commission has, in fact, "been reduced to a research centre."<sup>154</sup> It has taken very few forceful or persuasive steps to curb serious human rights violations. Clearly, popular demand for the establishment of a quasi-judicial body for the effective protection and enforcement of the provisions of the Charter has not been met with the establishment of the Commission. There had been some early speculation that the Commission, because of its ineffectiveness, should be abolished and replaced by a Court but the consensus was that the Court should reinforce the Commission.<sup>155</sup>

### III. ADDING A COURT

While there is now consensus—among civil society and OAU states—that an African Human Rights Court is needed to give the Banjul Charter teeth, the process toward the establishment of such a court has been a long one, propelled by many actors and circumstances. This Part looks back at this process—from early opposition to the Court,

152. See Banjul Charter, *supra* note 4, art. 45 (enumerating functions of Commission).

153. See *id.* art. 52 ("[A]fter having tried all appropriate means to reach an amicable solution based on the respect of human and peoples' rights, the Commission shall prepare . . . a report stating the facts and its findings.").

154. KAYODE ESO, THOUGHTS ON HUMAN RIGHTS NORMS VIS-À-VIS THE COURTS AND JUSTICE: AN AFRICAN COURT OR DOMESTIC COURTS? 12 (1995).

155. See ANKUMAH, *supra* note 142, at 194; GINO J. NALDI, THE ORGANIZATION OF AFRICAN UNITY: AN ANALYSIS OF ITS ROLE 149 (1999); Gino J. Naldi & Konstantinos Magliveras, *The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison*, 8 AFR. J. INT'L & COMP. L. 944, 946 (1996).

to growing support, to the five-year drafting process that led to the final adoption of the Protocol.

A. *Early Opposition to the Establishment of a Court*

Non-provision for a Court of human rights appears to have been deliberate. The experts who drafted the Charter contended that they favored negotiation and diplomatic and bilateral settlement of disputes in an amicable manner rather than adjudication, arguing that African culture frowned upon litigation, the adversarial and adjudicative procedures common to Western legal systems.<sup>156</sup> Third party adjudication is generally considered confrontational, whereas it is often argued that Africans favor consensus and amicable settlement of disputes.<sup>157</sup> Traditional African dispute settlement places a premium on the improvement of relations between the parties on the basis of equity, good conscience, and fair play rather than on strict legality.

In fact, when the OAU was established, its Charter created a body called the *Commission of Mediation, Conciliation and Arbitration*. Article 19 of the Charter contains a specific undertaking about peaceful settlement of disputes and provides for the creation of the Mediation Commission by a separate Protocol. This instrument, concluded in 1964—almost twenty years prior to the Banjul Charter—is considered an integral part of the Charter. The creation of this specifically African machinery also represents an attempt to settle disputes on a regional basis without referring them to the Security Council.<sup>158</sup> The tendency had been to shy away from litigation, preferring forms of dispute settlement considered more “African.”<sup>159</sup>

Yet another argument against the establishment of an African Human Rights Court by early opponents was that there was insufficient political will among governments in the region to support the Court. The group of experts that met in Dakar, Senegal, under the Chair of

156. See, e.g., Naldi & Magliveras, *supra* note 155, at 944; NALDI, *supra* note 155, at 147. On African systems of adjudication generally, see T.OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* (1962); R. DAVID & J.E.C. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (1985).

157. See NALDI, *supra* note 155, at 147. As another early commentator affirmed, the African system “is one of forgiveness, conciliation and open truth, not legal friction or technicality.” M.I. Isokun, *Towards an African System of Justice: Concepts and Perspectives*, 2 JUSTICE 103 (1991) (quoting *Time for Soul-Searching*, DAILY TIMES, Aug. 23, 1979).

158. This is, of course, consistent with Articles 52 and 53 of the U.N. Charter dealing with regional arrangements for the maintenance of peace and security. For more on the Commission, see generally T.O. Elias, *The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity*, 40 BRIT. Y.B. INT’L L. 336 (1964); Tiyanjana Maluwa, *The Peaceful Settlement of Disputes Among African States, 1963–1983: Some Conceptual Issues and Practical Trends*, 38 INT’L COMP. L. Q. 299 (1989).

159. It is, however, doubtful whether traditional reconciliatory methods can be a substitute for modern judicial settlement. See generally T.O. Elias, *The Role of the International Court of Justice in Africa*, 1 AFR. J. INT’L & COMP. L. 1 (1989).

Justice Keba Mbaye, was given a set of overriding principles, one of which was that they should not exceed what African states may be willing to accept.<sup>160</sup> According to Mbaye, the Charter constituted “what the African States were able to accept in 1981.”<sup>161</sup> It was argued that African States would have been reluctant to ratify the Charter had provision been made for compulsory judicial settlement.<sup>162</sup> As has been noted, however, this difficulty might easily have been overcome as the jurisdiction of the court need not have been automatic; it could have been contingent on acceptance by States through separate declarations, including the possibility of appending reservations, as was done in the case of the Inter-American and European systems.<sup>163</sup>

Human rights groups and NGOs were also divided on the timing and desirability of a human rights court under the Charter. Rather than establish a court immediately, some human rights groups and activists advocated first strengthening the Commission to allow a clear jurisprudence of African human rights to emerge before a judicial body was established. Former Commissioner Mokama stated in an interview:

67

I am personally not eager on starting a court at this stage. I would rather get the Commission to be more aggressive and establish itself first before we move into the court otherwise we could have a duplication of various institutions that are indifferent in their various performances and that could be demoralizing. While supporting the idea of a court, I would not want it to be started in the next five years. I would want the five years to be spent by the Commissioners getting more and more aggressive in the interpretation of the Charter and making sure that it is seen to protect th[ose] rights that are violated day in day out and when it has reached that performance then I would like us to consider . . . a court. But before then no. I don't like many institutions which don't work. It is bad enough to have one that doesn't work but to have two or three that don't work would be extremely embarrassing.<sup>164</sup>

It was further contended that an ineffective Court would discredit

68

160. See Raymond Sock, *The Case for an African Court of Human and People's Rights: From a Concept to a Draft Protocol over 33 Years*, AFR. TOPICS, Mar.–Apr. 1994, at 9.

161. *Id.*

162. See Naldi & Magliveras, *supra* note 155, at 944.

163. See *id.* at 944–45; American Convention, *supra* note 104, art. 62(2) (unconditionally allowing such declarations); [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 46, 213 U.N.T.S. 221, amended by Protocol 11, *infra* note 178 [hereinafter Revised European Convention] (same); see also Inter-Am. Ct. Hum. Rts., *The Effect on Reservations on the Entry into Force of the American Convention (Arts. 74 and 75)*, Advisory Opinion OC-2/82, Sept. 24, 1982, Ser. A, No. 2 (1982).

164. Interview by Chidi Odinkalu with Hon. Justice Mokama, Gambia (Apr. 9, 1993), quoted in ANKUMAH, *supra* note 142, at 195.

the African human rights groups themselves, who might also appear to be ineffective.<sup>165</sup>

B. *Growing support for an African Court of Human Rights*

69

Ultimately, many coalescing factors contributed to the adoption of the Protocol to establish an African Court of Human and Peoples' Rights. Popular clamor from the citizens of Africa, growing mobilization among nongovernmental organizations, and international political pressures all played key roles. Likewise, coordinated plans to create an African Economic Community under the eye of an African Court of Justice took steam out of the old argument that Africans were averse to judicial litigation as an acceptable form of dispute settlement. Finally, the relative successes of the Inter-American and European regional human rights systems—both of which rely on human rights courts for their effectiveness—gave further impetus to the growing call for a human rights court in Africa. The Protocol, therefore, is the fruit of many efforts toward strengthening the African human rights system.

1. *Popular Clamor, NGO Movement, and International Political Pressure*

70

The movement toward the establishment of an African Court gained decisive momentum in the early 1990s, when it had become clear that the African Commission on Human and Peoples' Rights was not, and clearly was not going to be, effective in protecting the basic human rights of Africans on its own. Pressure increased from NGOs and the international community. Repeated calls were made for the establishment of a human rights court in symposia and conferences throughout the early 1990s. Strong advocacy for a court came, for example, from the Judicial Colloquium on the Domestic Application of International Human Rights Norms held in Banjul in November 1990,<sup>166</sup> the recommendation of the African Bar Association meeting in Abuja in 1991, and the Kampala Forum of distinguished Africans in 1991. Support for a Court also emerged at the symposium organized in Mombassa, Kenya, by World Organization Against Torture, the Kenya section of the International Commission of Jurists in 1993, and the Fifth and Sixth Conference of NGOs on the Work of the African Commission in 1993 and 1994.

71

The calls of NGOs and inter-governmental organizations for an African court reflected the yearnings of individual members of civil society. It was widely believed that a Court was essential to the development of African human rights jurisprudence and to the

165. See C. Odinkalu, *Courting the Court*, AFR. TOPICS, Mar.-Apr. 1994, at 11.

166. See *The Banjul Affirmation: African Judges Adopt Human Rights Principles*, 5 INTERIGHTS BULL. 39 (1990).



implementation, in concrete terms, of the protective mandate of the Commission under the Charter. Africa itself was, and is, undergoing momentous political transformation, with her citizens increasingly clamoring for democracy and an end to human rights abuses. In fact, aid and other forms of resource transfers are now, in many cases, predicated on democracy, good governance, and respect for human rights.<sup>167</sup> It is in this way that the calls of civil society and international political pressure have merged in support of the creation of an African Court of Human and Peoples' Rights.

In the face of unprecedented democratic changes in Africa and the emergence of popular grassroots movements as promising engines of change and catalysts for state accountability, those who once advocated a gradualist approach became increasingly convinced of the urgency of establishing a regional human rights court.<sup>168</sup> By 1994, the OAU Assembly of Heads of State and Government itself called upon its Secretary General to call a meeting of government experts to "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."<sup>169</sup>

72

## 2. African Economic Community and African Court of Justice

The movement to establish an African Court of Human and Peoples' Rights was also aided by the adoption of the African Economic Community (AEC) Treaty in 1991 by Member States of the OAU.<sup>170</sup> In

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167. This is particularly true in regard to European cooperation. See, e.g., Fourth Lome Convention, Dec. 15, 1989, art. 5, 29 I.L.M. 809, as amended Nov. 4, 1995 by Mauritius Agreement, available at <[http://www.idea.int/lome/bgr\\_docs/lomeiv.html](http://www.idea.int/lome/bgr_docs/lomeiv.html)> (providing that international cooperation must be directed toward human rights and people-centered development); *Resolution on Human Rights, Democracy and Development*, Council of Eur., Nov. 28, 1991, para. 10, available at <[http://www.idea.int/lome/background\\_documents/resolution.html](http://www.idea.int/lome/background_documents/resolution.html)> ("The Community and its Member states will explicitly introduce the consideration of relations with developing countries; human rights clauses will be inserted in future cooperation agreements. Regular discussions on human rights and democracy will be held, within the framework of development cooperation, with the aim of seeking improvement.").

168. See Sock, *supra* note 160, at 10.

169. See *Resolution on the African Commission on Human and Peoples Rights*, Assembly of Heads of State and Gov't, 30th Ordinary Sess., para. 4, Res. AHG/Res 230(xxx), available at <<http://www1.umn.edu/humanrts/africa/resafchar30th.html>> [hereinafter *Resolution to Ponder Court*].

170. See Treaty Establishing the African Economic Community, June 3, 1991, 30 I.L.M. 1241 (entered into force May 12, 1994) [hereinafter AEC Treaty], reprinted in DOCUMENTS OF THE ORGANIZATION OF AFRICAN UNITY 203 (Gino J. Naldi ed., 1992). As of June 1998, 51 African states had signed the Treaty, while 42 had ratified it. See *Report of the Secretary-General on the Status of OAU Treaties*, Council of Ministers, 68th Ordinary Sess. (1998), reprinted in 10 AFR. J. INT'L & COMP. L. 522, 532 (1998). For a more detailed discussion of the African Economic Community, see AFRICAN ECONOMIC COMMUNITY TREATY: ISSUES, PROBLEMS AND PROSPECTS (M.A. Ajomo & Omobolaji Adewale eds., 1993) and Gino J. Naldi & Konstantinos D. Magliveras, *The African Economic Community*:

addition to establishing the AEC, the treaty created provision for the establishment of an African Court of Justice to serve as a regional mechanism for solving disputes among participating African States.<sup>171</sup>

Under the treaty, the African Court of Justice is to enjoy jurisdiction over all actions brought by a member state of the AEC Community or by the OAU Assembly alleging violation of the AEC Treaty, a legislative measure, or on grounds of lack of competence or abuse of powers by an organ or member state.<sup>172</sup>

It has been suggested<sup>173</sup> that the proposed court should be independent of the Community and should be given jurisdiction over matters crucial to the continent, such as human rights, territorial borders, the environment, and mercenaries.<sup>174</sup> If this suggestion is ultimately adopted, the African Court of Justice and the new African Court of Human and Peoples' Rights could exercise concurrent jurisdiction in matters pertaining to human rights. I shall briefly touch on this overlap when I come to analyze the Protocol.<sup>175</sup> In any case, given strong regional support for the African Court of Justice, the argument that regional courts are "foreign" to African culture can no longer credibly be maintained.

### 3. *European and Inter-American Courts of Human Rights*

A third impetus to the establishment of an African human rights court to augment the African regional human rights system has come from increasing knowledge in Africa of the experiences and successes of the Inter-American and European Courts of Human Rights. Both the Inter-American and the European Court of Human Rights have gained the grudging respect of political leaders throughout their respective continents. Unlike the regional human rights commissions, state governments almost universally respect judicial orders of the regional human rights courts. Both courts have proved to be effective mechanisms for the protection of human rights in their regions. The Inter-American Court, for example, has been hearing cases since 1979, and has made important contributions to the evolution of regional human rights law under the American Convention on Human Rights,

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*Emancipation for African States or Yet Another Glorious Failure*, 24 N.C. J. INT'L & COM. REG. 601 (1999). For a discussion of the African Court of Justice, see *id.* at 610-15.

171. See AEC Treaty, *supra* note 170, art. 7(1)(e).

172. *Id.* art. 18(3)(a).

173. Although Article 18 of the AEC Treaty provides for the constitution and functions of the Court, it does not provide for the Court's status, membership, and procedure. These were to be determined by the Assembly through the adoption of a subsequent Protocol, see *id.* art. 20, which has not yet been proposed.

174. See, e.g., Chris Maina Peter, *The Proposed African Court of Justice—Jurisprudential, Procedural, Enforcement Problems and Beyond*, 1 E. AFR. J. PEACE & HUM. RTS. 117 (1993).

175. See *infra* Part V(A)(7).

as well as to international human rights law in general.<sup>176</sup>

The European Court of Human Rights has an even more entrenched and respected jurisprudence. It has been so effective and so well-used that in May 1994 Protocol No. 11 was adopted, abolishing the European Commission of Human Rights in order to create a more speedy and effective unitary mechanism.<sup>177</sup> Under the new institutional structure of the European human rights system, the Court, supported by the Committee of Ministers of the Council of Europe, stands as the sole mechanism for the protection and interpretation of the human rights guarantees enshrined in the European Convention on Human Rights.<sup>178</sup>

As the only regional human rights system without a court, the issue became one the OAU could no longer ignore—particularly as the spotlight of international media and political attention increasingly focused on massive human rights abuses in Africa in the 1990s. In a world where globalization is the watchword, the creation of a Human Rights Court in Africa had become a necessity. It would signal, in a very significant way, the integration of the African continent into the modern era. The Inter-American and European examples were worth emulating.

### C. *The Road to Ouagadougou: Adopting the Protocol on the Court*

Civil society, including African and international NGOs, contributed immensely to the process of drafting and ultimately adopting the protocol to establish the Court. As mentioned, proposals for the establishment of an African human rights court began to emerge among NGOs and human rights scholars between 1991 and 1993. The International Commission of Jurists (ICJ) played an extremely prominent role in this process. In 1993, the ICJ commissioned a legal expert to produce a working draft of a protocol to the Charter for the establishment of a Court of Human and Peoples' Rights, along with a draft statute for the proposed Court. These drafts were to be the basis of a further campaign in support of a regional human rights court.

The draft protocol and draft statute were discussed extensively at a November 1993 meeting of African and International NGOs, convened

176. See, e.g., Inter-Am. Ct. H.R., *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Ser. C, No. 4 (setting international standard on scope of state responsibility for human rights abuse by private actors).

177. Protocol No. 11 to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, 33 I.L.M. 960 (1994), reprinted in 37 Y.B. Eur. Conv. on H.R. 2 (1994) [hereinafter Protocol 11]; see also *Explanatory Report*, 33 I.L.M. 943, 949, para. 24 (1994) ("The creation of a single Court is intended to prevent the overlapping of a certain amount of work and also to avoid certain delays . . ."). The Protocol entered into force on November 1, 1998 for all the parties to the European Convention. See generally Andrew Drzemczewski & Jens Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism, as Established by Protocol No. 11*, 15 HUM. RTS. L.J. 81 (1994).

178. See Revised European Convention, *supra* note 163.

at the insistence of the ICJ. Participants made far-reaching suggestions on the draft texts and appointed a five-person working group from among themselves that included representatives of the OAU's Legal Division and the African Human Rights Commission. The working group's delegated task was to further elaborate and refine the draft texts to incorporate the comments and views expressed at the meeting.

81 The final product of the working group was submitted to the Secretariat of the OAU in early 1994 and, at the group's request, was included in the provisional agenda of the Thirtieth Ordinary Session of the OAU Assembly, held in June 1994. It was at this Session that the OAU adopted the first resolution reaffirming the need for the establishment of the Court to complement and reinforce the Commission.<sup>179</sup> The resolution specifically requested that the OAU Secretary-General convene a meeting of government legal experts, in conjunction with the Commission, to ponder the need, and process, for establishing the proposed Court.<sup>180</sup>

82 For the next two years, legal experts, international organizations, and NGOs worked tirelessly on this project. Three government legal experts' meetings were to follow.<sup>181</sup> The first such meeting was held in Cape Town, South Africa in September 1995, in which the two draft texts of the protocol and Court statute were the basic working papers. This meeting eventually produced the first official draft protocol, "the Cape Town Draft."<sup>182</sup>

83 All participants in the Cape Town meeting approved the adoption of the draft Protocol. OAU Assistant Secretary-General, Mr. A. Haggag, and the South African Minister of Justice, Mr. Dullah Omar, both expressed the hope that the proposed Court would be able to contribute to the economic development of Africa.<sup>183</sup> Mr. Adamu Dieng, Secretary-General of the International Commission of Jurists, stated that the Court was an urgent necessity to curb human rights abuses.<sup>184</sup> The text of the draft was circulated among Member States for comments and observations. It was scheduled for deliberation at the Sixty-Fifth Ordinary Session of the OAU Council of Ministers in February 1997 in Tripoli, Libya.

84 Although the text of the draft had earlier been circulated among Member States for comments and observations, the OAU Council of Ministers deferred the consideration of the draft protocol at its Sixty-Fourth Ordinary Session in Yaounde, Cameroon in July 1996 to allow

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179. See *Resolution to Ponder Court*, *supra* note 169.

180. *Id.* para. 4.

181. See *Report of Government Experts Meeting on the Establishment of an African Court of Human and Peoples' Rights*, OAU Doc. OAU/LEG/EXP/AFCHPR/RPT (1) Rev.1.

182. See Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PRO(1) Rev.1, reprinted in 8 AFR. J. INT'L & COMP. L. 493 (1996) [hereinafter Cape Town Draft].

183. See 10 AFR. TOPICS, Nov.-Dec. 1995, at 11.

184. *Id.*

time for additional observations and comments on it from States.<sup>185</sup> At its Sixty-Fifth Ordinary Session, the Council again delayed, deciding that a Second Meeting of Governmental Legal Experts be convened in April 1997 to finalize the draft protocol “taking into account the comments and observations made by Member States.”<sup>186</sup>

The second government legal experts’ meeting was held in Nouakchott, Mauritania in April, 1997.<sup>187</sup> This meeting produced the second draft protocol, “the Nouakchott draft,”<sup>188</sup> which was considered at the Sixty-Sixth Ordinary Session of the Council of Ministers. The Nouakchott draft protocol differed from the Cape Town draft in at least five ways. It introduced an amicable settlement into the protocol for the first time, increased the number of ratifications required to bring the protocol into force from eleven to fifteen, and required the court to sit in one instead of two chambers. In addition, the Nouakchott draft authorized the Assembly of Heads of State and Government to intervene in the process of removing judges from the human rights court and effectively limited access to the court to the Commission and State Parties to the Protocol. NGO access was to be strictly limited to exceptional cases involving a series of “serious” and “massive” violations of human rights. In such cases, the Nouakchott draft provided that the Court will be unable to examine the case without first seeking the views of the African Commission.

The Council of Ministers again directed that the draft text be circulated among Member States for further comments and observations.<sup>189</sup> It also ordered that a third government legal experts’ meeting (enlarged to include diplomats) be convened to finalize the text.<sup>190</sup> This meeting was held in December of 1997 in Addis Ababa, Ethiopia, where the meeting participants produced the final text of the draft protocol, significantly amending the Nouakchott draft.<sup>191</sup> This

185. See *Resolution on the African Commission on Human and Peoples’ Rights*, Council of Ministers, 64th Ordinary Sess., paras. 3–4, available at <<http://www1.umn.edu/humanrts/africa/resafchar64th.html>>.

186. See Ibrahim Ali Badawi 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*, 9 AFR. J. INT’L & COMP. L. 943, 944 (1997).

187. *Second Government Legal Experts Meeting on the Establishment of an African Court on Human and People’s Rights*, Apr. 11–14, Nouakchott, Mauritania, OAU/LEG/EXP/AFR/HPR/RPT(2), reprinted in 9 AFR. J. INT’L & COMP. L. 423 (1997).

188. [Nouakchott] Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, reprinted in 9 AFR. J. INT’L & COMP. L. 432 (1997) [hereinafter *Nouakchott Draft*].

189. See *Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court of Human and Peoples’ Rights*, OAU Council of Ministers, 66th Ordinary Sess., OAU Doc. CM/2020(LXVI) (1997). Naldi and Magliveras note, regretfully, that this recirculation of the draft was due to the inadequate response from Member States to the prior circulation and call for comments; the majority of countries did not respond at all to the first invitation. See Naldi & Magliveras, *supra* note 155, at 969.

190. See OAU Doc. CM/Dec.348(LXVI); Badawi El-Sheikh, *supra* note 186, at 944.

191. See *Comments and Observations Received from Member States on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights*, OAU Doc. OAU/LEG/EXP/AFCHPR/Comm(3) & addendum 1 (1997).

draft was finally adopted by the Thirty-Fourth Ordinary Session of the General Assembly in June 1998.<sup>192</sup> The text of the Protocol represents a compromise between different trends in the history of its drafting. With its adoption, the foundation for the new Court was now firmly established.

#### IV. FEATURES OF THE NEW COURT: AN OVERVIEW OF THE PROTOCOL

87 The 1998 Protocol established the African Court of Human and Peoples' Rights, empowering it to enforce the provisions of the Banjul Charter and other human rights instruments that are in effect for the African states. Its preamble places the Protocol "in the wider context of a natural progression,"<sup>193</sup> linking the fundamental objectives of the OAU with the establishment of the Court. It restates the OAU's commitment to the principles of "freedom, equality, justice, peace, and dignity" and to the fundamental rights and duties "contained in the declarations, conventions and other instruments adopted by the OAU and other international organisations."<sup>194</sup>

88 The Protocol contains thirty-five articles. While many of the Protocol's provisions are similar to the statutes of both the European and Inter-American Court of Human Rights, several unique features distinguish the African Court. In this section, I shall concentrate on the composition, jurisdiction, remedial powers, and procedures of the new Court as well as its relationship with the Commission, as these are the issues that will most directly affect the Court's effectiveness as a human rights instrument.<sup>195</sup>

##### A. *Composition*

89 The ultimate composition of the new Court will be crucial to its ability to function as an effective body for the protection of human rights. How judges are nominated and ultimately elected, their part-time vs. full-time status as regional human rights court judges, and their relative independence from political pressures will all be critical factors in whether or not the Court can overcome the structural deficiencies that have plagued the Commission's tenure.

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192. See Protocol, *supra* note 1.

193. G.J. Naldi & K. Magliveras, *Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and People's Rights*, 16 NETH. Q. HUM. RTS. 431, 433 (1998).

194. Protocol, *supra* note 1, pmb., paras. 1-2; see also *id.* para 7.

195. The Protocol contains other provisions, including those related to vacancies (art. 20), presidency of the Court (art. 21), registry of the Court (art. 24), and seat of the Court (art. 25). Space will not allow for detailed consideration of these important provisions aimed at enhancing the effectiveness of the Court.

### 1. *Nominations and Elections*

Pursuant to the Protocol, the Court is to consist of eleven judges, who must be nationals of the Member States of the OAU.<sup>196</sup> This is similar to the Inter-American system, which permits the nomination of nationals of any OAS member state, irrespective of whether the state is a party to the American Convention.<sup>197</sup> Under the European human rights system, by contrast, the Court consists of “a number of judges equal to that of the High Contracting Parties” to the European Convention on Human Rights.<sup>198</sup>

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The eleven judges to sit on the African Court shall be “elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples’ rights.”<sup>199</sup> This provision resembles the European Convention,<sup>200</sup> rather than the American Convention’s stricter requirement that candidates possess qualifications required for appointment to the highest judicial offices.<sup>201</sup>

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In order to ensure even geographic representation on the Court, the Protocol provides that “[n]o two judges shall be nationals of the same State.”<sup>202</sup> The judges are to be elected by secret ballot for a six-year term, renewable only once, by the OAU General Assembly.<sup>203</sup> The Protocol does not indicate what margin of votes will be required for the election of judges to the Court, but it is presumed that it will require a two-thirds majority of Members present and voting in the Assembly.<sup>204</sup> Balanced representation of the main regions of Africa and of their principal legal traditions is also required in the election of judges to the

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196. See Protocol, *supra* note 1, art. 11(1).

197. See American Convention, *supra* note 104, art. 52(1). Seven judges sit on the Inter-American Court.

198. Revised European Convention, *supra* note 163, art. 20.

199. Protocol, *supra* note 1, art. 11(1).

200. The European Convention allows for not only those qualified for the highest judicial appointments, but also for “jurisconsults of recognized competences.” Revised European Convention, *supra* note 163, art. 21(1).

201. See American Convention, *supra* note 104, art. 52(1). The recently adopted, but yet to be ratified, Statute of the International Criminal Court in Rome is similar to the American Convention. It provides that the judges to be chosen must be persons “of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.” Rome Statute of the International Criminal Court, July 17, 1998, art. 36(3), U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, 1020; see also Statute of the International Tribunal for Rwanda, art. 12(1), S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955, 33 I.L.M. 1598 (1994).

202. Protocol, *supra* note 1, art. 11(2). Article 32 of the Banjul Charter, *supra* note 4, imposes a similar restraint on the Commission’s membership.

203. See *id.* arts. 14(1), 15(1).

204. While a two-thirds majority was specified in Article 13(1) of the Cape Town Draft, *supra* note 182, the provision was removed in the Nouakchott draft, *supra* note 188, which formed the basis for the final Protocol. Under Rule 25 of the Assembly’s Rules of Procedure, a two-thirds majority of all Members present and voting is required for votes on resolutions and decisions. It is presumed the same rule will be applied to the election of judges.

Court.<sup>205</sup>

93

Importantly, the Protocol further requires that due consideration be given to adequate gender representation in judicial appointments. “[A]dequate gender representation” is mentioned twice in the Protocol, in relation to both the nomination of judges<sup>206</sup> and their election.<sup>207</sup> This gender-aware provision is novel to the African system. Its inclusion in the Protocol is a victory for women’s rights advocates, although it falls short of their original demand for gender equality, rather than gender representation. The Protocol does, however, represent a step in the right direction.<sup>208</sup> Neither the American nor European systems include specific provisions regarding gender representation. The Inter-American Court has had only one female judge, and only a few have been elected to the European Court.

## 2. *Part Time vs. Full Time Status*

94

With the exception of the President, the Court does not have any full-time members.<sup>209</sup> During the Addis Ababa deliberations, the working group reasoned that a full-time Court would increase expenses considerably, and that the initial caseload might not justify the appointment of full-time judges. While the Inter-American Court similarly operates on a part time basis,<sup>210</sup> the European Court functions on a permanent basis,<sup>211</sup> as does the International Court of Justice.<sup>212</sup>

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Judges on the African Court will effectively be on sabbatical much of the time, leading to a situation in which judges may assume additional posts incompatible with their judicial duties. The part-time status of commissioners on the African Commission has been one of its

205. See Protocol, *supra* note 1, art. 14(2) (“The Assembly shall ensure that in the Court as a whole there is representation of the main regions of Africa and of their principal legal systems.”). The principal legal traditions in Africa include traditional or customary law, Islamic law, common law, and civil law. The main regions of the continent include Northern, Eastern, Central, Southern, and Western Africa.

206. See *id.* art. 12(2).

207. See *id.* art. 14(3).

208. Progress is also being made at the African Commission on the issue of gender sensitivity. Until June 1993, the composition of the Commission was all male. During the 1993 OAU Summit, however, Cape Verde presented Ms. Vera Duarte Martins for election to the Commission and succeeded in getting her elected. Similarly, in the June 1995 OAU Summit, Congo succeeded in getting Ms. Julienne Ondziel elected to the Commission. Indeed, at the time of writing, there are four women on the African Commission.

209. See Protocol, *supra* note 1, art. 15(4) (“All judges except the President shall perform their functions on a part-time basis. However, the Assembly may change this arrangement as it deems appropriate.”); *id.* art. 21(2) (“The president shall perform judicial functions on a full-time basis and shall reside at the seat of the Court.”).

210. See Rules of Procedure of the Inter-American Court on Human Rights, Inter-Am. Ct. H.R. 18, art. 11, OEA/Ser.L/V/III.25 doc.7 (1992), available at <<http://www1.umn.edu/humanrts/oasinstr/zoas7ctr.htm>>.

211. Revised European Convention, *supra* note 163, art. 19.

212. See Statute of the International Court of Justice, June 26, 1945, art. 23(1), available at <<http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>> [hereinafter ICJ Statute].



greatest weaknesses and, in the author's opinion, should be directly avoided with the Court. Significantly, Article 15(4) of the Protocol envisages this possibility as it provides that "the Assembly may change this [part-time] arrangement as it deems appropriate."<sup>213</sup>

### 3. *Independence and Removal*

The Protocol provides that the independence of judges shall be fully ensured in accordance with international law.<sup>214</sup> Accordingly, the judges of the Court shall "enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law."<sup>215</sup> At no time, moreover, shall they be held liable for any decision or opinion issued in the exercise of their functions.<sup>216</sup> These important expressions of international law were also provided by the Banjul Charter with respect to members of the Commission<sup>217</sup> and are aimed at ensuring the full independence of the Court's judges. As the experience of the Commission shows, however, while these measures are necessary, they are not sufficient to ensure institutional independence in the absence of other measures, such as sufficient funding and independent enforcement powers.

Similarly, a judge may not be suspended or removed from office unless it is determined, "by the unanimous decision of the other judges of the Court," that the judge is no longer fulfilling the required conditions for the post.<sup>218</sup> Such a decision becomes final unless the Assembly sets it aside at its next session.<sup>219</sup> This implies that the affected judge can lodge an appeal against his removal before the Assembly of the OAU.

If a judge is a national of any State that is party to a case submitted

213. Protocol, *supra* note 1, art. 15(4).

214. *See id.* art. 17(1).

215. *Id.* art. 17(3). *Cf.* Revised European Convention, *supra* note 163, art. 51; American Convention, *supra* note 104, art. 70(1).

216. *See* Protocol, *supra* note 1, art. 17(4).

217. *See* Banjul Charter, *supra* note 4, art. 43.

218. Protocol, *supra* note 1, art. 19(1). Article 24 of the Revised European Convention, *supra* note 163, similarly allows other judges to decide that a judge has ceased to fulfill the required conditions of the office, but requires a two-thirds majority. The American Convention, by contrast, leaves this determination to the OAS General Assembly. *See* American Convention, *supra* note 104, art. 73. While the Protocol does not establish what the required conditions are to be a judge on the Court on Human Rights, reference might be made to Article 18(1) of the Statute of the Inter-American Court, which stipulates that the position of a judge is incompatible with being a member or high-ranking official of the executive branch of government, official of international organizations, or any other position which prevents discharge of duties, or affects independence or impartiality or the dignity and prestige of the office. *See* Statute of the Inter-American Court on Human Rights, art. 18(1), O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, vol. 1, at 98, Inter-Am. Ct. H.R. 16, OEA/Ser.L/V.III.3 doc.13 corr.1 (1980).

219. *See* Protocol, *supra* note 1, art. 19(2) at 957.

to the Court, that judge shall not hear the case.<sup>220</sup> Unlike some jurisdictions, however, the Protocol does not envisage the possibility of appointing *ad hoc* judges. Under the American Convention, when one of the judges hearing an inter-state case happens to be the national of a State Party to that case, then any other State Party is entitled to appoint a person of its choice to serve as *ad hoc* judge.<sup>221</sup>

## B. *Jurisdiction*

The Protocol also establishes the new African Court's jurisdiction. Its jurisdictional provisions are the heart of the Protocol, as they determine who will have access to the Court, under what conditions, and what types of violations will be redressed. Fortunately, the Protocol vests the Court with a broad mandate and provides for automatic jurisdiction upon ratification;<sup>222</sup> it does not require the deposit of an additional declaration for the Court to entertain petitions filed by the Commission, another State Party, or an African Inter-Governmental Organization. An important exception to this general rule, however, relates to individuals and NGOs. Under Article 34(6), the Commission does not have jurisdiction to entertain cases filed by individuals and NGOs unless the target State has made an explicit declaration to that effect and deposited its declaration with the OAU Secretariat.<sup>223</sup>

Like the other regional human rights courts, the African Court is bestowed with both contentious and advisory jurisdiction. In other words, it is authorized both to consider particularized disputes between individual and state parties and to issue general interpretive opinions regarding subjects that are not the subject of contentious proceedings. Below I consider the Court's contentious and advisory powers, respectively, by looking at the Protocol's provisions for personal and subject matter jurisdiction as well as its general admissibility requirements.

### 1. *Contentious Jurisdiction*

Under Articles 3 and 7 of the Protocol, the Court has jurisdiction to adjudicate disputes brought against a State Party to the Protocol in which it is alleged that the State has violated the Banjul Charter or any other human rights instrument that it has ratified. Such claims may be

220. See *id.* art. 22. This differs from the Inter-American system in which such a judge retains his right to hear the case. See American Convention, *supra* note 104, art. 55(1).

221. American Convention, *supra* note 104, art. 55(2). Cf. ICJ Statute, *supra* note 212, art. 10(2). Similarly, if none of the judges hearing an inter-state case is a national of any of the litigant States Parties, the latter may appoint *ad hoc* judges. See American Convention, *supra* note 104, art. 55(3). Cf. ICJ Statute, *supra* note 212, art. 10(3).

222. See Protocol, *supra* note 1, art. 34(3).

223. See *id.* art. 34(6).

filed directly with the Court by the complaining party or indirectly by the Commission.

i. *Personal Jurisdiction: Who Can File A Complaint with the Court?*

Article 5 of the Protocol is particularly important as it defines who may bring a case before the Court. Subsection 5(1) entitles four categories of claimants to directly access the Court: the Commission; a State Party that has lodged a complaint to the Commission; a State Party against which a complaint has been lodged; and a State Party whose citizen is a victim of a human rights violation. For these two sets of actors—the Commission and States Parties—access is *automatic* upon a state's ratification of the Protocol.<sup>224</sup>

102

For a fourth and fifth category of claimants—individuals and “[r]elevant NGOs with observer status before the Commission”—the Protocol, under articles 5(3) and 34(6), provides for *optional* jurisdiction. The discretion to allow direct access to the Court by individuals and NGOs lies jointly with the Court and the target State. On the one hand, the Court has discretion to grant or deny individual and NGO access at will.<sup>225</sup> On the other, in order for a willing Court to hear a case filed by an individual or NGO, the State must have made an express declaration accepting the Court's jurisdiction to hear such cases. As Article 34(6) provides:

103

[A]t the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. *The Court shall not receive any petition under article 5(3) involving a State Party which has not made such a declaration.*<sup>226</sup>

It appears that Article 34(6) was deliberately inserted as a compromise to facilitate the adoption of the Protocol. The question of access to the Court by non-state entities, such as NGOs and individuals,

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224. See *id.* art. 5(2).

225. See *id.* art. 5(3) (providing that the “Court *may entitle* relevant Non-Governmental Organizations (NGOs) with observer status before the [African] Commission, and individuals to institute cases directly before it”) (emphasis added).

226. *Id.* art. 34(6) (emphasis added). Cf. ICCPR, *supra* note 20, art. 41(1) (“A State Party to the present Covenant may at any time declare under this article that it recognizes the competence of the [U.N. Human Rights] Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration”).

was extremely controversial throughout the drafting of the protocol. As noted by Ambassador Badawi, a member of the African Commission and its former chair, “[t]he question of allowing NGOs and individuals to submit cases to the Court was one of the most complicated issues during the consideration of the Draft Protocol.”<sup>227</sup> The Cape Town draft provided that NGOs and other individuals would be allowed to file cases before the Court in “exceptional circumstances,” each case to be determined by the Court.<sup>228</sup> NGOs criticized this provision as being too restrictive and subjective, opening decisions about what constitutes “exceptional circumstances” to political considerations.

105 The Nouakchott draft, which amended the Cape Town draft, further restricted NGO access to the Court by specifying that only NGOs with consultative status before the Commission could file cases with the Court—and even then only in cases of “urgent or massive or systematic violations.”<sup>229</sup> States Parties were also permitted to exclude, by declaration, the Court’s jurisdiction over non-state cases against it. A further limitation was a requirement that the Commission determine the admissibility of all cases submitted to the Court by non-state actors.

106 This provision was also the subject of considerable criticism. NGOs argued that to require the Commission to determine the admissibility of *urgent* cases sent directly to the Court would defeat the very purpose of the provision; it would *increase delay* in those cases in which *urgency* was the decisive factor. The final Protocol amends this point at the margin by making Commission consultation on admissibility issues *optional*.<sup>230</sup> The Court may waive it in urgent cases where the Court is required to act with dispatch to avoid irreparable damage. This is particularly important since the Commission sits only twice per year, and the Protocol envisions no special mechanism to allow immediate consultation on urgent cases outside of the Commission’s ordinary sessions.

107 The Protocol’s provisions for direct NGO and individual access to the African Human Rights Court are limiting and represent a serious shortcoming to the Court’s jurisdiction. They do, however, represent an innovation among the regional human rights systems given traditional notions of how two-leveled systems work.<sup>231</sup> In the Inter-American system, for example, only States Parties and the Commission have the right to submit cases directly to the Court;<sup>232</sup> individuals must first go to

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227. See Badawi, *supra* note 186, at 947.

228. See Cape Town Draft, *supra* note 182, art. 5(1).

229. See Nouakchott Draft, *supra* note 188, art. 5(1), 5(3).

230. See Protocol, *supra* note 1, art. 6(1).

231. See Inger Osterdahl, *The Jurisdiction Ratione Materiae of the African Court of Human and Peoples’ Rights: A Comparative Critique*, 7 REVUE AFRICAINE DES DROITS DE L’HOMME 132, 134 (1998).

232. See American Convention, *supra* note 104, art. 61. At the same time, the contentious jurisdiction of the Court is not automatically accepted through ratification of the Convention; rather, the State Party must file a declaration or enter a special agreement to that effect. See *id.* art. 62(1).

the Commission. The new European system has dispensed with the Commission, and thus “the Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.”<sup>233</sup> The African innovation in a two-tiered system may be justified by the importance of direct access to the Court in urgent situations requiring an immediate and enforceable solution.

The Protocol also permits party joinder where a State Party has an interest in a case that is before the Court.<sup>234</sup> The Protocol has not, however, defined what the nature of the interest must be. Under Article 36(2) of the Revised European Convention, a request for joinder must be “in the interest of the proper administration of justice.” The new African Court will also be guided by the practice of other international tribunals, such as the International Court of Justice and its precursor, which have adopted a fairly strict approach to requests for intervention.<sup>235</sup>

108

Finally, while a case may not be filed against a non-State party or an individual perpetrator, the African Court should recognize the international legal principle that the legal rights and responsibilities of states are not affected by changes in the head of state or the internal form of government.<sup>236</sup>

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## ii. *Subject-Matter Jurisdiction*

The Protocol also represents significant innovations in regard to the subject matter jurisdiction of the African Court. The Court’s jurisdiction extends “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

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233. See Revised European Convention, *supra* note 163, art. 34. Acceptance of this procedure is mandatory for all member states.

234. See Protocol, *supra* note 1, art. 5(2). Cf. ICJ Statute, *supra* note 212, art. 62.

235. See, e.g., Wimbledon Case, 1923 P.C.I.J. (ser. A) No. 1, at 12 (Aug. 17) (requiring that “the existence of this interest must be sufficiently demonstrated”). The burden of proof appears to be fairly high. See generally S. ROSENNE, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE ch. 7 (1993).

236. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 80 (1998). The African Commission has already affirmed this principle in several of its decisions:

Principles of international law stipulate . . . that a new government inherits the previous government’s international obligations, including the responsibility for the previous government’s mismanagement. The change of government . . . does not extinguish the present claim before the Commission. Although the present government . . . did not commit the human rights abuses complained of, it is responsible for the reparation of the abuses.

Communication Nos. 64/92 *Krischana Achutan*, 68/92 *Amnesty International*, 78/92 *Amnesty International* (joined), in *Eighth Annual Activity Report*, *supra* note 149, communication no. 11, para. 12, available at <<http://www1.umn.edu/humanrts/africa/ACHPR1.htm>>.

concerned.”<sup>237</sup> Article 7 further provides that “the Court shall apply the provisions of the Charter and *any other human rights instruments* ratified by the States concerned.”<sup>238</sup>

111 These provisions go much farther than Articles 60 and 61 of the Banjul Charter, which require the Commission to merely look toward comparative and international human rights law when interpreting the provisions of the Charter. Indeed, the Commission may not interpret or apply any human rights instrument other than the Charter under its contentious jurisdiction.<sup>239</sup> While the Charter may be interpreted “draw[ing] inspiration from”<sup>240</sup> other international and regional human rights instruments, all cases must be decided with reference to the Banjul Charter. The same is true of the European and Inter-American Courts, whose direct subject matter jurisdiction is limited to the Conventions under which they were created.<sup>241</sup>

112 Under the Protocol, by contrast, the African Human Rights Court will exercise direct jurisdiction over all human rights instruments “ratified by the State concerned.” Presumably, this extends to all regional, sub-regional, bilateral, multilateral, and international treaties. The Inter-American Court, for example, has held in an important advisory opinion that with reference to the term “other treaties,” as used in a jurisdictional clause of the American Convention, the treaty need not be concerned solely or even primarily with human rights and need not be regional in character nor adopted under the auspices of the regional political organ, the OAS. While excluding treaties that may not be ratified by States in the region, the Court held that its jurisdiction under the clause in question extended to all treaties dealing with the protection of human rights of the persons in the region.<sup>242</sup>

113 This has extremely important implications. Thus, for example, a perception and fear has been expressed that the Banjul Charter “does not adequately protect, or it could be used to abuse, women’s rights.”<sup>243</sup>

237. Protocol, *supra* note 1, art. 3 (emphasis added).

238. *Id.* art. 7 (emphasis added).

239. See Banjul Charter, *supra* note 4, art. 45.

240. *Id.* art. 60.

241. See Revised European Convention, *supra* note 163, art. 32; American Convention, *supra* note 104, art. 62. This does not, of course, preclude the Courts from looking toward each other’s decisions and those of other human rights agencies to find solutions to questions concerning the interpretation and application of their own Convention.

242. Inter-Am. Ct. H.R., “Other Treaties” Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Sept. 24, 1982, Ser. A, No. 1, paras. 34–38.

243. Makau Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUM. RTS. Q. 342, 358–59 (1999); see also Claude E. Welch, Jr., *Human Rights and African Women: A Comparison of Protection under Two Major Treaties*, 15 HUM. RTS. Q. 549 (1993); Chaloka Beyani, *Toward a More Effective Guarantee of Women’s Rights in the African Human Rights System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 285 (Rebecca Cook ed., 1994); J. Oloka-Onyango, *The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee*

Rather than rely on the Charter then, an aggrieved woman or group of women could bring a case to the African Court under another international treaty that better protected her rights.<sup>244</sup> The same could be true where a State tried to invoke a “clawback clause” to justify a breach of internationally protected rights: the victim could simply invoke a treaty protecting the same rights, such as the ICCPR, that did not include a similar clawback clause.

Article 7 could further be used to expand social and economic rights, such as the right to housing, that are not explicitly protected in the Banjul Charter. Thus, an individual or NGO in a State that has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, would have standing in the African Court to seek an effective remedy against housing rights violations committed by that State in violation of the ICESCR.<sup>245</sup> As can be seen, the subject matter jurisdiction provisions of the Protocol are revolutionary in expanding the protections afforded by regional human rights courts.

Fears have been expressed that an overly broad mandate may overwhelm the Court with noncompelling complaints or those relating to issues outside the scope of its mandate.<sup>246</sup> These fears are unfounded. In particular, the Court’s discretionary jurisdiction over cases filed by individuals and NGOs will limit the numbers of cases that actually reach the Court to a manageable number, ensuring that those with the greatest merit are heard.

## 2. *Advisory Jurisdiction*

In addition to its contentious jurisdiction, the Court is also fitted with advisory powers. Pursuant to Article 4(1) of the Protocol, the Court is authorized to give advisory opinions: “At the request of a member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments ratified by the States.”<sup>247</sup>

The African Court exercises the widest jurisdiction of any of the

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and Internally Displaced Women in Africa, 24 DENV. J. INT’L L. & POL’Y 349, 371–74 (1996).

244. See, e.g., Women’s Convention, *supra* note 23. At the African level, pressure is on to adopt a Protocol on women’s rights. A Draft Protocol to the African Charter on Human and People’s Rights on the Rights of Women was submitted to the 26th Ordinary Session of the African Commission on Human and Peoples Rights, Nov. 1–15, 1999, Kigali, Rwanda. See *Progress on Additional Protocol on Women’s Rights*, AFR. HUM. RTS. NEWSLETTER (Afr. Center for Democracy & Hum. Rts. Stud.), July–Sept. 1999, at 6.

245. Housing rights are protected in the ICESCR. See ICESCR, *supra* note 21, art. 11 (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing . . . .”) (emphasis added).

246. See Osterdahl, *supra* note 231, at 138.

247. Protocol, *supra* note 1, art. 4(1).

regional human rights systems in terms of who may submit requests for advisory opinions on legal matters. Under the Inter-American system, only OAS Member States and OAS organs have the right to seek such opinions.<sup>248</sup> Under the European system, only the Committee of Ministers has this power.<sup>249</sup> By contrast, the new African system will permit the African Court to exercise advisory jurisdiction over not only the OAU, Member States, and OAU organs, but also “any African organization recognized by the OAU.”<sup>250</sup> This should allow for a more robust and sustained analysis of the meaning of the Charter, the Protocol, and the compatibility of domestic legislation and regional initiatives with the human rights norms contained therein.

118 The African Court’s advisory jurisdiction is also the broadest of the three regional systems in terms of subject matter. Under the Protocol, the Court may provide an opinion on any legal matter relating to the Charter, the Protocol, or, significantly, to “*any other pertinent human rights instrument ratified by the States concerned.*”<sup>251</sup> Thus, for example, the Court could conceivably issue an advisory opinion on the compatibility of domestic legislation affecting land rights, housing availability, or food prices with the obligations assumed under the International Covenant on Economic, Social, and Cultural Rights by an African State Party thereto.

119 The power of the Court to render advisory opinions is purely discretionary; no guidelines are established in the Protocol for determining when to exercise nor when to decline to exercise its advisory jurisdiction.<sup>252</sup> The Court shall, however, give reasons for its advisory opinion and, as under its contentious jurisdiction, every judge shall be entitled to deliver a separate or dissenting decision.<sup>253</sup>

120 The advisory opinions of the Court, by definition, are not formally binding on any specific party. Nevertheless, they derive their value as

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248. See American Convention, *supra* note 104, art. 64(1). See generally Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT’L L. 1 (1985).

249. Revised European Convention, *supra* note 163, art. 47(1). (“The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.”).

250. The contours of what constitutes “any African organization recognized by the OAU” are not clearly defined. Presumably, the provision will even extend to various sub-regional organizations, such as ECOWAS.

251. Protocol, *supra* note 1, art. 4(1).

252. The European Court, by contrast, is prohibited from exercising its advisory powers over “any question relating to the content or scope of the rights or freedoms defined in [the Convention], or with any other question that the Court or the Committee of Ministers *might* have to consider in consequence of any such proceedings as *could* be instituted in accordance with the Convention.” Revised European Convention, *supra* note 163, art. 47(2) (emphasis added). The idea underlying this limitation “seems to be to force all parties involved to use the proper hard-and-fast judicial channels in order to get answers to any questions concerning the interpretation of the substantive provisions of the European Convention.” Osterdahl, *supra* note 231, at 141. In any case, it severely restricts the scope of the Court’s advisory powers.

253. Protocol, *supra* note 1, art. 4(2).



legal authority from the character of the Court as a judicial institution. As such, the advisory mandate is very important as it can have a substantial impact on the development of regional human rights jurisprudence. It may also significantly impact the domestic application of the Charter and other international human rights principles. The Court may, for example, be asked to decide whether national legislation is inconsistent with the Charter<sup>254</sup> and, therefore, unlawful.<sup>255</sup> The Commission has already set the pace in this direction. In *Civil Liberties Organization v. Nigeria*, the petitioner challenged a Nigerian law prohibiting the domestic enforcement of the Banjul Charter. The Commission found the law incompatible with Nigeria's obligations under the Charter:

If Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice, which it has not done. Nigeria cannot negate the effects of its ratification of the Charter through domestic action. Nigeria remains under the obligation to guarantee the rights of Article 7 to all its citizens.<sup>256</sup>

### C. Remedial Authority and Enforcement Capacity of Court

In stark contrast to the Commission, the African Court is empowered to offer remedies to victims of human rights violations and to seek enforcement of its judgments against States. Article 27 provides:

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If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall

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254. While there is no express provision for this in the Protocol, as there is in the American Convention, it may be implied.

255. Domestic legislation may be declared unlawful where it negates the treaty obligation of the State concerned. *See, e.g.*, Vienna Convention on the Law of Treaties, May 23, 1969, arts. 27, 1155 U.N.T.S. 340, 8 I.L.M. 679 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). In Nigeria, for example, the Court has ruled that the Nigerian government cannot, by legislation, negate or abrogate its treaty obligation assumed upon ratification of a treaty. A treaty, being an international instrument, has superior application over municipal law. The Banjul Charter has been held, for example, to have "an aura of inviolability unlike most municipal laws and may as long as it is in the statute book be clothed with vestment of inviolability." *Gani Fawehinmi v. Sani Abacha* (1996) 9 NWLR (Pt. 475) 710 (Nig.); *see also* *Oshevire v. British Caledonian Airways* (1991) 2 NWLR (Pt. 189) 234 (Nig.).

256. Afr. Comm. H.P.R., *Unlawful Nullification of Any Domestic Effect of the Charter by Nigeria*, Opinion of Mar. 22, 1995, para. 12, Comm. 129/94, AHG/Res. 250 (XXXII), reprinted in 18 HUM. RTS. L.J. 35, 36, para. 12 (1997).

adopt such provisional measures as it deems necessary.<sup>257</sup>

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While the Protocol does not expressly grant the Court powers to grant structural remedies or order recalcitrant States to revoke the practices or domestic laws that have led to human rights violations, a broad interpretation of Article 27 clearly permits such a result. The Court should look at the practices of other regional courts in this regard.<sup>258</sup> Although the Commission has, in the past, recognized the need for reparation and compensation regarding a number of complaints, it has never actually ordered compensation. The Court, by contrast, has express powers to do so. By providing reparation to victims, the Court will not only assist in returning individuals to the *status quo ante*, but will serve an important deterrent and educational role as well.

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The express power to order provisional measures is also welcome; it represents an important step toward effective protection of human rights. By Article 10(3) of the Protocol, “any person, witness or representative of parties who appears before the Court, shall enjoy protection and all facilities, in accordance with international law, necessary for the discharging of their functions, tasks and duties in relation to the Court.” This provision, read with Article 27, will enable individuals to appear before the Court without fear of retaliation. The Inter-American Court has utilized its power under Article 63(2) of the American Convention, similar to Article 27 of the Protocol, to order provisional measures for the protection of witnesses scheduled to testify before it when concern was expressed for their safety.<sup>259</sup>

124

In terms of enforcement of the African Court’s remedial and provisional orders, the Protocol provides that States Parties “*undertake to comply* with the judg[ment] in any case to which they are parties within the time stipulated by the Court and to *guarantee its execution*.”<sup>260</sup> At the same time, the Court is required to specifically list those states that have failed to comply with its judgments in its annual reports to the OAU.<sup>261</sup> This is a potent “shaming” mechanism aimed at strengthening the authority and effectiveness of the Court; indeed,

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257. Protocol, *supra* note 1, art. 27. Cf. American Convention, *supra* note 104, art 63. See generally Scott Davidson, *Remedies for Violations of the American Convention on Human Rights*, 44 INT’L & COMP. L. Q. 405 (1990).

258. See, e.g., Inter-Am. Ct. H.R., *Aloeboetoe, Reparations*, Judgment of Sept. 10, 1993, Ser. C, No. 15, para. 116, reprinted in 14 HUM. RTS. L.J. 413, 425 (1993) (ordering State to reopen school and medical dispensary in village where majority of victims’ families resided and to pay cash sum to victims’ families).

259. For the full text of the provisional measures ordered by the Inter-American Court of Human Rights in 1995–96, see <<http://www1.umn.edu/humanrts/iachr/seriesmisc.html>>. See also Naldi & Magliveras, *supra* note 193, at 451–52 (discussing provisional measures in Inter-American and African systems comparatively).

260. Protocol, *supra* note 1, art. 30 (emphasis added).

261. See *id.* art. 31 (requiring the Court to “submit to each regular session of the Assembly, a report on its work during the previous year. The report shall specify, in particular, the cases in which a State has not complied with the Court’s judgment”).

African States will be averse to having their names published in the Court's annual reports as a human rights violator. Importantly, the Protocol also provides that the OAU Counsel of Ministers shall monitor the execution of judgments on behalf of the Assembly of Heads of States.<sup>262</sup> The provision is in harmony with the norms applied before the American and European Courts.<sup>263</sup>

Although the Protocol does not expressly confer upon the OAU Assembly the right to act against non-complying States Parties, the Assembly may rely on Article 8 of the OAU Charter in taking affirmative action. The Charter provides that "[t]he Assembly . . . shall be the supreme organ of the Organization. It shall, subject to the provisions of this Charter, discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization."<sup>264</sup> This may involve the use of various forms of political and economic pressure to compel compliance with the Court's orders, such as passing resolutions urging states to respect the Court's judgments or threatening economic sanctions. It may even involve suspension of the recalcitrant State from membership of the OAU, as is the position under Article 8 of the Council of Europe statute.<sup>265</sup>

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Significantly, the Court is not constrained by the confidentiality clause that has so handicapped the effectiveness of the Commission under Article 59 of the Banjul Charter. It will not need the authorization of the Assembly to make its activities and judgments public, and, under article 10, its proceedings are to be conducted in public. Clearly, the work of the Court will be far more publicized than that of the Commission. Public exposure and authoritative condemnation of human rights violations is an extremely effective tool in the promotion and protection of human rights.

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#### D. Court Procedures

While the Court will be empowered to create its own Rules of Procedure, several mandatory procedural provisions are already laid out in the Protocol. These include provisions dealing with admissibility

127

262. See *id.* art. 29(2). The Council is made up of ministers of foreign affairs of Member States of the OAU. It usually meets twice a year, one of which immediately precedes the annual ordinary session of the General Assembly of the OAU.

263. See, e.g., Revised European Convention, *supra* note 163, art. 46(2) ("The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."); American Convention, *supra* note 104, art. 65 (providing that Court may report any case in which a state has not complied with its judgment to the OAS General Assembly along with pertinent recommendations).

264. OAU Charter, *supra* note 55, art. 8.

265. Article 8 provides: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine." Statute of the Council of Europe, May 5, 1949, art. 8, 87 U.N.T.S. 103, Europ. T.S. No. 1.

requirements, hearing procedures, and finality.

128 First, and very importantly, the Protocol provides that the Court shall take into consideration the provisions of Article 56 of the Banjul Charter when making admissibility determinations on pending communications.<sup>266</sup> To be admissible, a communication must be compatible with the OAU and Banjul Charters, be sent within a reasonable time after domestic remedies have been exhausted, and not deal with matters that have been settled by other means.<sup>267</sup> Yet, the Protocol also retains some of the more questionable provisions, such as requiring authors to identify themselves, even if they request anonymity, and requiring that the language not be disparaging or insulting in relation to a State or regional institution.<sup>268</sup> These provisions are not relevant to the merit of the complaint nor do they serve any important procedural function. In all cases, the Court may retain a matter if it feels that it is in order; otherwise, the complaint is referred back to the Commission.<sup>269</sup>

129 General international law requires the exhaustion of local remedies, including judicial and administrative procedures, before granting recourse to international remedies. The Banjul Charter creates an exception to this general rule in cases of unduly prolonged procedures and unjustified delay.<sup>270</sup> The Court should bear in mind the peculiar problems of administration of justice in African countries—such as the slow and ineffective domestic judicial interventions in cases of violations of human rights—and apply the exhaustion requirement permissively. The requirement of exhaustion of domestic remedies should also be waived where there are no domestic remedies to protect against a violation of the rights in issue or where the party alleging violation has been denied access to the remedies under domestic law, such as is the case in the American system.<sup>271</sup>

130 The Protocol also establishes hearing procedures for the Court. The Court shall operate as a single chamber in examining cases brought before it, provided there is a quorum of at least seven judges.<sup>272</sup> The Court is empowered to preside over plenary hearings and to “receive written or oral evidence including expert testimony.”<sup>273</sup> It shall hear submissions by all parties and if deemed necessary hold an inquiry.<sup>274</sup> States are expected to assist the Court by providing relevant facilities

266. See Protocol, *supra* note 1, art. 6(2).

267. See Banjul Charter, *supra* note 4, art. 56(2), (6), (7).

268. *Id.* art. 56(1), (3).

269. See Protocol, *supra* note 1, art. 6(3).

270. See Banjul Charter, *supra* note 4, art. 56(5).

271. See American Convention, *supra* note 104, art. 46(2).

272. See Protocol, *supra* note 1, art. 23. The Inter-American Court functions with a quorum of five judges. See American Convention, *supra* note 104, art. 56.

273. Protocol, *supra* note 1, art. 26(2).

274. See *id.* art. 26(1) (“The Court shall hear submissions by all parties and if deemed necessary, hold an enquiry. The States concerned shall assist by providing relevant facilities for the efficient handling of the case.”).

for the efficient handling of the case.<sup>275</sup> There are also provisions aimed at ensuring fairness in the hearing proceedings. The sessions of the Court, for instance, shall be in public, although the Court may “conduct proceedings in camera as may be provided for in the Rules of Procedure.”<sup>276</sup>

Finally, the Protocol establishes a number of “finality” provisions aimed at the speedy and efficient administration of justice. Article 28(1) provides that “the Court shall render its judgment within ninety (90) days of having completed its deliberations.” Such judgment, decided by the majority,<sup>277</sup> shall be final and not subject to appeal.<sup>278</sup> The Court may, however, review its decision in light of new evidence under conditions to be set out in the Rules of Procedure.<sup>279</sup> The principle of finality calls for a clear end to litigation and non-modification of judgments except for good cause and with clarification of the meaning or scope of the judgment rendered.

131

#### E. *Relationship between the Court and Commission*

Another essential issue in the establishment of the new African Human Rights Court, and in its potential effectiveness, is its relationship with the African Commission. Under the Protocol, this relationship is intended to be organic<sup>280</sup>: the Court will “*complement the protective mandate* of the African Commission on Human and Peoples’ Rights . . . conferred upon it by the African Charter on Human and Peoples’ Rights.”<sup>281</sup> While these provisions remain vague, it is clear that the Commission and Court were intended to share many powers. This raises concerns about potential decisional conflicts, inefficiency, and unnecessary duplication.

132

Indeed, both the Commission and Court are authorized to undertake “contentious,” “advisory,” and “friendly settlement” functions over much of the same subject matter and many of the same parties. Under their respective contentious jurisdictions, for example, both bodies may entertain inter-party disputes alleging violations of the Banjul Charter. Where such cases are filed directly with the Court by NGOs and individuals under Article 5(3), the Court may, in deciding admissibility issues, seek the opinion of the Commission, which must respond “as soon as possible.”<sup>282</sup> The Court may consider the case

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275. *Id.*

276. *See id.* art. 10(1). *Cf.* Revised European Convention, *supra* note 163, art. 40(1).

277. *See* Protocol, *supra* note 1, art. 28(7) (“If the judgment of the Court does not represent, in whole or in part, the unanimous decision of the judges, any judge shall be entitled to deliver a separate or dissenting opinion.”).

278. *See id.* art. 28(2).

279. *See id.* art. 28(3).

280. *See* Osterdahl, *supra* note 231, at 133.

281. Protocol, *supra* note 1, art. 2; *see also id.* pmb. No similar provision is found in either the Inter-American or European Charters.

282. *Id.* art. 6(1).

instituted directly before it or transfer the case to the Commission.<sup>283</sup> No criterion is provided, however, as to the circumstances that should lead the Court to retain original jurisdiction or transfer the case. Unlike any other regional human rights system, moreover, both the Commission and the Court are empowered to seek amicable settlement in disputes pending before them.<sup>284</sup>

The Protocol nevertheless tries to maintain a balance between the work of the Court and the Commission. The Commission is the preliminary body for the settlement of disputes between two states or between an individual and a state. In other words, the Commission serves as an organ of investigation to help the Court's judgment on the case. It will play a prominent role as a filter mechanism.<sup>285</sup>

## V. MAKING THE COURT EFFECTIVE

Like any mechanism for the protection of human rights, the success of the Court will be measured by the concrete results that it produces in favor of aggrieved individuals. Accordingly, special attention must be placed on responding to potential barriers to the court's effectiveness. This Part is intended to highlight some of these hurdles and then to offer some recommendations.

### A. *Hurdles to Implementation: Potential Barriers to an Effective Court*

The essential challenge of the Court, and of those struggling for its effectiveness as a protective regional human rights instrument, is to avoid the structural and normative deficiencies that have so plagued the Commission over its fifteen years of existence. These maladies have centered around the non-binding nature of the Commission's decisions and, consequently, the meager attention that they have attracted from governments; the lack of enforceable remedies; and the lack of independence and creative vision of the Commission. The same potential barriers to effectiveness haunt the current process of establishing the Court as a functional institution. In particular, potential barriers include ratification, individual/NGO jurisdiction, funding, judicial independence, judicial competence, nonrestrictive interpretation of the Court's mandate and jurisdiction, and enforcement powers.

#### 1. *Ratification*

The first hurdle to implementation of the Protocol is, of course, the

283. See *id.* art. 6(3).

284. See *id.* art. 9.

285. See Naldi & Magliveras, *supra* note 155, at 946–47.

need for early ratification. While thirty of the fifty-two OAU Member States signed the Protocol on June 9, 1998, only three countries—Senegal, Burkina Faso and Gambia—have ratified it as of February 2000.<sup>286</sup> Fifteen ratifications are needed for the Protocol to come into force.<sup>287</sup> We are still a long way from this end, and African states, particularly those embroiled in situations of systematic human rights violations, are not likely to rush to sign the Protocol. As a potential barometer, however, it took five years for the Banjul Charter to gain enough signatures to enter into force for the continent.<sup>288</sup>

## 2. Direct Access to Court for Individuals and NGOs (Article 34(6))

There are justifiable fears that the inclusion of Article 34(6)—requiring States to affirmatively *opt in* to allowing NGOs and individuals to have direct access to the Court—is dangerous to the potential effectiveness of the Court. These fears stem from the dual facts that NGOs and individuals are those with the greatest incentive and need to use human rights institutions such as the Court and, at the same time, that States Parties are unlikely to readily support direct access by these parties. While it is clear that this provision was included to facilitate the early ratification of the Protocol, it would perhaps have been more effective to include a provision that permitted States Parties to *opt out* of accepting the otherwise automatic jurisdiction of the Court over individual and NGO petitions. Under such a framework, States Parties would have retained the power to restrict direct access to the courts, but civil society would also have had a greater rallying point around which to pressure governments to withdraw any such declaration.

It is also worth mentioning that Article 5(3) of the Protocol provides that NGOs may submit a complaint directly to the African Court only if they are “*relevant NGOs with observer status before the Commission.*” This, again, is a unique—and potentially restricting—provision. Under the Inter-American system, any non-governmental entity *legally recognized in one or more member states* of the Organization of American States may lodge petitions with the Commission.<sup>289</sup> This

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286. Senegal ratified the Protocol on September 29, 1998, depositing its instruments of ratification at the OAU on October 31, 1998; Burkina Faso ratified on December 31, 1998, depositing its ratification instruments on February 23, 1999; and Gambia ratified on June 30 1999, depositing its ratification instruments on October 15, 1999. See OAU Doc. CAB/LEG/66.5.

287. See Protocol, *supra* note 1, art. 34(3). This is an improvement in light of the 26 ratifications required for the Banjul Charter to enter into force. It is higher, however, than the 11 ratifications required under the Cape Town Draft.

288. Article 63(3) of the Banjul Charter required the ratification by a simple majority of the Member States of the OAU. Adopted in 1981, the Charter came into force on October 21, 1986, three months after the Secretary-General received the instrument of ratification or adherence of the 26th Member State of the OAU.

289. See American Convention, *supra* note 104, art. 44.

opens the door to a larger number of NGOs, both small and large, in countries throughout the hemisphere. By contrast, the requirement of obtaining "observer status" before the Commission potentially implies a longer, more expensive process that few small NGOs are likely to be able to undertake.<sup>290</sup>

### 3. *Funding*

Another hurdle to the potential effectiveness of the Court is inadequate funding. Article 32 of the Protocol provides that "expenses of the Court, emoluments and allowances for the judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court." The OAU must take this provision seriously, for the effective functioning of human rights machinery is heavily dependent on adequate staffing and financial resources. Indeed, one of the prime reasons for the African Commission's failure to fulfill its mandate has been lack of funds. The Commission has had to depend on donations to carry out some, if not all, of its mandate. These donations, as indicated earlier,<sup>291</sup> have come mainly from outside Africa. A conviction that human rights protection is basic to progress and development in the continent must propel OAU Member States to satisfy the financial requirements of the Court and its secretariat.

290. Any "serious" African or non-African NGO concerned with human rights can apply for observer status. To do so, it must submit a documented application to the Secretariat of the Commission at least three months prior to the Commission's next session showing the NGO's willingness and capability to work for the realization of the objectives of the African Charter. The Organization must provide its status, proof of its legal existence, a list of its members, its last financial statement, as well as a statement of its activities. The Commission then designates a rapporteur to study the application and, if all necessary documents have been received, the Commission considers the application during any of its sessions, usually in October and March each year. See *Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organizations Working in the Field of Human Rights with the African Commission on Human and Peoples' Rights*, Afr. Comm'n for Hum. and Peoples' Rts., 25th Ordinary Sess., OAU Doc. DOC/OS(XXVI)116 (1999); see also *African Commission Adopts New Criteria for NGO Observer Status*, AFR. HUM. RTS. NEWSLETTER, *supra* note 33, Apr.-Jun. 1999, at 4. The observers admitted have the right to participate in the public meetings of the Commission and to receive its documents and publications; they may also be consulted by the Commission either directly or indirectly. See, e.g., Rules of Procedure of the African Commission on Human and Peoples' Rights, Oct. 6, 1995, arts. 75-76, available at <<http://www1.umn.edu/humanrts/africa/rules.htm>>. As of November 1999, 231 African and international NGOs have been granted observer status with the Commission—including, *inter alia*, Amnesty International (1988), International Commission of Jurists (1988), African Association of International Law (1988) Human Rights Internet (1989), Lawyers Committee of Human Rights (1989), African Centre for Democracy and Human Rights Studies (1989), Human Rights Watch/Africa Watch (1989), African Society of International and Comparative Law (1990), Commonwealth Secretariat (1990), Civil Liberties Organization (1990), and Human Rights Africa (1991).

291. See text accompanying *supra* note 151.



#### 4. *Judicial Independence*

A related hurdle is how to secure, in practical terms, the independence of the Court. The Court must be insulated from all manner of political wrangling by Member States, particularly in the appointment and composition of judges, and ensured absolute autonomy in its undertakings. Judicial independence is necessary to give the Court the honor, prestige, integrity, and unrestrained liberty to do justice. It enables the judges to be bold in their pronouncements, to rise above passion, popular clamor and the politics of the moment, and to exercise “freedom in thought and independence in action.”<sup>292</sup> Only in this way may the Court succeed in enforcing the provisions of the Charter and in offering effective remedies to victims.

141

While the independence of the new African Court judges, as individuals, may be structurally protected by the provisions of the Protocol—by salary and removal provisions, for example—their complete independence may be threatened by judges’ part-time status. At the same time, funding questions seriously threaten the independence of the Court as a whole. A human rights institution—as the experience of the Commission demonstrates—may be politically dominated as much by lack of resources and staff as by threats of salary cuts. Indeed, a court lacking a library, paper, computers, printers, and translators may, by necessity, succumb to political pressures in order to receive additional funding necessary for its continued function. This is a serious potential threat to the independence of the Court. Structural solutions should be sought immediately to avoid lack of adequate funding for the African Human Rights Court.

142

#### 5. *Election of Competent and Non-Partisan Judges*

The ability of the OAU to elect outstanding and competent judges, on a non-partisan basis, is another potential hurdle to the effectiveness of the Court. Inertia on the part of Member States to be politically motivated in the nomination of candidates must be avoided. The effectiveness of the Court depends on the caliber of the elected judges. If they are unduly conservative in interpreting and exercising their mandate, the Court will achieve very little. The same is true if judges fail to serve in their individual capacities—as representatives of the entire African continent—rather than as representatives of their specific countries of origin. NGOs, again, have an important part to play; they should lobby for the appointment of well-respected, neutral,

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292. Chukwudifu Oputa, *Judicial Ethics, Justice and the Judiciary*, in 1990 JUDICIAL LECTURES: CONTINUING EDUCATION FOR THE JUDICIARY 35 (1991); see also Judge Manfred Lachs, *A Few Thoughts on the Independence of Judges of the International Court of Justice*, 25 COLUM. J. TRANSNAT’L L. 593 (1987) (discussing independence of judges of international tribunals)

and highly dedicated persons as judges of the Court.

6. *Broad vs. Restrictive Interpretation of Jurisdiction and Mandate*

144 The real effectiveness of the Court, however, will depend on how creative its judges are in interpreting their mandate and jurisdiction. If the Court takes a conservative approach to these issues, there is little hope that it will be any more effective than the Commission in protecting human rights in the continent. By contrast, if the Court takes a liberal and creative approach to interpreting its mandate under the Protocol, the Court has the potential to take the lead on many innovative trends in regional and international human rights protection.

145 This is particularly true in regard to the Court's jurisdiction over persons and subject matter. Should the Court, for example, interpret Articles 34(6) and 5(3) of the Protocol narrowly, it could effectively foreclose NGO and individual access to the Court. Likewise, a narrow interpretation of its jurisdiction to entertain contentious petitions concerning "other human rights treaties" would significantly restrict its power to vindicate a wide variety of human rights violations in the continent. It is further conceivable that the Court could interpret the economic, social, and cultural rights provisions of the Banjul Charter, as well as those related to duties and group rights, as non-justiciable questions that defy judicial resolution. These concerns must be seriously, and *proactively*, addressed by human rights groups in Africa and internationally.

146 In particular, there is a strong need for a broad and creative interpretation of Article 5(3) by the Court to avoid injustices based on formalisms and technicalities in the textual language of the Protocol. While Article 5 opens the doors of the Court to civil society, it does so only part way: few will actually be able to squeeze themselves through. Indeed, though Article 5(1) may demonstrate "that African States have been receptive to the criticisms made of the system,"<sup>293</sup> it is not immune from the same barriers that have paralyzed the Commission. A strong interpretive role by the Court is needed to overcome these hurdles to implementation of the Protocol and to a strong and effective role for the Court in the protection of human rights in Africa.

7. *Concurrent and Conflicting Jurisdiction*

147 Another potential problem is that of concurrent jurisdiction and conflicting judgments. Such questions arise, for example, in relation to the provisions of the AEC Treaty<sup>294</sup> and the Revised Treaty of the

293. Naldi & Magliveras, *supra* note 193, at 439.

294. See *supra* text accompanying notes 170–175.

Economic Community of West African States (ECOWAS Treaty),<sup>295</sup> both of which impact on human rights<sup>296</sup> but which create their own enforcement mechanisms. These potential problems do not appear to have been properly addressed.

While there is no express provision in the AEC Treaty that the AEC Court has exclusive jurisdiction on any matter related to a provision therein,<sup>297</sup> some writers are of the view that the AEC Court will have jurisdiction to the exclusion of all other international tribunals on any matter within its jurisdiction under the Treaty.<sup>298</sup> At the same time, the ECOWAS Treaty expressly enshrines the principle of exclusivity of competence. Article 22(1) of the Protocol on the ECOWAS Community Court of Justice states that “no dispute regarding interpretation or application of the provisions of the Treaty may be referred to any other form of settlement except that which is provided for by the Treaty or this Protocol.”

148

To hold tenaciously to this interpretation will be to hamstring the Human Rights Court. Indeed, there is good reason to suppose that both the AEC Court and the ECOWAS Court will eventually face situations in which they must pronounce on human rights, possibly invoking the Banjul Charter.<sup>299</sup> The African Court should be aware of this potential jurisdictional conflict, and should resolve to entertain any human rights issue in the continent. There is no strong reason why this should not be so, and the Protocol appears to make specific provision for resolution of such disputes. Indeed, the Protocol provides that in case “of a dispute as to whether the Court has jurisdiction, the Court shall decide.”<sup>300</sup> This corresponds to a fundamental principle of international law, namely, the inherent power of a tribunal to interpret the text establishing its jurisdiction.<sup>301</sup>

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295. See Economic Community of West African States (ECOWAS) Revised Treaty, July 24, 1993, 35 I.L.M. 660 (1996) [hereinafter ECOWAS Revised Treaty], reprinted in 8 AFR. J. INT'L & COMP. L. 187 (1996). See generally Kofi Oteng Kufour, *Securing Compliance with the Judgements of the ECOWAS Court of Justice*, 8 AFR. J. INT'L & COMP. L. 1 (1996).

296. See, e.g., ECOWAS Revised Treaty, *supra* note 295, art. 4(g) (affirming “recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights” as fundamental objective of treaty); AEC Treaty, *supra* note 170, art. 3(g) (same).

297. Cf. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 219, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. I (Cmd. 5179-II) (“Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than [to the Court of Justice of the European Communities].”).

298. See, e.g., A.O. Obilade, *The African Court of Justice: Jurisdictional, Procedural and Enforcement Problems*, in AFRICAN ECONOMIC COMMUNITY TREATY, *supra* note 170, at 312, 314.

299. See *supra* note 296.

300. See Protocol, *supra* note 1, art. 3(2).

301. Of course, the Respondent State party always retains the right to file preliminary objections to the Court’s jurisdiction. This helps to ensure that the respondent party will not be subjected to a trial over which the Court has no jurisdiction. Albania, for example, was allowed to file such preliminary objections to the jurisdiction of the International Court of Justice in the Corfu Channel Case, Preliminary Objections

## 8. *Enforcement*

150 Finally, there is the hurdle of enforcement of the Court's judgments. States Parties must be given appropriate carrots and sticks to honor their duty under Article 30 to enforce the Court's orders. Historically, there has been an open resistance by African States to comply with binding orders of international courts. As Umozurike has pointed out, African states have usually been wary of taking disputes to international courts, feeling unease about the dominance of Western influence and jurisprudence.<sup>302</sup> This was evidenced, for example, by the OAU Charter's failure to provide any provision to refer disputes to the ICJ.

151 International law and society have changed, however, and, of late, the ICJ has vigorously pronounced on far reaching norms and principles of international law in a number of important decisions. African countries have increasingly resorted to the Court both in contentious and advisory opinion cases<sup>303</sup> and have carried out the decisions of the Court. In the process, they have contributed greatly to the development of international law.<sup>304</sup>

152 It is hoped that African States will also act in good faith with respect to the decisions of the African Human Rights Court. They should respect the rule of law and cooperate with the human rights supervisory organs. This is the only way that the authority of the Court can be made manifest and the citizens of the continent can develop confidence in the regional protection of human rights.

## B. *Recommendations*

153 With these hurdles in mind, I offer a few recommendations for increasing the effectiveness of the new African Human Rights Court once it is established. These refer to the establishment of the Court's rules of procedure, its relationship with the Commission, creative interpretation of its mandate, and the pressure that is needed from civil society to make these recommendations and other reforms reality.

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(U.K. v. Alb.), 1948 I.C.J. 15. (Mar. 25).

302. Umozurike, *supra* note 82, at 83–84.

303. To access full text versions of all the contentious and advisory opinions and orders of the ICJ from 1947–1999, see <<http://www.icj-cij.org/icjwww/idecisions.htm>>. Botswana, Burkina Faso, Burundi, Cameroon, Chad, Congo, Ethiopia, Guinea, Guinea Bissau, Liberia, Libya, Mali, Namibia, Nigeria, Rwanda, Senegal, South Africa, Tunisia, Uganda, and Western Sahara have all resorted to the ICJ's jurisdiction to resolve interstate disputes.

304. See *generally* T.O. ELIAS, AFRICA AND THE DEVELOPMENT OF INTERNATIONAL LAW (1972); T.O. Elias, *The Role of the International Court of Justice in Africa*, 1 AFR. J. INT'L & COMP. L. 11 (1989).

### 1. *Court's Rules of Procedure*

One of the initial tasks the Court will face will be the adoption of its regulations or rules of procedure.<sup>305</sup> The rules of procedure “shall lay down the detailed conditions under which the Court shall consider cases brought before it, bearing in mind the complementarity between the Commission and the Court.”<sup>306</sup> Accordingly, the way in which the Court formulates its rules of procedure will be crucial to the effectiveness with which the Court will be able to carry out its important task.

154

Problematic areas will include the issue of personal jurisdiction, particularly regulation of NGO status, questions of standing, direct access to the Court by individuals, and application to individual cases of the provisions on “other treaties,” “economic, social, and cultural rights,” and “group rights” in the Banjul Charter. There will also be the need to define the precise relationship between the Court and the Commission as well as the precise scope of the exception to automatic jurisdiction for “non-state cases,” that is, for NGOs and individuals. Others will relate to the commencement of proceedings before the court, notification of service of process, written briefs by the parties, oral evidence, preliminary objections, and interim measures of protection.

155

Given these important problematic areas, the Court should establish its rules in a detailed, thoughtful, and comprehensive manner. Human rights groups, government actors, international organizations, and other members of civil society should be given the opportunity to participate in the drafting and commenting process before the rules are adopted. This will allow a broad spectrum of voices to be heard and issues to be debated before these critical regulations are put into place. The Court and the Commission should also meet regularly to harmonize the rules of procedure and other aspects of their relationship.

156

### 2. *Relationship between the Commission and the Court*

One source of potential conflict between the Commission and the Court concerns jurisdiction. The Protocol has not provided any guidance as to when it might be appropriate to submit a complaint to the Court rather than to the Commission or *vice versa*. The option opened to the complainant may depend on the nature and seriousness of the violation, the remedy sought, and the political and diplomatic sensitivity surrounding the case. The Rules of Procedure should define this clearly. For the greatest effectiveness of the system, an unambiguous demarcation of areas of competence between the Commission and Court should be established. This will increase the legitimacy of both institutions, and, most importantly, of the system as a whole.

157

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305. See Protocol, *supra* note 1, art. 33 (“The Court shall draw up its own procedures. The Court shall consult the Commission as appropriate.”).

306. See Protocol, *supra* note 1, art. 8.

### 3. *Broad, Flexible, Creative Interpretation*

The rules of the system should be broad, flexible and creative so that the purposes of the Banjul Charter will not be defeated by mere technicalities. Accordingly, the Court should adopt an evolutionary approach to the interpretation of the Banjul Charter and other related instruments. The Banjul Charter must be kept abreast of the times and subjected to what Judge Huber, President of the International Court of Justice, has referred to as “inter-temporal law.”<sup>307</sup> This means that an international legal document must be interpreted in the light of the state of the law both at the time of its conclusion and at the time of application.

The Court has a lot to learn from other regional Courts in this regard. As Judge Sonia Picado Sotela of the Inter-American Court of Human Rights has reflected:

[A] court of human rights should be much more flexible than a regular court . . . . The international law of human rights is broader [than international law], and it should have more possibilities to really apply the principles of human rights. If we are going to believe in the enforcement of human rights, we have to take an attitude that is not very positivistic or legalistic, but instead [is in] the spirit of the law in the defense of human beings. In this sense, the judge should believe that a Court of human rights is obligated to create jurisprudence . . . . I believe that the court has the obligation to look for openings, because in reality these are new cases and different situations. We should bind ourselves, for example, neither to the civil procedure nor the criminal procedure of any state, but instead should look for openings.<sup>308</sup>

In *Marckx v. Belgium*, the European Court found that differences of treatment between “illegitimate” and “legitimate” children, which when the Convention was drafted had been regarded as “permissible and normal”, were no longer to be considered acceptable.<sup>309</sup> The same approach was used in the Northern Ireland homosexual case *Dudgeon v. United Kingdom*:

As compared with the era when [the criminal] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to

307. See *Island of Palmas Case* (U.S. v. Neth.), 2 R.I.A.A. 829 (1928).

308. Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14 HUM. RTS. Q. 171, 185 (1992).

309. *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 19 (1979), 2 Eur. H.R. Rep. 330, para. 41.

the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices [between consenting adults in private] as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member states.<sup>310</sup>

This technique of treaty construction has enabled the Strasbourg institutions to adapt the Convention standards to new situations in modern society, thus ensuring that they remain relevant.<sup>311</sup> At the same time, as the volume of cases considered by the Convention institutions increased, there was also a qualitative evolution in the legal orders of the Contracting States: the European Convention, as interpreted and applied by its institutions, has dug progressively deeper into the norms of modern society. In an ever-widening variety of circumstances, the question whether the legal order has, in the specific case, properly safeguarded the right or freedom in question has been frontally addressed. As Rolv Ryssdall puts it, "if the Convention as an instrument is a scalpel, it has gone from scraping the surface to making deep incisions."<sup>312</sup> The African Human Rights Court should take the same attitude to its mandate under the Protocol.

161

Such interpretative technique should inspire the supervisory organs of the African system and the inspiration should color their interpretation of the Banjul Charter. They can achieve a great deal in this regard if they engage in a creative interpretation of their mandate and of the treaties they are to supervise. Both the Banjul Charter and the Protocol under consideration offer plenty of opportunities for such interpretation. It is to be hoped that the Court will utilize these opportunities to the fullest. It will also be interesting to see if the Court builds a distinctive jurisprudence emphasizing the socio-economic rights provided for in the Banjul Charter. Notwithstanding the fact that the Charter places considerable emphasis on these rights, and does not seek to qualify their realization, the jurisprudence of the African Commission has tended to focus on civil and political rights.<sup>313</sup>

162

310. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) para. 60 (1982), 21 I.L.M. 554, 569-70, 4 Eur. H.R. Rep. 149, para. 60.

311. See generally D.J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1995).

312. Rolv Rupsdall, *Opinion: The Coming of Age of the European Convention on Human Rights*, 1 EUR. HUM. RTS. L. REV. 18, 22 (1996).

313. The exception to this general rule was the matter of *Free Legal Assistance Group et al v. Zaire*, 18 HUM. RTS. L.J. 32 (1997), where the Commission found that the failure to provide basic services such as safe drinking water and electricity and the shortage of medicine violated Article 16's guarantee of the right to health, and that the closure of secondary schools and universities violated Article 17 guaranteeing the right to education. It must be acknowledged, however, that the commitment of many African States to the realization of these rights does not often go beyond the rhetorical. At the same time, progress is severely limited by resource constraints and lack of political will. See, e.g., J.

163 A creative interpretation of the Banjul Charter and related instruments will leave behind rich human rights jurisprudence that will serve as a guiding light to national courts, as is the case with the Strasbourg Court. The case law of the European Court continues to exert an ever-deeper influence on the laws and social realities of the States Parties. At the same time, national courts in those states increasingly turn to the Strasbourg case law when deciding on human rights issues, freely applying the standards and principles developed by the Court.

#### 4. *Civil Society Pressure*

164 There is also the need for NGOs and the entire civil society in Africa to engage the Court and strengthen its procedures when it is eventually established. The experience of the African Commission and similar bodies in other regions is that NGOs play key roles in the effective functioning of such human rights mechanisms.

165 In any case, OAU Member States should ratify the Protocol without further delay. In fact, given the challenges facing the continent, a joint strategy is required. In this regard, it is useful to reiterate the conclusions of the *Report of the Experts Meeting on the African Court* held in Ouagadougou, Burkina Faso, December 7–9, 1998.<sup>314</sup> The Report emphasized the need to identify eminent and competent personalities in the different regions of Africa to enlighten public and government officials on the Protocol and to appeal for early ratification. It also emphasized the need to seek the assistance of the Ministers of Justice, attorneys-general, legal experts, and diplomats involved in the preparatory process leading to the adoption of the Protocol to urge and support the ratification process. The Report further highlighted the need to prepare a ratification kit to assist state officials in explaining the provisions of the Protocol and in drafting the necessary background documents for the attention of the ratifying authorities. Finally, the experts emphasized the need to explore the possibility of sending missions to various countries and regions to urge all concerned parties to expedite the ratification process and to identify focal points and officials in each country or region to coordinate the efforts for ratification of the Protocol.<sup>315</sup>

166 These recommendations commend themselves to this writer; indeed, all stakeholders, especially legal and other professional

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Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L. L.J. 1 (1995).

314. See OAU Doc. DOC/OS(XXV)/93 (Annex). The Experts meeting was convened by the ICJ, in collaboration with the OAU, primarily to reflect on how to ensure early ratification of the Protocol on the African Court. The participants were independent legal experts from Africa as well as representatives of the European Court on Human Rights and the Inter-American Commission of Human Rights.

315. *Id.* at 2.



associations, NGOs, and national human rights institutions should rise to the occasion and work to achieve early ratification. They should lobby their national governments both to ratify the Protocol and to make the Article 34(6) declaration. Those outside the African continent should lobby missions of African states in their own countries. NGOs should also organize national activities to disseminate the content of the Protocol and to lobby actively for its ratification by the appropriate authorities. The OAU Assembly should also take an active stand. It should, for example, pass resolutions urging Member States to ratify the Protocol and create other incentives for early ratification. Civil society and the OAU Assembly should also take an active role in pressuring African States to submit the declaration contemplated in Article 34(6) to provide their citizens the widest access to the protective powers of the Court.

#### 5. *Individual Access to the Court: Legal Aid Programs*

Every party to a case before the Court is entitled to legal representation of his choice.<sup>316</sup> Where a party is not represented, the Court is expected to provide free legal representation.<sup>317</sup> Legal representation at the Court will be necessary because of the technicalities of procedural rules and arguments. State Parties are, however, under no obligation under the Charter to provide free legal representation to indigent persons who cannot afford to hire counsel on their own.

167

By way of general recommendation and to complement the efforts of the Court in this regard, Member States should establish effective legal aid programs in Africa to guarantee the right to legal representation. This call is necessary because of the weak economy and poor income of most Africans. Many people are not capable of paying for legal services, without which it will be difficult for them to properly defend themselves or enforce their rights. Human rights lawyers and NGOs should equally brace up to the challenges ahead in this area and provide free legal representation in deserving cases.

168

#### 6. *Seat of the Court*

Member States of the OAU and its other policy organs will soon have to determine the seat of the Court, as the Protocol did not so provide.<sup>318</sup> In determining the Court's seat it is necessary to leave

169

316. See Protocol *supra* note 1, art. 10(2). Cf. Banjul Charter, *supra* note 4, art. 7(1)(C) (providing every individual shall have "the right to defen[s]e, including the right to be defended by counsel of his choice"). It is hoped, but far from certain, that the Court will be sufficiently funded to be able to arrange free legal services to indigent persons.

317. See Protocol, *supra* note 1, art. 10(2) ("Free legal representation may be provided where the interests of justice so required.").

318. See *id.* art. 25 ("The Court shall have its seat at the place determined by the

politics out of the decision and to ensure that due consideration is given to the facilities required for the effective functioning of the Court. The crucial factor is ensuring an enabling environment that includes adequate physical facilities and infrastructure, accessibility, information technology, library, and research facilities.

### 7. *International Cooperation*

170

Human rights are a concern of all nations and all peoples. As such, international cooperation is both welcome and necessary. The international community should be more supportive of Africa's endeavors to protect and ensure human and peoples' rights, bearing in mind the national, regional, and international dimensions within which African development efforts take place. This may come by way of resource assistance, both financial and otherwise, that will enable the Court to discharge its mandate. As indicated earlier, the Commission has enjoyed a great deal of goodwill and support from the international community; it is hoped that such goodwill will be extended to the Court as well.

## VI. CONCLUSION: BETTER LATE THAN NEVER

171

After more than a decade of experiments with regional human rights, Africans have come to realize that what their leaders gave them in the Banjul Charter was merely hortatory. It has not functioned in practice to guarantee or protect their rights. Gross violations of human rights still abound and, in many cases, appear to have increased. The failure of the Banjul Charter to establish a regional judicial institution for the protection of human rights has contributed to this end. In light of the above, the initial arguments canvassed against the establishment of a Court had to be challenged from several angles, leading to the acceptance by the OAU of the imperative for a Court.

172

The foundation for the protection of human rights in Africa was laid when the Banjul Charter was adopted. Some construction work has begun; but it has been very slow as the institutional framework of the Charter was very weak. We can speed up the building process. The adoption of the Protocol on the African Human Rights Court is a step in the right direction.

173

The African Court will, of course, not end human rights abuses in Africa overnight. It will, however, strengthen the regional human rights system as a whole, provide an important deterrent to human rights abuse, and help to further build a strong human rights culture in Africa. With this Protocol, the African human rights system now joins the ranks of the European and American systems. No more can human

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Assembly from among States parties to this Protocol . . . [which] may be changed by the Assembly after due consultation with the Court.").

rights breaches be swept under the carpet as internal affairs in Africa. But as the *Algiers Declaration* acknowledged, much remains to be done to bring these developments to the level of our own expectations and the legitimate aspirations of our peoples.<sup>319</sup>

The optimism of Africans is very high. The endeavor to legally establish the African Court on Human and Peoples' Rights has finally drawn to a successful close; although the process to make it an effective human rights institution has just begun. In the *Declaration of Ouagadougou*, adopted at the end of the Summit in which the Protocol was adopted, the OAU resolved to "work towards the establishment and consolidation of a credible and independent justice accessible to all" and to ensure "respect for human rights and fight impunity."<sup>320</sup>

174

It is hoped that the Court will not fail the people of Africa; rather, that it will bring healing to a continent that has been torn apart by coups, dictatorships, strife, wars, famine, and, above all, abuse of rights. To borrow the language of Christian Tomuschat, "It is not the legal perfection of its normative structure that matters in the last analysis, but its actual impact on the real enjoyment of human rights."<sup>321</sup> The battle to make human rights realizable in Africa is not yet over. Africans are anxiously waiting for their Court. The Protocol itself has been late in coming; but it is better late than never.

175

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319. See *Algiers Declaration*, *supra* note 83, pmbl.

320. See OAU Doc. AHG/Decl.1 (XXXIV).

321. Christian Tomuschat, *Quo Vadis, Argentoratium? The Success Story of the European Convention on Human Rights – and a Few Dark Stains*, 13 HUM. RTS. L.J. 401, 401 (1992).