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TOWARDS AN AFRICAN COURT OF HUMAN RIGHTS: STRUCTURING AND THE COURT

VINCENT O. ORLU NMEIELLE*

I. INTRODUCTION

African human rights discourse assumed a new dimension¹ with the adoption of the African Charter on Human and Peoples' Rights (the Charter) in Nairobi in 1981 by the Assembly of Heads of State and Government (AHSG) of the Organization of African Unity (OAU). The Charter was born out of the conviction of the African States of the need for a home-grown regional human rights commitment in light of international standards laid down by the Universal Declaration of Human Rights, other subsequent norm-creating international human rights instruments, and the experience of other regions. Further, the African states, which had long been preoccupied with their struggles against colonial domination, realized that after more than two decades of the end of *de jure* colonialism, a need existed to organize for the protection of the

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1. Before this time, human rights discourse in Africa centered on the condemnation of African colonialism and the terrible practice of apartheid in South Africa.

rights of African people against violations by their own home governments.²

While these assertions may provide some of the underlying reasons for the promulgation of the Charter, the state of human rights in many African countries at that time was problematic. Totalitarianism was in the air, either in the form of military governments or party-dominated autocracies. This threat created much of the regional and international outcry, as well as a need for action.

When the Charter came into force in 1986, many commentators viewed the document as unique, impressive in its elaborate provisions, and ground breaking in such progressive provisions as "Peoples' rights" and the incorporation of economic, social and cultural rights. Yet analysis has since shown that the mechanism for the protection and enforcement of human rights under the Charter is not effective. The African Commission (the Commission) created under the Charter with the responsibility of giving effect to its provisions lacks the necessary effective authority to carry out its mandate. The lack of provision for a judicial organ, in this case, a court, compounds the problem of the weakness of the entire system.

The purpose of this paper is to argue the need for an African Court of Human Rights if African states truly wish to maintain an African human rights mechanism. In other words, for an effective African regional human rights protection and enforcement mechanism to exist, the African system must be made more effective and supplemented with a court of human rights. The proposal for an African Court of Human Rights will require an amendment of the Charter by a treaty or convention. Recent human rights violations include those that took place in Nigeria, in former Zaire under Mobutu Seseko, and the carnage and genocide in Rwanda.

This paper is divided into four sections. Section one offers a brief evaluation of the current system, with the aim of pointing out its inherent weaknesses and possible means to strengthen it. This necessarily involves an evaluation of the Commission and the effectiveness of its mandate as a remedy for human rights violations. Section two builds on

2. For example, the oppressive regimes of Idi Amin's Uganda, Bokasa's Central African Empire, and Nguema's Equatorial Guinea, just to mention a few, were viewed internationally as paradigmatic of African leadership. The continent's leadership needed to reclaim international legitimacy and salvage its image.

the previous section to present arguments in favor of a court. Section three suggests a structure for the court in terms of composition, basic foundation, and its relationship with the Commission. Finally, section four focuses on how to empower the court in terms of jurisdiction, independence, enforcement of its decisions, and funding.

The author will draw inspiration from existing international and regional mechanisms,³ as well as current initiatives in the African region.⁴ The author will comment on and make use of the Draft Protocol to the African Charter on Human and Peoples' Rights already in place, considering it as a possible treaty or convention-based amendment to the African Charter.

II. BRIEF EVALUATION OF THE PRESENT AFRICAN HUMAN RIGHTS

This section will evaluate and analyze some aspects of the mechanism bordering on some substantive provisions of the Charter affecting the African Commission. These are provisions that tend to clog the effective realization of the mandate created by the entire mechanism, particularly, the mandate of the Commission and the remedy inherent in the exercise of this mandate. This section will not recount the history of the African Charter, nor is it intended to describe the process of the mechanism established by the Charter in general.

A. THE AFRICAN COMMISSION

Under Article 30 of the African Charter, the African Commission on Human and Peoples' Rights was established as the implementing institution of the Charter, with the basic mandate to "promote Human and Peoples' Rights and to ensure their protection in Africa."⁵ The contents of this promotional function were elaborated and emphasized in Article

3. While the African system may not duplicate the Inter-American and European systems, it will be very useful to draw from their experiences and evolution.

4. Such an initiative is the meeting of "government experts on the question of the creation of an African Court on Human and Peoples' Rights" held in Cape Town, South Africa from September 6 - 12, 1995, under the auspices of the International Commission of Jurists and the OAU by virtue of its Resolution AHG/230(XXX) at the Tunis Summit in June 1994 (in which the Secretary General of the OAU was invited to summon experts to meet on the establishment of an African Court for Human Rights). This meeting was held in collaboration with the South African Ministry of Justice. The meeting came up with a proposed Draft Protocol to the African Charter on the establishment of an African Court on Human and Peoples' Rights.

5. For the general provisions on the Charter and its composition, *see* Articles 30 - 44. These provisions deal with the basic administrative set-up of the Commission.

45 dealing with the mandate of the Commission. This mandate ranges from collection of documents, organizing conferences and seminars, formulation of legal principles and rules aimed at the solution of legal problems relating to human rights, collaboration with state parties and the like. The basic question here is, why is the mandate of the commission centered on promotional activities rather than on protection and enforcement? There is, no doubt, great need for promotional activities especially in the African system. Should promotion, no matter how important, take over the place of protection and enforcement? The usual answer to the above questions is that at the time the African Charter was adopted, member states were not prepared to accept anything not contained in the Charter.⁶ In other words, the Charter was a compromise document not meant to be very effective, nor was the Commission, its implementing institution. As such, the Charter was not intended to go too far in guaranteeing human rights at the African regional level.

It may be argued that given the fact that the Charter was ratified by many member states, it was not intended to go very far. Thus, many states were prepared to ratify it so long as the Charter did not impose heavy burdens. It has been suggested, and rightly so, that one of the key purposes of any human rights instrument is the control of state action.⁷ It is also certain that the object and purpose of the Charter is the protection of human rights in accordance with international standards rather than a particular African standard. However, the Charter was not given the power to do these tasks because of the lack of an effective enforcement machinery under it. According to Claude E. Welch Jr., "beyond the official prose of the Charter, the program of action, and the guidelines for national periodic reports, the current situation is far from satisfactory."⁸ In the opinion of this author, the Charter was, at least in spirit, an ineffective compromise.

6. This view is often attributed to Judge Keba Mbaye, the "father" and principal author of the African Charter, who said, "we have already highlighted the inadequacies of the norms conceived and elaborated in the Charter. The criticisms that have been made about the prospect are perhaps too harsh. We must remember that in 1981, the year in which the African Charter was adopted, Africa was not prepared to accept, either materially or institutionally, anything that was not contained in the African Charter on Human and Peoples' Rights." See specifically, the Address by Adama Dieng, Secretary General for the International Commission of Jurists at the meeting of government experts on the question of the creation of an African Court on Human and Peoples' Rights held in Cape Town, South Africa on September 6 - 12, 1995, in which he quoted Judge Keba Mbaye.

7. Makau Mutua, *The African Human Rights System In a Comparative Perspective: The Need for Urgent Reformulation* 5 LEGAL FELLOW 31 (1993).

8. Claude E. Welch, Jr., *The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment* 14 HUM. RTS. Q. 42 at 53 (1992). Welch, however, is of the view that the situation is not as serious as the Commission's most severe critics allege.

Nevertheless, on balance, it appears that the Charter is a limited document. It is important to point out the inherent weakness in the entire mechanism through a treaty-based amendment. This in turn amounts to a correction of these weaknesses based on treaty law, rather than on judicial or quasi-judicial pronouncements. One of these weaknesses which affects the Commission is the political control which Assembly of Heads of State and Government of the OAU exercises over it. The Commission is made dependent on the political control of the Assembly of Heads of State and Government, which, of course, is composed of member states whose actions the Commission is set up to consider.

One basic problem presented by this control is the lack of publicity given to the Commission's work. Article 59 of the Charter, which deals with the Commission's procedure, provides that "all measures taken within the provisions of the present Charter shall remain confidential until such a time as the Assembly of Heads of State and Government [AHSO] shall otherwise decide." The Commission interprets this to mean that it cannot mention the cases, nor the countries complained against, nor the stages reached in individual cases.⁹ Further, the Commission cannot even publish its report, as indicated by subsection 2 of Article 59. Under section 59(2) the chairman of the Commission can only publish the Commission's report on the decision of the AHSO. From the inception of the African System, the AHSO has not readily authorized the publication of any report of the Commission until recently. This lack of publicity has given a wide impression that the communication procedure of the Commission cannot be relied upon by potential petitioners,¹⁰ resulting in few communications addressed to the Commission.

What effect will a human rights mechanism have if the freedom to make its activities public is removed? The effect of publicity in the field of human rights protection cannot be overemphasized. Other international procedures encourage the publication of reports and activities of the systems under which they are set up. The successes of the Inter American and European systems were largely achieved by the freedom they enjoyed to publicize their activities. Reports of the European Commission are published in nearly all cases by the Committee of Ministers,¹¹ while the Inter American Commission decides on its own, by virtue of article 51(3) of the American Convention, Human Rights,

9. Wolfgang Benedek, *The African Charter and Commission on Human and Peoples' Rights; How to Make it More Effective*, 1 NETH. Q.H.R. 25 at 29 (1993).

10. *Id.*

11. *Id.*; European Convention on Human Rights, art. 32(3).

decides whether to publish its report. Thus, it is desirable for the Charter to mandate the Commission to publish its reports in cases that come before it.

Second, the Commission lacks adequate resources, equipment, and support to make it truly effective. The serious financial problems of the OAU affect the Commission, and have prevented it from operating at its full capacity. There is no doubt that the OAU is in financial crisis, due to the poverty of the majority of its member states who cannot and do not live up to their financial obligations. One example of the dearth of financial resources is the failure to construct the planned information and documentation center. Yet there have been increasing human rights violations in Africa, and thus, more need for the Commission to be able to do the work it is set up to do. The hope is that member states will endeavor to make the Commission more financially viable. There is also a need for more international financial support for the Commission if the international outcry against the terrible human rights situation in Africa is sincere. This will enhance the gains already made by the international assistance already extended to the Commission, mainly from the European Community and the UN Voluntary Fund for Advisory Services.¹²

Finally, from its beginning, a weakness of the Commission has been the lack of activist conviction of its members, especially, the initial Commissioners, since members of the Commission were not interested in judicial activism aimed at developing the jurisprudence of the Commission. Despite the evasive nature of the mandate of the Commission in the Charter, there are ample provisions upon which the Commission can rely to serve the purposes of human rights protection and even enforcement. Since the Commission has the mandate of drawing up its rules of procedure,¹³ it could use that measure to assert some level of independence in construing the Charter.

The Commission also has the power under article 45(1)b to formulate principles and rules aimed at the solution of legal problems relating to human rights and fundamental freedom upon which the African Governments may base legislation. Article 60 gives the Commission the power to draw "inspiration from international laws . . ." while Article 61 allows it "to take into consideration, as subsidiary measures to determine

12. See Welch, *supra* note 8, at 54. It is estimated that each of these bodies has committed approximately \$200,000 to the purse of the Commission.

13. African Charter on Human and Peoples' Rights, art. 42(2).

the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human rights, customs generally accepted as law, general principles of law recognized by African states as well as jurisprudence and legal doctrine.” The combined effect of these provisions, it can be argued, is the power to apply international standards in Commission deliberations. Thus, the Commission could use innovation to realize what it was expressly or impliedly denied in the Charter.

Critics of the Commission argue that the Commissioners have been unwilling to use these windows of opportunity for a number of reasons, including their close relationships to the African states.¹⁴ Many of the commissioners were or still are prominent officials in their states of origin, which makes it difficult for such individuals to act independently.¹⁵

Recent activities of the commissioners, however, suggest the willingness of the Commission to be more progressive in interpreting the Charter and using its powers under it. The Commission now appears willing, for example, to circumvent the restrictive provisions of Rule 32 of its procedure endorsing in camera sittings and sessions of the Commission.¹⁶ Scholars of African Human Rights¹⁷ note the following as reasons for the shift in practice: (1) the increased self-confidence the Commission has gained over time, (2) the growing number of qualified observers such as international non-governmental agencies, and (3) recognition of the need that the work of the Commission be understood and supported by the public in order to be effective.

The Commission has also started trying to circumvent the confidentiality feature of the Charter under Article 59 which has brought the efficacy of

14. Mutua, *supra* note 7, at 34

15. *Id.*, Examples of such membership in the Commission are two former Commissioners, Moleki D. Mokama and Alexis Gabou, who during their term of office on the Commission, also served as Attorney General and Minister of Interior of Botswana and Congo, respectively. See specifically, EVELYN A. ANKUMA, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURE* 18 (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1996). *Infra* note 18.

16. In its ninth session in Lagos, Nigeria in March, 1991 the Commission allowed observers to view all meetings except those dealing with protection activities and the report to the OAU. The Commission has also recently undertaken visits to some member countries to review the human rights situation in those countries, the most recent being the visit by a delegation of the Commission to Nigeria, on the invitation of the government in March, 1996.

17. Welch, *supra* note 8 at 54.

the Charter into question. In an attempt to publicize the Commission's activities, in 1991, non-governmental organizations (NGOs) attending the Commission's session and working with the Commission, established an NGO register under the supervision of the International Commission of Jurists. Under this system, individuals, NGOs, and others who have submitted complaints to the Commission are to record their complaints and any information received by the Commission on the status of the complaint in the register.¹⁸ This system, which is supposed to make the activities of the Commission accessible, regrettably has not been made much use of by many NGOs.¹⁹ The Commission also distributes its Final Communique, issued at the end of each Ordinary Session, as well as press releases and its Annual Activity Report, which becomes a public document after its adoption by the AHSG.²⁰

While these attempts at publicity are commendable, the Commission still maintains a restrictive interpretation of the confidentiality provision of the Charter on its activities. The Commission does not publish the method by which it reaches its decisions on admissibility and the substantive rights in the Charter.²¹ In other words, apart from its Final Communique, press releases, Annual Activity Report and the "Review of the African Commission on Human and Peoples' Rights", there is no publication of the deliberation and reasoned decision of cases by the Commission.

Thus, it must be said that there is still a lack of full confidence on the part of the Commissioners to explore the Commission's hidden powers, as discussed earlier. There needs to be a major reformulation of the African Charter to incorporate express powers to the Commission in light of the needs of the human rights environment in Africa. There is no doubt that an express provision of law is better than implied authority, at least for the purpose of providing effective remedies.

B. REMEDY UNDER THE CHARTER

Even if the commission concludes that there has been a violation of rights, what effective remedy does the African Charter provide for? In

18. EVELYN A. ANKUMA, *THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: PRACTICE AND PROCEDURE* 39 (The Hague, The Netherlands: Martinus Nijhoff Publishers, 1996).

19. *Id.*

20. *Id.* The Seventh Activity Report of the Commission, considered by the ASHG at its 30th session in Tunis in 1994 and published by the OAU, went a step further in disclosing the status of the cases submitted to the Commission.

21. *Id.* at 77.

fact, the Charter does not offer significant remedies. Article 58 of the Charter provides:

(1) When it appears after deliberations of the Commission that one or more exceptional situations apparently reveal the existence of a series of serious or massive violations of human and Peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to them.

(2) The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these situations and make a factual report, accompanied by its findings and recommendations.

(3) A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request in-depth study.

One must agree with Wolfgang²² on his comment about these provisions. According to him, there is a distinction between the remedy available in ordinary cases of violations and special cases of violations. He opines that while there appears to be a remedy in special cases, there is no remedy in ordinary cases of violation. Special cases are those involving the existence of serious or massive violations of human and Peoples' rights. Thus, whether a remedy is available or not is dependent on whether the act complained of is a serious and massive violation of human rights or requires emergency action, or is an ordinary abuse of human rights. The remedy, whether there is an ordinary abuse or a special or emergency case, is in-depth study after the Commission either makes factual reports to the AHSG or draws the AHSG's attention to them.

What remedy, if any, does in-depth study or recommendation provide? The Assembly of Heads of States and Governments is not a body that is in session all year round, nor does the Commission have the power to summon such assembly. The AHSG has not been known to order an in-depth study as suggested by Article 58. Indeed, the AHSG has been known to be strongly guided by the OAU's objective of non-intervention in member countries' internal affairs, which has been the organization's attitude towards human rights violations by its members. As a result, the

22. Wolfgang, *supra* note 9, at 31.

Charter remedy is ineffective and there is in fact, no remedy within the Charter. A former Chairman of the Commission summed up the situation thus:

The enforcement procedure is unsatisfactory. In the absence of a court and effective measures to a breach, the Charter may well be a paper tiger except for public opinion that may be whipped up against the offender. The Commission may investigate, discuss and make recommendations to the states concerned. Do these include the award of damages, restoration or reparation? The Assembly can only ask the commission to make in-depth studies. The Charter does not state that it can condemn an offending state.²³

This obvious inherent lack of effective remedy in the African human rights mechanism should be corrected by amending the Charter to provide for a court without the Commission's limitations and to align new roles to be performed by the Commission with those to be performed by the court.

III. THE NEED FOR A COURT

Critics of the proposition that the African mechanism needs a court often argue that the idea of a court is not in keeping with traditional African ways of dispute resolution. They maintain that mediation and conciliation are the proper avenues, as mechanisms rooted in African tradition.²⁴ The tenability of that argument today remains to be judged by the realities of present day Africa in light of the ineffectiveness of the present mechanism under the Charter. Why should traditional African considerations prevail in the area of human rights? Domestic legal institutions are not modeled on traditional African ways of dispute resolution; rather, they duplicate the various legal systems of Africa's colonial past. According to Dieng,²⁵ "the delights of traditional anthropology should not lull us to the point of obscuring reality. Today, the time has come to accede to the demands of Africans who feel it

23. U.O. MOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS*, Nigerian Institute of Advanced Legal Studies, 25 (1992).

24. Dieng, *supra* note 6, at 4.

25. *Id.*

indispensable for the victims of human rights violations, or their representatives, to have recourse to judicial process on demand."²⁶

Apart from the traditional African mode of settling disputed questions, critics may also have another objection, a fear which is common to all other international mechanisms; that that the values of one legal system would dominate the court to the subordination or exclusion of other values.²⁷ This objection, juridical in nature, has become irrelevant, since a regional court, like other international mechanisms, would apply principles of international law, which are based on international customs, rather than any particular body of common or civil law.²⁸ International law, it has been agreed, involves an amalgam of commonly held values of all nations, rather than a reflection of the values of any one particular legal system or philosophy.²⁹

Another objection that has always been an issue in international law is that any international mechanism like a court of human rights infringes upon the national sovereignty of member states.³⁰ Scholars have argued that one way to remove this fear from members is to provide for an optional clause similar to article 36 of the Statute of the International Court of Justice (ICJ).³¹ Alternatively, two bases of jurisdiction, compulsory and advisory, have been suggested in order to attract general membership to an international mechanism.

While it is desirable to attract many state members to an international or regional mechanism, it should be noted that human rights law should supersede the notion of national sovereignty.³² Individuals are the beneficiaries of international human rights law and thus, must be shielded from abuses of national sovereignty. States must accept that human rights law is inherently a limit on the scope of state action. For example, one cannot torture people as a matter of state policy any more than one can wage aggressive war. In modern international law, sovereignty does not confer the right to do either. The opinion of the Inter-American Court of Human Rights in one of its advisory opinions

26. *Id.*

27. Nanette Dumas, *Enforcement of Human Rights Standards: An International Human Rights Court and Other Proposals*, 13 HASTINGS INT'L & COMP. L. Rev. 592 (1990).

28. *Id.*

29. *Id.*

30. *Id.* at 593.

31. *Id.*

32. *Id.*

on the real nature of human rights instruments is persuasive. According to the court:

[M]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting states. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but toward all individuals within their jurisdiction³³

The above quote indicates the importance of the individual in human rights jurisprudence even though individuals are not *per se* subjects of international law. It is even arguable that human rights treaties make them subjects of international law.

Some scholars of African Human Rights have concluded that a weak enforcement machinery such as the African Commission was all that was feasible at the time of the adoption of the African Charter, and would have made the establishment of a court premature at that time. Subsequent establishment of a court would therefore depend on how the initial organ functioned.³⁴

The current situation in Africa indicates the need for such a court. One basic question that may arise is whether African states are ready to cooperate in establishing a court of human rights. That readiness is can be gleaned from the resolution of the Assembly of Heads of State and Government³⁵ during the Summit of the OAU in Tunis in June 1994, in which the Secretary General of the organization was called upon to summon experts to meet on the establishment of an African Court of Human Rights. Further, the wind of democratization is blowing across Africa; and the fall of apartheid in South Africa poses a great challenge

33. Inter-Am. C.H.R., Advisory Opinion OC-2/82, Ser. A, No.2, 29 (1982). This opinion is based on the effect of reservations on entry into force of the American Convention.

34. EZE C. OSITA, HUMAN RIGHTS IN AFRICA: SOME SELECTED PROBLEMS, The Nigerian Institute of International Affairs in co-operation with Macmillan Nigeria Publishers Ltd. 226 (1984).

35. Resolution AHG/230(XXX) June 1994. *Supra* note 4.

to African governments to emphasize social justice both at the domestic and regional level.³⁶

The present realities of human rights in Africa today make the establishment of a court invaluable for the following reasons:

First, the protection of human rights under the African Charter and its institution has not been effectively realized, and will continue as such if nothing is done. The African Commission as presently structured and mandated is merely a committee making recommendations to the Assembly of Heads of State and Government of the Organization of African Unity, which holds the ultimate word. This procedure has already subjected the human rights situation in Africa to subjective political considerations, and has inevitably weakened the position of the only organ meant for protection functions.³⁷ A sincere effort at eradicating the shortcomings of the present mechanism will necessarily entail the establishment of a court, which in turn will involve a reformulation of the Charter. A question that may arise in this regard is whether solving the problem necessarily requires a court; whether a stronger Commission would not solve the problem. However, the basic issue here is enforcement, a power which may not easily be given to a commission by member states. Moreover, experience has shown even within the UN system that a commission does not possess the authority to issue a binding and enforceable decision.

Second, the experience of other regional counterparts of the African system has shown that a court is necessary for the articulation of international legal principles at the regional level. An authoritative statement of this principles by a judicial organ is needed. These principles may be articulated either in the court's exercise of compulsory jurisdiction, or in jurisdiction of an advisory nature.³⁸ This will necessarily lead to uniformity in the definition of international human

36. Mandela's South Africa, together with the International Commission of Jurists, is in the forefront of this new crusade for the addition of a judicial organ to the present African Mechanism.

37. For a detailed discussion of this proposition, see N.S. REMBE, *THE SYSTEM OF PROTECTION OF HUMAN RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: PROBLEMS AND PROSPECTS*, Institute of Southern African Studies, National University of Lesotho 1 (1991).

38. It could be said that the Inter-American Court achieved its major success in the human rights situations of Central and Southern American countries from the articulation of international legal principles under the appropriate instruments primarily by way of advisory opinions. The same can be said of the International Court of Justice (ICJ) and the European Court of Human Rights. A court in the traditional sense is required to properly articulate and enforce a legal principle, especially in international law; and particularly in human rights law.

rights obligations assumed by member states, which in turn will lead to development of standards in the region concerning other issues that will come before the court. Such uniformity would create a system fair to both the defending state parties and the victims, rather than permit human rights violators to go unpunished³⁹ as in the present mechanism.

Third, human rights enforcement is likely to be more easily realized with the establishment of a court than in the present situation. A case coming before the court will entail publicity, not the confidentiality and secrecy of the present system. Even where a decision of a court is an advisory opinion and therefore not binding, it usually attracts far-reaching publicity and promotes compliance. States are known to have complied with advisory decisions, either in ending violations of human rights or adopting laws that follow the opinion of the court.⁴⁰ In human rights law, adverse publicity serves as a form of sanction.⁴¹ Condemnation of a state action by a regional court attaches a serious obligation to state party, and is therefore more effective in commanding the respect of that state. Also, domestic courts, especially courts with common law traditions in Africa, will look to a human rights court for direction and precedents in their application of human rights instruments at the domestic level.⁴²

Fourth and finally, as a regional human rights organ, a court can be an important instrument in sustaining constitutional democracies and facilitating the fulfillment of human rights which are now universally recognized.⁴³ Domestic systems ought to be committed to basic values of the modern international movement such as democracy, humane government; and the fulfillment of the basic human rights established by the international system⁴⁴ but are oftentimes times guaranteed by domestic constitutions without assurance of protection. A court would therefore serve as an external check to ensure that democracies follow the rules.

39. Dumas, *supra* note 27, at 585.

40. This has been particularly true in the case of the Inter-American system, where the exercise of the court's advisory jurisdiction set the ground for enunciating doctrinal principles in international human rights law as it affects the Americas. For more detail on the advisory jurisdiction of the Inter-American Court, see Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985).

41. REMBE, *supra* note 37, at 39.

42. *Registered Trustees of the Constitutional Rights Projects v. The President of the Federal Republic of Nigeria and 2 Others*, 3 J. HUM. RTS. L. PRAC. 217 (1993).

43. W. Michael Resiman, *Practical Matters For Consideration In The Establishment Of a Regional Human Rights Mechanism: Lessons From The Inter-American Experience*, ST. LOUIS-WARSZAW TRANSATLANTIC L.J. 89 at 100 (1995).

44. *Id.*

IV. STRUCTURING THE COURT

A. COMPOSITION

Establishing an African Court of Human Rights would require a composition that takes into account African geography and legal traditions. The two basic legal traditions in Africa are the common and civil law traditions.⁴⁵ Geographical considerations should take cognizance of proportionate representation of African states based on regions. Consideration of the population density of countries in the various regions will prove useful in this regard.

The generally accepted regional divisions of Africa include Northern Africa, Central Africa, Southern Africa, Eastern Africa, Western Africa, and the Islands. There is a greater concentration of countries in the west, a lesser concentration in the Islands, and a relatively equal concentration of countries in the other regional divisions. Composing a court based on population density will also contribute to balancing of legal traditions, since all the regions tend to have countries with legal systems based on the common and civil law traditions. The reason for regional rather than state representation on the court is clear, both for economic and practical reasons.⁴⁶

If composition based on regional representation is acceptable, numerical representation by region should then be determined. This paper proposes that the court be composed of thirteen judges, two representing each region of the Northern, Central, Southern, and Eastern divides, with the Western region represented by three judges, and the Island region by one.⁴⁷ This mode of allocation takes cognizance of the number of countries that compose the regions. While the west has the largest

45. It should be noted, however, that the notion of personal law is growing to be another legal tradition in Africa. This class includes customary law, or native law and custom which has become an integral part of African legal tradition. Sharia law, for instance, is seen as personal law; thus, it is customary law in areas where common law and civil law are predominant. On the other hand, there are Islamic States in Africa, where Sharia is the main or major legal tradition. Sharia is believed to be God's law for the Islamic community, indeed, for all human kind. *See* JOHN L. ESPOSITO, *ISLAM: THE STRAIGHT PATH* 88 (Oxford University Press, 1990.) *See also* S.G. VESEY-FITZGERALD, *NATURE AND SOURCES OF THE SHARIA IN LAW IN THE MIDDLE EAST* 85 (Magidd Khadim and Herbert J. Libesny, eds., 1955.)

46. Compare this situation with the European mechanism, where each state party is represented in the European Court of Human Rights through the European Convention on Human Rights. Africa is made up of fifty three countries. It would generally be impractical to begin a court with fifty three members.

47. This proposal would be subject to negotiation by member states. While negotiation on numerical representation may be difficult, it would be reasonable for member states to consider the concentration of countries in the various regions.

concentration of countries, the Islands have the smallest concentration. Further, the composition of thirteen judges would offer the court a good selection of judges from across the African continent.⁴⁸

The court should consist of persons of the highest moral integrity who have shown demonstrated interest and commitment in the field of human rights, and with wide-ranging experience and qualifications.⁴⁹ This would ordinarily include qualified lawyers, judges, scholars and juriconsults. It has been argued that one need not be a lawyer to be acquainted with human rights, and thus, non-lawyers could be members of a human rights court. While this may be true, being a member of a court necessarily involves the articulation of legal principles, which could be said to be the exclusive preserve of lawyers. It does not follow, however, that all lawyers are necessarily knowledgeable in human rights law.

Member countries should ordinarily⁵⁰ make the nominations of who should compose the court by way of appointment,⁵¹ while actual election should be undertaken by the Assembly of Heads of State and Government of the OAU.⁵² Wa Mutua⁵³ is of the view that members of the court should be proposed by the African Bar Association together

48. Note that under Article 10 of the Draft Protocol to the African Charter on Human and Peoples' Rights, there is a provision to the effect that the court shall consist of eleven judges. Under Article 11 of the said Protocol, the composition is explained as emphasizing representation of all regions of Africa and also, adequate representation of women in the court in relation to men.

49. This is the usual qualification required of judges and other members of international human rights tribunals or quasi-judicial organs. See specifically American Convention on Human Rights, art. 52 (1). Compare European Convention on Human Rights, art. 38; and Covenant on Civil and Political Rights, art. 28(2) dealing with the qualification of the members of the Inter-American Commission, the European Commission and the UN Human Rights Committee respectively.

50. It may be stressed that states may not always nominate members of a regional or international tribunal. The approach taken under the Statute of the International Court of Justice (ICJ), which uses groups of independent experts to make nominations of members of the court, may as well serve as a mode of appointing members of the proposed African Court. This mode, it is argued, may lessen the prospect of nominating poorly qualified persons as political favors. See Mutua, *supra* note 7, on his proposal of using the African Bar Association and other national Bars to make nomination to the African Court.

See specifically Statute of the International Court of Justice, art. 4 which provides that members of the ICJ shall be elected by the UN General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration... or by national groups appointed for that purpose by governments, members of the UN not represented in the Permanent Court of Arbitration.

51. Representing the countries in this case will imply country of origin rather than representing the interest of the country in question since the members of the court are supposed to serve in their individual and personal capacities.

52. See Proposed Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, art. 11, 12, and 13 [hereinafter Draft Protocol].

53. Mutua, *supra* note 7, at 34.

with the national bar association of the country from which the candidates originated. This author believes that one of the reasons behind this view is the need for the court to be an impartial body; a body without the slightest influence from their home governments. Another reason is to enhance individuality of each judge to the court. It is actually desirable to have an independent body with input by the bar of African countries. It needs to be stated, however, that the political realities of the situation will require states to be given the opportunity to nominate candidates, provided the candidates possess the requisite qualifications and the commitment to break new ground in human rights enforcement in Africa. States will be very unwilling to relinquish this function to bar associations at least at the early stages.

B. BASIC FRAMEWORK

Scholars of African human rights systems have on many occasions lamented the non-existence of an African Court on Human Rights as compounding the problem of human rights enforcement in Africa. They recommend such a court. However, none has suggested any structural framework. A guess would be that they envisage that the structure of an African Court of Human Rights should be drawn from such existing mechanisms in Europe and the Americas and the International Court of Justice. Indeed, the structure of an African Court should be inspired by these forerunner institutions, provided the special needs of the African continent are taken into consideration.⁵⁴ Accordingly, the structure to be developed should be able to withstand the test of time. In other words, the structure, while focusing on the present, should envisage the volume of work that the court will have to face in the future, and should aim at establishing a permanent court as an institution.

The following basic structure should be put in place by way of an amendment such as the Draft Protocol:

First, with the election of the judges by member states of the OAU assembled, the judges should be able to elect the officers of the court, namely, the president and vice president,⁵⁵ whose duties as well as other

54. The drafters of the Draft Protocol on the African Court for Human and Peoples' Rights give credence to the fact of drawing inspiration from existing regional and international systems in the Explanatory Notes to the Draft Protocol.

55. See Draft Protocol, art. 18. Compare African Charter on Human and Peoples' Rights, art. 42(1) with respect to members of the African Commission; Statute of the Inter-American Court of Human Rights, art. 12(1); and European Convention on Human Rights, art. 41.

requirements should be spelled out by the rules of the court which would be made by the court, as in other regional practices.⁵⁶

Second, the functional structure of the court would require a plenary court and chambers as the need arises. Article 20 of the Draft Protocol provides for a quorum of seven judges for the court based on its provision for eleven judges as members of the court; and requires the establishment of two chambers of five Judges each "if the need arises." It might be necessary that a separate provision be made in the Protocol for the establishment of chambers, unless it is envisaged to be a matter directly within the competence of the court to deal with in its rulemaking power.⁵⁷ In this author's opinion, the two chambers should consist of five judges each, and judges of the various chambers should be allowed to rotate based on the number of judges proposed in the composition subsection above.

When the court is fully established, the majority of cases should be decided by the various chambers. The plenary court would be invested with the power of deciding cases of great importance to the establishment or restatement of important principles of international human rights law and the interpretation of the African Charter as it affects the domestic law of member states, or where the court sees it necessary to overrule itself and depart from its earlier decision.⁵⁸

The importance of this procedure cannot be overemphasized. It will afford a greater sense of direction to domestic courts as to how to apply their own law, especially for legal traditions that place precedential emphasis on the decision of a higher court. Further, the plenary court could help to shape development of the entire system and gain the confidence of member states, who may ordinarily be reluctant to recognize the jurisdiction of limited panels of the court.

56. See Article 42 (2) of the African Charter; Article 22 of the Draft Protocol on the African Charter; Article 55 of the European Convention; and Article 60 of the American Convention on Human Rights.

57. Article 26 of Protocol 11 reforming the European System specifically provides, *inter alia*, that the new court shall sit in chambers. However, it appears that under the Statute of the UN Tribunal for the former Yugoslavia, the issue of chambers was left to the court to organize as the need arose. This author is of the view that specifically providing for the chambers in the protocol is preferable to leaving it to the discretion of the court.

58. Under Rule 15 of the Rules of the European Court of Human Rights, a chamber of the court has discretion to relinquish jurisdiction to the plenary court if a case raises serious issues of interpretation of the Convention, but must relinquish such jurisdiction in the event of a possible departure from previous case law. Note that under the new Protocol 11, some of the jurisdiction with respect to certain matters of the present Plenary Court will be exercised by the new Grand Chamber, while the new Plenary Court will be involved with administrative matters.

Third, the court will require a registry or secretariat that will carry out the administrative aspects of the court's functions. The functions of the registry will necessarily involve preparing cases, having the relevant official attend the court's deliberations, and drafting judgments in light of the deliberations. The registrar should ordinarily be appointed by the court and not by a political body like the OAU acting through its secretary general.⁵⁹ This is one area where the independence of the court should be emphasized. With respect to the proposed court, Draft Article 21 (1) of the Draft Protocol tried to correct the defect noticed in the Charter with regard to the Commission by vesting the court with the power to appoint its own registrar.

There is no disputing the fact that the registry of the court, like the secretariat of the Commission, will be dependent upon the OAU for its budget. The registrar need not be an outsider to the OAU system; rather, the court should appoint whom it will, including prospective applicants from the OAU Secretariat. This is essential as a way of emphasizing the court's independence. Its registry, including the secretariat of the Commission, should not have the status of an administrative unit of the OAU.⁶⁰ In the case of the present European system, one of the main reasons why the European Court is vested with the power of appointing its registrar is that subjecting the registry of the court to the oversight of the of the Secretary General of the Council of Europe would involve a political chain of command that would be incompatible with the court's judicial independence, especially as the registry plays a vital role in the judicial work of the court.⁶¹

59. For example, with respect to the Secretary of the African Commission, Article 41 of the African Charter provides that the Secretary General of the OAU shall appoint the Secretary of the Commission and that he shall provide the staff and the services necessary for the effective discharge of the duties of the Commission. In the case of the UN Tribunal for the former Yugoslavia, it is true that the UN Secretary General makes the appointment of the Registrar under Article 13 of the Statute of the Tribunal. That appointment, however, is in consultation with the President of the Tribunal, who in turn seeks the opinion of the judges. It was the intention of the drafters of the statute to give the Tribunal a say in the appointment of the Registrar which enhances the independence of the Tribunal.

60. See Rule Aeneid 12 of the Rules of the European Court under which the Court elects the Registrar of its registry for a renewable term of seven years, as well as the Deputy Registrar. The other officials of the Council of Europe are appointed by the Secretary General of the Council of Europe with the agreement of the President of the Court or Registrar as provided by rule 13. See also Rule 7(2) of the Rules of the Inter-American court on the election of the Secretary of the Court's secretariat.

61. MAHONEY AND PREBENSEN, *THE EUROPEAN COURT OF HUMAN RIGHTS*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* Martinus Nijhoff Publishers 620 (MacDonald et al., eds., 1993).

In the European system the registrar is regarded as a member of the court.⁶² This should be duplicated in the African Court in view of the roles that will be proposed for the court in this paper with regard to the court's relationship with the existing African Commission. Thus, the basic framework to be given the court at the beginning should be such that will enhance the court's independence.

C. RELATIONSHIP WITH THE COMMISSION

The establishment of an African Court of Human Rights will definitely impact the work of the present Commission, and requires clarification of the functions each of the bodies will perform in the proposed new mechanism. In this author's view, there are four possible scenarios under which this relationship can exist.

The first scenario is similar to the present practice of the Inter-American system,⁶³ where only a Commission or a member state may present a case to the court after the Commission completes its consideration of a petition in accordance with the procedural requirements of the American Convention.⁶⁴ This procedure, it has been argued,⁶⁵ portends delay, which may result in a denial of justice to victims of human rights abuse. It is strongly argued that governments accused of human rights abuses be given time to respond to complaints filed against them, and at the same time be free to refer a case to the Court if they are dissatisfied with the proceedings before the Commission.⁶⁶

Yet individuals, as beneficiaries of international human rights law, have no standing before the court in their own right. Thus, an individual has no recourse if dissatisfied with the Commission's decision or if the government fails to comply with the Commission's recommendations.⁶⁷ While an individual is given standing before the Commission, he or she

62. *Id.*

63. For a detailed discussion of the Inter-American System, see T. BUERGENTHAL AND DINAH SHELTON, *PROTECTING HUMAN RIGHTS IN THE AMERICAS: CASES AND MATERIALS*, Revised 4th Edition (Strasbourg, France: International Institute of Human Rights 1995). See also Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U. J. INT'L L. & POL'Y 333 (1994); and Jo M. Pasqualucci, *The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law*, 26 U. MIAMI INTER-AM. L. REV. 297 (1995).

64. See the Inter-American Court Decision in the *Viviana Gallardo Case* of Nov. 13 1981; Inter-Am. Ct. H.R. 12, OEA/Ser. A and B No. G.101/81 (1982) where the Court refused a case submitted by Costa Rica because it was not filed and considered first by the Commission.

65. See Pasqualucci, *supra* note 63, at 309.

66. *Id.*

67. *Id.* at 316.

is denied access to the court. There needs to be a complete and reasonable access given to individuals.⁶⁸

With respect to an African System, the criticism of the Inter-American system described above would apply equally, particularly as to individual standing before the court. Modern human rights law principles, as developed by the Inter-American and European systems, show that there is a great need for individuals to have direct access to a human rights Court. Advocating individual standing before the court is not endorsing an unrestricted access to every case or potential case.

The second scenario is the one envisaged in the Draft Protocol to the African Charter. Article 2 of the Draft Protocol, dealing with the relationship between the Court and the Commission, provides that "the Court shall 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." Draft Article 5 (1) provides that the Commission, a state party which has lodged a complaint to the Commission, and a state party against which the complaint has been lodged at the Commission will have the power to submit a case to the court. Article 5(2) goes on to provide that when a state party has a legal interest in a case, it may submit a request to the court to be permitted to join. Article 7, however, provides for an additional exceptional jurisdiction:

(1) Notwithstanding the provisions of Article 5, the Court may on exceptional grounds, allow individuals, non-governmental organizations and groups of individuals to bring cases before the Court without first proceeding under Article 55 of the Charter.⁶⁹

(2) The Court will consider such a case, taking into account the conditions enunciated in Article 56 of the Charter.

68. It may be true that leaving control of the "courthouse door" to the Commission and governments under the Inter-American system limits the number of cases and allows judicial resources to be used efficiently. However, it should be stressed that while gate keeping of the courthouse door is important, it may exclude individuals with meritorious cases, and may some times be used as a political tool.

69. Article 55(1) & (2) of the African Charter provides that the Secretary of the Commission at each session shall make a list of communications referred to in Article 56 and transmit them to members of the Commission, who may read them and submit them to the Commission. Such communications shall be submitted to the Commission at the request of the simple majority of its members. It should be noted that the communications referred to here, whose contents and conditions are explained in Article 56 are those by individuals or organizations rather than states.

(3) The Court itself may consider the case or refer it to the Commission.

The combined effect of draft Articles 5 and 7 is that while state parties and the African Commission have direct access to the court, in exceptional circumstances individuals, groups of persons, and non-government organizations may also go directly to the court without passing through the commission. Presumably, the court would interpret the meaning of exceptional circumstances, in which case it may decide the matter or order that the Commission to consider the matter first. This procedure would need further elaboration as to how it will work.⁷⁰

Under this scenario, as one would have expected, there is no drastic change in the relationship between the African Commission and the proposed court. It simply modifies the first scenario based on the Inter-American System by granting individual standing before the proposed court in exceptional circumstances. Unless there are such exceptional circumstances, the situation remains the same as under the Inter-American system.⁷¹ It seems likely that the interpretation of exceptional grounds will be quite narrow, which will not make this procedure a popular one. Since human rights violations in African Countries are rampant, an individual should not be to a finding of exceptional circumstances before he or she is given standing before the court.

The third scenario would involve the adoption of a procedure similar to the one under Protocol 9 to the European Convention which introduced individual standing before the European court.⁷² This procedure requires a screening panel of three members of the Court in a case referred by an individual. This panel determines whether the case raises a serious

70. This is due to the fact that in their explanation the drafters of the Protocol did not state the details of the dynamics of Article 7. It merely states standing has been granted to individuals and international organizations in accordance with the provisions of the African Charter. It may well be that the court will work it out procedurally in its rules.

71. Note that draft Article 8(2) & (3) of the draft protocol provides that the court will not consider a matter involving inter-state communication (Article 49 of the Charter) or communications by individuals or groups (not amounting to exceptional grounds - normal article 55 of the Charter provision) until the proceedings before the Commission have been considered and a report prepared or a decision is made as to each case. This it can be argued is a codification of the rule in the Inter-American case of *Viviana Gallardo*, *supra* note 64, which has been criticized by Pasqualucci. See Pasqualucci, *supra* note 63, 309-317.

72. Protocol 9 to the European Convention amends Article 48 of the Convention by providing, among other things, that the person, non-governmental organization, or group of individuals having lodged the complaint with the Commission may refer a case to the Court. Note that Protocol 9, which is optional, was adopted in 1990 and entered into force in 1994. As of 1995, it had been ratified by seventeen countries.

question affecting the interpretation or application of the Convention. Where it does not, the panel may, by unanimous vote, decide that the case shall not be considered by the court,⁷³ in which case it will be decided by the Committee of Ministers.⁷⁴ Thus, the screening panel determines which cases proceed to the court. After the panel has completed its task, even in cases that it decides should proceed to the Court, the usual procedures in examining a case referred to the Court are followed.⁷⁵

The procedure introduced by Protocol 9 appears to have influenced the inclusion of Article 7 of the draft Protocol to the African Charter. The only difference is that under the draft protocol the complaint need not be lodged with the African Commission before a person or group of persons can have standing before the court. The determination of exceptional grounds will most likely require the same standard as that vested in the screening panel under Protocol 9, mainly for purposes of controlling the volume of cases that eventually make it to the court.

Protocol 9 has the shortcoming of not fully realizing that individuals have been granted standing before the court. It also fails to eliminate the inherent delay⁷⁶ in a two-tiered system that does not appear to perform entirely different functions. These may be some of the reasons that the European System is undergoing an entire reform with the promulgation of Protocol 11,⁷⁷ which eliminates the European Commission and establishes a Court of Human Rights as the only European Human Rights institution to deal with matters that were formerly dealt with by two institutions.

The fourth scenario, which this author espouses, will result in significant reform of the African Human Rights Mechanism. It will entail adapting the object of the European Reform under its Protocol 11 to the African

73. Article 5(2), second sub-paragraph.

74. *Id.*

75. *See also*, D. J. HARRIS ET AL., *THE LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 659, 663 (London: Butterworth 1995).

76. Under the European dual system it took, on average five years and six months (four years and four months before the Commission, 13 months before the Court) for a case to be decided in Strasbourg in 1992; in 1993 the average was five years and eight months (four years and four months before the Commission, one year and three months before the Court). For this and other characteristics of the new European System, *see* Andrew Drzemczewski and Meyer-Ladewig, *Principal Characteristics of the New ECHR Control Mechanism as Established by Protocol no. 11 Signed on 11 May 1994*, 15 HUM. RTS L.J. 81 at 85 (1994).

77. Protocol 11 is not yet in force. It was opened for signature as of May 11, 1994. According to its Article 4 the Protocol shall enter into force one year after all parties to the European Convention have either ratified accepted or approved the Protocol.

mechanism, while still retaining the African Commission. It will require assigning distinct functions to the Commission and the Court based on the need of Africans. Under this framework, the proposed court would assume a great deal of human rights protection and enforcement, while the Commission would assume full responsibility for human rights promotion and negligible aspects of protection. The court should take over the communication functions of the Commission as well as maintaining its own adjudicatory functions. Cases should be filed directly with the Court, whether by individuals, states, or organizations.

The new European mechanism is particularly instructive in the actual organization of its proposed framework. As in the proposed European Protocol 11, the proposed African court's registry will communicate with petitioners and, where necessary, request additional information from the parties, with the aim of eliminating obviously inadmissible, hopeless and frivolous applications at the early stage of the proceedings. Where it is established that a petition makes out a *prima facie* case, it would be registered and heard by a chamber. Before the case goes to the chamber, it should be considered by a screening committee made up of judges, which should include a judge rapporteur designated for that particular case. The committee determines whether a petition is admissible

Where a petition is declared inadmissible, the petition is terminated. On the other hand, a petition that is declared admissible proceeds to a chamber for consideration on the merits or further questions of admissibility. The judge rapporteur would normally prepare the case files and communicate with the parties regarding the procedures. The chamber should be able to explore and facilitate friendly settlement if possible, in which case, it sends the case to the Commission to initiate and follow up on friendly settlement⁷⁸ within a specified time. Where no friendly settlement occurs, the chamber proceeds to render a judgment which could be referred to the plenary court in exceptional circumstances that raise serious questions on principles affecting the interpretation and application of the Charter.⁷⁹ The plenary court should be in a position to determine which cases it will accept, which in turn will depend on the

78. This is one area in which the procedure in the proposed African Court will differ from the European Protocol 11 procedure. Under Protocol 11, exploring and initiating friendly settlement is the responsibility of the chamber considering the case. Under the African proposal, the Commission could be involved in protective functions to maintain the sense of neutrality and balance that every petition requires.

79. The Plenary Court under the proposed African system will combine the power of the Grand Chamber and the Plenary Court under the European Protocol 11 procedures.

serious issues of international human rights law involved in the case, and the need to establish precedent.

The procedure highlighted above should be able to ensure proper gatekeeping with regard to control of cases that go before the proposed African Court of Human Rights. In light of the number of petitions that will come before the court, proper gatekeeping is a genuine concern.

With the African court squarely involved with human rights enforcement, the African Commission should be able to settle down to the more traditional work of human rights promotion in its entirety as envisaged under the Charter, in addition to receiving and considering state reports. Here the Commission could embark on fact-finding missions, engage in country studies, issue country reports,⁸⁰ organize conferences and seminars, and develop regional human rights scholarship.

An additional area for the Commission would be advising member states on aspects of economic, social, cultural, and Peoples' rights that may not be immediately justiciable, in which the court may not be vested with subject matter jurisdiction in its adjudicatory functions. The Commission should be able to draw from the work of the UN Committee on Economic, Social and Cultural Rights in determining the obligations of member states as they affect the economic, social, cultural and Peoples' rights provisions of the African Charter. These aspects of the Charter have received little or no attention in the work of the Commission.⁸¹ This added function presupposes that states will cooperate in their periodic reports to give detailed coverage of all aspects of the Charter's provisions.⁸²

The reason for proposing distinct functions for the Commission and the Court is clear. There is an increase in human rights violations in Africa for which victims need redress in the form of a court. It is also true that human rights promotion in Africa has a long way to go. An increase in

80. The American Commission achieved a great deal for human rights in the Americas through its issuance of country reports. It also enabled the Organization of American States to take resolutions regarding human rights situations in those countries.

81. The Commission would do well to issue general comments and recommendations in these areas, as did the UN Committee. It is possible that the recommendation of the Commission in this regard could lead to progressive development in these areas as envisaged by the Charter.

82. The African Commission has recently introduced the practice of calling upon individual states to submit their periodic reports in final communiqués issued by the Commission; previously, the communiqués had simply made a general call on states which had not yet submitted their reports. See ANKUMA, *supra* note 18, at 76

human rights promotion, along with protection and enforcement by distinct institutions, will no doubt be a more efficient way of addressing the human rights situation in Africa.

It could be said that this framework is very ambitious and may not enjoy popularity with African States in terms of resources and cooperation. Yet if reform of the African mechanism is necessary, it should be a proper reform, rather than reaching a compromise as was done under the Charter. Human rights and other non-governmental organizations need to embark on spirited lobbying and persuasion of African Governments and domestic institutions to ensure that an effective mechanism aimed at addressing the increasing human rights violations evolves in Africa.

V. EMPOWERING THE COURT

A. JURISDICTION

The jurisdiction of an African Court of Human Rights would encompass both adjudicatory and advisory functions. The subject matter jurisdiction of the Court will have an impact on the court's adjudicatory and advisory functions. These aspects of the court need to be examined.

1. Adjudicatory Jurisdiction

This is usually referred to as the compulsory or ordinary jurisdiction of a human rights court or other international tribunal to determine contentious disputes that come before it on the merits. According to Judge Piza Escalante⁸³ it is this form of jurisdiction that is likely to be relied upon most frequently in guaranteeing the rights protected by a human rights instrument. The main object of a court's contentious jurisdiction is to rule on whether a state has violated any rights contained in a particular human rights instrument for which the victim seeks redress,⁸⁴ in this case, the African Charter on Human and Peoples' Rights. The exercise of this jurisdiction by the court will enable it to apply the instruments and issue a decision on the merits, which may include the award of reparations or other remedies where the court finds a violation.

83. In his explanation to his dissenting vote in *Viviana Gallardo*, *supra* note 64, before the Inter-American Court of Human Rights.

84. SCOTT DAVIDSON, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 62 (Dartmouth Publishing Company Limited 1992).

In both the European and Inter-American Human Rights systems, member states may have accepted the compulsory jurisdiction of the Courts by declaration.⁸⁵ Thus, the use of the courts' contentious jurisdiction in these systems is optional. Without acceptance of compulsory jurisdiction, courts cannot hear cases on the merits. The reasoning behind this practice was to reserve to states some measure of power based on the notion of sovereignty to decide whether to subject their actions to the review of an international body.

The draft Protocol on the African Charter is silent on this point with regard to the proposed African Court. Its Article 3 provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other applicable African human rights instrument." The reason for this silence is deliberate in the sense that drafters of the Protocol intend that ratification of the Protocol by member states also amounts to acceptance of the compulsory jurisdiction of the Court.⁸⁶ Their decision may also have been influenced by the fact that the African Charter, unlike the European Convention, did not make communications by individuals to the African Commission dependent on the optional acceptance of this procedure by member states.

Critics of this provision who know the disposition of African states with respect to human rights may be of the view that this is too ambitious; that it would be better to have a declaration as to the optional recognition of the court's compulsory jurisdiction by member states to attract the requisite ratification that will make the Protocol go into force. On the other hand, it would appear that the drafters of the Protocol view the current reforms in regional human rights mechanisms, especially, the European mechanism, as an opportunity to have a solid human rights mechanism in Africa, the ratification of which will demonstrate some measure of seriousness and commitment by the ratifying states.

85. See Articles 46 of the European Convention on Human Rights and 62(3) of the American Convention on Human Rights. The change introduced by Protocol 11 to the European Convention will eliminate this option when the Protocol comes into force. According to the provisions of the new Article 34 of the European Convention as amended by the Protocol, individual applications may be received by the court with the High Contracting Parties undertaking not to hinder in any way the effective exercise of this right by individuals.

86. See the Explanation to the Draft Protocol on the African Charter on Human and Peoples' Rights at 2.

2. Advisory Jurisdiction

The advisory jurisdiction of any international or regional tribunal involves a formal rendering of legal opinions on issues presented before it, even though those opinions have no binding legal effect in the form of requiring positive or negative action from the parties. Even though advisory opinions are not legally binding, the practice of the Inter-American Court has shown that it can go a long way to affect the conduct of states with respect to human rights. The use of advisory opinions is particularly important in the sense that it may be the only way a court can have the benefit of looking into an issue involving a state not a party to the instrument vesting jurisdiction on the merits in the court.

Drawing from the experience of the Inter-American system, this appears to be particularly important in the African system.⁸⁷ Article 4(1) of the Draft Protocol to the African Charter provides that "at the request of a member State of the OAU, any of its organs or any organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or other African human rights instruments." Subsection 2 gives a judge the freedom to render dissenting opinions. The practice of the Inter-American system whereby the Inter-American Court is regarded not just as a Convention organ, but also as an institution of the Organization of American States (OAS) in matters relating to human rights,⁸⁸ will be highly instructive for proposed African reform. As an OAU mechanism, the African Charter⁸⁹ views member states as parties to the Charter.

The exercise of advisory jurisdiction will also be highly relevant in those areas of the Charter where the question of justiciability as a result of the nature of the subject matter may be in doubt. The court may be able to articulate principles aimed at progressive development of the questions raised.

3. Subject Matter Jurisdiction

A probing question arises regarding the substantive rights that the proposed African court will apply in cases that come before it on the merits, in view of the fact that the African Charter contains and

87. For a detailed discussion, see Buergenthal, *supra* note 40, at 1.

88. *Id.*

89. See Article 1 of the Charter. See also Article 66, which provides for the enacting of special protocols and the like to supplement the provisions of the Charter.

guarantees a plethora of rights in the domain of traditional civil and political rights,⁹⁰ as well as economic, social, and cultural rights.⁹¹ The Charter is also innovative in terms of Peoples' and other group rights.⁹² The question is whether states will have the right to petition the court for individuals or group of individuals to perform their duties under the Charter.

It appears that the framers of the draft Protocol did not address this issue with regard to the substantive rights jurisdiction of the proposed court. It could therefore be concluded that they foresee the application of the Charter as it is. For practical purposes, it is expedient for the Court to inquire into traditional civil and political rights and those aspects of economic, social, and cultural rights that could be said to be tangibly enforceable.⁹³ Other rights not considered to be tangibly enforceable could form a substantial aspect of the Court's advisory jurisdiction. Some of these questions must come before the court before an appropriate interpretation as to the meaning of the Charter regarding them can be reached. A court would be equipped to give legal direction in this regard which could set a standard for other regional and international systems. As mentioned earlier, this could be an area in which the African Commission will be effective, especially in seeking advisory opinions of the Court on the actual meaning of and principles governing the realization of the economic, social, cultural, and Peoples' rights aspects of the Charter.

It should be stated that this author believes that social and economic rights can be realized. They go a long way toward complementing civil and political rights. This is especially so in developing countries, where the need to for a conducive atmosphere to realize the basic necessities of life must be balanced with the need to realize civil liberties. However, the rampant corruption of the ruling class, whether military or civilian, especially in Africa in the face of needed economic, social, and cultural developments complicates the issues.

B. INDEPENDENCE

The functioning of a regional or international tribunal will require a great deal of independence in the exercise of its functions. The judges of such

90. African Charter, art. 3-13.

91. *Id.* art. 14-18.

92. *Id.* art. 20-24.

93. Such rights as property rights guaranteed under Article 14.

tribunals should have attained the professional and moral reputations required of judges of the highest court of their states of origin.⁹⁴ It follows, therefore, that they should be taken seriously and allowed a free hand in their job.

The Inter-American system and the European system recognize the importance of this independence in the various forms it takes. According to a commentator on the independence of the European Court in making its rules, "the court has astutely used this rule making competence, which serves to ensure its collective independence, to fill the gaps in the Convention."⁹⁵ Further, judges are individually required to be independent of any influence from home governments or other entities.⁹⁶ This serves to emphasize the requirement that judges be selected on the basis of their individuality.

Another form of independence is the granting of diplomatic immunity to the judges, as well as immunity from liability for any decisions or opinions issued in the exercise of their functions. These principles will definitely benefit the proposed African system. Article 43 of the African Charter guarantees such immunity for members of the African Commission.

The draft Protocol on the African Charter makes elaborate provision for the independence of judges of the proposed court. In Article 15, which also has a provision regarding immunity, it is expressly provided that the "Judges shall be independent in the exercise of their functions. The Court shall decide matters before it impartially, on the basis of fact and in accordance with law, without any restriction, undue influence, inducement, pressure, threat or interference, direct or indirect, from any quarter for any reason." This is a pretty strongly worded provision with an undertone that decries the manipulation that judicial decisions in Africa have been subjected to.

An African court of human rights needs a great deal of independence for effective enforcement of human rights. This guarantee of independence will evoke in the judges the zeal and activism needed to develop the law

94. See Article 52(1) of the American Convention and Article 38 of the European Convention on Human Rights. See also Article 31 of the African Charter regarding the qualification of the members of the Commission.

95. Walter Ganshof van der Meersch, *The European Court of Human Rights*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, 193 (Installment 8, 1985).

96. See Rule 4 of the Rules of the European Court. See also Article 71 of the American Convention.

in the region, and will ensure the effective exercise of the Court's power to order provisional measures in cases of extreme gravity and urgency as required in Article 25 of the draft Protocol. The Inter-American experience has shown that vesting a human rights court with the power of ordering provisional remedies can be highly effective.⁹⁷

C. ENFORCEMENT OF JUDGMENTS

As noted earlier in this paper, an area in which the present African mechanism falls short is in the enforcement of any decisions of the African Commission. It should be recalled that the decision of the Commission is not binding, nor is the Commission vested with the power to condemn any state action. Accordingly, states are not under any obligation to comply with the Commission's recommendations. It thus falls to the Assembly of Heads of State and Government (AHSG) of the OAU to decide the manner of enforcement.⁹⁸ It is imperative that for an African court of human rights to serve its purpose, its decisions on the merits must be enforced, either by the states ruled against taking positive action to comply with the decision, or by vesting a body with fewer political ties in the region with the power to ensure that decisions of the court are complied with.

In drafting the draft Protocol to the African Charter, its framers knew there was no effective enforcement mechanism in the Charter and tried to prevent it with regard to the Court. The draft Protocol provides for an enforcement mechanism that ranges from making the judgment of the Court final and not subject to appeal,⁹⁹ to requiring state parties to comply with the court's judgment and guarantee its execution in any case to which they are a party.¹⁰⁰ Further, it provides for the transmission of the Court's judgment to other member states of the OAU and for the notification of Council of Ministers to monitor its execution on behalf of the AHSG.¹⁰¹ Finally, it provides for the Court to submit its reports to regular sessions of the Assembly, specifying cases in which a state has

97. For a detailed analysis of how the Inter-American system has used its provisional measure power, see Jo M. Pasqualucci, *Provisional Measures in the Inter-American Human Rights System: An Innovative Development in International Law*, 26 VAND. J. TRANSNAT'L L. 803 (1993).

98. See Article 59 of the African Charter. The AHSG, as a political body whose member governments are the ones complained of, has not been known to have enforced any decision of the Commission. In addition, nothing in the Charter states that the decision of the Commission is binding on member states.

99. African Charter, art. 26(4).

100. *Id.* art. 27.

101. *Id.* art. 28.

failed to comply with the Court's judgment.¹⁰² These provisions borrow more heavily from the Inter-American system¹⁰³ with regard to the process of the enforcement mechanism and take more from the European system on the use of Council of Ministers to monitor the execution of judgments.¹⁰⁴

The drafters intended for a victim of a human rights abuse to enforce the compensation aspect of the judgment in a domestic court, vesting the Council of Ministers with the power to apply political pressure as well as taking strong measures against a state to ensure compliance. If necessary, the AHSG can ultimately take the same measures. This framework for enforcement of a human rights system will go far to ensure the protection of human rights in the region even though, as has been observed in the European system,¹⁰⁵ the Council of Ministers is a political body that may sometimes allow political considerations to interfere with its supervisory role.

A problem that remains for Africa is the willingness of member states of the OAU to realize the "notorious" effect of a report of a state's noncompliance with the court's judgment, in view of the "sacred" objective of non-intervention in the internal affairs of member states enshrined in the Charter of the OAU. On the other hand, it can be said that the realities of present-day Africa will make the enforcement framework go far. States now seem willing, no matter the cost, to publicly condemn human rights violations of member states.¹⁰⁶ There is no doubt that a wind of change is blowing across Africa, fanned by the Continent's wish not to be left behind in the new world order of things, especially in the areas of human rights and democratization, which have increasingly become the basis of international relations.

102. *Id.* art. 29.

103. Compare Articles 26(4), 27, 28 and 29 of the draft Protocol with Articles 67, 68(1) and 69 of the American Convention.

104. Note that in the Inter-American system it is the General Assembly of the OAS that is vested with the power addressing non-compliance with a judgment of the Inter-American Court. For more details, see Davidson, *supra* note 84, at 88. Under the European Protocol 11, the Committee of Ministers retains its power of supervising the execution of the judgment of the European Court.

105. MAHONEY AND PREBENSEN, *supra* note 61, at 636.

106. Recently, Zambia publicly condemned the terrible human rights situation in Nigeria, notwithstanding the fact that Zambia paid the price for Nigeria's withdrawal of members of its Technical Aid Corps working in Zambia.

D. FUNDING

It need not be emphasized that a regional human rights system must provide adequate funding for its enforcement organs if they are to be effective. Financing international and regional institutions is a huge issue, especially for an African institution. Member states are known not to respect their financial obligations to the parent regional organs which set the budgets for these human rights institutions.¹⁰⁷ The defense of many states opposed to the establishment of human rights institutions has always been the lack of resources to maintain these institutions. It is not in doubt that the work of a human rights court in Africa will require enormous financial resources. Staff lawyers must be hired to process and assist the court with basic legal analysis of the cases, judges must be paid, and the necessary infrastructure must be in place.

Since a lack of financial resources can be a reasonable argument against a court, it will take strong political will to establish and financially sustain a court. If African states are determined to meet their financial obligations to the OAU, there is no doubt that a court will be established and gradually sustained. Judges need not begin on full-time basis.¹⁰⁸ It can also be argued that prioritizing regional spending can help the financial situation of the regional organ. In 1991, the OAU promulgated the African Economic Treaty which provides for the Establishment of an African Court of Justice. The treaty aims at African economic integration and unity. Also, the African Charter on the Rights of the Child provides for a Committee that will perform a similar function, though particular to that Charter, as the African Commission does in respect of the African Charter. These other mechanisms are equally important. Africa needs economic integration and unity as much as it needs human rights enforcement. There still needs to be proper fiscal discipline in the face of scarce resources. The commitment of the richer African countries should be directed to uplifting the region rather than to elevating domestic corruption to the level of an industry.

In the opinion of this author, all that is required is the determination of African states to take the bold step in this direction. Donor agencies and other international development institutions under the auspices of the

107. Under Article 41 of the African Charter the OAU sets the budget of the African Commission.

108. It would be expedient, however, for the president of the court to serve full time to ensure effective coordination of the activities of the court. See Article 18(2) of the draft Protocol to the African Charter on the establishment of an African Court.

United Nations should in turn lend a helping hand. The possible political implication of such aid is apparent. On the other hand, it is a truism that human rights has become everyone's concern. The international community could demonstrate its concern for human rights in Africa by helping in this regard.

VI. CONCLUSION

The Resolution of the Assembly of Heads of State and Government of the OAU at its summit in Tunis in June 1994 requesting the Secretary General of the OAU to convene a government experts' meeting to consider, in conjunction with the African Commission, the means to enhance the efficiency of the African Commission and to consider the establishment of an African Court of Human and Peoples' Rights, is the beginning of a new era in African human rights jurisprudence. In the last few years, the African Commission has begun to find its way by using its implied powers to address some of the human rights situations in Africa. It could be argued that this resolution is indicative of the inadequacy of the present mechanism under the African Charter.

It has been the goal of this paper to demonstrate that an African Court of Human Rights that genuinely draws on the experiences of the European and Inter-American systems will enhance the protection of human rights in Africa. A court can make a great difference in human rights enforcement. The psychological effect of an international court's judgment on a state is critical. The stage has been set by the resolution of the AHSG and the subsequent meeting of government experts in South Africa in 1995 which came up with a draft Protocol to the African Charter. The draft Protocol will need further refinement to realize its potential in light of the reforms proposed by this paper.

This paper has shown that while the exercise of implied power may be desirable, it may not go far enough if challenged. The challenge will come not before a court of law, but in the blatant refusal of a state to comply with the Commission's bidding. A decision by the Commission is not binding, and has never been enforced by any regional entity. A better solution is to increase the Commission's effectiveness in functioning under the reforms proposed by this paper. Therefore, a complete reform of the present African mechanism is necessary to promote, protect, and enforce human rights in Africa.