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The African Human Rights System: A Critical Evaluation

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A Critical Evaluation

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I. Introduction

The regional African human rights system is based on the African Charter on Human and Peoples' Rights (the African or Banjul Charter),[1] which entered into force on October 21, 1986, upon ratification by a simple majority of member states of the Organization of African Unity (OAU).[2] In June 1998, the OAU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.[3] The African Human Rights Court is intended to complement[4] the African Commission on Human and Peoples' Rights,

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[1]The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 59 (1982).

[2]The African Charter was adopted in 1981 by the 18th Assembly of Heads of State and Government of the OAU, the official body of African states. It is also known as the Banjul Charter because a final draft of it was produced in Banjul, the capital of the Gambia.

[3]Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Assembly of Heads of State and Government of the Organization of African Unity, Ougadougou, Burkina Faso, June 1998, OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2. [hereinafter Protocol]. See also "African Foreign Ministers Discuss Human Rights," Africa News, April 15, 1999, available in LEXIS, News Library, CURNWS File.

[4]The Protocol shall enter into force thirty days after ratification by fifteen OAU member states. Protocol, supra note 3, article 34. Although by April 1999 the Protocol had been signed by 30 states, only two, Burkina Faso and Senegal, had ratified it. See "African Human Rights Commission Session Opens," Africa News, April 26, 1999, available in LEXIS, News

the body that has exercised continental oversight over human rights since 1987.[5] The Protocol suggests that the African Human Rights Court will make the promotion and the protection of human rights within the regional system more effective.[6] But the mere addition of a court, although a significant development, is unlikely by itself to address sufficiently the normative and structural weaknesses that have plagued the African human rights system since its inception.

The modern African state is in many respects the colonial in a different guise. The African state has been such an egregious human rights violator that skepticism about its ability to create an effective regional human rights system is appropriate.[7]

Library, CURNWS File. The Protocol states in the preamble that the African Human Rights Court shall "complement and reinforce the functions of the African Commission on Human and Peoples' Rights." See preamble, Protocol, supra note 3. Elsewhere, the Protocol clarifies and emphasizes that the African Human Rights Court shall "complement the protective mandate of the African Commission on Human and Peoples' Rights." Id., article 2. See also Gino J. Naldi & Konstantinos Magliveras, “Reinforcing the African System of Human Rights: The Protocol for the Establishment of an African Court of Human and Peoples’ Rights,” 16 Neth. Q. Hum. Rts. 431 (1998); U. Oji Umozurike, “The African Charter on Human and Peoples’ Rights 92-3 (1997).

[5]Until the Protocol comes into force and a Human Rights Court is established, the African Commission on Human and Peoples' Rights [hereafter African Commission] will remain the sole supervisory organ for the implementation of the African Charter on Human and Peoples' Rights.

[6]See generally preamble, Protocol, supra note 3.

[7]For discussions and analyses of the colonial imprint on the African post-colonial state, see Mahmood Mamdani, Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism (1996); Crawford Young, "The Heritage of Colonialism," in Africa in World Politics 19 (John W. Harbeson & Donald Rothschild, eds., 1991); Robert H. Jackson, "Juridical Statehood in Sub-Saharan Africa," 46 J. Int'l Aff. 1 (1992); Ali A. Mazrui, "The African State as a Political Refugee: Institutional Collapse and Human Displacement," Int'l J. Refugee L., Special Issue, July 1995, at 21; Makau wa Mutua, "Why Redraw the Map of Africa: a Moral and Legal Inquiry," 16 Mich. J. Int'l L. 1113 (1995). Discussing Africa's colonial legacy, one author notes that the "[m]ost obvious and powerful expressions of the continued African conceptual reliance on European political forms are the African

Although the Banjul Charter makes a significant contribution to the human rights corpus, it creates an ineffectual enforcement system. Its most notable contributions are the codification of the three "generations" of rights, including the innovative concept of peoples' rights, and the imposition of duties on individuals.[8] But many commentators have focused on the weaknesses in the African system. These include the "clawback" clauses in the African Charter, the potential abuse of the language of duties, and the absence of an effective protection mandate for the African Commission.[9]

Recent changes in the African state, particularly those related to demands for more open political societies, may augur well for the protection of civil and political rights.[10] Emergent democracies such as Namibia, Malawi, Benin, South Africa, Tanzania, and Mali are more inclined than their predecessors to respect human rights at home, and to agree to a more viable regional system. In this context, the African Human Rights Court is likely to operate

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states themselves. The states are direct and uncritical successors of the colonies." See Art Hansen, "African Refugees: Defining and Defending Human Rights," in Human Rights and Governance in Africa 139, 161 (Ronald Cohen, Goran Hyden, & Winston Nagan, eds., 1993).

[8]On duties on the individual, see arts. 27-29, African Charter, supra note 1. For a discussion of the concept of duties in human rights discourse and the African Charter, see Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: an Evaluation of the Language of Duties," 35 Va. J. Int'l L. 339 (1995).

[9]For discussions of these problems, see Richard Gittleman, "The African Charter on Human and Peoples' Rights: a Legal Analysis," 22 Va. J. Int'l L. 667 (1982); Richard Gittleman, "The African Commission on Human and Peoples' Rights: Prospects and Procedures," in Guide to International Human Rights Practice 153 (Hurst Hannum, ed., 1984); Cees Flinterman & Evelyn Ankumah, "The African Charter on Human and Peoples' Rights," in Guide to International Human Rights Practice 159 (Hurst Hannum, ed., 1992).

[10]See Makau wa Mutua, "African Renaissance," New York Times, May 11, 1991 (describing the demands by Africans for political democracy); Human Rights Watch, Human Rights Watch World Report 1993 (1992), at 6-9 (reporting Africa's political upheavals, including those related to demands for political reforms and democracy).

in a less hostile or cynical environment, the climate that determined and sharply limited the powers and effectiveness of the African Commission. In addition, the 1994 Rwandese genocide and the recent atrocities in Nigeria, Liberia, Somalia, Ethiopia, Sudan, Sierra Leone, Burundi, the Republic of the Congo, and the Democratic Republic of the Congo have further illuminated the need for stronger domestic and regional guarantees for human rights. In fact, at no time in recent African history have the conditions for the creation of an effective regional human rights system been more favorable.

This paper critically evaluates the African human rights system and assesses its potential impact on human rights conditions on the continent. It examines the normative aspects and institutional arrangements created under the African Charter and the Protocol for the African Human Rights Court. It asks whether a clear and mutually reinforcing division of labor between the African Commission and the African Human Rights Court could be developed to more effectively promote and protect human rights on the continent. Should, for example, the mandate of the African Commission be limited primarily to promotional activities, and the African Human Rights Court exclusively given the protective function? What relationship should the court have to the African Commission?

In sum, the paper explores the effect of the African human rights system in three principal areas. First, it examines the normative, conceptual, and historical aspects of the African Charter and its contribution to the human rights corpus. Second, it looks at the work of the African Commission in the development of the law of the African Charter, including the problems that it has faced. Third, it addresses the norms and structure governing the African Human Rights Court and its potential to fill the lacunae left by the African Commission and alleviate some of its weaknesses. The paper also looks at the roles of civil society and the media in the processes of political reform and democratization, as these are intrinsically linked to the promotion and protection of human rights in Africa. Finally, it discusses ways in which the African human rights system can penetrate the legal and political cultures of African states to inspire, encourage, and ensure the internalization of human rights.

II. The African Charter: A Diagnosis

The African Charter is not an accident of history. Its creation by the OAU came at a time of increased scrutiny of states for their human rights practices, and the ascendancy of human rights as a legitimate subject of international discourse. For African states, the rhetoric of human rights had a special

resonance for several reasons. First, post-colonial African states were born out of the anti-colonial human rights struggle, a fight for political and economic self-determination. Second, black-ruled African states deployed human rights arguments to demonize and delegitimize the colonial and minority white-ruled states of Angola, Mozambique, Namibia, Rhodesia (now Zimbabwe), and Apartheid South Africa. Finally, the atrocities of some of the most brutal dictatorships the African continent has ever known heightened the urgency for a regional human rights system. The abominations of Idi Amin of Uganda, Bokassa of the Central African Empire, and Nguema of Equitorial Guinea came to be viewed internationally as paradigmatic of African leadership. As this author has pointed out elsewhere:

> The [African] leadership had to reclaim international legitimacy and salvage its image. In 1979, shaken by these perceptions, the OAU Summit in Monrovia, Liberia, appointed a committee of experts to prepare a draft of an African human rights charter. It was ironic that virtually none of the men, the Heads of State and Government, were freely and fairly elected. Without exception, they presided over highly repressive states. It was virtually the same club of dictators who adopted the African Charter in Nairobi, Kenya in 1981. Thus was born the African human rights system.[11]

Normatively, the African Charter is an innovative human rights document. It substantially departs from the narrow formulations of other regional and universal human rights instruments. It consists of 68 articles and is divided into four chapters: Human and Peoples' Rights; Duties; Procedure of the Commission; and Applicable Principles.[12] It weaves a tapestry which includes the three "generations" of rights: civil and political rights; economic, social, and cultural rights; and group and peoples' rights. Its most controversial provisions impose duties on individual members of African societies. The Charter links the concepts of human rights, peoples' rights, and duties on individuals.

The problems of the African human rights system, which thus far has been anchored in the African Commission, are well documented.[13] These include the normative weaknesses in the African

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[11]See Makau wa Mutua, "The African Human Rights System in a Comparative Perspective," 3 Rev. Afr. Comm. Hum. & Peoples' Rts. 5, 7 (1993).

[12]See generally African Charter, supra note 1.

[13]For analyses of some normative and structural problems of

Charter and the general impotence of its implementing body, the African Commission. But the distinctive contributions of the African Charter to the human rights corpus, which include the concept of duty and the inclusion of the "three generations" of rights in one instrument, have also been articulated and applauded by some scholars.[14]

Perhaps the most serious flaw in the African Charter concerns its “clawback” clauses. These clauses permeate the African Charter and permit African states to restrict basic human rights to the maximum extent allowed by domestic law.[15] This is especially significant because most domestic laws in Africa date from the colonial period and are therefore highly repressive and draconian. The post-colonial state, like its predecessor, impermissibly restricts most civil and political rights, particularly those pertaining to political participation, free expression, association and assembly, movement, and conscience. Ironically, it is these same rights that the African Charter further erodes.

> "Clawback" clauses, that is, qualifications or limitations, permeate the provisions [of the African Charter] dealing with fundamental freedoms.... These fundamental civil and political rights are severely limited by clauses like "except for reasons and conditions previously laid down by law," "subject to law and order," "within the law," "abides by the law," "in

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the African human rights system, see Richard Gittleman, "The African Charter on Human and Peoples' Rights: A Legal Analysis," 22 Va. J. Int'l L. 667 (1982); Cees Flinterman & Evelyn Ankumah, "The African Charter on Human and Peoples' Rights," in Guide to International Human Rights Practice 159 (Hurst Hannum, ed., 1992); Olosula Ojo & Amadu Sessay, "The OAU and Human Rights: Prospects for the 1980s and Beyond," 8 Hum. Rts. Q. 89 (1994); Evelyn Ankumah, The African Commission on Human and Peoples' Rights: Practice and Procedures (1996).

[14]Makau wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties," 35 Va. J. Int'l. L. 339 (1995); B. Obinna Okere, "The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems," 6 Hum. Rts. Q. 141 (1984); Josiah Cobbah, "African Values and the Human Rights Debate: An African Perspective," 9 Hum. Rts. Q. 309 (1987).

[15]See Mutua, "The African System in a Comparative Perspective," supra note 11, at 7.

accordance with the provisions of the law," and other restrictions justified for the "protection of national security."[16]

[16] Id., at 7.

The African Charter does not have a general derogation clause. This omission is all the more serious because the Charter in effect permits states through the "clawback" clauses to suspend, de facto, many fundamental rights in their municipal laws.[17] In any event, nothing in the Charter prevents African states from denying certain rights during national "emergencies."[18] A revision of the Charter should excise the offending "clawback" clauses, insert a provision on non-derogable rights, and another specifying which rights states can derogate from, when, and under what conditions.

Another controversial question in the Charter concerns its language of duties. The African Charter takes the view that individual rights cannot make sense in a social and political vacuum, unless they are coupled with duties on individuals. In other words, the Charter argues that the individual egoist is not the center of the moral universe. Thus it seeks to balance the rights of the individual with those of the community and political society through the imposition of duties on the individual. The Charter contemplates two types of duties: duties that individuals owe to other individuals, to the community, and the state, on the one hand, and duties that the state bears to its subjects, on the other.

Individuals owe duties to the “family and society, the State and other legally recognized communities.”[19] Furthermore, each individual has a “duty to respect and consider his fellow beings without discrimination.”[20] Significantly, every individual has a duty to “preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need.”[21] Among other matters, these provisions raise questions about the commitment of the African Charter to women’s rights. There is a perception and fear that either the African Charter does not adequately protect or could be used to abuse women's rights.[22] The

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[17]Arthur E. Anthony, "Beyond the Paper Tiger: the Challenge of a Human Rights Court in Africa," 32 Tex. Int'l L. J. 511, 518 (1997).

[18]See Thomas Buergenthal, International Human Rights 233-34 (1995).

[19]Art. 27(1), African Charter, supra note 1.

[20]Id., art. 28.

[21]Id., art. 29(1).

[22]For discussions of the Charter's view on women, see Claude

"family" provisions have been thought to condone and support repressive and retrogressive structures and practices of social and political ordering.[23] This language, which places duties on the state and individuals to the family, has been interpreted as entrenching oppressive family structures which marginalize and

exclude women from participation in most spheres outside the home. others feel that it supports the discriminatory treatment of women on the basis of gender in marriage, property ownership and inheritance, and imposes on them unconscionable labor and reproductive burdens.

In my view, these fears are exaggerated because a progressive and liberal construction of the Charter seems to leave no room for the discriminatory treatment of women. The Charter could be read differently. It can be argued that these are not the practices that the Charter condones when it requires states to assist families as the "custodians of morals and traditional values." Such an interpretation would be a cynical misreading of the Charter. One interpretation is that the reference here is to those traditional values which enhanced the dignity of the individual and emphasized the dignity of motherhood and the importance of the female as the central link in the reproductive chain. In many societies across pre-colonial Africa, women were highly valued as

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E. Welch, Jr., "Human Rights and African Women: a Comparison of Protection under Two Major Treaties," 15 Hum. Rts. Q. 548 (1993); Florence Butegwa, "Using the African Charter on Human and Peoples' Rights to Secure Women's Access to Land in Africa," in Human Rights of Women: National and International Perspectives 495 (Rebecca Cook, ed., 1994); Chaloka Beyani, "Towards 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; Joe Oloka-Onyango, "The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa," 24 Denver J. Int'l L. & Pol. 349, 371-74 (1996).

[23]Article 18, African Charter, supra note 1, refers to the family as the "natural unit and basis of society" and requires the state to "assist the family which is the custodian of morals and traditional values recognized by the community." Elsewhere, the Charter provides that the individual owes "duties towards his family and society." Id., art. 27(1). Further, that every individual has the duty to "preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need." Id., art. 29(1).

equals in the process of the regeneration of life.[24]

The Charter's veneration of African culture has also been construed as reinforcing gender oppression. The charge here is that the Charter sees itself as the savior of an African culture is permanent, static, and unchanging. Viewed this way, the Charter would freeze in time and protect from reform, radical change, or repudiation those cultural norms, practices, and institutions which are harmful to women. Again, taken in its totality as a human rights document, the Charter does not support such a backward reading. The Charter seems to guarantee, unambiguously and without equivocation, the equal rights of women in its gender and equality provision by requiring states to "eliminate every discrimination"[25] against women and to protect women's rights in international human rights instruments.

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[24]See Mutua, "The African Cultural Fingerprint," supra note 14, at 371-72.

[25]Id., at 372. The Charter states that the "state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions." Art. 18(3), African Charter, supra note 1. Among the international conventions applicable here would include the Convention on the Elimination of All Forms of Discrimination against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 14 (CEDAW). Normatively, CEDAW is perceived as a very progressive and forward-looking document.

Read in conjunction with other provisions, the Charter seems to leave no room for discriminatory treatment against women. To allay these fears, however, and to prevent a conservative human rights court from ever giving the Charter a discriminatory interpretation in gender matters, the African Charter should be supplemented by an optional protocol to fully address women's rights issues in all their complexity and multiple dimensions.[26]

[26]There already have been calls for a protocol on women's rights. See Rachel Murray, "Report of the 1996 Sessions of the African Commission on Human and Peoples' Rights," 18 Hum. Rts. L. 16, 19 (1997).

The more general critique sees the language of duties as "little more than the formulation, entrenchment, and legitimation of state rights and privileges against individuals and peoples"[27] These critics of the language of duties, however, only point to a theoretical danger that states might capitalize on the duty concept to violate fundamental rights.[28] The fear is frequently expressed that emphasis on duties may lead to the "trumping" of individual rights, if the two come into conflict.[29] In my view, these criticisms, while understandable, are mistaken. African states have not notoriously violated human rights because of their adherence to the concept of duty. The disastrous human rights performance of many African states has been triggered by insecure regimes whose narrow political classes have no sense of national interest and will stop at nothing, including murder, to retain power. In any case, it is not a plausible argument that individuals should not owe any duties to the state. In fact, they do, in tax, criminal, and other laws. A valid criticism of the language of duties should rather focus on the precise meaning, content, conditions of compliance, and application of those duties. More work should be done to clarify the status of the duties in the Charter, and define their moral and legal dimensions and implications for enforcement.

III. The African Commission: Ambiguity and Anemia

The African human rights system is anchored by the African Charter and implemented by the African Commission. The Commission is vested largely with promotional functions and an ambiguous protective function. Thus far the system lacks a credible enforcement mechanism. This is hardly surprising because virtually no African state, with the exceptions of the Gambia, Senegal, and Botswana could even boast of a nominal democracy in 1981, the year that the OAU adopted the African Charter.[30] Hopes by observers of the African Commission that it would robustly construe the Charter to alleviate its weaknesses have largely gone unrealized. With

[27]H. W. O. Okoth-Ogendo, "Human and Peoples' Rights: What Point is Africa Trying to Make?," in Human Rights and Governance, supra note 7, at 74, 78-79.

[28]Id., at 79.

[29]Ronald Cohen, "Endless Teardrops: Prolegomena to the Study of Human Rights in Africa," in Human Rights and Governance, supra note 7, 3, at 15.

[30]Mutua, "The African Human Rights System in a Comparative Perspective," supra note 11, at 7.

respect to specific functions, and to its performance in general, the African commission has been a disappointment. This section discusses the architecture of the African Commission and outlines its basic strengths and weaknesses.

The African Commission was established in 1987, the year after the African Charter entered into force.[31] The eleven members of the African Commission, the commissioners, are elected by secret ballot by the OAU Assembly of Heads of State and Government from a list nominated by states parties to the African Charter.[32] The commissioners, who serve in their personal capacity,[33] are elected for a six-year term and are eligible for re-election.[34] Only by the unanimous agreement of all other commissioners can a member of the Commission be removed from office, for failure of performance.[35]

[31]Art. 30, African Charter, supra note 1.

[32]Id., art. 33.

[33]Id., art. 31(2).

[34]Id., art. 36.

[35]Id., art. 39(2).

The basic functions of the African Commission are both promotional and protective.[36] The promotional function, which the Charter emphasizes, includes research and dissemination of information through workshops and symposia, the encouragement of national and local human rights institutions, the formulation of principles to address legal problems in human rights, and cooperation with African and international human rights institutions.[37] The Commission is empowered to interpret the Charter at the request of a state party, the OAU, or any organization recognized by the OAU.[38] In contrast, the provision relating to the protective function is quite terse. It provides, without elaborating, only that the Commission shall "[e]nsure the protection of human and peoples' rights" in the Charter.[39]

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[36]Id., art. 45, which sets out the functions of the African Commission.

[37]Id., art. 45(1).

[38]Id., art. 45(3). This role, which allows the Commission to interpret the Charter, is potentially one of the areas that the commissioners could seize upon to expound and clarify the Charter.

[39]Id., art. 45(2).

More concretely, the African Charter charges the Commission with three principal functions: examining state reports,[40] considering communications alleging violations,[41] and expounding the African Charter.[42] These functions follow the general script of other regional as well as universal human rights bodies.[43] In particular, the Commission seems to have drawn substantially from the procedures and experiences of the UN Human Rights Committee.[44] Its Rules of Procedure,[45] which provide for process before the Commission, and the Reporting Guidelines,[46] which specify the form and content of state reports, mirror the lessons of other human rights bodies. The Guidelines were supplemented by General Directives, an unpublished document that was sent to foreign ministers of states parties in 1990.[47] The Directives are just a

[40]States parties must submit, every two years, a report on the legislative and other measures taken to give effect to rights in the African Charter. Id., art. 62.

[41]Id., arts. 47 and 55. The Charter permits two types of communications: from individuals, NGOs, and groups, on the one hand, and inter-state communications, on the other. The latter has never been invoked and will not concern this Article.

[42]Id., art. 45(3).

[43]See Philip Alston, "Appraising the Human Rights Regime," in The United Nations and Human Rights: a Critical Appraisal 1 (Philip Alston, ed., 1992); See generally Thomas Buergenthal, International Human Rights, supra note 18, at 21-247 (describing UN Charter-based and treaty-based human rights instruments and bodies, as well the African Inter-American, European human rights systems).

[44]The Human Rights Committee is the treaty body that oversees the implementation of the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

[45]The Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted on October 6, 1995, reproduced in 18 Hum. Rts. L. J. 154-163 (1997) [hereinafter Rules of Procedure].

[46]See "Guidelines for National Periodic Reports," Second Annual Activity Report of the African Commission on Human and Peoples' Rights, Annex III, June 1989, AFR/COM/HPR.5(VI).

[47]See Astrid Danielsen, The State Reporting Procedure Under the African Commission 51-2 (1994) [hereinafter State Reporting

precis of the Guidelines.

Procedure]; Evelyn A. Ankumah, The African Commission on Human and Peoples' Rights: Practice and Procedures 82-3 (1996) [hereinafter Practice and Procedures of African Commission].

The Commission's primary protective function, that of considering complaints filed by individual victims as well as non-governmental organizations (NGOs),[48] has a large potential which thus far has not been realized. First, the Charter places no restriction as to who may file a communication, an opening that allows any individual, groups, or NGOs, whether or not they are the direct victims of the violation complained of, to lodge a petition.[49] However, communications can only be considered by the Commission if they: indicate their authors, even if the authors wish to remain anonymous to the public; are not written in a language that is insulating or disparaging to the state or the OAU; are not incompatible with the OAU Charter and the African Charter; are not be based exclusively on media reports; are sent after the petitioner exhausts local remedies, unless these are obviously unduly prolonged; are submitted within a reasonable time after local remedies are exhausted; do not deal with a matter that has been settled by the states concerned in accordance with international instruments.[50]

Although the Charter does not explicitly require it, communications are considered in private or closed sessions.[51] If the Commission determines that one or more communications "relate to special cases which reveal the existence of a series of serious or massive violations"[52] of human rights, it must draw the attention of the OAU to such a situation and, presumably, conduct an on-site

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[48]The African Charter requires that the Commission "cooperate" with African and international NGOs in its work. Art. 45(1)(a) and (c), African Charter, supra note 1. Thus the Commission grants human rights NGOs observer status which allows their representatives to participate in the public sessions of the Commission. Rule 75, Rules of Procedure, supra note 45.

[49]Art. 55, African Charter, supra note 1.

[50]Id., art. 56.

[51]Rule 106, Rules of Procedure, supra note 45. The Commission, which makes its own rules of procedure, may justify closed sessions for communications under article 59 of the Charter which provides, in part, that "all measures taken within the provisions of the present Charter shall remain confidential" until the OAU decides otherwise. But this provision is overbroad and vague. A literal interpretation of "all measures" would be absurd. Perhaps the Commission could open at least part, if not all, of the communications processes to the public.

[52]Art. 58(1), African Charter, supra note 1.

investigation. In the case of an emergency, the Commission must inform the Chair of the OAU and request an in-depth study, which most likely calls for on-site fact-finding.[53] This provision had remained a dead letter until 1995 when the Commission, with the assistance of the OAU Secretary General, secured the agreement of Senegal and Togo for field investigations.[54] The Commission's power to conduct such investigations is clearly authorized by the Charter which empowers it to "resort to any appropriate method of investigation."[55] The commissioners, however, had been reluctant until recently to claim these powers.

The Commission's formula for considering individual communications closely mirrors that of the UN Human Rights Committee. In a format similar to that of the HRC, the Commission arranges its decisions into sections dealing with facts, argument, admissibility, merits of the case, and the finding. Each of these sections is scant and thin in both substance and reasoning. Two examples will suffice. In Constitutional Rights Project v. Nigeria,[56] a petition challenging a death penalty that was imposed in violation of due process protections, for example, the Commission adopted its scripted presentation, "declared" a violation of the Charter provisions, and "recommended" that Nigeria free the petitioners.[57] In another petition, Civil Liberties Organization v. Nigeria,[58] the Commission found that the government enacted laws, in violation of the African Charter, to abridge due process rights and undermine the independence of the judiciary. It is fair to say, however, that the communications procedure has come

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[53]Id., art. 58(3).

[54]"Final Communique of the 17th Ordinary Session of the African Commission on Human and Peoples' Rights," March 12-22, 1995, Lome, Togo, available in <http://www1.umn.edu/humanrts/africa/achpr17f.html>; see also, Ankumah, Practice and Procedures of the African Commission, at 47.

[55]Art. 46, African Charter, supra note 1.

[56]Communication 60/91, "Decisions and Reports: African Commission on Human and Peoples' Rights," 18 Hum. Rts. L. J. 28 (1997).

[57]Id.

[58]Communication 129/94, "Decisions and Reports: African Commission on Human and Peoples' Rights," 18 Hum. Rts. L. J. 35, 36 (1997).

a long way since the early days. A predictable tradition of considering petitions is slowly evolving.

It is also clear, however, that the decisions referred to here, and others before them, are formulaic, and do not reference jurisprudence from national and international tribunals or fire the imagination. They are non-binding and attract little, if any, attention from governments and the human rights community. The decisions cannot be published without permission from the OAU Assembly of Heads of State and Government.[59] As explained by two human rights advocates, the African Commission has revised its earlier strict interpretation of article 59 which prohibited the publication of communications:

> This changed with the Seventh Activity Report of the Commission, adopted by the Assembly in June 1994. For the first time, this report made available information on the first fifty-two communications decided by the Commission. The information disclosed includes a summary of the parties to the communication, the factual background, and the Commission's summary decision. With the adoption of the Commission's Eighth and Ninth Annual Activity Reports, the Commission went a step further and issued full texts of its final decisions.[60]

The publication of the Commission's decisions takes place only after they have been submitted to the OAU Assembly.[61] Although the procedure appears quasi-judicial, the Commission sees its principal objective as creating a dialogue between the parties, leading to the amicable settlement of the dispute in question.[62] In any case,

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[59]The Charter 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 shall decide otherwise." See Art. 59(1), African Charter, supra note 1.

[60]See Chidi Anselm Odinkalu & Camilla Christensen, "The African Commission on Human and Peoples' Rights: the Development of its Non-state Communications Procedures," 20 Hum. Rts. Q. 235, 277 (1998) [hereinafter "Development of Non-state Communications"].

[61]Id.

[62]Communications 16/88, 17/88, 18/88 Comite Culturel pour la Democratie au Benin, Hilaire Badjogoume, El Hadj Boubacare Diawara v. Benin (it notes, inter alia, that "it is the primary objective of the Commission in the communications procedure to

neither the Charter nor the Commission provide for enforceable remedies or a mechanism for encouraging and tracking state compliance with decisions. To many victims, the Commission's findings are too remote if not virtually meaningless.[63] This overall picture, which is a gloomy one, is by no means universally shared. Some see in the communications procedure the gradual evolution of an effective mechanism:

> A comparison of the decisions over the years shows that while room remains for considerable improvement, the quality of the Commission's reasoning and decision making has continued to evolve positively. In the past two years, the decisions of the Commission have been more substantive and elaborate on the issues of law and fact that are raised in and considered in communications.[64]

State reporting, which is required by the Charter, follows the pattern of other human rights bodies.[65] The Charter tersely provides that states shall submit every two years, a "report on the legislative or other measures taken with a view to giving effect to the rights and freedoms" enumerated in it.[66] The Charter does not say to what body the reports are to be submitted, whether, how, and with what goal the reports should be evaluated, and what action should be taken after such evaluation. The Commission, not surprisingly, has filled in these gaps by borrowing heavily from other treaty bodies.[67] Unfortunately, it has mimicked both the good

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initiate a dialogue between the parties which will result in an amicable settlement to the satisfaction of both and which remedies the prejudice complained of"). See Odinkalu and Christensen, "The Development of Non-state Communications," supra note 60, footnote 51, at 244.

[63]See African Society of International and Comparative Law, Report of the 16th Session of the African Commission on Human and Peoples' Rights 62-83 (1996) for more communications by the Commission. For a very thoughtful analysis of the communications procedure before the African Commission, see Odinkalu & Christensen, "The Development of Non-state Communications," supra note 60.

[64]Odinkalu & Christensen, "The Development of Non-state Communications," supra note 60 at 278.

[65]Art. 62, African Charter, supra note 1.

[66]Id.

[67]See Felice D. Gaer, "First Fruits: Reporting By States

and the bad in those bodies.

The Reporting Guidelines, which are detailed, are supposed to guide states in the preparation of their reports. In particular, the Guidelines specify both the form and content of reports. Thus reports must describe in detail the legislative regime as well as the actual application and protection of specific human rights. In reality, however, many of the reports submitted thus far have been woefully inadequate on both counts.[68] The initial report of Ghana, for example, was only a scant five pages while that of Egypt, although a voluminous fifty pages, only described abstractly some legislation without commentary on the state of human rights conditions on the ground.[69]

Reports are examined in public and state representatives and the commissioners engage in "constructive dialogue," whose purpose is to assist and encourage states implement the Charter. After considering a report, the Commission communicates its comments and general observations to the state in question.[70] Although the Charter came into force in 1987, the majority of states parties have not submitted their reports, and the Commission has been powerless to force compliance.[71] The reporting process seems to have yielded very little so far, as many of the state representatives have appeared either incompetent or ill-prepared.[72] States do not seem to take the reporting seriously and so far the comments and observations of the Commission on state reports have not had any discernable effect on states.

But the African Commission has taken some steps which have the potential to increase its impact on states. In 1996, the

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Under the African Charter on Human and Peoples' Rights," 10 Netherlands Hum. Rts. Q. 29 (1992), for an evaluation of the initial state reporting under the African Charter.

[68]See generally, Ankumah, Practice and Procedures of African Commission, supra note 47, at 79-110.

[69]Id., at 91-2.

[70]Rule 106, Rules of Procedure, supra note 45.

[71]Mohamed Komeja, "The African System of Human and Peoples' Rights: an Annotated Bibliography," 3 East Afr. J. of Peace & Hum. Rts. 271, 284-85 (1996).

[72]Ankumah, Practice and Procedures of the African Commission, supra note 47, at 99.

Commission appointed one its members as a Special Rapporteur on Summary and Extra-judicial Executions is potentially significant if the office is used to investigate, report, and dialogue with states.[73] Additionally, its country-specific and thematic resolutions raise its visibility and engage states directly. Such resolutions have, for example, called on Sudan to allow detainees access to lawyers and doctors and asked the government to support negotiations for the settlement of the conflict with the south.[74] Another resolution urges African states to respect the rights of prisoners and to ratify the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.[75] These resolutions have received little publicity and there are no indications that states take them seriously. However small and tentative, these are steps in the right direction.

IV. The African Human Rights Court: Fears and Hopes

Both the European and the inter-American human rights systems give the impression that a human rights court is an essential, if an indispensable component of an effective regime for the protection of human rights. The reasoning here is that norms prescribing state conduct are not meaningful unless they are anchored in functioning and effective institutions. In the case of the African regional system, this truism merits special attention because both the norms in the African Charter and the African Commission itself have been regarded as weak and ineffectual. Hence the push for a human rights court, an institution that is intended to correct some of the more glaring failures of the African system.

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[73]Rachel Murray, "Report of the 1996 Sessions of the African Commission on Human and Peoples' Rights," 18 Hum. Rts. L. J. 16 (1997), supra note 26.

[74]See Report of the 16 Session of the African Commission on Human and Peoples' Rights, supra note 63, at 89-90.

[75]Id., at 95.

There have been two polar views on the creation of an African human rights court. One view holds that a human rights court must be established as soon as possible to salvage the entire system from its near-total irrelevance and obscurity.[76] According to this view, the deficiencies of the African system -- both normative and institutional -- are so crippling that only an effective human rights court can jump-start the process of its redemption. The court is here seen as a proxy for putting some teeth and bite in the system. The state is the target that must be restrained.

The other view is gradualist and sees the work of the African system as primarily promotional and not adjudicative. According to it, the major problem in Africa is the lack of awareness by the general populace of its rights and the processes for vindicating those rights. Proponents argue that the regional system must therefore first educate the public by promoting human rights. The task of protection, which would include a human rights court, is seen here as less urgent.[77] Critics argue that a court might be paralyzed by the same problems that have beset the African Commission. They therefore urge that the African Commission be strengthened instead of dissipating scarce resources to create another, possibly impotent institution.[78]

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[76]See Mutua, "The African System in a Comparative Perspective," supra note 11, at 10; Komeja, "The African System of Human and Peoples' Rights': an Annotated Bibliography," supra note 71, at 287.

[77]See Ankumah, Practice and Procedures of the African Commission, supra note 47, at 194-95.

[78]Id., at 195.

From the mid-to-late 1990s, the gradualist view gave way to the proponents of a human rights court largely due to the lobbying efforts of African NGOs and human rights academics. It had become clear by the mid-1990s, even to pro-establishment figures, that the African system was a disappointment, if not an embarrassment for the continent. In 1994, the conservative OAU Assembly of Heads of State and Government asked 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."[79]

Events moved speedily in the next several years. In September 1995, a draft document on an African human rights court was produced by a meeting of experts organized in Cape Town, South Africa, by the OAU Secretariat in collaboration with the African Commission and the International Commission of Jurists.[80] Later that month, an OAU meeting of governmental legal experts produced the Cape Town Draft of the draft protocol for a human rights court.[81] After several rounds of meetings and more drafts, the Draft Protocol was adopted by the conference of OAU Ministers of Justice/Attorneys General in December 1997. The OAU Council of Ministers adopted the Draft Protocol in February 1998[82] and the OAU Assembly gave its final blessing in June 1998,[83] opening the Protocol for signature by OAU member states.

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[79]See Report of Government Experts Meeting, AHG/Res 230(xxx), 30th Ordinary Session of the Assembly of Heads of State and Government, Tunis, Tunisia, June 1994, cited in 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) [hereinafter Draft Protocol to the African Charter].

[80]Id., at 944.

[81]See "Report of Government Experts Meeting on the Establishment of an African Court of Human and Peoples' Rights," September 6-12, 1995, Cape Town, South Africa, OAU/LEG/EXP/AFCHPR/RPT(1)Rev.1. Id.

[82]See "International Conference on Human Rights Commission Opens in Addis," XINHUA NEWS AGENCY, May 18, 1998, available in LEXIS, News Library, CURNWS File.

[83]See "Pursuit for Peace Remains Major Task for Africa: Salim," XINHUA NEWS AGENCY, June 18, 1998, available in LEXIS, News Library, CURNWS File.

The consensus among government officials, NGOs, and academics on the need for a human rights court in the African regional system has steadily gained momentum. This realization is indicative of the shortcomings that currently plague the African system. While the push for the court is not a repudiation of the African Commission, it is an acknowledgment of its general ineffectiveness. The hope appears to be that a court will strengthen the regional system and realize its promise. But that will not happen unless the court avoids the pitfalls that have trapped the African Commission.

The presence of other regional human rights courts in the Americas and Europe has given impetus to the African initiative and advanced the idea within the modern African state that its conduct towards its own citizens is no longer an internal, domestic matter. Even in Asia, where states have been more resistant to the application and internalization of the human rights corpus -- and where as of yet there is no regional human rights system -- that resistance is bound to come under increasing attack by NGOs due to the establishment of a human rights court in Africa. The regional supervision of a state's internal conduct towards its nationals is quickly becoming a reality.

There is little doubt that both the European Court of Human Rights and the Inter-American Court of Human Rights have given the idea of international enforcement concreteness in a way that did not seem plausible a mere fifty years ago. Africa, a continent that has been plagued by serious human rights violations since colonial rule, is now poised to further erode the power of the sovereign with the establishment of an adjudicatory body, the African Court on Human and Peoples' Rights.[84] At the adoption of the Draft Protocol in December 1997, Salim Ahmed Salim, the OAU Secretary General, stated that human rights "is a basic requirement in any society and a pre-requisite for human progress and development."[85]

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[84] Id.

[85] "Talks Open in Addis Ababa on Establishing African Human Rights Court," Deutsche Presse-Agentur, December 12, 1997, available in LEXIS, News Library, CURNWS File.

The African Human Rights Court is an attempt to address some of the weaknesses of the African system. Its basic function is protective, and seeks to complement the work of the African Commission, whose work is basically promotional.[86] Although the African Commission's mandate includes state reporting[87] and the consideration of communications[88], a function which is protective, it is the promotional activities which have been the centerpiece of its operations.[89] But commentators agree that both the state reporting and the communications procedures have been disappointing, partly due to the lack of powers and the absence of textual clarity. Can the African Human Rights Court cure these problems?

The court would be composed of eleven judges elected in their individual capacity by the OAU Assembly of Heads of States and Government 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."[90] Judges would serve for a six-year term and be eligible for re-election only once.[91] It is a shortcoming that all judges, except the

[86]The Protocol realizes this contrast -- in essence the weaknesses and the incompleteness of the African Commission -- when its states in its preamble that the African Human Rights Court will "complement and reinforce the functions of the African Commission on Human and Peoples' Rights." Protocol, preamble, supra note 3. It adds, further, that the African Human Rights Court shall "complement the protective mandate of the African Commission." Id., Article 2.

[87]Article 62, African Charter, supra note 1.

[88]These include state-to-state and "other" communications, which could come from individuals, groups, and organizations. Id., articles 55, 56.

[89]The principal activities of the African Charter, which are promotional, are to collect documents, undertake studies, organize seminars, disseminate information, encourage national and local institutions concerned with human rights, formulate principles to resolve human rights problems, and interpret the African Charter. See Id., article 45.

[90]Art. 11(1), Protocol, supra note 3.

[91]Id., art.15 (1).

President of the court, serve on a part-time basis.[92] Although their independence is formally guaranteed and they are protected by the immunities of diplomats under international law, part-time service undermines the integrity and independence of the court.[93] A Judge can only be removed by the unanimous decision of all the other judges of the court.[94] A Judge who is a national of a state party to a case must be recused to avoid bias.[95] The court appoints its own registrar and registry staff.[96]

The court's jurisdiction is not circumscribed or limited to cases or disputes that arise out of the African Charter.[97] The Protocol provides that actions could be brought before it on the basis of any instrument, including international human rights treaties, which are ratified by the state party in question.[98] Furthermore, the court can apply as sources of law any relevant human rights instrument ratified by the state, in addition to the African Charter.[99] The court is empowered to decide if it has jurisdiction in the event of a dispute.[100] The court can exercise both contentious and conciliatory jurisdiction.[101] It has advisory jurisdiction through which it may issue advisory opinions on "any legal matter relating to the Charter or any other relevant human rights instruments."[102] Such an opinion can be requested by a wide variety of entities including a member state of the OAU, the OAU or any of its organs, or even an African NGO, provided it is

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[92]Id., art.15(4).

[93]Id., art.17.

[94]Id., art.19.

[95]Id., art.22.

[96]Id., art.24.

[97]Id., art.3(1)

[98]Id.

[99]Id., art. 7.

[100]Id., art.3(2).

[101]Id., art. 9, which allows the court to attempt the "amicable settlement" of disputes.

[102]Id., art.4(1).

recognized by the OAU.[103]

One serious shortcoming of the African Human Rights Court relates to the limitation of access placed by the Protocol on individuals and NGOs. The court has two types of access, one automatic, the other optional. The African Commission, states parties, and African intergovernmental organizations enjoy unfettered or "automatic" access to the court once a state ratifies the Protocol.[104] In stark contrast, however, individuals and NGOs cannot bring a suit against a state unless two conditions are met. First, the court has discretion to grant or deny such access.[105] Secondly, at the time of ratification of the Draft Protocol or thereafter the state must have made a declaration accepting the jurisdiction of the court to hear such cases.[106]

While this limitation may have been necessary to get states on board,[107] it is nevertheless disappointing and a terrible blow to the standing and reputation of the court in the eyes of most Africans. After all, it is individuals and NGOs, and not the African Commission, regional intergovernmental organizations, or states parties, who would be the primary beneficiaries and users of the court. The court is not an institution for the protection of the rights of states or OAU organs. A human rights court is primarily a forum for protecting citizens against the state and other governmental agencies. This limitation will render the court virtually meaningless unless it is interpreted broadly and liberally.

The court is technically independent of the African Commission although it may request the Commission's opinion with respect to

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[103]Id.

[104]Id., art.5(1), 5(2).

[105]Id., art. 5(3) provides 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)

[106]Id., at 5(3), 34(6).

[107]Ambassador Badawi, a member of the African Commission and its former chair, alludes to this when he notes that the "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." See Badawi El-Sheikh, "Draft Protocol of the African Charter," supra note 79.

the admissibility of a case brought by an individual or an NGO.[108] In ruling on admissibility of a case, the court must also take into account the requirements that communications must meet under the African Charter.[109] Presumably, the court should not hear cases which do not meet these criteria. The court may also consider cases or transfer them to the African Commission, where it feels that the matter requires an amicable settlement, not adversarial adjudication.[110]

It is vital that the court determines its own rules of procedure[111], a fact which should enhance its independence. Proceedings before the court would generally be conducted in public and parties would be entitled to legal representation of their own choice.[112] Witnesses or parties to a case "shall enjoy all protection and facilities, in accordance with international law"[113] in connection with their appearance before the court. This would shield witnesses from various pressures and intimidation and facilitate their ability to more fully and freely participate in proceedings.

The court is given wide powers in conducting proceedings. It seems to have discretionary jurisdiction, and need not take all the cases that come before it. This should allow the court to avoid over-load and to hear only those cases which have the potential to advance human rights protection in a meaningful way. The court may hear submissions from all parties, including oral, written, and expert testimony.[114] States are required to assist the court, and provide facilities for the efficient handling of cases.[115] Once the

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[108]Art. 6(1), Protocol, supra note 3.

[109]Id., art. 6(2). See art. 56, African Charter, supra note 1, for a list of the requirements that communications before the African Commission must meet.

[110]Art. 6(3), Protocol, supra note 3.

[111]Id., art.33.

[112]Id., article 10(1), (2). Free legal representation may also be provided where the "interests of justice so require." Id., article 10(2).

[113]Id., art.10(3).

[114]Id., art.26.

[115]Id., art.26(1).

court finds a violation, it may order remedies, including "fair compensation or reparation."[116] In cases of "extreme gravity and urgency," the court may order provisional remedies, such as an injunction, to avoid irreparable harm to victims, actual or potential.[117]

The court's judgments, which are final and without appeal,[118] are binding on states.[119] In its annual report to the OAU, the court specifically lists states which have not complied with its judgements.[120] This is a "shaming" tactic that marks the violator. The OAU Council of Ministers is required to monitor the execution of the judgement on behalf of the OAU Assembly. Presumably the OAU Assembly can take additional measures to force compliance, such as passing resolutions urging states to respect the court's judgements. Alternatively, the OAU Chairman could be empowered to write to delinquent states asking that they honor the court's judgements.

Critics and supporters alike have argued that it makes little sense to create an institution that duplicates the weaknesses of the African Commission. In the context of the OAU, an organization with scarce financial resources and limited moral clarity and vision, the establishment of a new body should be approached

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[116]Id., art.27(1).

[117]Id., art.27(2).

[118]Id., art.28.

[119]Id., art.30 provides, in part, that states "undertake to comply with the judgement in any case in which they are parties within the time stipulated by the Court and to guarantee its execution." (emphasis added).

[120]Id., article 31.

somberly. A human rights court will only be useful if it genuinely seeks to correct the shortcomings of the African system and provides victims of human rights violations with a real and accessible forum to vindicate their basic rights. What the OAU and the African regional system do not need is yet another remote and opaque bureaucracy, one that promises little and delivers nothing. If that were the case, then it would make more sense to expend additional resources and energy to address the problems of the African Commission and defer the establishment of a court for another day. Several important questions will have to addressed if the human rights court is to become a significant player in human rights in Africa.

The second set of problems that face the human rights court are institutional. These concerns are external to the court and are compounded by matters internal to it, such as the tenure of judges and its effect on the independence of the court and the limitation of access to the court to individuals and NGOs. It is absolutely critical that the court is, and be perceived as, separate and independent from the African Commission to avoid burdening it with the severe image problems and the anemia associated with its older sibling. This is possible if there is a clear-cut division of labor between the African Human Rights Court and the African Commission. That is not currently the case. A court was not contemplated by the drafters of the African Charter and as a result the African Commission was vested with both promotional and protective functions. One clear protective function is the individual complaint procedure which makes the Commission "court-like" because of its quasi-judicial character.

The African Charter should be revised to remove protective functions from the African Commission and to vest them exclusively with the African Human Rights Court. The African Commission should only be charged with promotional functions, the most basic of which should be state reporting and dialogue with NGOs and government institutions in member states to encourage promotion, advocacy, and the incorporation of human rights norms into state policies and domestic legislation.[121] This unambiguous demarcation of areas of competence should alleviate the problem of hierarchy or "competition" between the two institutions, and may enhance cooperation and mutual reinforcement. Importantly, it should avoid tainting one body with the baggage of the other. Thus the African Commission would clearly be the "political" body while the court

[121]At a recent meeting, NGOs and members of the African Commission started a dialogue on possible amendments and revisions to the African Charter. These included women's rights, "clawback" clauses, and derogation of rights. Id., at 19.

would alone be the judicial or "legal" organ of the African human rights system.

The court has broad powers and may, presumably at its discretion, exercise contentious, conciliatory, or advisory jurisdiction. The Protocol does not seem to impose a mandatory jurisdiction on the court, that is, require it to hear every admissible case. While certain entities are entitled to submit cases to it, the court has discretion under the admissibility clause to consider or transfer cases to the African Commission.[122] This discretion is essential if one considers the purposes of adjudication that the court ought to carve out for itself to become effective, relevant, and visible in the struggle against the culture of impunity and human rights violations.

There are three basic purposes which are associated with national and international adjudicatory bodies. These are: vindicating the rule of law by providing justice in an individual case; protecting rights through deterrence and behavior modification; and expounding legal instruments and making law through elucidation and interpretation.[123] To fulfill its promise, the African Human Rights Court will have to reflect carefully on these roles and decide where it has the potential to make a meaningful contribution.

The African Human Rights Court should not be viewed as a forum for offering individual justice to victims of human rights violations. While such a goal is certainly noble, it is by all means impossible. The court can act neither as a forum of first instance nor as the mandatory court of appeal for all cases. Cast in this role, the court would be paralyzed by a torrential caseload. Statistics from other fora tell why the court should not burdened with a mandatory jurisdiction. The most poignant example is that of the Human Rights Committee (HRC), the body that oversees the implementation of the International Covenant on Civil and Political Rights.[124] Under the Optional Protocol to the ICCPR,

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[122]Art. 6(3), Protocol, supra note 3.

[123]See Henry J. Steiner, "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?," in The Future of UN Human Rights Treaty Monitoring (Philip Alston & J. Crawford, eds., Cambridge University Press, forthcoming 1999) (see text at the beginning of section entitled "Purposes of Adjudication").

[124]See International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1996) [hereinafter ICCPR].

individuals can petition the HRC for the vindication of their rights.[125] The HRC's use of a mandatory jurisdiction to consider all admissible cases has created a back-log of at least three years.[126] The possible ratification of the Optional Protocol by states with large populations such as China, India, USA, and Indonesia -- together with the growing familiarity by victims with the procedure -- can only underscore the complete inability of the HRC to respond to all individual cases.

The African Human Rights Court need not make the mistake of the HRC. It will not survive if it adopts a mandatory jurisdiction because the volume of cases is bound to be enormous. Instead the court should only hear those cases that have the potential to expound on the African Charter and make law that would guide African states in developing legal and political cultures that respect human rights. In other words, the court should not be concerned with individual cases where it looks, as it were, backwards, attempting to correct or punish an historical wrong to an individual. Rather, the court should look forward and create a body of law with precedential value and an interpretation of the substantive law of the African Charter and other key universal human rights documents to direct states. Here, the court would protect rights by judgements which by their nature deter states from future misconduct by modifying their behavior. Individual justice would be a coincidence in the few cases the court would hear. Moreover, individual courts in OAU member states should look to the African Human Rights Court for direction in the development and application of human rights law.

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[125]See Optional Protocol to the ICCPR, G.A. Res. 2200 A(XXI), 21 U.N. GAOR Supp. No. 16, at 59, U.N. Doc. A/6316 (1966).

[126]For statistics on the twenty years since the HRC communications procedure became effective under the Optional Protocol, see 1997 Report of the Human Rights Committee, GAOR Supp. No. 40 (A/52/40), Section VII(A).

Finally, the African Human Rights Court would benefit tremendously from the experiences of the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights as well national fora such as the Constitutional Court of South Africa which have taken the lead in developing human rights jurisprudence. The court should closely examine the factors that have made these institutions more effective. Some authors have identified a checklist of such factors which the African Human Rights Court ought to contemplate.[127] Helfer and Slaughter have organized them into three clusters: factors that states parties to the treaty creating the court control (such as tribunal's composition, its investigative powers, and the legal status of its decisions); factors that the tribunal itself controls (such as quality of legal reasoning and degrees of autonomy from political interests); and factors beyond the control of the tribunal and the states parties (such as the cultural identities of states and the nature of abuses monitored by the tribunals).[128]

This checklist can be particularly useful if judges are independent and motivated by the drive to make the African Human Rights Court the central institution in the development of a legal culture based on the rule of law. Over the past decade, there has been a general movement in Africa towards more accountable and open governments. The court comes in an environment of increased awareness about the proper limits of governmental conduct. For the first time since decolonization, states seem to be more willing to either foster or allow the creation of institutions of public accountability. The checklist by Helfer and Slaughter would appear to be a useful one under these circumstances, considering that the three clusters make a reasonable template for an emergent regional court. Ultimately, effective supranational adjudication will not be possible in Africa unless the OAU system and individual member states treat, and expect, the African Human Rights Court to lead them in transforming the dismal legacy of state despotism on the continent.

5: Civil Society, Human Rights, and Political Reform

[127] See generally Laurence R. Helfer & Anne-Marie Slaughter, "Towards a Theory of Effective Supranational Adjudication," 107 Yale L. J. 273 (1997).

[128] Id., at 298-337.

The establishment of the regional human rights system in Africa in the mid-to-late 1980s coincided with the onset of what has been termed African Renaissance.[129] After the first three decades of independence had failed primarily because of bad government, African peoples across the continent were determined in the late 1980s to end years of despotic, unaccountable, single party or military governance. After all, many economic and social indicators had dipped to an all-time low. It was in this climate that Africa started witnessing historic demands for political liberalization since decolonization some three decades earlier. Throughout the continent, millions of citizens started to demand a government sanctioned by the free will of the governed. This "second African liberation" sought to reverse decades of authoritarian one-party rule, unspeakable human rights abuses, and economic mismanagement. A determined cadre of middle-class moderates, mostly notably lawyers, journalists,[130] and human rights advocates were relentlessly pressing governments throughout Africa to open up the political process to a competitive electoral process. The rallying cry for these reformers was, and remains, human rights and its inseparable twin, the rule of law.

These continental convulsions started in 1989 in Cotonou, Benin, then a centrally planned, autocratic one-party state. Almost in tandem with anti-communist reformers in Eastern/Central Europe, hundreds of citizens took to the streets of Cotonou demanding that long-standing dictator Mathieu Kerekou resign immediately and hand over power to an elected government. At first, Kerekou responded to the protests by ordering the beatings and arrests of the demonstrators. He relented, however, as the number of mass protests mounted. Within months, President Kerekou was forced to agree to a national constitutional conference with his political opponents, civic leaders, and religious groups. In March 1991, he was resoundingly defeated in the country's first democratic election since independence in 1960. The newly elected, democratic government of Nicephore Soglo won international acclaim for its impressive stewardship of the emergent democracy. The new government restored judicial independence and the freedom of the press. For the first in the country's history, the legislature and civic and local organizations became vehicles for popular

[129]Makau wa Mutua, "African Renaissance," New York Times, May 11, 1991, at L23.

[130]For reports on the emergent African free press and its struggles with the state, see Committee to Protect Journalists, Attacks on the Press in 1994, 14-55 (1995).

political participation.[131]

Since the turn toward democracy, more respect for human rights, and a free press in Benin, many African governments have agreed to open political competition, some after protracted national debates and false starts and fits. But typically, virtually all one-party or military regimes in Africa have been forced over the past decade to agree to new constitutional frameworks that guarantee open political competition and fundamental human rights. In 1994 apartheid in South Africa was defeated in no small measure to the relentless campaigns of the internal civil society and political groups working in concert with the international community. In May 1994, Kamuzu Banda relinquished power in Malawi after the first open election in the country's history.[132] This story has been replayed in most states in Africa. In effect, political reformers have uprooted one dictator after another. Today only a few states in Africa formally reject political democracy as a system of government.

The apparent spontaneity and unpredictability of the democratic upheaval throughout Africa shocked policy analysts, particularly in the West, where it has been believed for a long time that Africa was not ready for political democracy. But to most Africans the events of the last decade were long overdue. Over the years, attempts by Africans to overthrow repressive regimes have been quickly reversed or fallen short. But a number of factors have combined to produce the beginnings of encouraging, albeit limited successes. The basic impetus for the change has been the inability of the African state to meet the basic economic needs of the population. At independence, Africans expected their governments to reduce widespread poverty, ignorance, and disease. But the very nature of the new regimes militated against sustained development. Carved haphazardly by European powers, most of them did not cohere as states or make sense as political and economic entities. The export-oriented, one-product economies imposed by colonial overlords did not create an auspicious setting for developmental take-off. The global marketplace, with its throw-away prices for primary commodities, would not be kind to these new

[131]It was ironic, but a measure of the progress brought about by popular participation, that in 1996 Kerekou became the beneficiary of the democratic rules of engagement that he has sought to suppress six years earlier. In 1996, he was returned to power after defeating Nicephore Soglo, the man who had defeated him in 1991 in the country's first democratic election since independence. See "Voodoo Day Called Ploy to Get Votes," Phoenix Gazette, January 11, 1996, at A2.

[132]Makau wa Mutua, "Forgive, But Don't Forget," Boston Globe, July 12, 1994.

entrants.

These problems were significantly compounded by the political and moral bankruptcy of the new elites of politicians and bureaucrats. They inherited and maintained, almost intact, the repressive and exploitative colonial structures. They faithfully carried out ill-advised economic programs and projects of the World Bank and the International Monetary Fund. They consumed conspicuously the national resources. To maintain their stranglehold on power, they depleted the balance of resources, including international assistance, to equip security forces. Dissent and independent political activity were brutally suppressed by persecution of opponents, real and perceived. Under these regimes, most indices of well-being plummeted sharply, giving rise to universal discontent among the citizenry. These desperate conditions led to coups and counter-coups, civil wars, and other social and economic catastrophes. With the end of the cold war, and the inability or the unwillingness of the United States and the former Soviet Union to prop up their client states, these miserable conditions left many governments exposed and without external support. Hence, the success of the pro-democracy reformers.

Not surprisingly, African reformers from Benin in 1989 to Nigeria in 1999 have based their campaigns to capture state power on civil and political rights, the language of liberalism. They argue that it is from these freedoms that a democratic ethos and a culture of tolerance will emerge. Human rights groups, women's groups, environmentalists, bar associations, private electronic and print media, and farmer's lobby groups have mushroomed throughout Africa in the past decade. Political parties have become one of the principal avenues for mediating state power. Yet human rights problems abound everywhere on the continent. Despite the establishment of the regional human rights system and the creation of national human rights institutions in places as diverse as Kenya, South Africa, and Uganda to mention a few, the continent remains a euphemism for human suffering. In the Democratic Republic of the Congo, Sudan, Burundi, Rwanda, Somalia, Ethiopia, Uganda, the Republic of Congo, and Angola, human rights conditions remain bleak and grim. There have been painful reversals in some states, such as Burundi and the Republic of Congo where democratic gains were made earlier in the decade. Elsewhere, the deepening and consolidation of democracy is becoming a serious challenge. One thing is clear: the emergent paper-thin democracies of Africa will fail or revert to dictatorship unless a confluence of domestic and international factors combine to lift these societies over the threshold.

Emergent democracies must create constitutional and legal regimes that permit the growth of a vibrant and open civil society

with a democratic ethos, respect for opposing views, and a free press. They must allow the whole gamut of civil and political rights. Formally, this can be effected at once. Repressive laws, undemocratic constitutional and state structures, and suffocating government regulations can be repealed at once upon the ascendancy of popularly elected legislatures. But that alone will not suffice. Due to centuries of abuse and deprivation, it has been difficult, and in many cases impossible, to develop and sustain practices that enhance and internalize concepts of civic responsibility, an essential ingredient in a functioning democracy. Emergent democracies must allow the growth of the private, non-governmental sector and instill in public servants and law enforcement officials an appreciation for the proper limits of state action. They must also contain and punish, without exception, the unconstitutional and corrupt practices of state officials. In this respect, the anti-corruption and reform efforts of Olusegun Obasanjo, the democratically elected president of Nigeria, will be instructive and telling about the future of democracy in Africa.[133]

The most serious threat to democracy, civil society, and reform remains, however, in the impoverished economies of African states. Democracy will not take root in Africa if the majority of its population continue to live in abject poverty. Africans support democracy because they expect it to reverse decades of corruption, mismanagement, and economic hardship. Only innovative domestic economic policies coupled with a reform of the international economic arrangements to take into account the difficult conditions of African states can create the conditions necessary for human development.

VI: Conclusion

Africa has been traumatized by human rights violations of historic proportions over the last five centuries. The recent chapter in that long history of abuses is still being authored under the direction of the post-colonial state. But the peoples of Africa, like peoples elsewhere, have never stopped struggling for better conditions of life, and especially for more enlightened and accountable political societies. The popular repudiation of one-party and undemocratic states over the past decade has once again given hope that the predatory impulses of the post-colonial state might be arrested. Within states, non-governmental organizations

[133]Norimitsu Onishi, “Nigerian Leader Amazes Many With Strong Anti-Graft Drive,” New York Times, November 23, 1999, at A1.

have multiplied during that period and governments are being been forced to revise policies and laws that are offensive to basic human rights. At the continental level, NGOs and human rights advocates have demanded that the African Commission become part of this movement towards change.

This is the lense through which Africans now view the African human rights system. While it is felt by many Africans that the idea of the African Commission was a step in the direction, there are serious misgivings that it has been largely ineffectual. Further, that a regional human rights system worth its name need strong institutions to anchor its norms. The African Human Rights Court is an attempt to fulfill that promise. However, the court promises to be a disappointment unless states parties revisit the African Charter and strengthen many of its substantive provisions. Moreover, the court will not meet the expectations of Africans if the OAU does not provide it with material and moral support to allow it to function as the independent and significant institution that it ought to be. Finally, of course, the initial integrity and vitality of the court will rest with those who will be privileged to serve as its first bench. Unless these conditions are met, the African Human Rights Court is condemned to remain a two-legged stool, a lame institution unable to fulfill its promise as a seat from which human rights can be advanced. In that case, the court will have failed to redeem the troubled African regional system.