

## **Finding an Impetus for institutional change at the African Court on Human and Peoples' Rights**

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# Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights

By  
Rebecca Wright\*

## I. INTRODUCTION

In Aesop's fable, *The Ant and the Chrysalis*, an ant discovers a chrysalis in a tree and derides it for being imprisoned in its shell, with "power only to move a joint or two of your scaly tail."<sup>1</sup> One day, the butterfly emerges from its bondage and flies off, leaving the ant with one clear lesson: evolution and change are always possible.

At first glance, the ant's lesson appears inapplicable to the new African Court on Human and Peoples' Rights (Court). Like the chrysalis, the Court has been tightly bound. Its two founding treaties, the African Charter on Human and Peoples' Rights (African Charter) and the Protocol on the Establishment of an African Court on Human and Peoples' Rights (Protocol establishing the Court),<sup>2</sup> staunchly protect state sovereignty, restricting the institution's power to act. Individual access to the Court is only possible through state consent. Requirements of confidentiality, amicable settlement and exhaustion of local

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1. *The Ant and the Chrysalis*, Aesop's Fables: Online Collection – Selected Fables, at <http://www.pacificnet.net/~johnr/aesop/aesopsel.html> [hereinafter *Ant and Chrysalis*].

2. African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> [hereinafter African Charter]. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (1998), available at <http://www1.umn.edu/humanrts/africa/courtprotocol2004.html> [hereinafter Protocol establishing the Court].

remedies allow states to avoid strict accountability. In addition, treaty-based institutions are notoriously difficult to change and evolution is strongly resisted once the power dynamics are locked in.<sup>3</sup> Thus, it appears that the Court's "basic genetic structure . . . so limits the institution that it is, from the outset, destined to fall short"<sup>4</sup> in its efforts to protect and promote human rights.<sup>5</sup> This paper, however, will explore one possible source for institutional change at the Court that might enable it to overcome its genetic shortcomings: foreign aid providers.<sup>6</sup> By linking aid provisions to demonstrated commitments to the Court, this group of "other interested parties"<sup>7</sup> can provide a potential source for growth. Observers may then find themselves as shocked as the ant, watching a tightly bound entity discover the impetus to evolve.

This paper will analyze the development of the Court from the perspective of rational design theory. While little of this literature addresses human rights directly, the observation that "states use international institutions to further their own goals, and . . . design institutions accordingly" is certainly applicable to human rights mechanisms.<sup>8</sup> The fact that institutions are a product of conscious state decision-making is evident in the treaties that establish the Court. State power has been left supreme and individual member states have purposefully restricted the ways they might be held accountable for human rights violations.

3. See, e.g., Cesare Romano & Chidi Odinkalu, *Africa Won't Have a Second Chance to Make a First Impression*, "DO IT RIGHT:" NEWSL. OF AFR. CT. COALITION (Coalition for an Effective Africa Court on Human and Peoples' Rights, Nig., Afr.), 2004, at 1 (on file with author) (noting how, "[f]or courts like the African Court, established by treaty, it is often impossible to find the majority support necessary to modify statutes and rules of procedure. They are documents that, time and again, have proved remarkably resistant to change"); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001) (observing how "Japan and Germany play modest roles in the UN today because they have been unable to reverse the decision made in 1944-45 to exclude them from the Security Council").

4. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT.'L L. 401, 413 (2006).

5. The Preamble to the Protocol establishing the Court states that the Court should be created to "complement and reinforce" the functions of the Commission. These functions are "on the one hand promotion and on the other protection of Human and Peoples' Rights, freedom and duties." Protocol establishing the Court, *supra* note 2, pmbl.

6. Foreign aid is also known as official development assistance (ODA) and is provided by donor governments and multilateral institutions. The funding of regional human rights courts might not be considered "foreign aid" according to some definitions because it is not aimed directly at poverty reduction or macroeconomic policy. However, Steven Roper and Lilian Barria have described how a broader definition of foreign aid has emerged that focuses on "conflict prevention and resolution, reconstructing social networks, strengthening civil and representative institutions, promoting the rule of law and security sector reform." Providing foreign aid to a regional human rights court would fall within this broader concept of foreign assistance. See Steven D. Roper & Lilian A. Barria, *Funding Institutions of Human Rights: Do International Tribunals Provide Good Value?*, Prepared for delivery at the Annual Meeting of the American Political Science Association, 3 (Sept. 1-4, 2005), <http://www.eiu.edu/~polisci/RoperBarriaAPSA.pdf>.

7. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT.'L L. 401, 414 (2006).

8. Koremenos, *supra* note 3, at 762 (emphasis omitted). In an additional article, Koremenos et al. concluded that "the preliminary evidence suggests that our hypotheses will also apply to the human rights area." Barbara Koremenos et al., *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG. 1051, 1062 (2001).

Thus, the nature of the game needs to be altered so that an incentive for change is provided. This is where foreign aid can play a role.

Apart from the evolution that occurs as a result of the “purposeful decisions” of state actors,<sup>9</sup> rational design theory does not tend to take account of the possibility for institutional change.<sup>10</sup> This paper, then, contributes to this body of scholarship by demonstrating how an outside influence can shift states’ interests, resulting ultimately in a judicial institution that serves functions unintended in its initial design. Part I provides a background to the development of the Court, demonstrating how the protection of state sovereignty has long been a priority in Africa’s regional human rights system. Part II describes the restrictive nature of the Court’s constituent instruments and how they limit the effective protection of human rights. It will compare a few key features of the African Court with the practices of the European and Inter-American Human Rights Courts and will suggest how the Protocol establishing the Court could have been made less restrictive. Part III will address how, as a group of other interested parties or “outsiders” with significant economic leverage over African nations, foreign aid donors could cause the Court to evolve. Although it is difficult to assess all the motivations underpinning the decision to grant foreign aid, the major donors have already begun to make their aid conditional on a respect for human rights—or at least conditional on efforts towards establishing good governance and rule of law. This last Part will provide concrete suggestions for the ways in which aid could be tied to institutional development.

Among the proposals discussed at the end of this paper are the need for individuals to have direct access to the Court and the need for a clear statement that domestic remedies should be fair and effective before they require exhaustion. Such measures will enable the Court to engage in “effective” adjudication by allowing it “to compel a party to a dispute to defend against a plaintiff’s complaint and to comply with the resulting judgment.”<sup>11</sup> Other functions, however, include strengthening the domestic courts and human rights institutions within Africa and providing a motivating focal point for African civil society. Only by fulfilling these latter two functions will the Court ensure that the human rights of African individuals are protected.

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9. According to rational design theory, the evolution of institutions only occurs in two situations: first, when states make “purposeful decisions as new circumstances arise”; second, when states begin to select a particular institution above others, favoring a specific institutional design. Koremenos, *supra* note 3, at 767.

10. In her article on international criminal tribunals, for example, Allison Danner noted how rational design scholars often assume that the interests of states remain constant. Danner explored ways in which institutional development can occur in unintended and irreversible ways so that courts perform functions not anticipated by the creating states. Such unintended evolution is, of course, a possibility for the African Court, but Danner’s theory is not predictive and will probably only be applicable over a long time period. Allison Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. (forthcoming 2006), Vanderbilt Public Law Research Paper No. 05-30, available at <http://www.ssrn.com/abstract=822809>.

11. This definition of “effectiveness” is the one used by Laurence Helfer and Anne-Marie Slaughter in their article on supranational adjudication. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 283 (1997).

This whole paper is, of course, based on the premise that regional human rights courts are important institutions and that it is beneficial to have them functioning effectively. The Inter-American Court, established in 1979, has succeeded in persuading governments to release individuals who have been unjustly imprisoned. It has also successfully ordered governments to pay compensation to families who have lost members through human rights violations.<sup>12</sup> Even more impressive is the history of the European human rights system that was established in 1953, with the current version of the European Court of Human Rights created in 1998.<sup>13</sup> In 2000, Mary Robinson commented that: "The [European] Convention and Court have . . . played a key role in increasing human rights awareness and in the promotion and protection of human rights" in the region.<sup>14</sup>

Within Europe, states have been provided with economic incentives to protect human rights. No country has joined the European Union without first being a member of the Council of Europe, an "institutional watchdog of human rights principles, pluralistic democracy and the rule of law."<sup>15</sup> The fact that increased human rights protection is a prerequisite for membership in the European Union is a motivating factor that has played a significant role in the development of the human rights system in Europe. It is clear that African states would like to replicate the type of economic success achieved through the European Union, and ultimately the African region might be capable of providing its own economic incentives for human rights protection.<sup>16</sup> Presently, however, there is a dire lack of resources within the region and a number of organizational weaknesses. Bronwen Manby, for example, has noted that, while the regional group New Partnership for Africa's Development (NEPAD) contains human rights commitments for member states, the organization "has

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12. Peru, for example, complied with the Court's order to release Maria Elena Loayza Tamayo from prison following the decision in *Loayza Tamayo v. Peru* (1997). States have also amended domestic laws following decisions by the Inter-American Court. See JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 8-9 (2003).

13. The European Human Rights system was established in 1953 when the Convention for the Protection of Human Rights and Fundamental Freedoms was ratified. The European Commission of Human Rights was established in 1954 and the limited Court of Human Rights was created in 1959. The current European Court of Human Rights (which replaces the dual system of Commission and Court) was created in 1998 by Protocol 11, an amendment to the Convention.

14. Mary Robinson, Address of the [United Nations] High Commissioner for Human Rights at the European Convention on Human Rights (Nov. 4, 2000), <http://www.unhchr.ch/hurricane/hurricane.nsf/0/F9DAEB800238EB3DC125698F00563E7C?opendocument>.

15. See Europa, *The EU's Relations with the Council of Europe*, [http://europa.eu.int/comm/external\\_relations/coe/](http://europa.eu.int/comm/external_relations/coe/). As Christina Hioureas' paper in this volume demonstrates, the European Court now has so many applications that it is almost a victim of its own success. Christina Hioureas, *Behind the Scenes of Protocol 14: Politics in Reforming the European Court of Human Rights*, 24 BERKELEY J. INT'L L. 718 (2006).

16. Rachel Murray has noted how the AU takes "the wider political and economic view that the EU now encompasses," observing that "it was the EU that was said to have served as the AU's model." RACHEL MURRAY, *HUMAN RIGHTS IN AFRICA: FROM THE OAU TO THE AFRICAN UNION* 31 (2004).

significant deficiencies” and so is unable to enforce these commitments.<sup>17</sup> As a result, economic incentives will need, at this present time, to come from an outside actor such as foreign donors.

## II.

### A HISTORY OF STATE SOVEREIGNTY AND THE GENESIS OF THE AFRICAN COURT

This Part will give a brief history of the regional human rights system in Africa, describing the main organizations and developments. It will begin by looking at the Organization of African Unity (now the African Union) and will then consider the African Charter and the African Commission on Human and Peoples' Rights (Commission). Finally, it will describe the negotiations that led to the adoption of the Protocol establishing the Court. This history emphasizes the ways in which the African states have succeeded in protecting their sovereignty within their regional human rights system.

#### *A. The Organization of African Unity/ African Union*

The Court is a creation of the Organization of African Unity (OAU), which has now transformed into the African Union (AU). The Charter of the OAU entered into force on September 13, 1963 and provided for a “supreme organ” called the Assembly of Heads of State and Government (AHSJ).<sup>18</sup> The principal concern underlying the OAU Charter was the determination to protect the newly acquired statehood of many African countries. In fact, as Claude Welch has noted, the OAU was created “in a context of nearly untrammelled state sovereignty, in which heads of state sought sedulously to safeguard the independence so recently won.”<sup>19</sup> Article III of the OAU Charter set out the principles to which the Member States agreed to adhere: first was “[t]he sovereign equality of all member states”; second was “[n]on-interference in the internal affairs of states.”<sup>20</sup> Any disputes between the states were to be resolved using negotiation, mediation or arbitration.<sup>21</sup> At this point, the focus was clearly on the protection of the state and not the individual. As a result, the “sovereignty principle, together with the non-interference principle – the reserve domain – became the identity symbol of the organization. The organization, thus, became a personality club in perpetual mutual adoration.”<sup>22</sup>

Given that the heads of state who were themselves responsible for massive

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17. Bronwen Manby, *The African Union, NEPAD, and Human Rights: The Missing Agenda*, 26 HUM. RTS. Q. 983 (2004).

18. Charter of the Organization of African Unity, 479 U.N.T.S. 39, art. VIII, available at [http://www1.umn.edu/humanrts/africa/OAU\\_Charter\\_1993.html](http://www1.umn.edu/humanrts/africa/OAU_Charter_1993.html) [hereinafter OAU Charter].

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

20. OAU Charter, *supra* note 18, art. III(1), (2).

21. OAU Charter, *supra* note 18, art. III(3).

22. Nsongurua J. Udombana, *An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?*, 28 BROOK. J. INT'L L. 811, 819 (2003).

human rights abuses traditionally led the OAU, it was no surprise that the organization strongly supported the principle of non-intervention. Idi Amin, for example, who was a dictator in Uganda during a notorious reign of terror, was elected as the chairman of the OAU in June 1975. Amin killed thousands of his countrymen after overthrowing the elected government of Milton Obote. One Ugandan Anglican bishop, Festo Kivengere, angrily commented after Amin's election in 1975 that: "At the very moment the heads of state were meeting in the conference hall, talking about the lack of human rights in southern Africa, three blocks away, in Amin torture chambers, my countrymen's heads were being smashed with sledge hammers and their legs being chopped off with axes."<sup>23</sup> Increasing political repression, denial of political choice, restrictions on freedom of association and other human rights violations met with rare murmurs of dissent from within the OAU.<sup>24</sup>

In the late 1990s, there was a growing momentum to replace the OAU with an organization that was able to handle modern political tensions and to address matters of economic and social concern. In September 1999, an Extraordinary Summit of the Heads and State of Government of the OAU was held in Sirte by the invitation of the Libyan leader, Colonel Ghaddafi.<sup>25</sup> This meeting resulted in the Sirte Declaration, which stated that: "[O]ur continental Organization (OAU) needs to be revitalized in order to be able to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances."<sup>26</sup> The Heads of State and Government decided to establish the AU so that it could, among other things, work towards "[s]trengthening and consolidating the Regional Economic Communities as the pillars for achieving the objectives of the African Economic Community."<sup>27</sup> As a result, the OAU adopted the Constitutive Act of the African Union (AU Act) in July 2000.<sup>28</sup> The AU Act entered into force in May 2001. At this point, the OAU was, as *Time Europe* commented, "mercifully killed off by its member states."<sup>29</sup>

23. George B.N. Ayittey, *Idi Amin Lives*, ProfileAfrica, Jan. 24, 2004, [www.profileafrica.com/Search195.htm](http://www.profileafrica.com/Search195.htm).

24. See, e.g., U.O. Umzurike, *The African Charter on Human and Peoples' Rights*, 77 AM. J. INT'L L. 902, 903 (1983) (noting that massacres of thousands of Hutu in Burundi in 1972-73, as well as repressive regimes in Uganda, Equatorial Guinea and the Central African Republic, "were neither discussed nor condemned by the OAU, which regarded them as matters of internal affairs.").

25. Some commentators have expressed distrust regarding Colonel Ghaddafi's leadership role in the OAU transformation process. As one reporter commented: "Doubt . . . hangs over the intentions of the Libyan leader . . . there were worries expressed in whispers in Lusaka about whether the Guide of the Libyan Revolution could really be the helmsman of the continental revolution. Questions are being asked about Al-Gaddafi's motives." Ofeibea Quist-Arcton, *From OAU to AU - Whither Africa?*, ALLAFRICA.COM, July 13, 2001, <http://allafrica.com/stories/200107130178.html>.

26. OAU, Sirte Declaration, Fourth Extraordinary Session of the Assembly of Heads of State and Government (Sept. 8-9, 1999), [http://www.un.int/libya/sirte\\_dc.htm](http://www.un.int/libya/sirte_dc.htm).

27. *Id.*

28. Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, available at <http://www1.umn.edu/humanrts/africa/auconst-act2001.html> [hereinafter AU Act].

29. Peter Hawthorne, *All for One, One for All: The Organization of African Unity is dead*,



The AU Act establishes the AU as a political, economic and social organization. Its political organ is the Assembly of the Union comprised of the members' Heads of State and Government. Whereas respect for sovereignty and the commitment to "non-interference by any Member State in the internal affairs of another" are still included as important principles in the AU Act, there is some effort towards limiting these assumptions.<sup>30</sup> Article 4(h), for example, provides the "right . . . to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."<sup>31</sup> While the AU has intervened in some ways—mediating, for example, peace talks in Abuja between the Sudanese government and the two rebel groups, and monitoring a humanitarian ceasefire in Darfur since June 2004<sup>32</sup>—it still does not aggressively condemn human rights abuses and states do not appear wary of AU disapproval. In January 2006, Muthoni Wanyeki lamented the AU's ineffectiveness, commenting how:

It allowed us to feel proud about our capacity to resolve our own problems when it intervened in Togo following the death of one of those few remaining African presidents who went on and on and on . . . But, its duty apparently done, it sat back and did nothing about the post-election fallout. And, of course, it has said nothing on the deteriorating situation in Swaziland. Or on the situation in Zimbabwe.<sup>33</sup>

The same month, Human Rights Watch made similar observations.<sup>34</sup>

*long live the African Union. Better luck this time?*, TIME EUROPE, July 14, 2002, available at <http://www.time.com/time/europe/magazine/article/0,13005,901020722-320737,00.html>.

30. AU Act, *supra* note 28, art. 4(g).

31. AU Act, *supra* note 28, art. 4(h).

32. The AU established an African Union Mission in Sudan (AMIS) and provided almost 7,000 troops to protect civilians in Sudan. This is the AU's largest ever military operation. See *Submission to the 38<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights*, HUMAN RIGHTS WATCH, Nov. 2005, <http://hrw.org/english/docs/2005/11/19/africa12060.htm>. Britain recently pledged more money to support the AMIS, noting that: "Despite its limited capacity, the 6,964-strong AMIS force, which was deployed in Darfur in August 2004, has been credited with helping to improve security in the region and enabling humanitarian agencies to deliver aid to those affected by the conflict." *Sudan: Britain to Give Additional Funding to AU Mission*, IRIN NEWS.ORG, Feb. 22, 2006, [http://www.irinnews.org/report.asp?ReportID=51846&SelectRegion=East\\_Africa](http://www.irinnews.org/report.asp?ReportID=51846&SelectRegion=East_Africa). But see *No Power to Protect: Increase Troops*, REFUGEES INTERNATIONAL, [http://www.refugeesinternational.org/section/publications/au\\_troops/](http://www.refugeesinternational.org/section/publications/au_troops/) (arguing that "AMIS needs more troops on the ground to effectively fulfill their mandate").

33. L. Muthoni Wanyeki, *AU's Dismal Date in Khartoum*, THE EAST AFRICAN (Kenya), Jan. 17, 2006, available at <http://allafrica.com/stories/200601171013.html>.

34. In addition to commenting on the situation in Togo and Zimbabwe, Human Rights Watch stated:

In the DRC, the A.U. has spoken of addressing the politically sensitive issue of foreign combatants in the country but has yet to act. In the Ivory Coast, the A.U. has downplayed issues of justice and accountability that are likely to prove essential to a lasting peace. Meanwhile, certain powerful leaders, such as Prime Minister Meles Zenawi of Ethiopia, escaped A.U. pressure altogether, even as he, unwilling to accept opposition gains in the country's first contested elections in May, led the police to kill scores of demonstrators and arrest thousands of opposition supporters.

*Darfur and the African Union*, HUMAN RIGHTS WATCH, Jan. 2006, <http://www.hrw.org/wr2k6/introduction/10.htm>.

*B. The African Charter on Human and Peoples' Rights*

Despite these problems, Africa does have a regional human rights treaty that will be integral to the functioning of the new African Court. This treaty is the African Charter on Human and Peoples' Rights which was adopted by the OAU in 1981 and came into force in 1986.<sup>35</sup> All AU states are now a party to this treaty.<sup>36</sup> While this Charter was heralded as a major advance in the human rights system in Africa,<sup>37</sup> it contains provisions that make state sovereignty supreme. For example, there are a number of "claw back clauses" that remove, or at least severely restrict, the human rights protections.<sup>38</sup> Article 6 states that: "No one may be deprived of his freedom *except for reasons and conditions previously laid down by the law.*"<sup>39</sup> Article 8 reads: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, *subject to law and order*, be submitted to measures restricting the exercise of these freedoms."<sup>40</sup> Many states in Africa have laws that directly restrict rights such as freedom of speech and freedom of conscience. For example, Article 46 of the new Algerian Charter for Peace and National Reconciliation prohibits, among other things, public debate regarding the atrocities committed during the past decade of internal conflict.<sup>41</sup> Article 21 of the Libyan Constitution states that

35. African Charter, *supra* note 2.

36. All African states apart from Morocco are members of the African Union. Morocco was forced to withdraw from the OAU in 1984 because it refused to recognize the Polisario movement's claim to the territory of Western Sahara. For an account of a 2001 proposal to allow Morocco to rejoin the OAU, see David Bamford, *OAU Considers Morocco Readmission*, BBC NEWS, July 8, 2001, <http://news.bbc.co.uk/1/hi/world/africa/1428796.stm>.

37. Kofi Oteng Gufuor has noted that: "The Banjul Charter was a turning point in the protection of human rights in Africa. Though the subject of much criticism, the Banjul Charter is still a landmark human rights treaty as, prior to its adoption, human rights were seen as issues within the domestic jurisdiction of the OAU's Members." Kofi Oteng Gufuor, *Human Rights in Africa: Interpreting and Understanding the Organization of African Unity's Grand Bay Declaration and Plan of Action*, University of East London Law Research Paper, 5-6, <http://www.uel.ac.uk/law/research/publications/documents/grandbay.doc>.

38. Most human rights treaties contain limitation or derogation clauses that provide specific circumstances in which states can limit or derogate from the rights guaranteed. However, as the Centre for Human Rights in the University of Pretoria has noted, claw back clauses are unique in that, claw back clauses have the effect of restricting rights *ab initio*. It [sic] undermines the proclaimed rights by granting states unqualified powers to infringe upon certain rights. Claw back clauses are therefore less precise because the restrictions are discretionary as it subject [sic] human rights to domestic laws. The negative aspect of this is that governments are traditionally the most frequent violators of human rights, and they also have the power to make and change laws. By inserting clauses that permit rights to be limited by domestic law, the Charter makes human rights vulnerable to those very institutions that attack them most often.

Centre for Human Rights, University of Pretoria, *African Human Rights System*, [http://www.chr.up.ac.za/centre\\_publications/ahrs/african\\_charter.html](http://www.chr.up.ac.za/centre_publications/ahrs/african_charter.html).

39. African Charter, *supra* note 2, art. 6 (emphasis added).

40. African Charter, *supra* note 2, art. 8 (emphasis added). Such claw back clauses are also contained in Articles 9, 10, 11 and 14. For an analysis of these provisions, see Nsongurua J. Udombana, *Toward the African Court on Human and Peoples' Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45, 63 (2000).

41. Article 46 reads: "Anyone who, by speech, writing, or any other act, uses or exploits the wounds of the National Tragedy to harm the institutions of the Democratic and Popular Republic of Algeria, to weaken the state, or to undermine the good reputation of its agents who honorably served

“freedom of conscience is absolute,” but adds that foreigners have “the right freely to practice religion so long as it is not a breach of public order and is not contrary to morality.”<sup>42</sup> These types of laws, which are not uncommon throughout Africa, make the claw back clauses in the African Charter a concrete problem.<sup>43</sup>

### C. The African Commission on Human and Peoples' Rights

Part II of the African Charter calls for the creation of an eleven-member independent Commission on Human and Peoples' Rights (Commission). The Commission's mandate is “to promote human and peoples' rights and ensure their protection in Africa.”<sup>44</sup> While the Commission has recently begun to challenge state sovereignty by allowing representation by NGOs and individuals and by declaring that provisional measures are binding,<sup>45</sup> it is severely restricted by a number of factors. First is the problem that the states generally refuse to cooperate with the Commission, both during hearings and during

it, or to tarnish the image of Algeria internationally, shall be punished by three to five years in prison and a fine of 250,000 to 500,000 dinars.” See *Algeria: New Amnesty Law Will Ensure Atrocities Go Unpunished*, HUMAN RIGHTS WATCH, Mar. 1, 2006, <http://hrw.org/english/docs/2006/03/01/algeri12743.htm>.

42. CONSTITUTION, Art. 21 (Libya), available at <http://www.libyanconstitutionalunion.net/constitution%20of%20libya.htm>.

43. Vincent Nmechielle, however, has claimed that while the criticisms leveled against the claw back clauses are well founded, the Commission has not in practice implemented these clauses:

The African Commission has, in fact, variously rejected that interpretation [that the claw back clauses allow domestic law to trump international human rights standards], and reinforced the overarching reach of international human rights law, which does not succumb to flimsy domestic laws or regulations that tend to limit the enjoyment of human rights protection without cause, or in a very irregular situation. In a series of cases consolidated in *Media Rights Agenda and Constitutional Rights Project v. Nigeria* the Commission set the standard for reviewing state limitation of human rights.

Vincent Nmechielle, *Development of the African Human Rights System in the Last Decade*, 11 HUM. RTS. BRIEF 6, 7 (2004). Despite this observation, the claw back clauses do provide states with a legal justification for avoiding human rights obligations and signify a worrying protection of state sovereignty. While they are still present in the African Charter, there is always a danger that they could be used as a defense.

44. African Charter, *supra* note 2, at art. 30.

45. In the Sixteenth Ordinary Session, held in October 1994, the Commission stated in paragraph forty-eight that: “It should be pointed out that for the first time victims of human rights violations or their representatives came to defend their cause before the African Commission.” The Commission heard the author of the communication for *Louis Emgba Mekongo v. Cameroon*. Final Communique, Sixteenth Ordinary Session, Afr. Comm'n on Hum. Peoples' Rts. (25 Oct.-3 Nov., 1994), <http://www1.umn.edu/humanrts/africa/achpr16f.html>. With regard to provisional measures, in *International PEN and Others v. Nigeria*, the Commission stated that “in ignoring its obligations to institute provisional measures, Nigeria has violated Article 1 [of the African Charter].” This statement indicated that, in the view of the Commission, provisional measures were mandatory, a declaration that challenged Nigeria's sovereignty (even though Nigeria ignored the Commission's decision). *International PEN and Others v. Nigeria*, Afr. Comm'n Hum. & Peoples' Rts., Comm. Nos. 137/94, 139/94, 154/96 and 161/97, holding (1998), available at [http://www1.umn.edu/humanrts/africa/comcases/137-94\\_139-94\\_154-96\\_161-97.html](http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html) [hereinafter International PEN].

investigations.<sup>46</sup> Second, the Commission lacks independence because it is integrally linked with the African Heads of State and Government. The eleven Commissioners, for example, are “elected by secret ballot by the Assembly of Heads of State and Government, from a list of persons nominated by the States Parties.”<sup>47</sup> Third, the work of the Commission is shrouded in secrecy, making any kind of external monitoring difficult. Article 59 states that: “All measures taken within the provisions of the present Chapter shall remain confidential until the Assembly of Heads of State and Government shall otherwise decide.”<sup>48</sup> Fourth, individual access to the Commission is difficult. Communications received from non-state parties must “relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples’ rights.”<sup>49</sup> In addition, such communications cannot be “written in disparaging or insulting language,” a provision that the Commission has, at times, strictly applied. In *Ligue Camerounaise des droits de l’homme v. Cameroon*, for example, the Commission ruled that phrases such as “regime of torturers” and “government barbarisms” constituted the type of insulting language referred to in Article 56.<sup>50</sup> The Commission therefore held the communication inadmissible, despite the complainant’s credible allegations of serious and massive human rights violations.<sup>51</sup> Finally, the Commission is restricted by a dire lack of funds. This has been acknowledged by the OAU/AU on a number of occasions. For example, in 1989, the AHSG asked the Secretary-General of the OAU to “find, prior to next financial year, appropriate solutions to the budgetary, financial and personnel problems raised by the African Commission.”<sup>52</sup> For these reasons, the Commission has been dismissed by many critics as a “toothless bulldog” that was never “created to bite.”<sup>53</sup>

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46. In *International PEN*, Nigeria ignored the Commission’s demands that the defendant should not be harmed pending the trial and he was executed before the Commission ruled that the defendant was not guilty. *International PEN*, *supra* note 45, paras. 8, 9 (describing how the Commission had invoked interim measures against Nigeria asking that the executions of Ken Saro-Wiwa and others be suspended but how Nigeria had carried out the executions without responding to this request).

47. African Charter, *supra* note 2, art. 33.

48. *Id.* art. 59.

49. *Id.* art. 58.

50. *Ligue Camerounaise des droits de l’homme v. Cameroon*, Afr. Comm’n Hum. & Peoples’ Rts., Comm. No. 65/92, para. 13 (1997), available at <http://www1.umn.edu/humanrts/africa/comcases/65-92.html> [hereinafter *Ligue Camerounaise*].

51. *Id.* para. 1 (describing how the complaint documented ways in which the prison conditions in Cameroon constituted cruel, inhuman and degrading treatment and how there was additional evidence of, among other things, “massacres of the civilian population”).

52. OAU, Resolution Relating to the African Commission on Human and Peoples’ Rights, AHSG, Twenty-Fifth Ordinary Session (24-26 July, 1989), AHG/Res. 188 (XXV), available at <http://www.africa-union.org/root/au/Documents/Decisions/hog/yHoGAssembly1989.pdf>. For a description of the Commission’s appeals for money, see MURRAY, *supra* note 16, at 55-57.

53. Udombana, *supra* note 40, at 64.

*D. Negotiations Toward an African Court on Human and Peoples' Rights*

It was the ineffectiveness of the Commission in protecting human rights in Africa that led to the creation of the Court. In 1993, the International Commission of Jurists (ICJ), under the auspices of Abdou Diouf, President of Senegal and then chairman of the OAU Assembly, convened a meeting of jurists and human rights specialists to address the failures of the Commission. Following the brainstorming session, several other meetings of experts were convened under the direction of the ICJ, together with the OAU and the Commission.<sup>54</sup> These meetings led to the creation of Resolution 230 which was adopted in the Thirtieth Ordinary Session of the AHSG of the OAU in June 1994. This Resolution expressed concern regarding, "the situation obtaining in the area of Human and Peoples' Rights" and requested that "the OAU Secretary-General to convene 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 of Human and Peoples' Rights."<sup>55</sup>

This Resolution was followed by a number of meetings held between the OAU and international experts. A draft Protocol was first submitted by the OAU Secretary-General to the Conference of Governmental Experts in Cape Town, South Africa, in September 1995. The draft Protocol that emerged from this session is referred to as the "Cape Town Draft." A second meeting was held in Nouakchott, Mauritania in April 1997 and resulted in a draft referred to as the "Nouakchott Draft." At this point, governments had only participated in the drafting process in a limited way and this deficiency led to a final meeting in December 1997, accompanied by an appeal for more state input to try to finalize the draft.<sup>56</sup> The final version of the Protocol establishing the Court was then recommended for adoption by the OAU.

The comments made by states during this drafting process emphasized the reluctance of African states to have an external regional body passing judgment on their domestic affairs. This attitude can be seen in part from the way they emphasized that the "proper" (i.e. traditional) way to resolve disputes within Africa was through mediation rather than through contentious proceedings. In 1995, the South African newspaper *Sowetan* stated that, in Africa, "[c]onventional wisdom then, as now, was that it was improper and a sign of bad neighborliness to intervene in the internal affairs of others."<sup>57</sup> This type of "conventional wisdom" was emphatically expressed in a letter written in the

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54. For more information on this NGO process, see Julia Harrington, *The African Court on Human and Peoples' Rights*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000*, 308 (Malcolm D. Evans & Rachel Murray eds., 2002).

55. OAU, Resolution on the African Commission on Human and Peoples' Rights, AHSG, Thirtieth Ordinary Session (13-15 June, 1994), AHG/Res. 230 (XXX), para. 4, available at <http://www1.umn.edu/humanrts/africa/resafchar30th.html>

56. See Harrington, *supra* note 54, at 312-13 (discussing the lack of state participation in the drafting process and how this probably led to the final and third meeting of governmental experts).

57. Editorial, *SOWETAN* (S. Afr.), Sept. 6, 1995, at 10 (on file with author).

same year to the Assistant Secretary-General of the OAU. Edwin Maepe, of the International Metalworkers Institute, called for the OAU to focus on mediation at a “[h]igh powered level,” rather than on a regional court. According to Maepe, “African states will respond more positively in my opinion to a mediatory approach rather than an adjudicative approach.”<sup>58</sup> Maepe was particularly concerned that judicial condemnation of human rights abuses was ineffective; in his view, “to think that Africa’s problem can be solved by passing judgements on members states is rather outrageous.”<sup>59</sup>

The Secretary-General of the ICJ has also referred to Africa’s traditional emphasis on mediation in a 1995 speech. Discussing the lengthy process that was required to create an African Court, he noted that: “The refusal to create an African Court on Human and Peoples’ Rights, no doubt, had a philosophical explanation. Generally, it is during open-floor discussions that consensus is reached regarding conflict directed towards individuals or clans. Traditional African justice is essentially conciliatory.”<sup>60</sup>

However, the ICJ Secretary-General was also careful to note that the “delights of traditional anthropology should not lull us to the point of obscuring reality.”<sup>61</sup> Mediation was not sufficient to address human rights abuses and so victims of these violations should “have recourse to judicial process on demand.”<sup>62</sup> Indeed, a number of judicial developments within Africa make it difficult to maintain that mediation alone is the African way. For one, the reliance on domestic constitutional courts has been said to have paved the way for the creation of an African court.<sup>63</sup> In addition, the strong regional support for the African Court of Justice and the active participation of many African nations in the creation of the ICC indicate that litigation is a well-accepted method of resolving disputes within the continent.<sup>64</sup>

However, despite indications that African states no longer rely upon mediation as the sole means of solving disputes, the desire to avoid contentious proceedings was clearly a motive that helped to shape the Court. For example, in comments made in 1996, the Government of Tunisia called for an explicit statement to be included in the Protocol declaring that the Court “shall attempt to assist the parties in arriving at an amicable settlement.”<sup>65</sup> The reason this

58. Letter from Edwin Maepe, International Metalworks Federation, to Ahmed Haggag, Assistant Secretary General of the OAU and to International Jurists, Switzerland (Sept. 26, 1995) (on file with author).

59. *Id.*

60. Adama Dieng, Secretary-General for the International Commission of Jurists, Speech given at the Meeting of Government Experts on the Question of the Creation of an African Court For Human and Peoples’ Rights, Cape Town, South Africa (Sept. 6-12, 1995), at 4 (on file with author).

61. *Id.*

62. *Id.*

63. See Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 *BROOK. J. INT’L L.* 1, 9 (2004).

64. Frans Viljoen argued that: “African enthusiasm and participation in establishing the ICC, and its entry into force in 2002 . . . left its mark on the parallel process of establishing the African Human Rights Court.” *Id.* at 12.

65. OAU, Report of the Secretary-General on the Draft Protocol on the Establishment of an

statement was necessary, noted the Tunisian Government, was “to highlight the fact that the purpose of the Court is to ensure respect for human rights and not to deliver a judgement condemning a State. If it succeed [sic] in achieving its end through prior reconciliation, it would have carried out the preventive role assigned to it.”<sup>66</sup> A provision on amicable settlement was not included in the Cape Town Draft, but it was added to the Nouakchott Draft, presumably in response to Tunisia’s comments.

An even more emphatic way to avoid interference with state sovereignty was to deny individuals direct access to the Court. The provision on individual access was one of the most contentious in the whole Protocol establishing the Court and provoked a number of comments by states. In the first draft produced after the Cape Town meeting, Articles 5 and 6 dealt with *locus standi*. Article 5 allowed two groups to submit cases to the Court: the Commission and the “State Party which had lodged a complaint to the Commission.”<sup>67</sup> Article 6 then provided for “exceptional jurisdiction” which read: “Notwithstanding the provisions of Article 5, the Court may, on exceptional grounds, allow individuals, non-governmental organisations and groups of individuals to bring cases before the Court, without first proceeding under Article 55 of the Charter.”<sup>68</sup>

This type of language undoubtedly reflects the influence of NGOs who were instrumental in creating the first draft of the Protocol.<sup>69</sup> African states, however, were determined that such extensive *locus standi* should be avoided. In March 1996, for example, Mauritius expressed concern that Article 6 would bring “a risk of inundation of the Court by applications from international

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African Court on Human and Peoples’ Rights, Annex III: Comments from Member States, Annex III(e) Tunisia, Sixty-Fifth Ordinary Session (Feb. 24-28, 1997), CM/1996 (LXV), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

66. *Id.*

67. OAU, Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, produced at Government Legal Experts Meeting on the Question of the Establishment of an African Court of Human and Peoples’ Rights (Sept. 6-12, 1995), Cape Town, South Africa, OAU/LEG/EXP/AFCHPR(I), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

68. Article 55 of the Charter stipulates that, before every session of the Commission, the Secretary has to make a list of communications submitted by individuals and NGOs and transmit them to the members of the Commission. Such communications are then considered by the Commission “if a simple majority of its members so decide.” African Charter, *supra* note 35, at art. 55.

69. Julia Harrington has noted that the 1995 Cape Town draft was not, in fact, the first version of the Protocol. Rather, “a draft protocol for an African court had first been made by Karl Vasak, a Czech jurist, in 1993, at the request of the International Commission of Jurists (ICJ), an NGO based in Geneva.” Harrington, *supra* note 54, at 308. For a copy of the early NGO draft, see [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

watchdogs.”<sup>70</sup> Egypt also expressed a reservation to this Article, providing two grounds for its objections: first, that it would undermine the work of the Commission, and second that it would “risk opening a wider discussion on the interpretation of article 55 of the Charter, which so far, had been interpreted by the Commission, as allowing individual complaints and not just ‘situation’ complaints.”<sup>71</sup> In the next round of negotiations, Burkina Faso supported Egypt’s statements and said that “individuals, non-governmental organizations and individual groups should first refer their issues to the Commission,”<sup>72</sup> a sentiment that was also reiterated by Madagascar.<sup>73</sup> These types of responses led to the rewriting of Article 6 in the Nouakchott Draft in such a way that individual access became conditional upon each State making an optional declaration accepting the competence of the Court to receive such petitions.<sup>74</sup>

Despite such hesitations, on June 8, 1998, the Thirty-Fourth Summit of the Heads of State and Government of the OAU adopted the Protocol on the Establishment of an African Court on Human and Peoples’ Rights. It came into force in January 2004 when the Protocol received the requisite number of ratifications.<sup>75</sup> At the beginning of 2006, the eleven judges were elected.<sup>76</sup>

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70. OAU, Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, Annex III: Comments from Member States, Annex III(a) Mauritius, Sixty-Fifth Ordinary Session (Feb. 24-28, 1997), CM/1996 (LXV), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

71. OAU, Annex I: Report of the Government Experts Meeting on the Establishment of an African Court of Human and Peoples’ Rights (Sept. 6-12, 1995), OAU/LEG/EXP/AFCHPR/RPT(I) Rev.1, available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

72. OAU, Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, Annex III: Comments from Member States, Annex III(c) Burkina Faso, Sixty-Fifth Ordinary Session (Feb. 24-28, 1997), CM/1996 (LXV), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc). Despite the reservations mentioned here, Burkina Faso is in fact the only country that has made a declaration accepting direct individual and NGO access to the Court.

73. OAU, Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, Annex III: Comments from Member States, Annex III(i) Madagascar, Sixty-Fifth Ordinary Session (Feb. 24-28, 1997), CM/1996 (LXV), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc) (noting concerns about how Article 6 would “reduce the importance of the role of the Commission”).

74. OAU, Draft (Nouakchott) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, produced at the Second Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples’ Rights (Apr. 11-14, 1997), Nouakchott, Mauritania, OAU/LEG/EXP/AFCHPR/PRO (2), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

75. A minimum of fifteen ratifications was required before the Protocol entered into force. As of March 2006, twenty-one countries have ratified the Protocol establishing the Court. These are Algeria, Burkina Faso, Burundi, Côte d’Ivoire, the Comoros, Gabon, the Gambia, Ghana, Kenya,



Ultimately, according to comments made to Reuters by Ibrahima Kane, the Court “will be situated in East Africa, with Mauritius the most likely location, and should be in place by July [2006] with an initial annual budget of \$2.25 million.”<sup>77</sup>

### III.

#### THE RESTRICTIVE NATURE OF THE CONSTITUENT INSTRUMENTS

In 1995, the Assistant-General of the OAU, Ambassador Ahmed Haggag, emphasized that “no continent and no people have experienced so much agony and suffering as a result of massive violations of human rights.”<sup>78</sup> Emphasizing that the “oneness of humanity and the universality of human rights cannot be denied,” Haggag ultimately called for “collective action at the national, regional and international level.”<sup>79</sup> Thus, Haggag suggested that one motive for the African states in creating a Court should be to eradicate individual suffering, a goal that would rise above state sovereignty. However, as discussed above, this motive did not triumph during the writing of the Protocol establishing the Court. Instead, the protection of state sovereignty remained the principle concern—a concern that is evident in the Court’s institutional design.<sup>80</sup>

This Part will focus on four principal features of the Court’s constituent instruments that may impede its evolution into a functioning human rights mechanism. The first and most important feature is the lack of individual access. Second is the fact that the Court must take into account the provisions contained in Article 56 of the African Charter, including exhaustion of domestic remedies and avoiding insulting language. Third is the requirement that the Court take steps to encourage amicable settlement. The final feature is the guarantee of confidentiality. Each of these elements will be briefly considered and compared with other regional human rights practices. Suggestions for possible improvement will be made, but with a full awareness that this type of change will probably only occur if the political dynamics of the Court are altered.

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Lesotho, Libya, Mali, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Togo, and Uganda.

76. AU, Decision on the Election of Judges of the African Court on Human and Peoples’ Rights Doc. EX.CL/241 (VIII), Executive Council, Eighth Ordinary Session (Jan. 16-21, 2006), EX.CL/Dec.261(VIII), available at [http://www.africa-union.org/root/au/Documents/Decisions/com/AU6th\\_ord\\_Council\\_Decisions\\_Jan2006\\_Khartoum.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/AU6th_ord_Council_Decisions_Jan2006_Khartoum.pdf). A list of judges with their biographies is available at [http://en.wikipedia.org/wiki/Judges\\_of\\_the\\_African\\_Court\\_on\\_Human\\_and\\_Peoples'\\_Rights#Dr.\\_Fatsah\\_Ouguergouz\\_.28ALGERIA.29](http://en.wikipedia.org/wiki/Judges_of_the_African_Court_on_Human_and_Peoples'_Rights#Dr._Fatsah_Ouguergouz_.28ALGERIA.29).

77. Nick Tattersall, *Africa Names Judges for New Human Rights Court*, REUTERS (Jan. 22, 2006), <http://www.alertnet.org/thenews/newsdesk/BLA251187.htm>.

78. OAU, Opening Ceremony Remarks, Government Experts Meeting on the Establishment of an African Court of [sic] Human and Peoples’ Rights (Sept. 6-12, 1995), Cape Town, South Africa, OAU/LEG/EXP/AFC/HPR/RPT(I) Rev.1 (on file with author).

79. *Id.*

80. Frans Viljoen has suggested another motive behind ratification of the Court that does not depend on a commitment to human rights. This motivation is “the prospect of bidding to host the African Court, an avenue open only to state parties to the Protocol.” Viljoen, *supra* note 63, at 12.

*A. Individual Access to the African Court*

Commenting on the Cape Town Draft, Tanzania said that if individual access to the Court was optional, it would “make the protocol virtually in operative [sic].”<sup>81</sup> Similarly, Burkina Faso’s Ministry of Foreign Affairs noted that individuals and NGOs should be able to access the Court directly because “[i]t would not be realistic to exclude them from having access to the Court at a time when on other continents texts are being revised to give them access to international justice in the area of human rights.”<sup>82</sup> This comment refers to the fact that, in 1998, individuals were allowed direct access to the European Court of Human Rights, a development that significantly improved the effectiveness of human rights protection in Europe.<sup>83</sup> Indeed, the lack of such access to the Inter-American Court has been one of its greatest weaknesses because it limits the role of the victim and necessitates instead the intervention of the Inter-American Commission which has to refer individual cases to the Court.<sup>84</sup> Unless African states allow individual access, this will also be the practice in the African Court, despite the fact that “[t]he right of individual petition, whereby individuals are granted direct access to justice at the international level, is a defining accomplishment of international human rights law. The essence of the international protection of human rights is the opposition of individual complainants to respondent states.”<sup>85</sup>

Not surprisingly, only one state, Burkina Faso, has currently made a declaration allowing individuals to access the Court. Most countries, it seems, share the sentiments expressed in a memorandum to the government of The Gambia which commented that the optional individual access “safeguards the integrity of the State and avoids vexatious and embarrassing actions being

81. OAU, Comments and Observations Received from Member States on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, received at the Third Government Legal Experts Meeting (Enlarged to Include Diplomats), Comments by Tanzania (Dec. 8-11, 1997), OAU/LEG/EXP/AFCHPR/Comm.(3), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

82. OAU, Comments and Observations Received from Member States on the Draft Protocol on the Establishment of an African Court on Human and Peoples’ Rights, received at the Third Government Legal Experts Meeting (Enlarged to Include Diplomats), Comments by Burkina Faso (Dec. 8-11, 1997), OAU/LEG/EXP/AFCHPR/Comm.(3), available at [http://www.chr.up.ac.za/centre\\_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc](http://www.chr.up.ac.za/centre_publications/hrla/references/DOCUMENTS%20LEADING%20UP%20TO%20THE%20ESTABLISHMENT%20OF%20THE%20AFRICAN%20COURT%20p.170.doc).

83. This direct access was introduced by Protocol 11 in Article 34 that replaced the previous Article 26 of the Convention on Human Rights. See Vaughne Miller, *Protocol 11 and the New European Court of Human Rights*, House of Commons Research Paper 98/109, Int’l Aff. & Def. Sec. (Dec. 4, 1998), <http://www.parliament.uk/commons/lib/research/rp98/rp98-109.pdf>. See also Christina Hioureas, *supra* note 15 at 723.

84. See PASQUALUCCI, *supra* note 12, at 98-99 (discussing how both the Inter-American Court and Commission are giving petitioners more autonomy).

85. Antonio A.C. Trindade, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 COLUM. HUM. RTS. L. REV. 1, 7 (1998).

brought directly to the Court by NGOs and individuals.”<sup>86</sup> Indeed, the states must have known that few governments would allow individual access. As Julia Harrington has commented: “The limitation on *locus standi* must be understood as a cynical move to diminish what power the Court might have over States by making it less accessible to those most likely to bring cases.”<sup>87</sup> Harrington hypothesized that one of the reasons for this tight restriction on individual access might have been the influence of Nigeria during the drafting stages. At that time, Nigeria was under the control of General Abacha’s government, which had “already given dramatic evidence of its disregard for human rights in general and the African Commission in particular.”<sup>88</sup> Given the secrecy that covers the majority of the debates regarding the Court, it is hard to know Nigeria’s exact input, but “as the largest country in Africa and one of the most powerful in the OAU, Nigeria surely made its presence felt.”<sup>89</sup>

### *B. Article 56 of the African Charter on Human and Peoples’ Rights*

Another restrictive element of the Court’s constituent instruments is the fact that Article 6 of the Protocol establishing the Court states that, when ruling on the admissibility of cases, the provisions of Article 56 of the African Charter must be taken into account. This statement ensures that the Court is in line with the procedure of the Commission, but it also introduces two elements that could safeguard state sovereignty. The first element is that Article 56 of the African Charter stipulates that domestic remedies must be exhausted before communications can be accepted. This requirement is, of course, important because it encourages domestic institutions to address human rights abuses and would allow the Court to become a potential agent for change within individual countries.<sup>90</sup> This function of a regional human rights court will be discussed in Part III because it is essential to the growth of human rights standards within Africa. However, a restricted application of the exhaustion requirement has enormous potential to exclude individuals from the communications mechanism, and it must therefore be applied carefully by the African Court.

It is essential, for example, that the Rules of Procedure for the Court contain an explicit reference to the fact that the domestic remedies must be both effective and adequate or exhaustion is not required. Article 31(2) of the Inter-American Commission’s Rules of Procedure, for example, makes this condition

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86. The Establishment of the African Court on Human and Peoples’ Rights (a memorandum addressed to the government of The Gambia that was endorsed by the Department of State for Foreign Affairs) (on file with author).

87. Harrington, *supra* note 54, at 319.

88. *Id.* at 321.

89. *Id.*

90. Jo Pasqualucci has stated: “It is a generally recognized principle of international law that a victim of human rights abuse must pursue and exhaust all available remedies in the local legal system before resorting to an international forum.” This can be seen in Article 46(1)(a) of the American Convention on Human Rights and Article 26 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. PASQUALUCCI, *supra* note 12, at 129-30.

explicit.<sup>91</sup> The African Commission has insisted on effective domestic remedies, ruling in a 1995 case that: "It would be improper to insist on the complainant seeking remedies from sources which do not operate impartially and have no obligation to decide according to legal principles."<sup>92</sup> However, the Commission has also issued inconsistent decisions that have interpreted the exhaustion of domestic remedies rule strictly and out of line with its favorable precedents. In *Legal Defence Centre v. The Gambia*, for example, which was decided in 2000, the Commission ruled that there was a failure to exhaust domestic remedies even though the petitioner was prohibited from reentering the state and therefore had no access to the courts there.<sup>93</sup> If the Court fails to pass judgment on inadequate domestic remedies, it will do little to improve human rights protection within African countries and will only continue to condone state violations.

In addition, if the requirement of Article 56 that communications cannot be "written in disparaging or insulting language" is interpreted broadly, legitimate and serious cases will be withheld from consideration.<sup>94</sup> It is likely that the Commission will have already assessed this type of communication before it reaches the Court, but it still remains a "dangerously subjective" criterion that provides a potentially easy way for a complaint to be rendered inadmissible on political grounds.<sup>95</sup>

91. Article 31 of the Inter-American Commission's Rules of Procedure states that the need to exhaust domestic remedies will not apply when: a) "the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated; b) the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies." Inter-American Commission on Human Rights, Rules of Procedure, available at <http://www.cdih.oas.org/Basicos/basic16.htm>.

92. Constitutional Rights Project v. Nigeria (in respect of Wahab Akamu, G. Adegba and others), Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 60/91, para. 10 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/60-91.html>. See also International PEN, *supra* note 45, at para. 77 (ruling that because the complainants were deceased, there were no domestic remedies that they could now seek and so the Commission could continue with the case); Media Rights Agenda, Constitutional Rights Project v. Nigeria, Afr. Comm'n Hum. & Peoples' Rts., Comm. Nos. 105/93, 128/94, 130/94, 152/96, para. 50 (1998), available at [http://www1.umn.edu/humanrts/africa/comcases/105-93\\_128-94\\_130-94\\_152-96.html](http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html)

93. Legal Defence Centre v. The Gambia, Commission, Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 219/98, para. 17 (2000), available at <http://www1.umn.edu/humanrts/africa/comcases/219-98.html>. See also Kenya Human Rights Commission v. Kenya, Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 135/94, para. 7 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/135-94.html> (failure to exhaust domestic remedies in a case involving unlawful repression of a university union despite the Commission's admission that the President of Kenya (who was also Chancellor of the university) stated "that the government would never register . . . [the union] despite the fact that the matter was already in court"); Mohammed Lamine Diakite v. Gabon, Afr. Comm'n Hum. & Peoples' Rts., Comm. No. 73/92, paras. 14-17 (2000), available at <http://www1.umn.edu/humanrts/africa/comcases/73-92b.html> (no exhaustion of remedies where complainant ordered expelled from Gabon on trumped up charges because Commission found he had never contested the decision of expulsion).

94. See Ligue Camerounaise, *supra* note 51.

95. Chidi A. Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures*, 20 HUM. RTS. Q. 235, 255 (1998) (observing how "it would be difficult to set objective standards for deciding, in the

### C. Amicable Settlement

Another problem with the constituent instruments is the amicable settlement clause. Article 9 of the Protocol establishing the Court, states that the institution “may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.”<sup>96</sup> The African Charter only explicitly mentions amicable settlement in state-to-state communications, but the Commission has also applied such settlements to individuals’ complaints.<sup>97</sup> If the Commission refers private party communications to the Court, then the Court will also have to deal with amicable settlements between individuals and states, and there is significant opportunity for the Court to abuse its discretion in deference to member state interests. The Commission, for example, has not always rigorously investigated the reasons for a complainant’s silence before concluding that the communication has been withdrawn. In *Maria Baes v. Zaire*, the Commission concluded that the communication had been withdrawn because the alleged victim had been released from prison and no further information was received.<sup>98</sup> By ruling in this way, the Commission allowed Zaire to avoid answering to charges of unlawful detention, in violation of Articles 6 and 7 of the African Charter.<sup>99</sup>

Again, this type of ruling will lead to the protection of state sovereignty rather than the championing of human rights, a bias that can only be avoided if the Court’s Rules of Procedure provide clear provisions regarding amicable settlement. For example, there should be a presumption in the rules that a settlement is not amicably settled unless the complainant and the state convey otherwise through an express communication. In addition, the Court should, as in the Inter-American system, be authorized to make follow-up inquiries.<sup>100</sup>

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context of adjudicating on violations of human rights, what constitutes ‘disparaging or insulting language’” and pointing out that individuals are usually traumatized when they write these complaints and tend to be writing in their second language).

96. Protocol establishing the Court, *supra* note 2, art. 9.

97. See INGER OSTERDAHL, IMPLEMENTING HUMAN RIGHTS IN AFRICA: THE AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS AND INDIVIDUAL COMMUNICATIONS 113-14, 125 (2002) (discussing how, despite the silence in the African Charter and the Commission’s procedural rules regarding amicable settlement with respect to individual communications, the Commission has applied friendly settlement to individuals’ cases).

98. The Commission found: “The author has failed to respond to inquiries from the Commission which learns that the detained person had since been released. The author shows no interest in pursuing the case. The Commission decides to close the file since the author has no interest in proceeding with the case.” *Baes v. Zaire*, Afr. Comm’n Hum. & Peoples’ Rts., Comm. No. 31/89, para. 2 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/allcases.html>.

99. The communication was filed by a Danish national, Maria Baes, on behalf of Dr. Shambuyl Naiadia Kandola. It was alleged that Kandola was “detained without charge in April 1988 for purely political reasons in breach of Articles 6 and 7 of the African Charter.” *Id.* at para. 1. Similar cases are discussed in OSTERDAHL, *supra* note 97, at 122.

100. Article 46(1) of the Inter-American Commission’s Rules of Procedure states that the Commission can, once it has published a report on friendly settlement, “adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations.” Inter-

*D. Confidentiality*

Finally, state power is also retained if the proceedings of the Court are confidential so that they are not open to external monitoring by civil society. Article 10 of the Protocol establishing the Court states that the Court's proceedings shall be held in public, which is a welcome development from the heavy emphasis placed on confidentiality in the African Charter.<sup>101</sup> However, it also notes that: "The Court may . . . conduct proceedings in camera as may be provided for in the Rules of Procedure."<sup>102</sup> It is therefore important that these Rules stipulate such confidentiality only in specific circumstances, where it is necessary to protect the privacy of individuals. Otherwise, the African Heads of State could exert improper influence over proceedings and, because of the secrecy, external groups and complainants might not be provided with the necessary information to object.

Overall, both the African Charter and the Protocol establishing the Court contain important provisions that make it difficult to challenge state sovereignty. These include not only the elements discussed above, but also provisions such as the 'claw back clauses' contained in the African Charter. If states did, over the years, decide that they wanted to make the Protocol establishing the Court more binding, they could, of course, accept *locus standi* for individuals and NGOs. In addition, Article 35 of the Protocol does allow for the possibility of amendment. A State Party to the Protocol establishing the Court can propose a draft amendment to the AHSG and this can then be adopted by a simple majority. Alternatively, the Court may propose amendments through the Secretary-General of the AU. However, the language of Article 35 is not entirely clear. Article 35(3), for example, declares that amendments shall come into force "for each State Party which has accepted" them.<sup>103</sup> It does not stipulate whether this process requires a declaration or whether it is automatic if the state votes for the amendment. Similarly, it is unclear what happens if a state votes for or against an amendment and then changes its mind. Regardless, it seems unlikely that the State Parties will be sufficiently motivated to amend the Protocol establishing the Court any time soon, particularly as treaties have consistently "proved remarkably resistant to change."<sup>104</sup>

## IV.

## FOREIGN AID DONORS AND INSTITUTIONAL CHANGE

It is clear that African states made rational and purposeful decisions about

American Commission on Human Rights, Rules of Procedure, *available at* <http://www.cidh.org/Basicos/basic16.htm>.

101. Article 59 of the Charter states: "All measures taken within the provisions of the present Chapter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide." African Charter, *supra* note 2, at art. 59.

102. *Id.*

103. *Id.*

104. Romano & Odinkalu, *supra* note 3, at 1.

the nature of the Court, creating an institutional design that protected state sovereignty. Their principal interest was not protecting human rights, but avoiding accountability. Yet African leaders have made powerful statements about the need to protect human rights. In 1995, for example, the Assistant-General of the OAU argued that it was important to strengthen regional institutions "to enable our continent to contribute with the rest of the world in consolidating the respect and protection of human rights."<sup>105</sup> Similarly, the OAU's 1999 Grand Bay Declaration noted "the growing recognition that violations of human rights [in Africa] may constitute a burden for the international community."<sup>106</sup> The new African Court, however, appears to be principally a symbolic gesture. Some African politicians involved in the negotiations to create the Court were undoubtedly committed to human rights protection and see the Court as the next step in the slow process of creating an effective regional system. Yet it is difficult to avoid the impression noted by Osita Eze in her book on Africa that "[f]or the most part, a gap exists between declaration [regarding human rights protection] and actual practice."<sup>107</sup>

Given that the states' interests are focused principally on protecting their sovereignty, it is necessary to change the political dynamics of the Court and to alter states' priorities. The pressure required to shift these interests and priorities is, however, substantial. As rational design theory emphasizes, states tend to "use international institutions to further their own goals."<sup>108</sup> African countries will therefore have to believe that it is in their own self-interest to make financial contributions to the Court and to adhere to that institution's judgments. Foreign aid donors are one group of outsiders that could generate this belief.

Foreign aid donors are in an unusually powerful position to influence African states. They have huge leverage over African countries because aid provides an important source of income for a large number of these states.<sup>109</sup> At least twenty percent of Burkina Faso's government budget is financed by foreign aid and, according to the US State Department, the country "has excellent relations with European aid donors, as well as Libya, Taiwan and other states which have offered financial aid. France and the EU in particular offer significant aid. Other donors with large bilateral aid programs include Germany,

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105. OAU, Statement by the OAU Assistant Secretary-General, H.E. Ambassador A. Haggag at the Government's [sic] Experts Meeting on the Establishment of an African Court of [sic] Human and People's [sic] Rights (Sept. 6-12, 1995), Cape Town, South Africa (on file with author).

106. OAU, Grand Bay (Mauritius) Declaration and Plan of Action, OAU First Ministerial Conference on Human Rights in Africa (Apr. 12-16, 1999), CONF/HRA/DECL (I), available at <http://www.africanreview.org/docs/rights/grandbBay.pdf>.

107. OSITA C. EZE, HUMAN RIGHTS IN AFRICA: SOME SELECTED PROBLEMS 23 (1984).

108. Koremenos, *supra* note 3, at 762 (emphasis omitted).

109. From 1975-1995, just over half of central government expenditures of the fifty most aid-dependent countries, the majority of which are in Africa, were funded by foreign aid. Jakob Svensson, *Foreign Aid and Rent-Seeking*, 51 J. INT'L ECON. 437, 438 (2000). In addition, "between 1960 and 2005, foreign aid worth more than \$450 billion, inflation adjusted, poured into Africa." Marian L. Tupy, *Poverty that Defies Aid*, WASH. TIMES, June 19, 2005 at B03.

Denmark, the Netherlands, Belgium and Canada.”<sup>110</sup> Similarly, Burundi, as the poorest country in the world, is supported in large part by Western Europe, though much of this aid was suspended after civil war broke out in 1993 and has only just been resumed.<sup>111</sup> This type of relationship with donors is representative of the majority of African countries that have both ratified and refused to ratify the Protocol establishing the Court.

This final Part will therefore consider the role that foreign donors can play in generating institutional change at the Court. It will briefly consider the motivations for providing foreign aid and why donors might be concerned with strengthening the Court. It will then describe how economic incentives have been critical in the European human rights system and how, despite increasing economic integration within Africa, African countries are currently unable to provide such incentives. Finally, the Part will conclude by providing sample, concrete proposals that could be tied to economic aid and will emphasize the critical need for effective monitoring. It will look at three possible recipients of aid: 1) the Court; 2) the countries that have ratified the Protocol establishing the Court; and 3) African civil society. By funding all three recipients, donors can ensure that the pressure for institutional change is maintained.

#### *A. Donor Motivations*

The incentives for providing aid are complex, and it is beyond the scope of this paper to delve into donor motivations in any detail. It will suffice to acknowledge that scholars have proposed a number of reasons why donors decide to give foreign aid. Principal among these is the desire to promote national interests and to provide money to states that enhance the donor’s political, economic or military goals.<sup>112</sup> Domestic politics is said to play a role, with pressure groups lobbying for aid donations and certain sections of the donor’s society benefiting from such contributions.<sup>113</sup> So why then would

110. U.S. Dept. of State, *Background Note – Burkina Faso*, [www.state.gov/r/pa/ei/bgn/2834.htm](http://www.state.gov/r/pa/ei/bgn/2834.htm).

111. On November 30, 2005, Germany gave the Burundian government nearly seventeen million euros. This donation marked the end of the suspension of German aid. *Burundi: Germany Resumes Aid with 17 million euros for water, sanitation*, IRINNEWS.ORG, Nov. 30, 2005, <http://www.irinnews.org/report.asp?ReportID=50423>.

112. Alberto Alesina & David Dollar, *Who Gives Foreign Aid to Whom and Why?*, 5 J. ECON. GROWTH 33 (2000) (noting how they found “considerable evidence that the direction of foreign aid is dictated as much by political and strategic considerations, as by the economic needs and policy performance of the recipients.”). The US Congressional Research Service also emphasized the strategic importance of foreign aid, stating: “Foreign assistance supports a great many objectives. Especially since the September 11 terrorist attacks in the United States, foreign aid has taken on a more strategic sense of importance, cast frequently in terms of contributing to the global war on terrorism.” Congressional Research Service, *Foreign Aid: An Introductory Overview of U.S. Programs and Policies* (Apr. 15, 2004), <http://usinfo.state.gov/usa/infousa/trade/files/98-916.pdf>.

113. Wolfgang Mayer & Pascalis Raimondos-Moller, *The Politics of Foreign Aid: A Median Voter Perspective*, 7 REV. DEV. ECON. 165 (2003), available at <http://ssrn.com/abstract=411189> (presenting a model of how the voters in donor countries determine support for foreign aid).



donors care about the success of the African Court? An answer to this question can be broken into three parts: first, it is important to note that it is not unusual for donors to contribute to regional courts; second, there are reasons why the African Court in particular might serve a donor's national interests; third, donors have become increasingly concerned with standards of good governance and human rights in recipient states. For these reasons, it is possible that foreign aid donors could become a force for institutional change.

### *1. Contributions to Regional Courts*

The provision of foreign aid to regional human rights courts is not a new phenomenon. While it is difficult to pinpoint the exact sources of funding for most regional organizations, it is clear that the Inter-American Court has received funding from both the EU and individual European countries. A 2004 report on the Inter-American Court's lack of financial sources noted that, "in order to make up some financial shortfalls the IACHR [Inter-American Court of Human Rights] has requested and obtained specific funds from member states of the OAS [Organization of American States] and from friendly countries in Europe."<sup>114</sup> The report went on to add that: "In order to cover all its needs the Commission will continue to seek additional resources from cooperation agencies and friendly countries that wish to contribute to special projects and specific funds."<sup>115</sup>

Even more significant for the purposes of this paper is the fact that foreign governments have already provided funding that was aimed at assisting in the establishment of the African Court. In 2002, for example, the British Foreign and Commonwealth Office (FCO) provided £92,573 to a project that aimed "to promote early ratification of the Court Protocol for the African Court on Human and Peoples' Rights."<sup>116</sup> In 2005, the FCO contributed £61,500 to another project that "aimed to enhance the capacity of the African Commission on Human and Peoples' Rights to fulfil its mandate to protect and promote human rights in Africa through the creation of an African Court of Human Rights."<sup>117</sup> In the same year, the FCO noted how "the UK continued to support the UK-based NGO Interights to work with the African Union in assisting countries to ratify the protocol [establishing the Court]... The UK welcomes the new

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114. Financing the Inter-American Human Rights System, A Report Prepared by the Office of the Secretary General of the OAS for the Ad Hoc Working Group on Human Rights (Apr. 28, 2000), <http://www.derechos.org/nizkor/la/doc/fine.html> [hereinafter *Financing the Inter-American System*].

115. *Id.*

116. FCO, Human Rights Annual Report 2003, Annex II: FCO Funding for Human Rights, 258 (2003) available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1028302592088>.

117. FCO, Human Rights Annual Report 2005, Annex II: GOF Projects, 258 (2005), available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1028302592088>.

protocol.”<sup>118</sup>

While it is interesting to note how national governments have already funded projects to help develop the African Court, the motivations underlying such contributions are unclear. In a recent study of foreign assistance provided to international criminal tribunals, Steven Roper and Lilian Barria concluded: “While we can rule out membership in the Security Council, regionalism and colonialism as having an appreciable effect among all tribunals, this result is not very satisfying. We are still at a loss to explain why countries contribute to tribunals aside from as a general policy of foreign assistance.”<sup>119</sup> What is undeniable, however, is that donor states somehow have to believe that it is in their best interests to provide financial assistance to a court because this will both spur the provision of money and allow politicians to justify their actions.<sup>120</sup>

## 2. *The African Court Serving Donors’ Interests*

There are significant reasons why donors would want to strengthen a regional human rights court in Africa. The Court is an important institution for protecting human rights and could be a source for stability within the region. Donors might desire a strong court in the belief that it will generate an environment within Africa that is conducive to trade and the expansion of foreign business. Certainly, there are clear indications that this factor might be a powerful incentive. A 2004 United Nations Economic Commission for Africa (UNECA) study emphasized how Africa was a continent with significant

118. FCO, Human Rights Annual Report 2005, Chapter 4: Human Rights and International Actions, 131 (2005), available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1119526503628>.

119. Roper and Barria analyzed why countries provide voluntary contributions to war crimes tribunals. They looked both at tribunals that have guaranteed funding under United Nations Chapter VII (such as the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia) and at tribunals that depend on voluntary contributions (such as the Special Court of Sierra Leone and the Extraordinary Chamber for Cambodia). The authors attempted to discover why a state would give voluntary financial contributions when it was already providing funds through Chapter VII and why, in addition, it might provide funds to a tribunal that is located in a country that offers few strategic and economic benefits (such as Cambodia and Sierra Leone). As noted above, the authors found it difficult to account for these actions. Roper & Barria, *supra* note 6, at 12.

120. The process of justification through self-interest is evident, for example, in the UK’s FCO report of 2003 which talks about British funding of the ICC. The FCO justified this financial contribution in the following terms:

[G]iven that the Court is intended as a disincentive to future war criminals, the potential human and economic savings are large. The genocide in Rwanda in 1994 was estimated to have cost 0.8-1 million lives. Between 1997 (when a UK development programme for Rwanda started) and 2002, the UK has contributed around £140 million in humanitarian assistance and other financial aid – a substantial amount of which contributed to rebuilding the country and its institutions following the conflict. Prior to 1997, the level of UK development assistance was minimal.

FCO Departmental Report, Chapter 7: Quality of Life and a Strong International Community, 80 (2003), available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1051783486185>.

economic potential: "In recent years, the continent has begun to recover from the 'lost decades' of the 1980s and 1990s. In 2003, Africa was the second fastest growing region in the developing world, behind Eastern and Southern Asia."<sup>121</sup> In a US State Department article published on March 7, 2006, the strategic importance of Africa was also highlighted: "Africa has evolved into a region of key strategic importance to the United States, China and many other countries worldwide as a supplier of energy and natural resources."<sup>122</sup>

The principal factor that has hindered the growth of Africa's potential, however, is the frequent recurrence of conflict and political instability. The Court can play a role in resolving these conflicts by establishing a stronger tradition of rule of law and by providing a forum where human rights violators can be brought to justice. It can provide a stabilizing force to a region that is rich in natural resources. Thus, foreign aid donors have clear incentives to encourage the development of an effective Court. As Jack Straw, the British Foreign Secretary, noted in 2003 in a section specifically about giving aid and support to Africa:

British diplomacy is not only about international security and maintaining relationships with key allies and partners. More than ever, it is also about working to tackle poverty, root out human rights abuses and improve the quality of life of all. There are moral imperatives for this approach. It is also in the UK's self-interest. Prosperity, justice and security are increasingly intertwined. Our long-term security depends on economic growth and political development elsewhere.<sup>123</sup>

Given that the Court could be a powerful force for justice in Africa, funding this institution will arguably serve the self-interest of foreign aid donors.

### 3. Foreign Aid and Human Rights Standards

Over the last ten years, donors have begun to make foreign aid conditional on good governance, rule of law and the protection of human rights, and so it is likely that these donors could also be persuaded to emphasize commitments to the African Court when making aid decisions. In a 1997 article, David Forsythe noted that Western governments, the European Union and Japan had started talking about human rights and democracy in their foreign aid programs.<sup>124</sup> During a speech in June 2005, President Bush stated that the link between democracy and development was critical because experience had shown that

121. UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, *Overview, in ECONOMIC REPORT ON AFRICA 2004: UNLOCKING AFRICA'S TRADE POTENTIAL* (2004), <http://www.uneca.org/ERA2004/full.pdf>.

122. Charles W. Corey, U.S. Dept. of State, *Pan Africa: Africa of Key Strategic Importance to U.S., World, Scholar Says*, ALLAFRICA.COM, March 7, 2006, <http://allafrica.com/stories/200603080122.html>.

123. Jack Straw, Foreword to FCO Departmental Report 2003 (May 12, 2003), <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1051783486185>.

124. David P. Forsythe, *The United Nations, Human Rights, and Development*, 19 HUM. RTS. Q. 334, 338 (1997).

“aid works best when certain conditions are in place such as a commitment to just governance, respecting the rule of law, investing in citizens’ health and education, and opening up economies.”<sup>125</sup> A related sentiment is reflected in the Bush administration’s Millennium Challenge Account (MCA) that expands development assistance for countries that are “ruling justly, investing in their people, and encouraging economic freedom.”<sup>126</sup>

This type of language is also included in the US African Growth and Opportunity Act (AGOA), a law that requires labor rights and human rights protection as a requisite for cooperation with the United States. The annual review of AGOA eligibility includes a careful examination of a state’s human rights record.<sup>127</sup> Similarly, as OXFAM Australia noted in a January 2001 report: “The UNDP, UNICEF, UNIFEM and a number of national governments – notably the United Kingdom and Sweden – have adopted an explicitly human rights approach to their development program.”<sup>128</sup> Thus, an important group of outsiders is already insisting on human rights protection as a fundamental prerequisite for foreign aid, suggesting that donors could be persuaded to show an interest in the development of the Court.

### *B. The Case for Change Through Aid*

The potential effectiveness of tying economic incentives to demands for institutional change is evident from developments made within Europe. Members of the EU benefit greatly from financial integration with other members and from the increased levels of investment and grants that flows from membership. The criteria for EU membership requires candidates to achieve “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”<sup>129</sup> Turkey is just one country that

125. Lloyd O. Pierson, African Organizations and Institutions: Positive Cross-Continental Progress, Statement Before the Committee on Foreign Relations (Nov. 17, 2005), *available at* <http://www.usaid.gov/press/speeches/2005/ty051117.html> (quoting a speech made by President George Bush on June 10, 2005).

126. Millennium Challenge Corporation, Frequently Asked Questions: How Does a Country Become Eligible for MCA Assistance, [http://www.mca.gov/about\\_us/faq/index.shtml](http://www.mca.gov/about_us/faq/index.shtml) (reporting President George Bush’s statement regarding required criteria).

127. “The Act authorizes the President to designate countries as eligible to receive the benefits of AGOA if they are determined to have established, or are making continual progress toward establishing the following: market-based economies; the rule of law and political pluralism; elimination of barriers to U.S. trade and investment; protection of intellectual property; efforts to combat corruption; policies to reduce poverty, increasing availability of health care and educational opportunities; protection of human rights and worker rights; and elimination of certain child labor practices.” African Growth and Opportunity Act, Country Eligibility, [http://www.agoa.gov/eligibility/country\\_eligibility.html](http://www.agoa.gov/eligibility/country_eligibility.html).

128. OXFAM Australia, The Link Between Aid and Human Rights, Submission to the Human Rights Sub Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade (Jan. 2001), *available at* <http://www.oxfam.org.au/campaigns/submissions/aidhumanrights.pdf>.

129. Conclusions of the European Council, Copenhagen, June 1993, *quoted in* Kristin Archick, Congressional Research Service Report for Congress: European Union Enlargement (May 2, 2005), *available at* <http://fpc.state.gov/documents/organization/47070.pdf>.

has made significant domestic reforms so that it can qualify for membership, moving away from a history of ethnic conflict. Human Rights Watch's 2005 report on Turkey notes how: "Since 1999, the promise of E.U. membership has supported a dynamic process of reform."<sup>130</sup> Thus, in Turkey's case, the desire to benefit from the financial gains of the EU has resulted in the evolution of domestic institutions.

Obviously, if African states did not care about economic development, such rewards would be less likely to make them change their priorities and allow the Court to develop. For, as Yitan Li and A. Cooper Drury have stated, economic engagement with countries that are poor and need reform is only effective when a state "tie[s] its future to economic development and world trade."<sup>131</sup> Fortunately, there has been a great push within Africa in the last five years to improve economic conditions. In a meeting between European and African experts in December 2004, the AU made a statement that: "Never before has Africa been so determined and resolute in her attempt to enhance socio-economic conditions on the continent."<sup>132</sup> Over the last ten years, a number of regional economic organizations have been created in Africa, including the Economic Community of West African States (ECOWAS),<sup>133</sup> the Southern African Development Community (SADC),<sup>134</sup> the UN Economic Commission for Africa (ECA),<sup>135</sup> and the African Development Bank (AfDB).<sup>136</sup> Recently, African leaders have also created the New Partnership for Africa's Development (NEPAD),<sup>137</sup> an organization with the goal of eradicating poverty, promoting sustainable development and increasing Africa's participation in the process of globalization. NEPAD has been heralded as a welcome development by the international community. The G8, for example, produced an African Action Plan when NEPAD was formed that was "designed to encourage the imaginative effort that underlies the NEPAD and to lay a solid foundation for future

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130. *A Crossroads for Human Rights?: Human Rights Watch's Key Concerns on Turkey for 2005*, HUMAN RIGHTS WATCH, <http://hrw.org/english/docs/2004/12/15/turkey9865.htm>.

131. Yitan Li & A. Cooper Drury, *Threatening Sanctions When Engagement Would be More Effective: Attaining Better Human Rights in China*, 5 INT'L STUD. PERSP. 378, 392 (2004).

132. AU, Africa's Position on Governance, Africa-Europe Enlarged Experts Meeting, Dec. 2-3, 2004, at 3, available at [http://www.africa-union.org/News\\_Events/Calendar\\_of\\_%20Events/AU-EU%20MEETING/4%20AFRICA's%20position%20in%20governance.doc](http://www.africa-union.org/News_Events/Calendar_of_%20Events/AU-EU%20MEETING/4%20AFRICA's%20position%20in%20governance.doc) [hereinafter *Africa's Position on Governance*].

133. The ECOWAS is a regional organization of fifteen West African nations, founded in 1975. ECOWAS, <http://www.ecowas.info/>.

134. SADC is a southern African regional organization that aims to integrate the economies of member states. See generally South African Development Community, <http://www.sadc.int/index.php>.

135. UNECA was established in 1958. It is a regional arm of the UN and is mandated to support the economic and social development of member states. United Nations Economic Commission For Africa, <http://www.uneca.org/>.

136. The AfDB was established in 1964 and is "a regional multilateral development finance institution." African Development Bank Group, <http://www.afdb.org/>.

137. NEPAD is an organization established by the OAU to promote socio-economic development in Africa. New Partnership for Africa's Development, What is NEPAD?, <http://www.nepad.org/>.

cooperation.”<sup>138</sup>

None of these African economic groups, however, have tied economic incentives to the way in which states act towards the Court. Indeed, it is questionable whether any of these organizations are, as yet, sufficiently powerful to achieve such leverage.<sup>139</sup> The AU itself has admitted that: “Africa’s resource base is not yet strong enough to undertake all the activities needed to enhance democracy and hence economic development.”<sup>140</sup> It therefore asked for Europe’s help: “The EU can therefore play its role as a constructive partner to buttress Africa’s efforts by providing strategic financial resources.”<sup>141</sup> Similarly, it will probably require an outside force such as foreign donors to provide the necessary leverage to generate institutional development within the Court.

Such institutional change can only occur if the donors ensure two things. First, they should make clear demands on the recipients of the aid. Second, they must establish an effective and consistent monitoring system to check that these demands are met. The remainder of this paper will offer some ideas for the types of demands that could be made and how they could be monitored. These are not exclusive suggestions but merely provide a starting point for possible change.

### *C. Concrete Proposals for Change*

Foreign aid donors could provide money in three different ways, all of which could be done concurrently. The first is to give the aid directly to the Court. The second is to give the aid to individual states that have signed the Protocol establishing the Court and are supportive of the Court’s mission. The third is to provide money to specific groups within African civil society that have a mandate to promote and improve the Court. By providing aid to all three recipients, donors can generate a dynamic force for institutional development. However, as noted above, the provision of aid is of little use if it is not combined with effective monitoring. Human rights systems have notoriously weak monitoring, with the majority of states failing to cooperate with treaty bodies or providing regular reports. This is precisely what allows states to use human rights treaties for their symbolic function, without worrying about the actual obligations undertaken.<sup>142</sup> Donors should therefore make thorough

138. G8 Summit Site, G8 African Action Plan, <http://www.g8.gc.ca/2002Kananaskis/kananaskis/afraction-en.asp>.

139. See, e.g., Bronwen Manby’s recent article that assessed whether NEPAD can improve the human rights situation in Africa. Manby concludes that NEPAD has “significant deficiencies” that limit its effectiveness. Manby, *supra* note 17, at 983.

140. *Africa’s Position on Governance*, *supra* note 132, at 10.

141. *Id.*

142. Oona Hathaway has suggested that states often ratify human rights treaties merely to signal to other important actors that they are committed to human rights. She calls this signaling the “expressive aspect of treaties.” The actual ratification, she argues, is costless because human rights treaties are rarely enforced. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 2007 (2002).

investigations into whether the recipients are fulfilling the required conditions.<sup>143</sup>

### 1. *Providing Aid to the Court*

According to Article 32 of the Protocol establishing the Court, the “[e]xpenses of the Court, emoluments and allowances for judges and the budget of its registry, shall be determined and borne by the OAU, in accordance with criteria laid down by the OAU in consultation with the Court.”<sup>144</sup> As successor to the OAU, the AU will now be responsible for funding the Court.

The Inter-American Court provides a clear example of the difficulties an institution can face when it is funded by a regional organization. The Inter-American Court has to deal with serious financial shortfalls because the Organization of American States (OAS) does not allocate it sufficient funds. In a 2000 report on the financing of the Inter-American human rights system, it was noted that:

Whereas the OAS spends 5.2% of its budget on human rights, the European Court of Human Rights enjoys a much greater budget priority within the work of the Council of Europe (COE). Of the COE’s 1999 total budget of over 1 billion French Francs, 19% – roughly US \$147m – went to the Court and other human rights programs.<sup>145</sup>

If human rights are not made a priority by the states that constitute the AU, the Court, like the African Commission, will find itself hampered by a lack of funds.<sup>146</sup> As with the Inter-American Court, the African Court would probably benefit from the assistance of foreign aid donors, which would at the least ensure that the Court has adequate financial resources to fulfill its basic functions. Yet, as the next section will emphasize, the foreign aid provided to the Court should not replace the funds given by the African states because these individual contributions play an important role in the politics of human rights.

In order to encourage institutional development, the donors should make clear demands regarding the Court’s function. It is important to note, however, that the requirements stipulated by the donors should not be too rigid or too extensive because this will restrict the growth of the Court and the freedom of the judges to develop their own body of jurisprudence. When Dean Claudio Grossman, President of the Inter-American Commission on Human Rights, requested additional funds from the OAS, he stated that: “Increased funding

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143. At present, such monitoring (and consequent sanctions) is not undertaken in a consistent manner. One example is that of President Bush, who has continued to allow AGOA eligibility to states such as Rwanda, Eritrea and Cote d’Ivoire whose human rights conditions are notoriously poor. See *Bush Trip to Africa, July 2003*, HUMAN RIGHTS WATCH, <http://hrw.org/backgrounders/africa/bush-africa2k3.htm> (declaring that, “[b]y failing to consistently use AGOA to press for an end to abuses in recipient countries, the administration risks squandering a potentially useful tool in the promotion of human rights in Africa”) [hereinafter *Bush Trip, 2003*].

144. Protocol establishing the Court, *supra* note 2, art. 32.

145. *Financing the Inter-American System*, *supra* note 114.

146. See discussion regarding the Commission’s lack of funds, *supra* Part I.C.

must be earmarked for institutional strengthening of the organs, which must enjoy the autonomy necessary to decide how to utilize the additional resources according to their needs and development strategies.”<sup>147</sup> Similarly, the Court should have a large amount of autonomy with only specific, limited requirements being made by donors.

Such requirements could involve certain areas of the court’s jurisprudence. For example, the donors could insist that the exhaustion of domestic remedies be dependent on whether the remedies are fair and effective. Similarly, the proceedings of the Court should be made as public as possible. Another extremely important area of the Court’s functioning is the election of judges. Amnesty International stated in 2004 that: “The effectiveness and efficiency of the African Court on Human and Peoples’ Rights will depend on the appointment of highly qualified judges with a strong commitment to human rights.”<sup>148</sup> Already, criticisms have been leveled against the January 2006 election of judges. Before the first eleven judges were elected, “an expert Coalition of African Jurists, National Human Rights Institutions, and NGOs . . . declared that the process of electing judges for the proposed African Court on Human and Peoples’ Rights is ‘substantially’ flawed.”<sup>149</sup> This group claimed that the process lacked transparency and that the candidates did not have sufficient experience in human rights.<sup>150</sup> Donors could tie the money they provide to the Court to certain goals regarding judicial independence and human rights experience. In other words, they could simply ensure that the Court reaches the standards that were agreed to in the Protocol establishing the Court.<sup>151</sup>

In order to assure compliance with these standards, the donors should establish a monitoring group that would, ideally, be composed of independent experts that could submit reports on the operation of the Court. This group could provide training to the judges and provide workshops and literature to NGOs and individuals who wish to bring a case before the Court. Training could also

147. Dean Claudio Grossman, President of the Inter-American Commission on Human Rights, In the Context of the Dialogue on the Improvement of the Inter-American Human Rights System, Address Before the Committee on Juridical and Political Affairs of the Permanent Council of the OAS, Washington, D.C. (May 3, 2001), <http://www.cidh.org/Discurso/05.03.01eng.htm>.

148. AI Press Release, African Court on Human and Peoples’ Rights: Only the Best Qualified Candidates Should be Appointed Judges, AI Index: IOR 10/001/2004 (Feb. 17, 2004), <http://web.amnesty.org/library/Index/ENGIOR100012004?open&of=ENG-375>.

149. Coalition for an Effective African Court on Human and Peoples’ Rights, Khartoum Unsuitable to Elect Judges of the African Human Rights Court (Jan. 19, 2006), <http://www.amdatatechnologies.com/acc/UploadedDocuments/119200614003PM218.doc>. See also Alexis Unkovic, *Africa Rights Court Judge Nomination Process Slammed for Lack of Transparency*, JURIST, Jan. 21, 2006, <http://jurist.law.pitt.edu/paperchase/2006/01/africa-rights-court-judge-nomination.php>.

150. *Id.*

151. For example, Article 11 of the Protocol establishing the Court states that judges should be selected “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.” Article 17 states: “The independence of the judges shall be fully ensured in accordance with international law.” Protocol establishing the Court, *supra* note 2, arts. 11, 17.



be provided to improve the interaction between the Commission and the Court. As a result, the Court would not be as rigidly locked into its institutional design, nor would it be as hampered by the states' desire to protect their sovereignty.

2. *Providing Aid to Individual States that Have Signed the Protocol establishing the Court*

While providing money directly to the Court might help with its basic operating costs and enable it to survive the vicissitudes of AU funding, the provision of aid directly to a human rights court could be problematic. This is because of the uniquely political nature of human rights systems and the fact that every state should be forced to participate by providing funding. This issue was addressed by the Secretary-General of the OAS who, while discussing external funding of the Inter-American Court, noted that:

A basic operating premise from which our human rights mechanism derives much of its power and legitimacy, is that the member states themselves fund it. There is even some tension that derives from the fact that some countries within the system donate more funds to the system than others. The farther we move away from the notion that the entire membership funds their own human rights enforcement mechanism, the more distortions and tension are likely to obtain.<sup>152</sup>

Thus, while direct funding to the Court might ensure that the institution does not collapse, and could provide some pressure for institutional reform, this should not replace AU funding provided by individual African countries. Rather, the most immediate way in which donors could influence the institutional design of the Court would be through demands they make to individual state recipients of aid.

If money was given to individual states, it could be tailored so that there were different levels of aid, the top ranks of which would be given on more favorable terms. The states that qualify for the "best" types of aid would be those that have ratified the Protocol establishing the Court and have made a declaration accepting individual applications. This aid should be reduced, however, if states fail to cooperate with the Court—either during proceedings, in the monitoring process, or after a judgment has been handed down.

The Court's design, however, could be most effectively altered if amendments were made to both the African Charter and the Protocol establishing the Court. Article 68 of the African Charter allows for amendment if a submission is made to the AU and the Commission has assessed the request. It will then come into force if a simple majority of states approves the amendment, but will only be effective in relation to states that have specifically accepted it. Article 34 of the Protocol establishing the Court has similar provisions.<sup>153</sup> Thus, the donors could provide incentives for individual states to

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152. *Financing the Inter-American System*, *supra* note 114.

153. Protocol establishing the Court, *supra* note 2, art. 34.

request and then accept amendments. In this way, the institutional design of the Court could be altered in a concrete manner, especially if provisions such as the ‘claw back clauses’ of the African Charter were removed so that states could not hide behind the defense of domestic law.

Once again, monitoring is essential. An independent group of experts should track the amount of funding provided to the AU by states and, in particular, to the African Court. The most crucial element that needs to be monitored, however, is the way in which domestic institutions in individual countries enforce human rights. The Court can attempt to hold states accountable for abuses, but if domestic institutions refuse to enforce the Court’s holdings or never provide an effective remedy for individual citizens, little will be accomplished towards improving human rights within the region. One of the reasons the European Court of Human Rights has been so effective is because it has “achieved substantial compliance with its judgments by forging relationships with domestic government institutions.”<sup>154</sup> The European Court has also made it clear that it is a subsidiary to national systems rather than a substitute for domestic courts.<sup>155</sup> Indeed, as Christina Hioureas notes in this volume, one of the principal recommendations to deal with the overload of cases currently submitted to the European Court is to ensure that Contracting States’ domestic remedies are adequate. In this way, individuals will not need to file applications with the European Court of Human Rights.<sup>156</sup>

In order to strengthen domestic institutions within Africa, foreign aid donors could provide the type of “strategic financial resources” requested by the AU with regard to NEPAD that could fund local monitoring systems to strengthen domestic institutions.<sup>157</sup> Such systems are probably best established by African civil society because these groups are on the ground and are best suited to monitor domestic actions. Additionally, the type of peer monitoring mechanism established as part of NEPAD could play a role in strengthening domestic courts. Under NEPAD’s African Peer Review Mechanism (APRM), states undertake to submit to and facilitate periodic peer reviews directed and managed by a group of African “Eminent Persons,” “to ascertain progress being made towards achieving mutually agreed goals.”<sup>158</sup> The EU has welcomed this

154. See Helfer & Slaughter, *supra* note 11, at 298.

155. Luzius Wildhaber, President of the European Court of Human Rights, has emphasized how the European Court should not replace domestic courts, stating: “What is . . . not in doubt is that these issues [constitutional issues regarding the fundamental rights of European citizens] are more properly decided, in conformity with the subsidiary logic of the system of protection set up by the European Convention on Human Rights, by the national judicial authorities themselves and notably courts of constitutional jurisdiction. European control is a fail-safe device designed to catch the ones that get away from the rigorous scrutiny of the national constitutional bodies. Luzius Wildhaber, President of the European Court of Human Rights, *The Place of the European Court of Human Rights in the European Constitutional Landscape*, Address at the Conference of European Constitutional Courts XIIth Congress, 2 (2002), <http://www.confcoconsteu.org/reports/Report%20ECHR-EN.pdf>.

156. See Christina Hioureas, *supra* note 15 at 726.

157. See *Africa’s Position on Governance*, *supra* note 132, at 10.

158. NEPAD, African Peer Review Mechanism (ARPM) [sic]: Base Document, Sixth

peer review system and has “offered to support the APRM, including through the APRM Trust Fund and through the implementation of APRM recommendations in the future.”<sup>159</sup>

States could be monitored by their peers to see if they are fulfilling two key commitments that will help to ensure that domestic institutions adequately protect human rights. The first is contained in Article 1 of the African Charter, which declares that all ratifying states “shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”<sup>160</sup> The second is contained in Article 30 of the Protocol establishing the Court which reads: “The States Parties to the present Protocol undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution.”<sup>161</sup> Just as the EU provides funds to assist the APRM, foreign donors could guarantee financial assistance to this type of peer monitoring of domestic institutions.

### 3. *Providing Aid to African Civil Society*

There is an understandably strong feeling in Africa that Africans should be supported to help themselves.<sup>162</sup> In 1997, an OAU representative, Ambassador Bah, “stressed the need for perseverance in all efforts aimed at ensuring that Africa was empowered to deal with its own problems.”<sup>163</sup> Indeed, African civil society might appear to be better placed to influence the Court than a group of foreign outsiders. However, this set of actors currently lacks the necessary power and leverage over states that will be required to encourage national administrations to change their interests and allow for institutional change. In a publication on Inter-African Initiatives in the field of human rights, INTERIGHTS noted the difficulties faced by African NGOs, particularly those that were working to build inter-regional support. These groups were “hampered by poor records and communications infrastructure and by having to deal with governments that have historically been alien to and alienated from their own

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Summit of the NEPAD Heads of State and Government Implementation Committee (Mar. 9, 2003), in AU, *The New Partnership for Africa's Development (NEPAD)*, The African Peer Review Mechanism (APRM), AHSG, Thirty-Eight Ordinary Session of the OAU (July 8, 2002), AHG/235 (XXXVIII), Annex II, paras. 6, 15, available at [http://www.chr.up.ac.za/hr\\_docs/aprm/docs/book3.pdf](http://www.chr.up.ac.za/hr_docs/aprm/docs/book3.pdf).

159. Press Release, Luxembourg Presidency, European Union-African Ministerial Meeting, Final Communiqué (Apr. 2005), [www.eu2005.lu/en/actualities/communiqués/2005/04/1lue-ua-final/](http://www.eu2005.lu/en/actualities/communiqués/2005/04/1lue-ua-final/).

160. African Charter, *supra* note 2, art. 1.

161. Protocol establishing the Court, *supra* note 2, art. 30.

162. Gebreselassie Tesfamichael, *In Africa, Just Help Us to Help Ourselves*, WASH. POST, July 24, 2005, available at Global Policy Forum, <http://www.globalpolicy.org/soecon/develop/africa/2005/0724helpourselves.htm>.

163. OAU, Remarks of Ambassador Mamadou Bah, Representative of the Secretary-General, Nouakchott, Mauritania (Apr. 11-14, 1997), OAU/LEG/EXP/AFC/HPR/RPT(2) (on file with author).

people.”<sup>164</sup> The dangerous situation faced by many human rights defenders within Africa was more emphatically expressed in a November 2005 report by the Observatory for the Protection of Human Rights Defenders that was presented to the African Commission. This report drew attention to “the worsening situation of human rights defenders in the African continent in 2005” and observed how “this year was marked by numerous acts of violence, including killings, against human rights defenders in a great number of countries.”<sup>165</sup> The report then documents in detail human rights defenders across Africa who have been killed, threatened with death, tortured, threatened and arbitrarily detained.<sup>166</sup> Thus, while NGOs and other elements of civil society might gain strength in the future, it is currently difficult to predict how they could provide the necessary incentives for the Court’s evolution.

However, even though it might be best for foreign donors to focus initially on the states and the Court itself, it is important to recognize that civil society will ultimately play a significant role in pushing for institutional change.<sup>167</sup> For this reason, donors should provide resources to civil society groups that are working within Africa to influence the development of the Court.<sup>168</sup> Such assistance is, in fact, already being allocated. For example, the British Government currently provides funds to The Coalition for an Effective African Court on Human and Peoples’ Rights,<sup>169</sup> an organization that “is open to civil society and non-governmental organizations from both within and outside Africa who share its objectives.”<sup>170</sup> These objectives include ensuring that all

164. Emma Playfair, *Preface to BUILDING BRIDGES FOR RIGHTS: INTER-AFRICAN INITIATIVES IN THE FIELD OF HUMAN RIGHTS*, at xi (Marguerite Garling & Chidi Anselm Odinkalu eds. 2001).

165. The Observatory for the Protection of Human Rights Defenders, *Situation of Human Rights Defenders*, Submission to the African Commission on Human and Peoples’ Rights, Thirty-Eighth Ordinary Session, (Nov. 2005), <http://www.fidh.org/IMG/pdf/cadhpbgeng-2.pdf>.

166. *Id.*

167. See, e.g., Harold H. Koh, *How is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397, 1409 (1998) (arguing that “[m]any efforts at human rights norm-internalization are begun not by nation-states, but by ‘transnational norm entrepreneurs,’ private transnational organizations or individuals who mobilize popular opinion and political support within their host country and abroad for the development of a universal human rights norm”). Note too, however, how Oona Hathaway emphasizes how the transformation created by Koh’s norm entrepreneurs “can take decades to lead to tangible change.” Hathaway, *supra* note 142, at 2022.

168. There are, of course, difficulties associated with providing foreign aid to civil society. Some groups do not want to be politically associated with foreign governments. And, even if these groups manage to maintain a distance from their funders, they might be accused of pushing a foreign agenda. This has, indeed, been a particular problem in Africa, where “African governments have accused Western-backed NGOs of being closely aligned to the governments that fund them and whose aid they distribute.” For example, “Zimbabwe President Robert Mugabe has led an assault on NGOs with a draft law tightening registration and barring foreign funding for NGOs with political and human rights programmes.” Cris Chinaka, *NGOs Tiptoe through Africa’s Political Minefields*, *REUTERS*, Oct. 11, 2005, reproduced in *Global Policy Forum*, <http://www.globalpolicy.org/ngos/state/2005/1011tiptoe.htm>.

169. The funding is provided by the Foreign and Commonwealth Office, whose logo is at the bottom of the organization’s web page. The Coalition for an Effective Court on Human and Peoples’ Rights, [http://www.africancourtcoalition.org/eng\\_about\\_us.html](http://www.africancourtcoalition.org/eng_about_us.html).

170. Coalition for an Effective African Court on Human and Peoples’ [sic] Rights, About

states sign the Protocol establishing the Court and that these states allow for individual access to the Court. In addition, the organization focuses on the need for a fair and transparent election of judges. There are other groups within African civil society that work with the Court and receive foreign funding—though not necessarily state funding—that could be a good target for foreign aid. For example, in 2005, the MacArthur Foundation provided \$400,000 to the Alliance for Africa “in support of the establishment of an effective African Court on Human and Peoples’ Rights.”<sup>171</sup> In the same year, they provided \$395,000 to the Institute for Human Rights and Development in Africa “in support of a project to develop litigation for the African Court on Human and Peoples’ Rights.”<sup>172</sup>

By providing aid to these types of organizations, while also putting pressure on states and the Court, foreign aid providers could establish a dynamic force for institutional change. In the immediate future, focus should be concentrated on the states because they have the power to change the most fundamental flaws in the Court’s genetic design—namely, the lack of individual access and the potential for proceedings to remain confidential. Ultimately, however, the growth of civil society within Africa is crucial because it is this more localized outside actor that is better placed to bring cases before the regional system and to monitor domestic implementation of the Court’s decisions.

## V. CONCLUSION

At present, the African Court on Human and Peoples’ Rights is an institution that is so tightly bound by its constituent instruments that it will only become involved in human rights protection by moving, like the chrysalis, “a joint or two.”<sup>173</sup> The community of states, which is one of the key actors at the Court,<sup>174</sup> has focused more on safeguarding national sovereignty than protecting human rights and so, in accordance with rational design theory, has created a Court that serves their self-interest. There is, however, a possibility for change arising from one crucial outside actor: foreign aid providers.

If foreign donors are able to initiate the type of institutional reform that is necessary to make the Court effective, the Court itself will be able to pass judgment on the failure of states to implement their human rights commitments. It will be able to police the rule of law in the domestic realm, making the African human rights system more effective. Indeed, this domestic influence is,

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the Coalition, [http://www.africancourtcoalition.org/eng\\_about\\_us.html](http://www.africancourtcoalition.org/eng_about_us.html).

171. MacArthur Foundation, Human Rights and International Justice: Recent Grants, [http://www.macfound.org/site/c.lkLXJ8MQKrH/b.938985/k.7091/International\\_Grantmaking\\_Human\\_Rights\\_and\\_International\\_Justice\\_Recent\\_Grants.htm](http://www.macfound.org/site/c.lkLXJ8MQKrH/b.938985/k.7091/International_Grantmaking_Human_Rights_and_International_Justice_Recent_Grants.htm).

172. *Id.*

173. *Ant and Chrysalis*, *supra* note 1.

174. David D. Caron, *supra* note 4 at 415.

for many African civil society activists, the Court's most significant function. Halidou Ouédraogo, head of the Union Interafricaine des Droits de l'Homme (UIDH), commented soon after the Protocol establishing the Court came into force: "With the [African] court we can put pressure on states to lessen their hold on the [domestic] courts, which they use to massively violate human rights throughout the region."<sup>175</sup>

However, before the Court can itself become an agent of reform, states will have to have their priorities altered and their interests changed. As a result, the Court could begin to operate in a way that was not anticipated in its initial design. If foreign donors impose the types of obligations and monitoring outlined above, this type of institutional evolution might well be attained.

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175. Michael Fleshman, *Human Rights Move up on Africa's Agenda*, 18 AFR. RENEWAL 10 (July 2004), available at [http://www.un.org/ecosocdev/geninfo/afrec/vol18no2/182human\\_rights.htm](http://www.un.org/ecosocdev/geninfo/afrec/vol18no2/182human_rights.htm). The UIDH is a network of NGOs from about fifty African countries.